MARTIAL LAW IN BANGLADESH, 1975-1979: A LEGAL ANALYSIS

by

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ABSTRACT

The primary object of this thesis is to offer a legal analysis of Martial Law in Bangladesh, 1975-1979. It is divided into nine chapters.

The introductory chapter traces the birth and constitutional and political development of Bangladesh before the proclamation of Martial Law in August 1975. It examines the various uses of the term 'Martial Law' and the controversies which have arisen as to the basic character of Martial Law. The role of the doctrine of 'necessity' in the promulgation and continuation of Martial Law, and in the justification of all measures taken under Martial Law are examined. The nature of Martial Law courts is considered, and the history of the promulgation of Martial Law in the Indian subcontinent is outlined.

Chapter II considers the legality and justification of the Proclamation of Martial Law in Bangladesh in 1975, the legality of the assumption of the office of President by Khandaker Moshtaque Ahmed, the position of the 1972 Constitution and other laws after the declaration of Martial Law. It examines the impact of the various coups upon the discipline of the armed forces, and deals with the structure of the Martial Law administration and the civilianisation of government and the withdrawal of Martial Law. The various Martial Law Regulations creating offences are discussed.

Chapter III examines the basic provisions relating to the constitution, powers and jurisdiction, and procedure of Martial Law courts.

Chapter IV deals with the establishment and composition of the Martial Law courts. It discloses the number of cases transferred arbitrarily from ordinary courts to Martial Law courts, and from one Martial Law court to another. It then looks into the implications of such transfers, and uncovers the number of persons convicted and acquitted by the Martial Law courts and examines certain cases tried by them.

Chapter V deals with the provisions relating to the constitution, power and jurisdiction, and procedure of the Special Martial Law Tribunal and Martial Law Tribunals, and examines the trial of the conspiracy case by the Special Martial Law Tribunal and the functioning of Martial Law tribunals. It attempts to ascertain the number of persons executed in the aftermath of the two abortive coups of 1977.

Chapter VI describes the definition and importance of the 'independence of the Judiciary'. It considers the independence of the Judiciary in Bangladesh both before and after the imposition of Martial Law in 1975, and the restrictions imposed on the powers and jurisdiction of the Judiciary by the Martial Law regime, and discusses the nature of the fundamental rights guaranteed by the 1972 Constitution of Bangladesh, including constitutional provisions relating to their enforcement and suspension during a proclamation of emergency. It examines the suspension of the enforcement of most of the fundamental rights under the 1974 Proclamation of Emergency and the removal of the power of the Judiciary to enforce fundamental rights by the Constitution (Fourth) Amendment Act, 1975, before the declaration of Martial Law. The chapter sets forth the subsequent restoration by stages of the judicial power to enforce fundamental rights by the Martial Law government.

Chapter VII details the definition and necessity of preventive detention. It portrays the possible abuse of the power of preventive detention and constitutional safeguards in this respect, and also examines the provisions of the Special Powers Act, 1974, and the Emergency Powers Rules, 1975, relating to preventive detention and the incorporation of constitutional safeguards into the Emergency Powers Rules with regard to preventive detention in 1977 by the Martial Law administration.

Chapter VIII depicts the operation of the laws relating to preventive detention under the Martial Law regime. It specifies the numbers of

détenus released under various general amnesties as well as in accordance with the orders of the Supreme Court, and gives some examples of the arbitrary exercise of the power of preventive detention. The chapter enumerates certain instances of writ petitions and the Supreme Court orders in respect of preventive detention, and also examines the case of a détenu who was released in accordance with the order of the High Court, only to be re-arrested at the prison-gate.

The last chapter summarises general conclusions. An overall assessment of Martial Law administration is attempted, and some suggestions offered for the prevention of the abuse of the power by Martial Law regimes in future by means of constitutional and legal provisions in respect of the promulgation and administration of Martial Law.

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Originally, my intention was to carry out research on "Fundamental Human rights as Guaranteed by the 1972 Constitution of Bangladesh", but this subject was fraught with many difficulties, and at the suggestion and stimulation of my first supervisor, Dr. R.H. Hickling, I selected the present topic for my thesis. I am indebted to him for his helpful advice. I also wish to thank my second supervisor, Mr. R.H. Tristram, whose recommendations and support enabled me to obtain grants from the SOAS Scholarships Committee and the University of London Central Research Fund to meet the cost of travel to and from Bangladesh.

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During my fieldwork in Bangladesh, I was immensely helped by my father-in-law, Professor M.A. Bari, Chairman, University Grants Commission, who was

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CHAPTER I

Introduction

I. The Birth and Constitutional and Political Development of Bangladesh before the Proclamation of Martial Law, 1975-1979

i) General Features of Bangladesh

Bangladesh is a country of 55,598 square miles with a population of 94.7 million in 1983.[1] It is now the world's eighth most highly populated country. With 1,703 persons per square mile, Bangladesh is the most densely populated nation in the world, with the exception of city-states like Hong Kong and Singapore. The majority of the people of Bangladesh are Bengalis and have a mixture of Dravidian, Aryan and Mongolian ancestry. About 85 per cent of the people of Bangladesh are Muslims. The vast majority of the Muslims are Sunni, who follow the Hanafi School of Islamic Law. Bangladesh is unique among the countries of South Asia in that it is almost unilingual. Except for the few Urdu-speaking Biharis, who derive their name from the Indian province of Bihar when they migrated to Eastern Bengal in 1947, the language of the people of Bangladesh is Bengali. There are a few tribal areas in which local tribal dialects are also spoken.

Bangladesh is one of the poorest countries in the world. The economy is primarily agricultural. The exports earnings are derived mainly from jute and jute goods; jute is the principal cash crop, produced from about two million acres of land. Bangladesh is the largest grower of this 'golden fibre'. It is a land of fertile alluvial soil washed very extensively by rivers and creeks.

The climate of Bangladesh is characterised by high temperatures, heavy rainfall, often excessive humidity and fairly marked seasonal variations. Except in the hill areas, there is little variation in temperature in most of the country, which ranges in the nineties in the hot months of April and May, cool slightly during the monsoon, and drops into the fifties during the cold weather of December and January. The average rainfall in the country is over 85 inches a year

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1. Statistical Pocketbook of Bangladesh 1983, published by the Ministry of Planning, Government of the People's Republic of Bangladesh, Dhaka 1984, pp.100, 101.

ii) The Birth of Bangladesh

When the transfer of power took place in August 1947 under the provisions of the Indian Independence Act 1947, and the subcontinent was partitioned by the British into two sovereign states of India and Pakistan, Bangladesh became a province, under the name of East Bengal (later known as East Pakistan), of the newly-established State of Pakistan. There was no direct land connection between the Western and Eastern parts of Pakistan; they were separated by 1,200 miles of Indian territory and the distance by sea was 2,450 miles.

However, the Panjabi-dominated Western wing of Pakistan consistently followed a policy of discrimination towards the Eastern wing in every sphere of governmental and public activity - political, social, cultural, economic and administrative. The denial of provincial autonomy, unequal representation in the civil and military services, disparity in economic development and division of export earnings created feelings of resentment and disaffection among the Eastern Pakistanis. It was widely believed that East Bengal was reduced to a mere colony of West Pakistan and that the East Bengalis had only changed their masters when India was partitioned. The rapidly-growing discontent among the East Bengalis against the domination and exploitation of West Pakistan led most of the political parties in East Pakistan to demand some measure of autonomy in their party manifestos as a way to resolve peacefully the disparities between the two parts of the country. The Awami League, a Bengali Party, went so far as to adopt a six-point formula which envisaged almost total autonomy for East Pakistan. Under this formula, currency and taxation were to be within the separate jurisdiction of East Pakistan and the Central Government was to have powers only in defence and foreign affairs, even then with certain limitations. However, the first General Elections, held on 7 December 1970, were the last hope for the East Pakistanis to

participate in a democratic, representative and civilian government ensuring autonomy for their province. In these elections, the Awami League won 160 seats out of 169 allotted to East Pakistan in the National Assembly, which was to have a total of 300 directly elected seats and thirteen nominated ones. The Awami League became the majority party not only of East Pakistan, but of the whole of Pakistan, without winning a single seat of the 144 reserved for West Pakistan, but with the right to form alone a national government. The inaugural session of the National Assembly was due to be held on 3 March 1971. However, the fear of being politically dominated by a new Bengali leadership under Sheikh Mujibur Rahman, the Awami League leader, ultimately led the military regime of Yahya Khan, on 1 March 1971, to postpone the first session of the newly-elected National Assembly indefinitely, at the instance of the West Pakistani Martial Law administration and with the concurrence of certain West Pakistani political leaders like Zulfikar Ali Bhutto (whose Pakistan People's Party won 88 seats only in West Pakistan). As a protest against this sudden postponement of the inaugural session of the National Assembly, Mujib called a general strike throughout East Pakistan. The general strikes called, and consequent directives issued by Mujib had the effect of setting up a provisional Awami League government in East Pakistan. All the organs of government in East Pakistan, including the judiciary, the Civil Service and the East Pakistan Unit of the armed forces were prepared to accept the authority and direction of Sheikh Mujib. While a mass movement based on non-co-operation and strikes thus gripped East Pakistan, Chief Martial Law Administrator Yahya entered into discussions with Mujib to resolve peacefully the political differences, especially over the question of autonomy for the Eastern wing. The "Yahya-Mujib" talks, which had taken place on 16 March 1971 in the capital of East Pakistan, Dhaka (formerly spelled 'Dacca') and continued up to

23 March, ultimately broke down. This was followed by the imposition of Martial Law in East Pakistani cities and the official military crack-down, on the night of 26 March 1971, upon the so-called rebels in East Pakistan. In fact, these steps were a futile attempt to crush the East Pakistanis' legitimate endeavour to assert their rights, won in the December 1970 General Elections, and to achieve a military solution to the autonomy problem.

However, tension now grew rapidly and the Bengali nationalists proclaimed the birth of the new State of Bangladesh on 26 March 1971. A civil war broke out between Bengali nationalists and the Pakistani Army. Eventually the intervention of India on the side of the Bengali nationalists decided the issue and Bengladesh effectively became independent of Pakistan on 16 December 1971 with the surrender of Pakistan forces in Bangladesh and the ultimate assumption of the authority by a government of the Awami League.

Thus the struggle of the people of East Pakistan, which initially started as one for the limited objective of greater provincial autonomy, culminated in complete independence.

iii) Salient Features of the 1972 Constitution of Bangladesh

Soon after the outbreak of civil war, Mujib was arrested and taken to West Pakistan. After nine-and-a-half months of solitary confinement in a Pakistani prison, Mujib - who had been named President of the Provisional Government by the rebels - was freed by Pakistan's new President, Zulfikar Ali Bhutto, on 8 January 1972. Mujib arrived in Dhaka, the capital of the newly-independent Bangladesh, on 10 January, and received an enthusiastic welcome. He assumed the Presidency, but instead of retaining the presidential system of government and concentrating all powers in his hands, two days later on 12 January, Mujib promulgated the Provisional Constitutional

Order, and introduced a parliamentary model of government with himself as the prime minister. This change confirmed his commitment to a Westminster form of democracy.

On 23 March 1972, the Bangladesh Constituent Assembly Order was promulgated for the purpose of framing a new constitution for Bangladesh. It brought into existence a Constituent Assembly with 430 members, who had been elected to the Pakistan National Assembly and the East Pakistan Provincial Assembly in December 1970. The Constitution of the People's Republic of Bangladesh was passed by the Constituent Assembly on 4 November 1972, and it came into effect on 16 December 1972 - exactly a year after the independence of Bangladesh. This early formulation of the Constitution may be due to the fact that the Awami League government wished to provide a basic political framework according to its own preferences before serious controversies could arise over the fundamentals of the proposed new Constitution. In doing so, it wished to avoid the tragic experiences of Pakistan, where a delay of nearly nine years to frame its first Constitution had led to the loss of legitimacy of the Muslim League government.

The salient features of the 1972 Constitution were as follows:

(A) The Constitution was a written one, and consisted of 11 parts, containing 153 Articles and 4 Schedules.

(B) It was a rigid Constitution, as the amendment of any provisions of the Constitution required to be passed not by a simple majority, but by a majority of not less than two-thirds of the total number of Members of Parliament.[2]

(C) The Constitution declared Bangladesh as a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh.[3]

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2. Article 142(1)(a)(ii) of the 1972 Constitution.
3. Article 1, ibid.

(D) The Constitution was the supreme law of the Republic, and if any other law was inconsistent with it that other law would, to the extent of the inconsistency, be void.[4]

(E) It established a parliamentary democracy.[5] There was a cabinet for Bangladesh with a prime minister as its head. The President appointed as prime minister the Member of Parliament who appeared to him to command the support of the majority of the Members of Parliament. All executive powers of the Republic were exercised by, or on the authority of, the prime minister. The cabinet was collectively responsible to Parliament. The President was a mere constitutional head.

(F) The Constitution provided for a unicameral legislature. The Parliament, which was to be known as the House of the Nation, consisted of 300 directly-elected members, and fifteen women members to be elected by the Members of Parliament.[6]

(G) It guaranteed seventeen fundamental rights,[7] and the High Court Division of the Supreme Court was given the power to enforce these fundamental rights.[8] (A discussion of the constitutional provisions relating to fundamental rights is included in Chapter VI.)

(H) The Constitution adopted secularism, nationalism, democracy and "socialism, meaning economic and social justice" as the fundamental principles of state policy.[9]

(I) The Constitution provided for the separation of the Judiciary from the Executive.[10] It attempted to ensure the independence of the Judiciary.[11] The President was required to consult the Chief Justice

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4. Article 7(2), ibid.
5. Part IV, ibid.
6. Article 65, ibid.
7. Part III, ibid.
8. Article 102(1), ibid.
9. Article 8(1), ibid.
10. Article 22, ibid
11. Part VI and Article 147, ibid.

in making appointments of puisne judges of the Supreme Court. The President was to appoint district judges on the recommendation of the Supreme Court and magistrates exercising judicial functions in accordance with rules made by the President in that behalf after consulting the appropriate Public Service Commission and the Supreme Court. The procedure for removal of the judges was made difficult: the President could remove them if a resolution for removal was passed by at least two-thirds of the total number of Members of Parliament on the grounds of proved misbehaviour or incapacity. The remuneration, privileges and other conditions of service of a judge of the Supreme Court could not be varied to his disadvantage during his term of office. The Supreme Court was given power to control and discipline the judicial officers of subordinate courts. (The independence of the Judiciary will be discussed in greater detail in Chapter VI.)

(J) The Constitution placed some restrictions on the powers of the Judiciary by empowering Parliament to establish one or more Administrative Tribunals to exercise jurisdiction in respect of certain matters. The Administrative Tribunals would deal with matters relating to the terms and conditions of employment of persons in the service of the Republic and in respect of acquisition, administration, management and disposal of any property vested in or managed by the government. All courts were precluded from entertaining any proceedings, or making any orders in respect of any matter falling within the jurisdiction of tribunals.[12]

(K) Perhaps with a view to strengthening the government's control over the bureaucracy, the Constitution provided for, in some cases, dismissal, removal or reduction in rank of any person holding a civil

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12. Article 52, ibid.

post in the service of the Republic without giving him a reasonable opportunity of showing cause against the proposed action.[13] The Constitution also provided that "Except as otherwise provided by this Constitution, every person in the service of the Republic shall hold office during the pleasure of the President".[14]

(L) In order to prevent the Members of Parliament from crossing the floor and changing their parties freely, the Constitution laid down an unusual provision in it to the effect that: "A person elected as a Member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he -

(a) resigns from that party; or

(b) votes in Parliament against that party".[15]

Perhaps the experience of the erstwhile East Pakistan Legislature of March 1957, when twenty-eight Awami League members in the Provincial Assembly resigned from the Awami League and later in July joined the newly-formed National Awami Party, actuated the framers of the Constitution to include such provisions. There were also precedents of similar constitutional provisions in other Commonwealth states, e.g., Kenya.[15a]

iv) The First General Elections in Bangladesh

Premier Sheikh Mujibur Rahman, who had been proclaimed "Bangabandhu" (The Friend of Bangladesh) before the independence of Bangladesh and declared 'Father of the Nation' after independence, in an effort to restore law and order, asked the guerrillas of the Liberation War to

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13. Article 135(2), ibid.
14. Article 134, ibid
15. Article 70, ibid.
15a. In Kenya, a Member of Parliament who contested elections with the support of or as a supporter of a political party, vacates his seat if he resigns from that party at a time when that party is a parliamentary party. Ghai Y.P. and McAuslan, J.P.W.B., Public Law and Political Change in Kenya, Nairobi, 1970, p.320.

surrender their arms to local authorities. However, his call largely went unheeded, especially among the radicalist guerrillas and miscreants. The arms and ammunition possessed illegally were freely used to eliminate political opponents. Political radicalism and violence threatened the government of Sheikh Mujib. Between February 1972 and February 1973, political killings claimed the lives of 800 workers of the governmental party of the Awami League and 500 workers and supporters of the opposition parties. Against such an increased use of violence by the party workers of both the government and the opposition parties, and after the Constitution had come into force, Mujib fixed 7 March 1973 as the date of the first General Elections in independent Bangladesh. Although Mujib could possibly remain in power till December 1975 without holding elections, he announced the date of election, perhaps, to test his popularity in the face of growing opposition and to receive a fresh mandate from the people to tighten his political grip. Accused of many failures - over law and order, smuggling, rising prices and corruption in its own higher ranks - Mujib's Awami League nevertheless won a landslide victory securing 292 out of 300 seats in Parliament. This landslide victory in which the Awami League polled 73.1 per cent of the votes is reminiscent of its performance in the 1970 General Elections held under the Yahya regime, when the League had polled 72.68 per cent in erstwhile East Pakistan. It seems that Mujib's personal popularity was responsible for this spectacular success. This landslide victory showed that the euphoric support for Mujib was still high. However, the organizational weaknesses of the opposition parties also contributed to Mujib's landslide victory.

v) Overall Situation of the Country after the General Elections of 1973

After the General Elections, the economic and law and order situations began to deteriorate steadily. Overall production of heavy industries,

which were nationalized by Mujib's government and in which jobs were created only to be filled by inefficient, incompetent and corrupt relatives and supporters, fell and was below the 1969-70 level. Devastating floods and an impending famine in 1974, an astronomical increase in prices of essential commodities including increases of four to five times in the price of foods over the prices in 1969-70, belied the expectation of Bengalis who had hoped for better days after the end of Pakistani exploitation. A worldwide shortage of food grains and extremely high prices of oil made Mujib's task of reconstruction even more difficult. Smuggling became rampant. Corruption pervaded not only at all office levels but, in fact, at all levels of the ruling elite of the new Republic. Misappropriation of foreign grants, aids and relief goods only added to the increased sufferings of the people. The spirit of self-sacrifice and enthusiasm which had emerged at the time of the Liberation War almost disappeared altogether.

Although political violence decreased considerably after the election, from September 1973 onwards it was on the increase again. The Awami Leaguers often became targets of violent attacks for their alleged corruption and association with the government of the day. By 1974, it was estimated by Mujib himself that more than 3,000 members of the Awami League, including five Members of Parliament, had been killed.[16] However, a study by the Home Ministry revealed that between March 1972 and May 1974, 4,925 people were killed in political violence.[17] Attacks on police camps and stations in the countryside by politically-motivated extremists, as well as by professional criminals, also increased. Widespread labour disputes began.

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16. Franda, Marcus, Bangladesh, the First Decade, New Delhi, 1982, p.54.
17. Far Eastern Economic Review, Asia 1975 Yearbook, p.123.

(vi) The Constitution (Second Amendment) Act, 1973

Although he started in office with unprecedented popular support, discontent against Mujib was now rapidly spreading and the popularity of his government was declining fast. Against such decreased popularity in a deliberate move to concentrate power in the hands of the Prime Minister, the Constitution (Second Amendment) Act was passed on 22 September 1973.

The Constitution (Second Amendment) Act for the first time enacted provisions recognising and regulating preventive detention, by adding clauses 4 and 5 to Article 33 of the 1972 Constitution, the Article which contained safeguards as to arrest and detention. But these clauses did not contain any express provision as to when a law providing for preventive detention could be passed or specifying the maximum period for which a person could be held in preventive custody. However, four months and twelve days after the Second Amendment, on 5 February 1974, the Special Powers Act was passed by Parliament "to provide for special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith". The Special Powers Act, which was passed in peace-time as a piece of permanent legislation, provided for preventive detention for an unlimited period. The Awami League government claimed that this Act was necessary to control prevailing lawlessness, turbulence, terrorist activities by extreme left-wing groups and the public use of firearms. (The provisions of the Special Powers Act relating to preventive detention will be examined in Chapter VII.)

The 1972 Constitution of Bangladesh did not originally contain any provision for the declaration of an emergency. Perhaps the repeated misuse of emergency powers by the Government of Pakistan, during the days when Bangladesh (erstwhile East Pakistan) was a province of Pakistan,

discouraged the framers of the 1972 Constitution from including such powers in the Constitution. It seems that later, in view of the failure to control the rapid deterioration in the economic and law-and-order situations, emergency powers were considered essential by the government in power to assert itself. Hence, the Constitution (Second Amendment) Act invested the President with the power of declaring an emergency in the country with the consent of the prime minister, at a time when the security and the economic life of Bangladesh was threatened by war or external aggression or internal disturbance.[18] While the proclamation of an emergency was in force, certain fundamental rights guaranteed in Articles 36, 37, 38, 39, 40 and 42 of the 1972 Constitution could be suspended so as to remove the restrictions imposed by these Articles on the powers of the Legislature to make any law or the Executive to take any action.[19] Similarly, during the operation of an emergency, the President could issue an order suspending the enforcement of any of the fundamental rights.[20] (This aspect will be discussed at greater length in Chapter VI.)

vii) The Proclamation of Emergency, 1974

Almost a year and three months after the insertion of emergency provisions, on 28 December 1974, a state of emergency was declared throughout the country on the ground that the security and economic life of Bangladesh were threatened by internal disturbances. Until then, Bangladesh had been the only country in the subcontinent not under emergency rule. However, the murders of a Member of Parliament and a Union Council chairman on 25 December 1974, while they were offering Eid prayers, furnished Premier Mujib with a convenient pretext to advise the

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18, Article 141A of the 1972 Constitution of Bangladesh.
19. Article 141B, ibid.
20. Article 141C, ibid.

President, Mohammadullah, to proclaim an emergency. Although the official version claimed that the proclamation was necessary to ensure security, public safety and the maintenance of essential supplies in view of the frequent acts of sabotage, murder and political violence by anti-social elements during the last three years, it is widely believed that the immediate causes of the Proclamation of Emergency were the threats of large-scale industrial unrest by five labour organisations from 18 January 1975. Many critics were of the opinion that the Emergency was declared because of the failure of Mujib's Awami League government to combat rapid inflation, food shortages, famine, smuggling and black-marketeering which came to pervade life after 1972 and had never reached such a scale even under nearly two-and-a-half decades of Pakistani domination. However, the enforcement of all the important fundamental rights guaranteed by the 1972 Constitution was suspended by the Presidential Order of 28 December 1972 issued as a consequence of the Proclamation of Emergency. (In Chapter VI this suspension of the enforcement of fundamental rights will be considered.)

However, the Emergency Powers Rules were issued by the Awami League regime on 3 January 1975. Under the Emergency Powers Rules, orders of preventive detention could be passed on the grounds which had already been the grounds for passing detention orders under the Special Powers Act, 1974. Although the Emergency Powers Rules provided for preventive detention, unlike the Special Powers Act, they did not incorporate into them any constitutional safeguards of an Advisory Board to investigate the sufficiency of grounds for the detention for a period exceeding six months and of communicating, as soon as may be, the grounds of the order of detention to the detainee, as well as of affording the detainee the opportunity to make representation against the order. The absence of constitutional safeguards permitted the government to take away the

cherished fundamental right of the individual, personal liberty, in a most arbitrary manner. (A more detailed consideration will be given to this aspect in Chapter VII.)

(viii) The Constitution (Fourth Amendment) Act, 1975

The Awami League government used the emergency to amend certain fundamental provisions of the 1972 Constitution, curb the independence of the Judiciary, abolish judicial powers to enforce fundamental rights, replace the parliamentary form of government with a presidential one and do away with a multi-party democratic system. Thus, on 25 January 1975, the Constitution (Fourth Amendment) Act was passed, the main features of which were as follows:

(A) The Constitution (Fourth Amendment) Act replaced the parliamentary democracy with a presidential form of government, centring around an all-powerful executive, the President. The President was to be elected by direct election, but no such election was necessary in the case of Premier Sheikh Mujib, who automatically became the first President. All executive powers of the Republic were vested in the President and were to be exercised by him directly or indirectly. It provided for a Council of Ministers to aid and advise the President in the exercise of his functions. The President, in his discretion, had the power to appoint a prime minister and other ministers, ministers of state and deputy ministers from among the Members of Parliament, or from persons qualified to become Members of Parliament.

(B) The Fourth Amendment virtually deprived Parliament of all powers of control over the Executive. The President and the ministers were not responsible to Parliament. The ministers were to hold office during the pleasure of the President. Even the procedures for the impeachment of the President on a charge of violating the Constitution

or of grave misconduct, and for his removal from office on the grounds of physical or mental incapacity, were made unusually difficult, rendering it almost impossible for Parliament to act. An initiative to move a motion for the President's impeachment or removal needed the support of at least two-thirds of the total number of Members of Parliament, and had to be passed by at least three-fourths of the total number of members.

(C) The President was now empowered to withhold assent from a bill of Parliament submitted to him for his assent. This was virtually a power of veto although the word 'veto' was not used in the Fourth Amendment.

(D) With a view to ensuring party loyalty and discipline in the Legislature, the Fourth Amendment provided that abstention of a member from voting in Parliament or his absence from any sitting of Parliament in disregard of the direction of the party concerned would be interpreted as if the member had voted against that party, and this would force him to vacate his seat in Parliament.

(E) The Fourth Amendment extended the life of the First Parliament, which was due to end in March 1978, to January 1980.

(F) It curbed the independence of the Juduciary. The President was given the power to appoint the Chief Justice and other judges of the Supreme Court at his discretion. He could also remove them from their offices on the grounds of misbehaviour or incapacity in accordance with his will. He was further invested with the power to appoint, control and discipline the persons employed in the judicial service and magistrates exercising judicial functions. (These curtailments of the independence of the Judiciary will be examined in greater detail in Chapter VI.)

(G) The Fourth Amendment took away the power of the High Court Division of the Supreme Court to enforce fundamental rights. It empowered Parliament to establish a constitutional court, tribunal or commission for their enforcement. (This aspect will be discussed in Chapter VI.)

(H) It provided that in order to give full effect to any of the fundamental principles of state policy of socialism, nationalism, secularism and democracy, the President might, by an Order, direct that there would be only one political party in the country. When such an order was passed, all political parties in the state would stand dissolved. The Fourth Amendment empowered the President to decide all matters pertaining to nomenclature, programme, membership, organisation, discipline, finance and functions of the National Party. In general, a person in the service of the Republic would be qualified to be a member of the National Party. Once such a National Party was formed, a sitting Member of Parliament would lose his seat unless he became a member of the National Party within a time specified by the President. Moreover, a person would not qualify for election as President or as a Member of Parliament if he was not nominated as a candidate by the National Party.

Thus the Constitution (Fourth Amendment) Act, 1975, undermined the spirit of liberal democracy. It was a drastic amendment which gave the President dictatorial powers. It introduced a presidential form of government on the American pattern without, however, its checks and balances, concentrating all the powers in the hands of a single person. Mujib, who during the Ayub regime in Pakistan had consistently expressed his commitment to parliamentary democracy, had now a complete change of heart and chose the presidential form of government with a view to concentrating all powers in his own hands as a more effective means of dealing with the deteriorating economic and law-and-order situations.

(ix) The Declaration of Bangladesh as a One-Party State

Under these new powers, on 24 February 1975 Sheikh Mujib, as the President of the Republic, issued an Order introducing the one-party system in Bangladesh. The single National Party formed was to be known as the Bangladesh Krishak Sramik Awami League (BKSAL) - the Bangladesh Peasants' and Workers' National Party. The Party was to be headed by the President himself. Later, on 6 June 1975, President Mujib issued a new constitution of the BKSAL which revealed his attempt to tighten his grip over the National Party. This Party constitution gave him absolute power to control and oversee all the high-ranking officials of the Party. He headed all the high-powered committees of the National Party, and the fifteen-member (National) Executive Committee, which was at the head of the BKSAL, consisted of four of Mujib's close relatives, ten of his associates and Mujib himself.

Thus the structure of the National Party formally recognised the fact that Mujib was the unquestioned leader and key figure of the country. However, it should be stressed here that the National Party was in fact more than a political party. It was as much a state organ as the government or Parliament. The provision for the Party, as mentioned earlier, was made in the Constitution of the country itself and its structure was announced on 6 June 1975 by an extraordinary Gazette notification.

Although for the time being there appeared to be no significant reaction, there were signs of the coming storm in the future. General Osmani, formerly the Commander-in-Chief of the Liberation Force, resigned from Mujib's government as a protest against the declaration of Bangladesh as a one-party state, and the JSD (Jatiya Samajtantrik Dal - the National Socialist Party) Members of Parliament refused to join the National Party and preferred to lose their seats in Parliament. However, the

transformation of Mujib, ardent supporter of liberal democracy, into an absolute dictator came as a shock to the politically-conscious citizens of Bangladesh.

Only thirteen days after the announcement of the Party constitution, on 16 June 1975, the President, Sheikh Mujib, wound up all daily newspapers except the (English) Bangladesh Observer and the (Bengali) Dainik Bangla (owned by the party in power). Immediately after the Presidential Order, two of the dissolved dailies, the (Bengali) Dainik Ittefaq and the (English) Bangladesh Times were revived as government-owned publications. However, the Presidential Order closed down thirteen dailies and dozens of political weeklies published from Dhaka and other district towns.[21] Since all the four existing newspapers were either owned by the government or by the party in power, there was no scope for free expression of the views or grievances of the people.

(x) The Resentment of the Military Forces towards the Mujib Regime

The people of Bangladesh became disenchanted with Sheikh Mujib for his new constitutional and political structure, and there was a growing feeling that Mujib intended to create a political dynasty for the benefit of his relatives and closest associates. The Bangladesh military forces shared, in general, this popular disillusionment. The military also had many grievances against the Mujib regime, some of which were as follows:

(A) Sheikh Mujib, who had an innate aversion to the regular army in whose hands he suffered most during the days of Pakistan, raised a strong paramilitary force, the Jatiya Rakkhi Bahini - the National Security Force - equipped and trained by Indian military forces. The Rakkhi Bahini, which was composed of the so-called politically-

21. The Asian Recorder, 23-29 July 1975, p.12691.

oriented cadre of the Mujib Bahini (i.e., Mujib Army) organised during the Liberation War to counterbalance freedom-fighters, belonged to different ideological groups, and was designed primarily to protect Mujib and his power structures. The creation of this paramilitary force, commonly known as Mujib's private army, revealed Mujib's distrust of the regular army. The suppression of riots, demonstrations, terrorists and insurgents was the main task of the Rakkhi Bahini. The members of the Rakkhi Bahini, who were disparagingly described as 'storm-troopers', were given preferential treatment in supplies and as such were a privileged group. This created a wide-spread discontent and disaffection among members of the regular army.

(B) In 1974 when Bengali officers of the regular army were repatriated to Bangladesh from (West) Pakistan, they found, in general, a paradoxical situation in which many officers junior to them in the hierarchy before the independence of Bangladesh now occupied senior positions, having been "freedom-fighters" or close to the ruling party. The senior repatriated officers, who were absorbed into the Bangladesh military, had to serve under these newly-promoted officers, while their own claims to promotion were not considered. This made them feel resentful.

(C) Many repatriated officers, who maintained the Pakistani Army tradition of anti-Indian feeling, could not condone Mujib's pro-Indian policies. Even many "freedom-fighter" elements of the Bangladesh military forces felt that Mujib had compromised the independence for which they had fought by substituting India's hegemony for Pakistan. The poorly-equipped army was disillusioned with Mujib's virtual failure to bring back the Pakistan Army's surrendered arms and ammunition that had been taken to India as war booty by the Indian forces.

(D) There was a strong rumour in army circles that Mujib had a calculated plan in sending his second son, Sheikh Jamal, in 1973 to Sandhurst Military Academy for training so that after finishing his course he could take over the command of the Bangladesh Army. Mujib's action was seen as a strategical move to control the army through his son.

(E) In April 1974, Sheikh Mujib entrusted the regular army with the task of curbing hoarding, black-marketeering and smuggling. To their utter surprise and disgust, the army personnel found that Mujib went out of his way to save his party men and family members arrested in the course of anti-smuggling campaigns. This undesirable intervention, as well as the sudden termination of the army's anti-smuggling operations in the face of their success, contributed, to a great extent, to raise the army high command's resentment and disillusionment with Mujib's regime at its peak.

(xi) The Declaration of Martial Law in August 1975

The grievances of the military found expression in the early hours of 15 August 1975, when Mujib and several members of his family were killed in a coup masterminded by a group of army officers, mostly majors, some of whom (Majors S.H.M.B. Noor and Shariful Hoque Dalim) Mujib had dismissed from the army more than a year earlier. Immediately thereafter, for the first time in the history of independent Bangladesh, Martial Law was declared throughout the country. Before offering a legal analysis of the 1975 episode of Martial Law in Bangladesh, it may be helpful to consider the general doctrines and historical experience of Martial Law in the Indian subcontinent.

II. The General Doctrine of Martial Law

i) Definition of Martial Law

According to common law doctrine, under normal conditions a citizen is subject to the ordinary laws of the land, civil and criminal, but in time of an emergency, which may arise due to a riot, rebellion, insurrection or war, these laws for the time may be superseded and displaced by a more restrictive law known as Martial Law. It is called a restrictive law because it curtails the ordinary rules relating to the manner of taking evidence, mode of trial and the relief against the sentence and imposes severe punishment for Martial Law offences as a deterrent. Therefore, Martial Law is an extreme remedy which can be employed in the event of imminent danger to the preservation and security of the state. It is essentially a law or rule of force to restore the country to normalcy, and to re-establish the supremacy of the ordinary laws. "The purpose of martial law", says F.B. Weiner, "is not to replace the civil administration of law but to support it by brushing aside the disorders which obstruct its normal operation".[22] So, Martial Law is used to meet force and restore peace and tranquillity in which the civil power can re-assert its authority. According to Joseph W. Bishop, Jr., "In one form or another, under such names as 'state of siege' or 'state of emergency', the concept [of Martial Law] is found in every country. In some countries it is almost the normal type of government. In Anglo-American law, its only proper purpose is to restore order with a view to the restoration of civilian government, and the degree to which the military may properly assume governmental functions depends entirely on the needs of the situation".[23]

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22. Weiner, F.B., A Practical Manual of Martial Law (Harrisburg, 1940), p.15.
23. Bishop, Joseph W. Jr., "Martial Law", International Encyclopedia of the Social Sciences, Vol.X, 1968, pp.315-316.

There are two theories about the source of the word "Martial" in the expression "Martial Law". One theory is that the word "Martial" was originally spelt "Marshal" which ("Marshal") is derived from marescallus; mareschalk, a stable servant and the Marshal was the Master of the Horse.[24] Therefore, "Marshal Law", which was subsequently spelt as "Martial Law" meant the law that was promulgated by the Crown, with the advice of the Constable and the Marshal - the leaders of the King's army,[25] for the due order and discipline of officers and soldiers, in time of war and was enforced by the Court of

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24. O'Sullivan, Richard, Military Law and the Supremacy of the Civil Courts, London, 1921, p.1, footnote (a).
25. During the early days of English history, no standing army existed. It was only in times of war or of insurrection that military forces were raised. So, when England had no standing army, "Every freeman was a soldier. Each warlike occasion brought the knights and their retainers to the field, 60,000 of the former being bound by free-hold tenures to respond for forty days each year to the sovereign's call to arms". Birkhimer, William E., Military Government and Martial Law, Kansas City, 2nd edn., 1904, p.372. And the Constable (or Comes Stabuli) and the Marshal "were two great ordinary officers, anciently, in the King's army; the Constable being in effect the King's general [i.e., the Commander-in-Chief of the King's army], and the Marshal was employed in marshalling the King's army, and keeping the list of the officers and soldiers therein; and his certificate was the trial of those whose attendance was requisite". Hale, Matthew, History of the Common Law of England, 4th edn., 1779, p.34. However, the offices of the Constable and the Marshal were hereditary.

the Constable and the Marshal.[26] "Always", says Matthew Hale, "preparatory to an actual war, the Kings of the realm, by advice of the Constable and Marshal, were used to compose a book of rules and orders, for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law".[27] And Edward Coke described the Court of the Constable and the Marshal as "the fountain of the marshal law".[28]

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26. In the Middle Ages, the Court of the Constable and the Marshal, which was "sometimes mentioned in records by another name, the Curia Militaris, The Court of Chivalry"(O'Sullivan, Richard, op.cit., p.1), was concerned primarily with the discipline of the army, and matters related thereto. Holdsworth, William, A History of English Law, Vol.1, 1971, p.573. It took cognisance of contracts relating to "deeds of arms and of war out of the realm", prisoners of war, whether aliens or rebels, ransoms, booty and the like. It also sat as a (Civil) Court of Honour to settle disputes on heraldic matters and precedence and slanders on men of noble blood. Ridges, Edward Wavell, (revised and largely re-written by Keith, A. Berriedale), Constitutional Law of England, 6th edn., 1937, p.274. This jurisdiction of the Constable and Marshal's Court was defined by a Statute in 1389 and another in 1399 (during the reign of Richard II). Holdsworth, William, op.cit., p.574. The Court of the Constable and Marshal continued to be active throughout the medieval period in England. On the attainder and execution of the Duke of Buckingham in 1521 (during the reign of Henry VIII), the office of High Constable was forfeited to the Crown. Since that date no permanent appointment to the office of High Constable has been made, though the title has been revived from time to time on the occasion of coronations and other like ceremonies. (For example, in 1911 and 1937 the Lord High Constable's office was filled for coronation ceremonial.) While with the disappearance of the Lord High Constable, the criminal jurisdiction of the Court of Chivalry came to be exercised by Commissions of officers (usually issued to the Generals, Lords-Lieutenants, and occasionally to municipal authorities), the old civil jurisdiction appears for a considerable period to have been exercised by the Earl Marshal. In 1640 (in the days of the Stuarts), the Court of the Marshal was declared by Parliament to be a grievance. And in Chambers v. Jennings (1701 7. Mod.p.125) in Anne's reign, it was decided that in the absence of the Constable, the Court was not properly constituted and was no longer a Court of Record and that the jurisdiction of the Marshal sitting alone was in point of fact a mere encroachment. However, the last case known to have been tried in the Court of the Marshal was Sir H. Blount's case (1737, 1 Atk.p.296). Thus in the course of the eighteenth century, the Court of the Marshal disappeared, though it seems never to have been formally abolished. O'Sullivan, Richard, op.cit., pp.5-6.
27. Hale, Matthew, op.cit., p.34.
28. Coke, Edward, The Fourth Part of the Institute of the Laws of England, 1797, p.122.

However, the other theory is that "Martial" is derived from the Latin word "martialis", an adjective meaning "pertaining to war", Mars being the God of War, and that Martial Law means the law relating to war.[29] Of the two theories, the first is, according to Robert S. Rankin, probably the correct one.[30] F.W. Maitland also supported the first theory when he wrote:

> "Now as a matter of etymology, marshal has nothing whatever to do with martial - the marshal is the master of the horse - he is marescallus, mareschalk, a stable servant - while of course martial has to do with Mars, the God of War. Still, when first we hear of martial law in England, it is spelt indifferently marshal and martial, and it is quite clear that the two words were confused in the popular mind - the law administered by the constable and marshal was martial law".[31]

William Holdsworth also held this view;

> "In the Middle Ages, martial law meant the law administered by the Court of the Constable and the Marshal. To that Court we must look for the origin both of the military and the martial law of the present day".[32]

It appears that in this respect the recently-published Oxford Companion to Law has just adopted the view of William Holdsworth:

> "In the Middle Ages, martial law meant the law administered by the Court of the Constable and the Marshal and from that court originated both the martial and the military law of today".[33]

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29. Harper's Latin Dictionary (edited by E.A. Andrews), quoted in Rankin, Robert S., When Civil Law Fails, Martial Law and its Legal Basis in the United States, 1939, p.4.
30. Ibid.
31. Maitland, F.W., The Constitutional History of England, Cambridge, 1926, p.266.
32. Holdsworth, William, "Martial Law Historically Considered", The Law Quarterly Review, Vol.XVIII, 1902, p.117.
33. Walker, David M., The Oxford Companion to Law, Oxford, 1980, p.812.

Therefore, it is evident that Martial Law originated in the disciplinary rules to be observed in the army, and matters related thereto be enforced by the Court of the Constable and the Marshal in medieval England.

The expression 'Martial Law' has been used in various ways by different renowned writers at different times, and as such carried no precise meaning. It is at times incorrectly employed to denote a variety of forms of government or law.

(a) "Martial Law" as "Military Law"

First, in former times the term 'Martial Law' was used to mean what we now call Military Law, the law for the discipline and government of the armed forces at home and abroad, in war and in peace. The term had this connotation up to the latter part of the eighteenth century.[34] So, when the earlier authorities like Edward Coke , Matthew Hale and even William Blackstone, speak of Martial Law, it is plain they are speaking of the law applicable to the soldier, or what in the modern phrase is called military law. It is plain they know of no other; and the fact that...such men as Lord Hale and Sir William Blackstone, with their accuracy of statement, call it martial law, and do not point out any distinction between martial law and military law as it is spoken of now, goes far indeed to show that they knew of no such difference, and that the distinction now supposed to exist is a thing that has come into the minds of men certainly much later than when these eminent

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34. As Fairman, Charles, wrote, "The words [Martial Law] had this connotation [to mean Military Law] at the period when the first American Constitutions were framed". Law of Martial Rule, Chicago, 1930, p.30.

luminaries of the law of England wrote their celebrated treatises".[35] This confusion in the old authorities is due to the fact that the rules that make up the 'Military Law' and the 'Martial Law' of the present day have a common historical origin, which has been pointed out earlier, in the law that was administered in medieval England in the Court of the Constable and the Marshal. And "Law of the Marshal which then ruled under the prerogative the Crown during war or insurrection, included both the law necessary for the government of the army (raised for the occasion), and also for the government of the [people of the] occupied territory or disturbed district while the ordinary law was in abeyance".[36]

(b) Martial Law as Military Government of Occupied Foreign Territory

Secondly, the expression 'Martial Law' has commonly been used in the sense of "Military Government in occupied foreign territory", and means the law administered by a military commander in occupied enemy territory in time of war. The Duke of Wellington had this kind of Martial Law in mind when in a debate on 1 April 1851 in the House of Lords on the question of the Ceylon rebellion in 1849, he said, "Martial Law is neither more nor less than the will of the general who commands the army; in fact, martial law is no law at all"[37] - recalling a remark he had used to describe his government in the Spanish Peninsula.

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35. Per Cockburn C.J. charge to the grand jury in R. v Nelson and Brand, Special Report, pp.99-100. Cited in Holdsworth, William, A History of English Law, Vol.X, 1938, p.710, footnote 1. For example, when Hale, Matthew, wrote, "First, that in truth and reality it [Martial Law] is not a law but something indulged rather than allowed, as a law; the necessity of government, order, and discipline in an army is that only which can give those laws a countenance, quod enim necessitas cogit defendi. Secondly, this indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others" (op.cit., pp.34-35), it is evident that here he is speaking of Military Law.
36. Tovey, Hamilton, Martial Law and the Custom of War, London, 1886, p.66.
37. Hansard, Parliamentary Debates, 3rd Series, Vol.CXV, 17 March to 10 April 1851, p.880.

And for expressing this view, the Duke of Wellington "unwittingly became an authority in American constitutional law, for his cliché has been repeated tripplingly by various federal judges".[38] Moreover, "this definition", says Robert S. Rankin, "has been most favoured by military men because it means that from their position the relations with the civil population will be ideal - that is, the subordination of all civil law to the military".[39] However, the Duke of Wellington's remark about Martial Law requires some qualification: that the will of the general must be exercised in accordance with international law and the conventions of civilized war fare. As the Attorney-General of the United States, Caleb Cushing, opined in 1857:

> "The commander of the invading, occupying, or conquering army, rules the invaded, occupied, or conquered foreign country, with supreme power, limited only by international law and the orders of the Sovereign or Government he serves or represents. For, by the law of nations, the occupatio bellica in a just war transfers the sovereign power of the enemy's country to the conqueror".[40]

At present, the restrictions which international law imposes on the exercise of the will of the general in occupied foreign territory are embodied in the Hague Convention of 1907 and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. However, Martial Law in the sense of Military Government, which takes the place of a suspended or destroyed sovereignty and replaces the previous governmental agencies, is quite outside the range of municipal law or

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38. Fairman, Charles, "The Law of Martial Rule and the National Emergency", Harvard Law Review, Vol.LV, No.8, June 1942, p.1259.
39. Rankin, Robert S., op.cit., p.4.
40. This opinion was given by Mr. Caleb Cushing, the Attorney-General of the United States, on 3 February 1857, Opinions of the Attorney-Generals, Vol.VIII, Washington, 1858, p.369.

constitutional law. Martial Law, in this sense of the term, is a part, not of municipal, but of international law.[41] In this sense, Martial Law is recognised by Public International Law as a part "of the jus belli. It is incidental to the state of a solemn war, and appertains to the law of nations".[42]

(c) Martial Law as the Use of Military Forces to Assist Civil Authorities in Suppressing Disorders

Thirdly, the term 'Martial Law' is sometimes used to mean "the rights and obligations of the military under the common and statute law of the country to repel force by force while assisting the civil authorities to suppress riots, insurrection or other disorders in the land".[43] Thus, Martial Law in this form "may amount to no more than the employment of troops, in aid of and under the direction of the civil authorities, to supplement the regular police in the control of riots and other public disorders and the enforcement of the law"[44] "without the existence (i.e., proclamation) of martial law".[45] In this sense it is a part of the English Constitutional Law and is called Martial Law in the English sense. To quote Justice Muhammad Munir, who in Muhammad Umar Khan v. the Crown[46] observed:

> "This form of martial law is well recognized by the (common) law of England and there are several ancient statutes which make it incumbent not only on the citizens but also servants of the Crown, including the army, to assist civil authorities in suppressing disorders in the land".[47]

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41. Ibid.
42. Ibid.
43. Muhammad Munir, C.J. in Muhammad Umar Khan v. The Crown, Pakistan Law Reports, Lahore, Vol.VI, 1953, p.830.
44. Bishop, Joseph W. Jr., op.cit., p.316.
45. Grayner, J.K., "(Martial Law) United States", Encyclopaedia Britannica, VOL.XIV, 1970, p.977.
46. Pakistan Law Reports, Lahore Vol.VI, 1953, p.825.
47. Ibid., p.830.

About this form of Martial Law, Professor A.V. Dicey wrote:

> "Martial Law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the Law of England".[48]

He further stated:

> "If, then, by martial law be meant the power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England".[49]

In American Constitutional Law, Martial Law in this sense is a form of the police power of the state and means law which has application when the military arm does not supersede civil authority but is merely called upon to aid such authority in the execution of its civil functions.[50] In Bangladesh, in times of disorder a Magistrate can under Section 129 of the Code of Criminal Procedure call in the military to suppress a

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48. Dicey, A.V., Introduction to the Study of the Law of the Constitution, 8th edn., 1915, p.284.
49. Ibid., p.286. It is evident that Dicey in his definition of Martial Law included not only the Crown's right to suppress breaches of the peace, but also the legal duty of every subject, whether soldier or civilian, whether a servant of the government such as a policeman or a person in no way connected with the administration, "to assist in putting down breaches of the peace" (p.284). The inclusion of such duty on the part of "all loyal subjects" within the ambit of Martial Law does not appear to be supported by the modern state of the law. Moreover, Dicey's view of the concept of Martial Law as "a power which has in itself no special connection with the existence of an armed force" (p.284) does not seem to be accurate as no one in modern times could think that Martial Law can be enforced without the aid or employment of the armed forces. As in Ex parte Milligan (Wallace, United States, Vol.IV, 1866, p.2) the Supreme Court opined that the administration of Martial Law is a strictly military function. Cited in Niaz Ahmad v. Province of Sind, All Pakistan Legal Decisions, Karachi, Vol.XXIX, 1977, p.634.
50. Section 4 of Article iv of the American Constitution.

riot and under Section 130 of the same Code, in the absence of a Magistrate, a commissioned military officer may disperse an unlawful assembly by force and nothing done in good faith by such officer is an offence. However, where the armed forces are called upon only to assist the civil authorities in maintaining public order, the civil courts continue to function, and members of the civilian population may be punished only for violations of the civil law, not for violations of military orders other than those in implementation of civil law.[51]

As regards the use of the term 'Martial Law' to mean the employment of the armed forces in aid of civil authorities, there is a difference of opinion among the authors. Joseph W. Bishop, Jr., called this Martial Law "in its mildest form".[52] But Justice Muhammad Munir in Muhammad Umar Khan v. The Crown[53] observed:

> "It is, however, a misuse of the term to describe these rights and duties (of citizens, including servants of the Crown and the military in suppressing riots and restoring law and order) as martial law; they are no more than a part of the civil law of the land".[54]

And Justice Karam Elahee Chauhan, in Darevesh M. Arby v. Federation of Pakistan[55] held:

> "In the English sense of Martial Law, the civil courts are not replaced because temporary governance through military courts instead of civil courts is not envisaged in that country and the process so deployed is thus not of Martial Law and nor is it so termed".[56]

Therefore, it is evident that the right to employ the military to assist civil authorities in suppressing riots and other public disorders is paramount to all law and the law of every civilized country recognizes it.

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51. Gayner, J.K., op.cit., p.977.
52. Bishop, Joseph W. Jr., op.cit., p.316.
53. Pakistan Law Reports, Lahore, Vol.VI, 1953, p.825.
54. Ibid., p.835.
55. All Pakistan Legal Decisions, Lahore, Vol.XXXII, 1980, p.206.
56. Ibid., p.243.

And "this is not what can properly be called martial law". It seems that for want of a proper name, the expression 'Martial Law' is employed to mean the use of the military in aid of civil authorities in putting down rebellion and other overpowering social disorders.

(d) Martial Law Strictly Defined as Law Promulgated by Military Authorities in Time of Emergency where the Civil Authority is Ousted or Subordinated

Fourthly, the term Martial Law is also used in its strict sense. "Martial Law in the strict sense means the suspension of the ordinary law, and the substitution therefore of discretionary government by the Executive exercised through the military."[57] "Martial Law, in the proper sense of that term", says A.V. Dicey, "means the suspension of ordinary law and the temporary government of a country or part of it by military tribunals."[58] It relates to a domestic territory in a

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57. Phillips, O.Hood and Jackson, Paul, Constitutional and Administrative Law, 6th edn., 1978, p.362.
58. Dicey, A.V., op.cit., p.283. The proclamation of Martial Law in the sense to mean the temporary and recognised government of a country or a district by military tribunals (which more or less supersede the jurisdiction of the courts) is, according to Dicey, unknown to the law of England and is nearly equivalent to the state of things in France and many other foreign countries (Latin-American countries) is known as the declaration of a "state of siege", p.287. The "state of siege", which is so known in the civil law countries of continental Europe and Latin America, is the civil law counterpart of Martial Law which obtains in common law countries. Rossiter, C.L., Constitutional Dictatorship, 1948, p.9. It has its origin in the traditional custom of transferring all civil authority in a beseiged town to its military commander. Elting, John R., "Martial Law", Encyclopaedia Americana, Vol.XVIII, 1977, p.335. The French Constitution contains necessary provision for the declaration of the "state of siege" under which the authority vested in the civil powers for the maintenance of law and order passes entirely to the army. Such a "stage of siege" can be declared if there is a threatened or actual invasion by a foreign army or if there is an insurrection of considerable magnitude in any part of the country. "A state of siege may be decreed in the Council of Ministers but only Parliament may authorise its extension beyond twelve days". Phillips, O. Hood and Jackson, Paul, op.cit., p.362. It is interesting to note that whereas in France in order to check the Executive abuse of the "stage of siege", it was made an constitutional and legel institution and brought under the control of the Legislature, in the Commonwealth countries as well as in the United

FOOTNOTE CONTINUED ON NEXT PAGE

condition of insurrection or invasion when the civil government has been rendered inoperative or powerless by the insurrectionary or invading forces[59] and to deal with which the military may take over and the general commanding the army usually completely ousts or subordinates civil authorities. Then the law applied by the army general during the period of his occupation is called martial law in sensu strictiore.

In the words of George W. Hickman, Jr.:

> "Martial Law, sometimes referred to as martial rule, is the assumption of the function of the domestic government by the military forces of that government in an effort to preserve order and ensure the public safety during a period of emergency. It is called into being in times of insurrection or invasion within domestic areas where the ordinary law can no longer function adequately".[60]

A similar definition is supplied by J.K. Gayner:

> "Martial Law is the temporary rule by military authority of a designated domestic area in time of an emergency when the civil authorities are unable to function or their attempt to continue functioning for the time being might endanger the state".[61]

An identical definition of Martial Law is to be found in Corpus Juris Secundum:

> "Martial Law or, more properly, martial rule, is the temporary government by military force and authority of territory in which, by reason of the existence of war or public commotion, the civil government is inadequate to the preservation of order and the enforcement of law".[62]

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58. (continued) States of America, there is no statutory provision for a crisis government of the type envisaged under Martial Law in the proper sense of that term. As Fairman, Charles, wrote, "In France the declaration of a state of siege, and particularly the legal results consequent thereto, are regulated by Statute. The state of siege is a definite legal status. Quite different is the situation in the United States (and for that matter, in Anglo-Saxon countries generally) where the law governing an exercise of martial rule is largely customary and judge-made". "Martial Rule and the Suppression of Insurrection", Illinois Law Review, Vol.XXIII, No.8, April 1929, p.776.
59. Arnold, Frazer, "The Rationale of Martial Law", American Bar Association Bar Journal, Vol.XV, 1929, p.551.
60. Hickman, George W. Jr., "Martial Law", Encyclopaedia Americana, Vol.XIX, 1977, p.81.
61. Gayner, J.K., op.cit., p.977.
62. Corpus Juris Secundum (a complete restatement of the entire American Law as developed by All Reported Cases), VOL.XCIII, p.115.

William E. Birkhimer also defined Martial Law in a similar way:

> "Martial law is that rule which is established when civil authority in the community is made subordinate to military, either in repelling invasion or when the ordinary administration of the laws fails to secure the proper objects of government".[63]

Therefore, to deal with an emergency, which may arise due to a riot, rebellion or invasion, the military commander imposes restrictions and regulations upon civilians in their own country. Moreover, Statutes and even the Constitution may be suspended or abrogated and replaced by ordinances of the military commander and the civilian courts may be superseded by Martial Law courts. Such courts, although they bear a generic resemblance to courts-martial, are not bound to follow the same procedure, but may employ whatever rules are called for by the needs of the emergency. So,W.F. Finlason is of the opinion that:

> "Martial Law is, in short, the suspension of all law, but the will of the Military Commanders entrusted with its execution, to be exercised, according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed and settled rules, or laws; no definite practice, and not bound even by the rules of ordinary Military Laws".[64]

And W.T. Wells observes:

> "Martial law can be defined as a stage intermediate between law and anarchy, in which, the normal administration of the law having broken down, the authority appointed in accordance with law maintains order by summary methods".[65]

In the light of the above definitions of Martial Law in its proper (or strict) sense, the sense in which the present study is concerned,

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63. Birkhimer, William E., op.cit., p.371.
64. Finlason, W.F., A Treatise on Martial Law as Allowed in the Law of England in Time of Rebellion, London, 1866, p.107.
65. Wells, W.T., "Martial Law", Encyclopaedia Britannica, Vol.XIV, 1970, p.976.

it can be said that Martial Law is an arbitrary kind of law which is generally promulgated and administered by and through military authorities in an effort to maintain public order in times of insurrection, riot or invasion when the civil government is unable to function or is inadequate to the preservation of peace and tranquillity and the enforcement of law and by which the civil authority as well as the ordinary administration of the law are either wholly suspended or subjected to military power.

(ii) Is Martial Law really Law?

It is interesting to mention here that there are certain scholars who are of the opinion that 'Martial Law' is not law at all. John R. Elting opines:

> "Actually, martial law is not law in the ordinary sense of that word, but simply the assumption of absolute power by the executive branch of the government, backed up by military force".[66]

Sir Charles Napier refers to the term "Martial Law" as:

> "In truth no law at all. It is merely a term applied to that Act of the Legislature which suspends social law, and places the people at the will of the military, or other chief".[67]

He then goes on to say that he considers that the expression "Martial Law" is inaccurate, and that "the just term for such a lawless state is 'despotism' as no law but that of might exists. Such a state may be one of more or less injustice according to the will of those who hold this absolute power; but it is clear that the will of such persons is the law, and that there is no other law".[68] "Martial Law", says, W.F. Finlason, "is arbitrary and uncertain in its nature, (as when Martial

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66. Elting, John R., op.cit., p.335.
67. Napier, Charles, Remarks on Military Law, p.2, quoted in Tovey, Hamilton, op.cit., p.67.
68. Ibid.

Law is proclaimed there is no rule or law by which the officers executing Martial Law are bound to carry on their proceedings) so much so that the term 'law' cannot be properly applied to it".[69] "In strictness it is not law at all, but rather a cessation of all municipal law...and in the final analysis is merely the will of the officer commanding the military forces".[70] In Muhammad Umar Khan v. The Crown,[71] Justice Muhammad Munir observed:

> "...the officer in chief command of the forces operating in the troubled area acquires for the time being supreme legislative, judicial and executive authority. In other words, he himself fixes the limits and definition of his own authority. He makes his own law, sets up his own courts and no civil authority, while he is in command, may call into question what he does. In this sense, therefore, martial law is not law at all but the will of the officer commanding the army".[72]

Thus the essence of this view is that Martial Law is not law at all, rather in fact the will of the general commanding the army, the will of whom, for the time being, is to be the law in place of ordinary law that the people are bound to obey and are subject to punishment, which this officer may choose to prescribe, in case of disobedience. He might consider anything he pleases an offence and any evidence sufficient to establish the offence without recording the evidence in full or following any particular procedure and even denying the accused the right to be defended by counsel of his choice.

On the other hand, there are some other authors who do not support this view that Martial Law is not law at all and it is the simple and pure will of the commander. Lieutenant-Colonel Tovey opined:

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69. Cited in Lowry, James M., Martial Law within the Realm of England. An Historical Outline, London, 1914, p.45.
70. Corpus Juris Secundum, Vol.XCIII, p.116.
71. Pakistan Law Reports, Vol.VI, 1953, p.825.
72. Ibid., pp.838-839.

> "It appears hardly correct to state that Martial Law is no law at all. It is true that much is left to the will, or rather to the discretion, of the military commander, but he cannot exercise his will without limit. He is responsible to his sovereign, to his country, and to the authority who has directed him to act. He is limited, in case of insurrection, by the conditions under which Martial Law is proclaimed, and in case of war, by the Law of Nations. He is, further, in all cases limited by the law of natural justice to use no greater violence than is necessary to carry out the object for which Martial Law is being used, whether this concerns the safety of the State or the safety of the force under his command".[73]

Justice Bashiruddin in Mir Hassan v. State[74] held the same view.

> "...if there is a Martial Law rule in the country, such rule is not arbitrary or uncontrolled by principles nor is it the simple and pure will of the commander....The person assuming the power is to ascertain the will of the people, their settled habits and sentiments and to make laws and Regulations to gain its ends. Thus...where the army of a country proclaims Martial Law to curb riots, tumults and violence to law, sovereignty still continues to rest with the people".[75]

Then he quoted the observation of the then Justice Hamoodur Rahman in Muhammad Afzal v. Commissioner, Lahore Division:

> "The Martial Law proclaimed chose a system of government which was not to be a negation of law but an orderly system following a pattern of its own selection not dissimilar to the pattern of civil administration prevailing in the country".[76]

Therefore, it follows that Martial Law is not purely arbitrary as to power or uncontrolled by principle or unrestricted as to method. It is the will of the commander of the army, subject to a few regulations. "Like any other form of rule over human beings, it is obliged by the circumstances to adapt itself to the circumstances in order to gain its ends, and one such circumstance of the utmost importance is the settled

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73. Tovey, Hamilton, op.cit., pp.67-68.
74. All Pakistan Legal Decisions, Lahore, Vol.XXI, 1969, p.786.
75. Ibid., p.816.
76. Ibid., p.817.

habits and sentiments of the people....It is always of importance to a new regime to cause the minimum disturbance in the lives of the ordinary citizens consistent with the execution of the purposes underlying its inception".[77]

(iii) Is "Martial Law" a System of Government? "Martial Law" or Martial Rule?

Martial Law in its proper sense cannot be described as a system of government. More appropriately, it is a system of military rule. "Martial Law is martial rule in governmental matters exercised by the commander of an army..."[78] in times of grave emergency when the military rises superior to the civil power. But Martial Law conveys to the people's mind the impression that there is a system of law when in fact it only means Martial Rule. "People imagine", says David Dudley Field, "when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another the martial law. I say what is called martial law, for strictly there is no such thing as martial law; it is martial rule....Let us call the thing by its right name; it is not martial law, but martial rule."[79] Charles Fairman also contends that Martial Law:

> "is more accurately described as martial rule, which obtains in a domestic community when the military authority carries on the government, or at least some of its functions.

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77. Cornelius, J. in Province of East Pakistan v. Md. Mehdi Ali Khan, All Pakistan Legal Decisions, S.C., Vol.XI, 1959, p.439.
78. Carbaugh, H.C., "Martial Law", Illinois Law Review, Vol.VII, March 1913, p.494.
79. David Dudley Field in his argument in Ex parte Milligan, Wallace, United States, Vol.IV, 1866, pp.35-36.

> Martial rule may exist de facto; the term is noncommittal as to its legality".[80]

F.B. Weiner supports the view of Charles Fairman when he states "...the term 'law of martial rule'...may be more exact because it is noncommittal as to the legality of the measures invoked under martial 'law'".[81] But Weiner did not use the term in his discussion only because "even if more exact, it is less familiar".[82] Perhaps, it would be much less confusing if the term 'Martial Rule' could be used instead of 'Martial Law' as the latter term is at times incorrectly employed to denote a variety of forms of government or law.

III. Martial Law and the Doctrine of Necessity

(i) The Role of 'Necessity' in the Proclamation of Martial Law

The doctrine of necessity, namely rendering lawful that which otherwise is unlawful - id quod alias non est licitum, necessitas licitum facit, is a well-established doctrine. In constitutional law, the promulgation of Martial Law is based on this doctrine of necessity. As regards the degree of necessity that will be sufficient for the declaration of Martial Law, A.V. Dicey advocated "immediate necessity",[83] thus agreeing with the Supreme Court of the United States in the Ex parte Milligan case: "Martial Law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration".[84] Sir Frederick Pollock pleaded for apparent necessity when he said that

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80. Fairman, Charles, Law of Martial Rule, Chicago, 1930, p.31.
81. Weiner, F.B., op.cit., p.9.
82. Ibid., p.10.
83. Dicey, A.V., op.cit., pp.549, 552. He says, "The presence of a foreign army or the outbreak of an insurrection in the north conceivably so affect the state of the whole country as to justify measures of extra-legal force in every part of England but neither war nor insurrection in one part of the country prima facie suspends the action of the law in other parts thereof, p.542.
84. Ex parte Milligan, Wallace, United States, Vol.IV, 1866, p.127.

Martial Law may be promulgated in areas merely threatened by invasion or rebellion.[85] The view of Pollock has been termed by Dicey, for the sake of convenience, as the "doctrine of political expediency".[86] Perhaps Martial Law may be described as the rule of reasonable necessity. As John Salmond suggests that:

> "...even within the realm itself, the existence of a state of war and of national danger justifies in law the temporary establishment of a system of military government and military justice in derogation of the ordinary law of the land, in so far as this is reasonably deemed necessary for the public safety".[87]

J.I.C. Hare contends that:

> "In saying that martial law cannot arise from a threatened invasion, Mr. Justice Davis (in the Ex parte Milligan case) may gone too far, and unduly limited the right of the military authorities to provide for the safety of the community. Nothing short of a necessity can justify a recourse to martial law; but such a necessity may exist before the blow actually falls....All that can be said with certainty is that there must be reasonable and probably cause for believing in the imminency of a peril that suspends the ordinary rules..."[88]

And F.B. Weiner also states that:

> "Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise....That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder or public calamity. What constitutes necessity is a question of fact in each case".[89]

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85. Pollock, Frederick, "What is Martial Law?", The Law Quarterly Review, Vol.XVIII, April 1902, pp.155-156.
86. Dicey, A.V., op.cit., p.551.
87. Salmond, John, Jurisprudence, 7th edn., pp.100-101.
88. Hare, J.I.C., American Constitutional Law, Vol.II, Boston, 1889, pp.964-965.
89. Weiner, F.B., op.cit., p.16.

"When because of internal commotion, the bonds of society are loosened, and the people, stripped of that protection which government is instituted to afford, or when, in presence of an invading army, it becomes necessary to concentrate every element of resistance to repel it, the necessity for enforcing martial law arises".[90] Therefore, the declaration of Martial Law would, in cases of foreign invasion, mainly serve the purpose of enabling the forces of the country to be better utilized for its defence and in cases of rebellion or other serious internal disorder, would enable the government to arrest persons, resisting its authority summarily try and promptly punish when the ordinary course of justice is, for its slow and regulated pace, utterly inadequate to serve the said purpose when every moment is critical. "Hence", says, A.V. Dicey, "martial law comes into existence in times of invasion or insurrection when, where, and in so far as the King's peace cannot be maintained by ordinary means, and owes its existence to urgent and paramount necessity."[91]

He further states:

> "The justification and the source of the exercise in England of extraordinary or, as it may be termed, extra-legal power, is always the necessity for the preservation or restoration of the King's peace".[92]

Sir James Mackintosh, speaking in the House of Commons on 1 June 1824, in support of Lord Brougham's motion condemning the use of Martial Law in Demerara, said on this point:

> "The only principle on which the law of England tolerates what is called Martial [law], is necessity: its introduction can be justified only by necessity....When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgements, it becomes necessary to find some rude substitute for them, and to employ, for that purpose, the military, which is the only remaining force in the community".[93]

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90. Birkhimer, William, E., op.cit., p.427.
91. Dicey, A.V., op.cit., p.539.
92. Ibid., p.544.
93. Hansard, T.C., The Parliamentary Debates, New Series, London, Vol.XI, March-June 1824, p.1046.

Therefore, Martial Law being the law based on necessity can be employed in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for the speedy restoration of peace and tranquillity, public order and safety in which the civil authority may function and flourish, but is limited by the emergency itself. Despite the fact that the promulgation of Martial Law suspends fundamental rights of the citizen and the right to enforce them in a court of law for the period of emergency, it becomes necessary only because there looms a greater emergency which might put an end to these rights forever, if steps are not taken to remedy the situation. Thus "The right of resorting to such an extremity", as jointly opined by Attorney-General Sir John Campbell and Solicitor-General Sir R.M. Rolfe, "is a right arising from and limited by necessity of the case - quod necessitas cogit, defendit"[94] - what necessity forces, it justifies. So, the true test of the right to establish Martial Law has been said to be, whether the civil authorities are able, by the ordinary legal process, to preserve order, punish offenders and compel obedience to the laws. In other words, the test is whether the interference by the military is necessary, when it becomes evident that the civil authorities are unable to function, or that because of impending grave danger it would be unsafe for them to function, in order to perform the duty of repelling force and restoring such condition of things as will enable the civil authorities to resume charge. Martial Law is, therefore, a measure which is used only as a last resort when less drastic measures have failed.

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94. Forsyth, William, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence, London, 1869, p.198.

(a) The Role of Necessity in the Proclamation of Martial Law and the Concept of Open Court

Here it may be pointed out that it is contended that the role of the doctrine of necessity in deciding the question of promulgation of Martial Law "cannot be separated from the concept of open court".[95] This doctrine of 'open court' may be traced from early English history, through the Theobald Wolf Tone case,[96] its transfer to America, and its adoption as law in the majority decision of the Ex parte Milligan case. It was held in the Ex parte Milligan[97] case that:

> "Martial law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction".[98]

This observation reveals that in promulgating Martial Law what should be taken into consideration is that the courts should not only be open but should be functioning properly and effectively, as it is possible that in times of invasion, insurrection or rebellion the court might be open yet its jurisdiction be disturbed and obstructed. In other words, "when, by invasion, insurrection, rebellions or such like, the

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95. Muhammad Afzal Zullah, J. in Zia-ur-Rahman, v. State, All Pakistan Legal Decisions, Lahore, Vol.XXIV, 1972, p.397.
96. Howell, T.B., State Trials, English, Vol.XXVII, 1798, p.613. The trial of Theobald Wolf Tone (Wolf Tone, an Irish resident and formerly a member of the Irish Bar, was sentenced to death by the court-martial in November 1798 and subsequently a motion was made in the Court of King's Bench) is a leading case on the subject of Martial Law in which the question came up whether a court-martial could proceed against a person who was not commissioned in the army of the King and whether military tribunals or courts-martial could try civilians when the civil courts were open and unobstructed in the performance of their functions (p.625). But these two most important issues could not be adjudicated upon as the motion in the Court of King's Bench failed due to the fact that the writ of habeas corpus could not be served and the prisoner brought to the Court on account of the prisoner having died of the wounds he had received in an attempt to cut his own throat.
97. Wallace, United States, Vol.IV, 1866, p.2.
98. Ibid., p.127.

peaceable course of justice is disturbed and stopped, so as the court of justice be, as it were, shut up, et silent leges inter arma," then only the question of promulgating Martial Law arises. Therefore, if the term "open court" is considered to mean a "court really and practically open for remedy or redress, so that the common law can have its course", then the true limit of Martial Law with respect to open court would be that when the civil courts are open to distribute justice to all and function properly and effectively, there is no necessity for a recourse to Martial Law. "At a time and place", says A.V. Dicey, "where the ordinary civil courts are open, and fully and freely exercise their ordinary jurisdiction, there exists, presumably, a state of peace, and where there is peace there cannot be martial law".[99]

However, the contention that there is no necessity for declaring Martial Law when the civil courts are open and in the proper as well as undisturbed performance of their jurisdiction does not seem to find unqualified support and perhaps it no longer holds good. Commenting on the majority decision in Ex parte Milligan, West W. Willoughby stated:

> "It is correct to say that 'the necessity must be actual and present', but it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly pointed out, there may be urgent necessity for martial rule even when the courts are open. The better doctrine, then, is...to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption".[100]

H. Earle Richards considers the rule of 'open court' to determine the necessity of Martial Law as "an artificial rule which does not commend

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99. Dicey, A.V., op.cit., p.545.
100. Willoughby, Westel W., The Constitutional Law of the United States, Vol.III, New York, 2nd edn., 1929, p.1602.

itself, apart from authority, to reason".[101] "There is no merit in the argument", says Charles Fairman, "that the courts of a state are closed by the very fact that the governor has declared the existence of an insurrection."[102] The Judicial Committee of the Privy Council in Ex parte D.F. Marais[103] also abandoned the historic doctrine that where the courts are open, martial rule cannot prevail: the fact that some courts were exercising uninterrupted jurisdiction was not conclusive that war was not raging. It was held:

> "The fact that for some purposes some tribunals had been permitted to pursue their ordinary course (in a district in which martial law has been proclaimed) is not conclusive that war is not raging".[104]

As regards the decision in Ex parte D.F. Marais, Sir Frederick Pollock said:

> "As to Ex parte D.F. Marais, the only point it really decided in my opinion, was that the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace. This, I venture to think, is right..."[105]

Therefore, it can be said that the Ex parte D.F. Marais case put an end to the "open court" rule, which did hold the field for a long time. Modern scientific knowledge and technological developments have revolutionised the very concept of warfare and it seems that new developments in the mode of fighting make it possible for the civil courts to be open and functioning and yet be in the actual fighting zone as in December 1941 Martial Law was declared in Hawaii following

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101. Richards, H. Earle, "Martial Law", The Law Quarterly Review, Vol.XVIII, April 1902, p.141.
102. Fairman, Charles, "Martial Rule and the Suppression of Insurrection", Illinois Law Review, Vol.XXIII, No.8, April 1929, p.787.
103. The Law Reports, Appeal Cases, London, 1902, p.109.
104. Ibid., p.114.
105. Pollock, Frederick, op.cit., p.157.

the Japanese bombing (of Hawaii) on 7 December 1941 when "the federal court in Hawaii was open...and was capable of exercising criminal jurisdiction".[106] The criterion of the courts being open or closed is, as Charles Fairman expresses it, "a fiction which served well in the time of the Stuart Kings, but may easily be too restrictive in time of modern War".[107] A.V. Dicey is right when he says, "this rule cannot... be laid down as anything like an absolute principle of law"[108] and should "not be accepted as a rigid rule".[108a]

Therefore, it would appear to be fair to state that the fact that courts are open and uninterrupted is but one of many factors (e.g., failure of the civil authorities to maintain law and order) relevant to determine the necessity of the promulgation of Martial Law.

(b) Necessity Operates Independently of a Proclamation

"Just as Martial Law may not be declared when no necessity exists, so the declaration of Martial Law is not necessary to the validity of measures of military rule when the necessity is actually present."[109] Necessity operates independently of a Proclamation of Martial Law and as such the existence of Martial Law does not in any way depend upon its proclamation. The Proclamation of Martial Law is merely an official declaration of an existing fact. As Caleb Cushing expresses it:

> "When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact".[110]

And Charles Fairman states:

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106. United States Supreme Court Reports, Vol.327[CCCXXVII], October Term 1945, p.332.
107. Fairman, Charles, Law of Martial Rule, Chicago, 1930, p.147.
108. Dicey, A.V., op.cit., p.544.
108a. Ibid., p.545.
109. Weiner, F.B. op.cit., pp.19-20.
110. Opinions of the Attorney-Generals of the United States, Washington, Vol.VIII, 1858, p.374.

> "The proclamation of martial law is...only evidence of a finding of the necessity for the commander's assuming control of the functions of civil government. It will be the emergency which called it forth, not the fact of proclamation, which justifies the extraordinary measures taken".[111]

To the same effect, it is also said:

> "...it is not the proclamation which makes martial law, but events which have created the emergency.... A proclamation may be evidence of such a state being already in existence, but it cannot change existing conditions from a peace-time footing to one of war within the realm".[112]

Therefore, in the absence of the necessity of the crisis which demands the initiation of Martial Law, a proclamation of Martial Law has no authority as the mere fact of a proclamation can in no way be the justification for enforcing Martial Law. If the exigencies of the situation call forth Martial Law, a formal proclamation is not necessary. As long as the forcible and exceptional measures are necessary for the purpose of restoring law and order, "they might be taken without any proclamation [of Martial Law] at all".[113] Lord Halsbury supports this view when he observes:

> "The right to administer force against force in actual war (or rebellion) does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war (or rebellion) or not. If there is war (or rebellion), there is the right to repel force by force".[114]

"The proclamation of Martial Law is not a generating source of power."[115] It does not add to the power or right inherent in the government to use force for the suppression of disorder, or resistance to

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111. Fairman, Charles, "The Law of Martial Rule and the National Emergency", Harvard Law Review, Vol.LV, No.8, June 1942, p.1288.
112. Wade, E.C.S., and Bradley, Constitutional Law, 8th edn., 1970, p.410.
113. Cited in O'Sullivan, Richard, op.cit., p.26.
114. In Tilonko v. The Attorney-General of the Colony of Natal, The Law Reports, Appeal Cases, London, 1907, p.94.
115. Fairman, Charles, op.cit., p.1288.

invasion. Also it does not confer upon the government any power which the government would not have possessed without it. The object and the effect of the proclamation can only be to give notice to the inhabitants of the place with regard to which Martial Law is proclaimed, of the course which the government is obliged to adopt for the purpose of defending the country, or of restoring tranquillity.[116]

"A proclamation of martial law", says F.W. Maitland, "can have no other legal effect than this - it is a proclamation by the King, or by persons holding office under the King, announcing that a state of things exists in which it has become necessary that force shall be repelled and suppressed by force; it is a warning that the part of our common law which sanctions such repulsion and suppression, has come into play."[117] In almost the same way, Sir David Dundas states:

> "The proclamation of martial law is a notice to all those to whom the proclamation (of martial law) is addressed that there is now another measure of law and another mode of proceeding than there was before..."[118]

that proclamation. Of the like opinion is Earl Grey, who, as Secretary for the Colonies, wrote in a despatch upon the Ceylon case:

> "The proclamation of martial law is, in fact, no more than a declaration that, under circumstances of urgent public danger, all the law is for a time suspended, and that, for the safety of the state, the government deems it necessary to set aside the ordinary rules of law by military force,

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116. Joint Opinion of the Attorney and Solicitor-General, Sir John Campbell and Sir R.M. Rolfe, as to the power of the Governor of Canada to proclaim Martial Law, Forsyth, William, op.cit., p.198.
117. Maitland, F.W., op.cit., pp.491-492.
118. Attorney-General Sir David Dundas in his evidence as to the nature and legality of Martial Law, imposed in Ceylon in 1848, to suppress a rebellious rising in Kandy, before a Committee of the House of Commons, quoted in Stephen, James Fitzjames, A History of the Criminal Law in England, Vol.I, London, 1883, p.213.

and to proceed summarily to put down the rebellion, or to punish those who are concerned in it".[119]

Therefore, the proclamation of Martial Law is nothing but a formal establishment of a system of military rule and justice in times of grave emergency and it serves merely as a notice or warning to all whom it may concern that the military forces are about to assume absolute control for the speedy restoration of peace and tranquillity, public order and safety. "The principal practical value of a proclamation of martial law", says F.B. Weiner, "is its effect in putting the public on notice that the situation demands military measures and restrictions broader than those ordinarily enforced by the civil authorities. A proclamation may also have a certain emotional value in that it suggests, at least to the ordinary citizen, that the situation is a grave one and that the enforcement of law and order has been vested, in whole or in part, in outside agencies".[120]

(ii) The Role of 'Necessity' in the Justification of All Measures Taken during Martial Law

Since the initiation of Martial Law is based on necessity, the justification of all measures adopted during a regime of Martial Law should also be based on necessity. "The fact that necessity", says A.V. Dicey, "is the sole justification for martial law or, in other words, for a temporary suspension of the ordinary rights of English citizens during a period of war or insurrection, does, however place a very real limit on the lawful exercise of force by the Crown or by its servants."[121] Necessity measures the extent and the degree to which Martial Law may be employed.[122] It justifies taking of those measures

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119. Quoted in Finalson, W.F., A Review of the Authorities as to the Repression of Riot or Rebellion, London, 1868, p.96.
120. Weiner, F.B., op.cit., pp.20-21.
121. Dicey, A.V., op.cit., p.542
122. Weiner, F.B., op.cit., p.16.

which in the normal conditions would be trespass, and thus unlawful. In general, the military commander should confine the exercise of his exceptional powers to taking such measures as can, on the restoration of order, be shown to have been necessary for ensuring the safety of his troops and suppressing rebellion, insurrection or riot. "While the laws are silenced", says Sir James Mackintosh, "by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society."[123] In order to attain the object of restoring the condition of things that will enable the civil authority to resume charge, the military commander may issue such orders, and enforce them in such manner as may be necessary for that purpose only and should not interfere beyond what is necessary for the restoration of order. His authority is, for the time being, supreme, but in practice the amount of his interference with the civil administration and the ordinary courts is measured by military necessity. It is rightly contended:

> "The Military Officer must at all times be guided by military exigencies of the situation. Having provided for these, he should confine himself to action directed to the restoration of order. It should be borne in mind that improved administration is not the object of Martial Law, that example and punishment are not its ends, but only its means and allowable only so far as necessary for its legitimate object; and that its severities can only be justified when they are necessary for the restoration of order and their establishment of civil authority".[124]

Therefore, it is clear that necessity must be the justification for every act during Martial Law.

(iii) The Role of 'Necessity' in the Continuation of Martial Law

Since Martial Law owes its existence to necessity, its continuance

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123. Hansard, T.C., The Parliamentary Debates, New Series, Vol.XI, March-June 1824, p.1046.
124. Pakistan Law Reports, Lahore, Vol.VI, 1953, p.846.

also depends on necessity. As in Queen v. Bekker[124a] acting Chief Justice Buchanan observed;

> "That as necessity justifies the proclamation of martial law, so also does necessity justify its continuance".[125]

Inasmuch as Martial Law is a temporary measure, it is to be continued only so long as the exigency giving rise to its initiation prevails. Martial Law, as A.V. Dicey puts it, "always lasts so long, and so long only, as the circumstances exist which necessitate the use of force..., the right to use force in putting an end to a riot ceases when order is restored, just as it only begins when a breach of the peace is threatened or has actually taken place".[126] So, it is allowed to govern by Martial Rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after order is restored it is a gross usurpation of power.[127] The continuance of Martial Law, as Sir James Mackintosh expresses it, "requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence...every moment beyond [necessity] is usurpation".[128]

Therefore, Martial Law ceases when the emergency comes to an end, when the country is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions and as such the political branches of the government terminate it by some formal act.

124a. Supreme Court Reports, Cape of Good Hope, Vol.XVII, part II, 1900, p.340.
125. Ibid., p.348.
126. Dicey, A.V., op.cit., p.544.
127. In Ex parte Milligan case, Wallace, United States, Vol.IV, 1866, p.127.
128. Hansard, T.C., op.cit., p.1046.

IV. Martial Law Courts

The courts that are used to administer Martial Law in the United States are called 'Military Commissions' in order to distinguish them from the courts-martial[129] which (courts-martial) enforce military law within the army as authorised by statute, articles of war and the Manual for Courts-Martial. In England it was long the custom to apply the name courts-martial to military tribunals indiscriminately.[130] But since the Ex parte D.F. Marais case of 1901, 'military tribunals',[131] or 'military court'[132] has come to be the accepted name for the courts that are employed to administer Martial Law. Perhaps it would be more appropriate to describe these bodies as Martial Law Courts or Martial Law Tribunals since they are set up during the Martial Law period to try Martial Law offences.

A Martial Law court is an almost inevitable incident of the resort to Martial Law to administer prompt and speedy justice for the restoration of law and order. The machinery of the civil law is sometimes considered inadequate in times of emergency because of its slow and ponderous proceedings. It is established because "Many of the offences which have to be suppressed are offences, not against the ordinary law, but against

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129. Tovey, Hamilton, op.cit., p.101.
130. As Edward James and James Fitzjames Stephen in their joint opinion in 1866 on Martial Law with reference to the insurrection (of negroes) which took place in 1865 at Morant Bay in Jamaica said, "The courts-martial, as they are called, by which martial law...is administered; are not, properly speaking, courts-martial..." Forsyth, William, op.cit., p.560; Stephen, James Fitzjames, A History of the Criminal Law of England, Vol.I, London, 1883, p.216
131. The Law Reports, Appeal Cases, 1902, London, p.114.
132. In Clifford and O'Sullivan, The Law Reports, Appeal Cases, Vol.II, 1921, London, p.570.

some rule, which for military reasons the commander has found it necessary to enact".[133] As in the King v. John Allen[134] Chief Justice Molony, who delivered the unanimous judgment of the court, observed:

> "...that during the continuance of hostilities, and while martial law exists, the necessities of the situation are for the decision of the military authorities, and that they may...try the prisoner by military Court at once..."[135]

Lord Halsbury also observed in Tilonko v. The Attorney-General of the Colony of Natal,[136] that if there is war or rebellion:

> "...there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time or war (or rebellion), instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved.... Such acts of justice are justified by necessity, by the fact of actual war (or rebellion)".[137]

Therefore, Martial Law courts are set up by a military commander with a view to punishing people promptly for contravention of Martial Law Regulations or Orders,

But Martial Law courts are not really courts at all, they are merely advisers to the military commanders and that as such their orders are essentially in the nature of executive action taken with the object of preventing mischief and disorder during the Martial Law period. As Edward James and James Fitzjames Stephen observed, the Martial Law courts,

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133. Richards, H. Earle, op.cit., p.138.
134. The Irish Reports, Vol.II, 1921, Dublin, p.241.
135. Ibid., p.273.
136. The Law Reports, Appeal Cases, 1907, London, p.93.
137. Ibid., pp.94-95.

> "...are not, properly speaking...courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government...They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authoritity of the law".[138]

In Clifford and O'Sullivan,[139] Viscount Cave on the Woolsack also held, with whom Lord Dunedin, Lord Atkinson and Lord Shaw of Dunfermline concurred, in a similar way that a Martial Law court is not a "court or judicial tribunal in any legal sense of those terms".[140] To the same effect, Chief Justice Molony in the King v. John Allen, observed:

> "In considering any question arising out of the administration of martial law by military Courts, we must not lose sight of the fact that they are not, in strictness, Courts at all".[141]

"A Martial Law Court is", as Viscount Cave held, "a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences".[142] It sits, "not as a tribunal for hearing charges of crime, but as a military committee for considering a matter arising under the proclamation and advising the commanding officer thereon".[143]

Thus a Martial Law court forms no part of the judicial system; it is not in any way similar to the ordinary court of justice and a

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138. Forsyth, William, op.cit., pp.560-561; Stephen, James Fitzjames, op.cit., p.216.
139. The Law Reports, Appeal Cases, Vol.II, 1921, London, p.570.
140. Ibid., p.581.
141. The Irish Reports, Dublin, Vol.II, 1921, p.270.
142. In Clifford and O'Sullivan, The Law Reports, Appeal Cases, Vol.II, 1921, London, p.581.
143. Ibid., p.582.

case tried before it is not, properly speaking, a "criminal cause or matter".[144] It exists as court neither by statute nor by the common law but by an order of the commanding officer during the Martial Law period. "It is nothing more than a sort of better-regulated decimation, founded upon choice, instead of chance..."[145] To attempt to make the proceedings of Martial Law courts, "administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of justice is quite illusory".[146] "The proceedings

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144. Ibid., Viscount Cave (in Clifford and O'Sullivan) held that as the so-called military Court is not a Court in any legal sense, so the charges that are brought before that body are not in any legal sense charges of crime. Ibid., p.581. "The term 'criminal cause or matter' involves the existence of a properly constituted Court, and, in fact, there being no Court there can be no cause or matter. The question does not depend on the quality of the act but is a question of procedure." Quoted in ibid., p.575. Viscount Cave observed that "in order that a matter may be a criminal cause or matter it must...fulfil two conditions which are connoted by and implied in the word 'criminal'. It must involve the consideration of some charges of crime, that is to say, of an offence against the public law (Imperial Dictionary, tit. 'Crime' and 'Criminal'); and the charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it". Ibid., p.580. Since the proceedings of the military tribunal do not fulfil either of these conditions (p.581) they are in no sense criminal proceedings, p.582. "This is not a criminal proceeding, although the topic is what is called a criminal matter, because the charge is not made under the law of the land, but is made under the proclamation of the Commander-in-Chief", p.575.
145. Sir James Mackintosh speaking in the House of Commons on 1 June 1824 in the debate on the Demerara case of 1823, Hansard, T.C., Parliamentary Debates, New Series, Vol.XI, March-June 1824, London, pp.1048-1049.
146. Lord Halsbury in Tilonko v. The Attorney-General of the County of Natal, The Law Reports, Appeal Cases, 1907, London, p.95.

of a military Court", as it is held in the King v. John Allen[147] (by Chief Justice Molony) derive their sole justification and authority from the existence of actual rebellion (or invasion), and the duty of doing whatever may be necessary to quell it, and to restore peace and order".[148]

Therefore, it can be said that a Martial Law court is not a court of law or is not a judicial tribunal, but a body of military (or civil) officers appointed by the commanding officer with a view to deal promptly with the breaches of Martial Law Regulations or Orders and its sentences, if confirmed, derive their force from the authority of the commanding officer and as such its proceedings are essentially in the nature of executive action.

V. The Historical Experience of Martial Law in the Indian Subcontinent

(i) Martial Law in Undivided India during the Rule of the East India Company

The East India Company, which started as a trading concern in India in 1613,[149] ultimately acquired administrative functions in 1765, when it obtained from the Emperor Shah Alam of Delhi (the then nominal ruler of India) a Charter, making the Company the Dewan[150] or Administrator of Bengal, Bihar and Orissa.[151] By "the middle of the nineteenth century, the Company emerged as the undisputed ruler of India, while two-fifths of India's territory remained 'independent' under Native Rulers".[152]

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147. The Irish Reports, Vol.II, 1921, Dublin, p.241.
148. Ibid., p.271.
149. Mukherjee, Ramkrishna, The Rise and Fall of the East India Company Bombay, 1973, p.224.
150. That meant the Company got the entire revenue and financial administration of these areas.
151. Bose, Subhas Chandra, The Indian Struggle 1920-1942, compiled by the Netaji Research Bureau, Calcutta, pp.11-12; Mukherjee, Ramkrishna, op.cit., p.269.
152. Ibid., p.282.

However, the East India Company encountered hostile powers like the Marathas (hostilities between the Marathas and the East India Company lasted till the second decade of the nineteenth century), who threatened the safety and public order of the Company's territorial possessions. Moreover, the Company confronted active opposition from the Indian people. In order to deal with the situation, the Bengal State Offences Regulation (Regulation X of 1804) was passed in 1804. This Regulation empowered the Governor-General-in-Council "to declare and establish Martial Law...for the safety of British possessions and for the security of the lives and property of the inhabitants thereof by the immediate punishment of persons...who may be taken in arms in open hostility...or in the actual commission of any overt act of rebellion...or in the act of aiding and abetting..."

The series of revolts that took place in India in the nineteenth century during the East India Company's rule necessitated the declaration of Martial Law on a number of occasions. Thus Martial Law was declared in Cuttack in 1817-1818, in Vizagapatam and Palkonda in 1832, in Kimedi in 1833, in Gumsur in 1835, in Savantwadi in 1844, and in the Division of Varanasi (Benares) and Alahabad during the Sepoy Mutiny of 1857. Of all these, the Martial Law promulgated in 1857 deserves special attention because, as a consequence of the Sepoy Mutiny (described by the Indians as the "First War of Independence"), India saw the end of the East India Company's rule.

During the Sepoy Mutiny of 1857, for "a considerable time, and over a large extent of territory, all civil law was necessarily suspended by the act of the rebels. The civil officers were driven away, and the courts were closed. No authority other than the military was in existence and it had to act summarily, and on the spur of the moment, as

a matter of self preservation".[153] On 9 June 1857, Martial Law was declared in the Divisions of Varanasi (Benares) and Allahabad. "While the hostile forces were face to face, everyone who appeared to belong to or to be siding with, the rebels, was dealt with as an enemy."[154]

Thus it is evident that Martial Law was declared in India from time to time during the East India Company's rule under the common law doctrine of necessity, the necessity to suppress revolt or mutiny and to restore the authority of the civil government.

It may be mentioned here that, after the declaration of Martial Law in Varanasi and Allahabad in 1857, there was for nearly sixty years no rebellion or insurrection necessitating the declaration of Martial Law in India.

(ii) Martial Law in Undivided India during the Rule of the Crown

The Government of India Act, 1858, which was passed after the suppression of the Sepoy Mutiny, put an end to the East India Company's rule in India. With the introduction of this Act, Queen Victoria issued a Royal Proclamation on 1 November 1858 and by this Proclamation, the East India Company was dissolved and its Indian possessions came under the control of the Crown.

(a) The Proclamation of Martial Law in the Five Districts of the Panjab Province in 1919

The Anarchical and Revolutionary Crimes Act, 1919, which was passed to deal with the situation resulting from the lapse of the Defence of India (Criminal Law Amendment) Act, 1915, after the end of World War I and which was to continue in force for three years from the date of the

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153. Mayne, John D., Criminal Law of India, Part II, 4th end., 1914, p.109.
154. Ibid.

termination of war, provided special law and procedure to supplement the ordinary law for dealing with subsersive and revolutionary activities. This Act, commonly known as the Rowlatt Act after the name of the President of the Sedition Committee, Rowlatt, who was a Judge of the King's Bench Division in the United Kingdom, created considerable resentment and met with very widespread opposition throughout India from people of all shades of political opinion. The Indians considered the Act as "the Black Act which would seriously curtail their personal and individual freedom".[155] M.K. Gandhi, the great Indian leader, started his Satyagraha[156] movement against the Rowlatt Act at Ahmedabad on 24 February 1919 and later, on 1 March, announced at Bombay that those taking the Satyagraha vow would offer civil disobedience to the Act. Although the observance of the hartal, called for by Gandhi in furtherance of his Satyagraha movement, on 6 April in a number of provinces (such as Bengal, Bihar, Orissa, and the Panjab) did not result in serious clashes between the police and the crowds, there were many signs of growing excitement and unrest among the people. Yet the strikes that took place, following the reported arrest of Gandhi on 9 April, at Amritsar, Lahore and other places on 10 April saw violent outbreaks, especially at Amritsar. The Civil Authorities of Amritsar, being unable to restrain the rioting, killing and looting, on 11 April made over charge to the Officer-Commanding, General R.E. Dyer, under Sections 130-131 of

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155. Hunter, William, Panjab Disturbances 1919-20, Vol.II, British Perspective (originally published under the title, Report of the Disorders Inquiry Committee 1919-20), New Delhi, 1976, p.96.
156. The root meaning of the term Satyagraha is 'holding on to truth'; hence truth-force. It means vindication of truth, not by infliction of suffering on the opponent, but one's own self and, therefore, excludes the use of violence in any form. Thus a true Satyagrahi invites pain and suffering upon himself with a view to inducing government to alter a measure to which he is opposed.

the Criminal Procedure Code, and asked him to take such steps as he thought necessary to re-establish civil control. This amounted to the establishment of de facto Martial Law. However, the firing, on the meeting held in Jallianwala Bagh in the afternoon of 13 April 1919 in defiance of General Dyer's proclamation forbidding processions of any kind or gatherings of four men, resulted in the killing of 379 persons and the injury of about 1,200 persons. This firing strained the temper of the people to breaking point. The disturbances on and after 14 April in the districts of Gujranwala, Gujrat and Lyallpur were the results of the sensational reports about the Jallianwala Bagh incident and false rumours about the damaging of the Golden Temple. The main targets of attack were railway stations, lines and bridges, banks, telegraphs offices, telegraph wire and post offices. A few innocent Europeans were also murdered.

Thus non-violent resistance to the Rowlatt Act turned into violent outbreaks and disorders. This showed that it is easy enough to undermine respect for the law, but it is not equally easy to inculcate the self-suffering necessarily involved in civil disobedience to the laws of a state in order to secure reforms or redress of grievances. However, Gandhi frankly admitted that he had made a blunder of 'Himalayan' dimensions[157] in prematurely embarking on a mass civil disobedience campaign which had enabled ill-disposed person, not true passive resisters at all, to perpetrate disorders, and he immediately announced the suspension of his movement.

However, on 15 April 1919, Martial Law was declared in the districts of Lahore and Amritsar (of the Panjab province) by the Lieutenant-Governor

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157. Williams, L.F. Rushbrook, India in 1919, Calcutta, 1920, p.36.

of the Panjab, in accordance with the direction of the Governor-General, Lord Chelmsford, on the ground that a state of open rebellion against the authority of the government had existed in those two districts. Later, by subsequent notifications, Martial Law was extended on the same ground to the districts of Gujranwala on 16 April, Gujrat on 19 April, and Lyallpur on 24 April. It is noteworthy that Martial Law was proclaimed in these districts under the Bengal State Offences Regulation of 1804, which had been extended to the Panjab by the Panjab Laws Act, 1872. However, several (five) Martial Law Ordinances were promulgated by the Governor-General for the administration of Martial Law.

There were controversies with regard to the justification of the imposition of Martial Law in the five districts of the Panjab. Many Indian lawyers and politicians were of the opinion that there was no concerted action on the part of the people to overthrow the British government in India and that there was no open rebellion to justify the declaration of Martial Law.[158] On the other hand, while the majority of Lord Hunter's Committee of Inquiry[159] (i.e., the Disorders Inquiry Committee, 1919-20) found that a state of rebellion existed, necessitating or justifying the declaration of Martial Law, the minority of that

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158. For example, Alfred Nundi, a leading lawyer of the Panjab, in his discussion (The Present Situation with Special Reference to the Panjab Disturbance, Dehra Dan 1920) made an attempt to show that there was no open rebellion in Lahore (pp.85-104). He contended that "a mob of 'city riff-raff and students' does not come within the category of rebels, and their wishing to take a promenade in the Mall, ordinarily favoured by the presence of Europeans, cannot constitute an act of open rebellion" (p.104), so as to justify the proclamation of Martial Law in Lahore.

159. Lord Hunter's Committee of Inquiry submitted their recommendations in the form of a majority and minority report. The majority report was signed by the President Lord William Hunter and four members of the Committee, Justice Rankin, General George Barrow, and Messrs. W.F. Rice and Thomas Smith. The minority report was signed by Sir C.H. Setalvad, Pandit Jagat Narayan and Sardar Sahibzada Sultan Ahmed Khan

Committee considered that the disorders did not amount to rebellion and that the disturbances might have been suppressed and order restored without suspending the control of the civil authorities or calling in military force save as auxiliary to the civil power.

The majority were of the opinion that "An intention to paralyse the arm of Government by extensive destruction of Government buildings and of means of communication can hardly find vent in practice upon a considerable scale and at the same time fall short of open rebellion. Where the Government is British and a comparatively insignificant number of the inhabitants are Europeans, most of them Government servants, and this intention is seen to culminate at prominent points in a murderous attack on Europeans simply as such, it may be said with some certainty that the Government so attacked is in face of an open rebellion in all reasonable implications of the phrase."[160] They believed that "Apart from the existence of any deeply laid scheme to overthrow the British, a movement which had started in rioting and become a rebellion might have rapidly developed into a revolution".[161] Therefore, the majority of Lord Hunter's Committee justified the proclamation of Martial Law as "the situation which had arisen in the Panjab was one of extreme gravity".[162]

According to the minority, the anti-government and anti-British outburst was not previously designed, but was the result of the frenzy with which the crowds became seized at the moment, it was a sudden development at the time.[163] Further, there was no organization even for bringing about the disturbances and the atrocities which were committed by the mobs seized by the frenzy of the moment.[164] "If

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160. Hunter, William, op.cit., p.109.
161. Ibid., p.103.
162. Ibid., p.118.
163. Ibid., p.158.
164. Ibid., p.155.

there was not organised or concerted attempt to bring about these disorders", says the minority, "it follows that there was no organisation for a rebellion...that in no place were the mobs provided with any firearms or swords or other weapons of that character. The evidence further shows that at no time was any attempt made by the crowds to obtain arms by raiding the houses of license holders or the ammunition shops in the disturbed areas....In several cases in the beginning of the disturbances, they had not come armed even with...sticks....The official evidence is unanimous that the rural population, as a whole, had nothing to do with these disturbances...outside the larger towns the country folk seemed contended."[165] Moreover, the Indian members of the armed forces took no part, directly or indirectly, in the disorders.[166]

Therefore, the minority were of the opinion that, there being no organised or preconceived conspiracy to subvert the British rule behind these disturbances, the vast rural tract in the districts of Lahore, Amritsar, Gujranwala, Gujrat and Lyallpur having remained tranquil and loyal, there having been disturbances only in a few places in the urban area, and even in those few places the majority of the residents not having taken any part in the disturbances, there was no open rebellion as alleged, and no justification in consequence for the proclamation of Martial Law.

Moreover, according to the minority, before the dates on which Martial Law was declared in the five districts of the Panjab, the disturbances had been quelled with the assistance rendered by the military and, as such, there was no justification for the proclamation of Martial Law. It was stated that:

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165. Ibid., p.157.
166. Panjab Disturbances, 1919-20, Vol.I, Indian Perspective, p.153.

> "...so far as the actual state of affairs was concerned there was no necessity for the introduction of martial law. The disturbances had been quelled, no doubt, by calling in the aid of the military, and on the 13th [April] when the Panjab Government moved the Government of India and on the 15th when martial law was actually proclaimed at Lahore and Amritsar and later at other places, there were no actual disturbances at those places which required such a step to be taken. The military by whose aid peace and order had been restored were available if any emergency arose....All that was necessary to be done in order to quell the disturbances had already been done by the civil authorities and all measures of immediate necessity like the curfew order and the like had been taken before the introduction of martial law".[167]

They also said:

> "If the actual disturbances were so quelled by the assistance of the military and the civil authorities had by such assistance practically regained control, it appears to us no sufficient reason why at a time when there were not actual disturbances the civil administration should have been superseded by introducing martial law".[168]

Thus the minority expressed the view that Martial Law was declared in the five districts of the Panjab not for the purpose of quelling disturbances and restoring law and order but for the purpose of preventing the recrudescence of such disturbances or, as Mr. Kitchin (the Commissioner of Lahore, who as such was in charge of the districts of Amritsar, Lahore and Gujranwala) put it, "to prevent

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167. Ibid., pp.170-171. It is noteworthy that, in his evidence before Lord Hunter's Committee of Inquiry, Deputy Commissioner H.S. Williamson of Gujrat said that by the time Martial Law was proclaimed there was no riot or disturbance: they had ceased. Therefore, Martial Law was not necessary for the quelling of riot or disturbances, but in view of the general situation he expressed his opinion that as a precaution against further trouble the promulgation of Martial Law was a very wise precaution (pp.169-170, 114-115). Similarly, when Martial Law was proclaimed in Lyallpur on 24 April 1919, "the district was quiet at the time. The Superintendent of Police, Mr. Smith, said that the introduction of Martial Law was desirable but not essential. There were only petty disturbances and they had all ceased by 19 April" (p.170).

168. Ibid., p.177.

the spread of infection" and for the prupose of creating a machinery for the speedy trial of the large number of people that had been arrested during disturbances and of those whose arrests were contemplated.[169]

However, Martial Law was withdrawn piecemeal: it was withdrawn from Gujrat on 28 May, from the districts of Amritsar, Gujranwala and Lyallpur on 9 June and from Lahore on 11 June 1919. Yet Martial Law continued on the railway lands until 25 August 1919.

Although the Lieutenant-Governor of the Panjab said, on 26 April 1919, that "Order has been restored almost everywhere...",[170] Martial Law continued in the Panjab for some weeks thereafter. This continuation became subject to more criticism than its original declaration. Notwithstanding that the majority of Lord Hunter's Committee of Inquiry asserted "it cannot be said that this state [of open rebellion] continued for the whole period during which martial law was in operation",[171] they contended that earlier withdrawal of Martial Law might have been followed by a recrudescence.[172] Therefore, the conclusion of the majority was that "those responsible for the maintenance of martial law did not prolong it beyond the time during which to the best of their judgment it was necessary for the maintenance and restoration of order in the provinces".[173]

Like the introduction of Martial Law, the minority differed widely from the majority on the question of the continuance of Martial Law in the Panjab. Assuming that the introduction of Martial Law was necessary they said that "it should not have been continued beyond a few days".[174]

The Panjab government, although the disorders had ceased, intended to continue Martial Law only "to establish a morale which would afford

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169. Ibid., p.171.
170. Ibid., p.180.
171. Ibid., p.119.
172. Ibid.
173. Ibid., p.124.
174. Ibid., p.179.

a guarantee against the recrudescence of disorders, to safeguard railway and telegraph communications against further interruptions, to restore the position of Government as the guarantor of peace and good order which had been sacrificed between the 10th and 17th April".[175] Moreover, the Panjab government suggested that Martial Law should be continued as "it has undoubtedly a steadying effect on the population" within the Martial Law areas as well as also outside, in order to enable the authorities to fix prices of commodities, in order to enable certain incidental expenses to be recovered from the population of the disturbed areas by means of a levy, in order to complete the trials of the principal offenders before the Martial Law Commission so that demonstrations could be avoided.[176] The reason for continuing Martial Law in the rural area of Lyallpur district was to avoid "trouble in getting in [land] revenue".[177]

These showed how far the Panjab authorities had gone beyond the principle that the continuance of Martial Law depends upon the necessity which led to its declaration. In other words, the common law principle that Martial Law should remain in force no longer than the public safety demands had not been kept in view.

(b) The Proclamation of Martial Law in Malabar in 1921

The rebellion in the district of Malabar, which broke out in August 1921, was due to the influence of the Khilafat movement among the poor and fanatical Muhammadan community (known as Moplahs) of the area in the Madras Presidency.[178] The doctrine spread that "government

175. Ibid., p.181.
176. Ibid., p.182.
177. Ibid., p.184.
178. Ker Campbell J., "Subversive Movements" in Political India, 1832-1932, edited by Sir John Cumming, pp.237-238.

was satanic" and should be paralysed so that "Swaraj", or an independent Khilafat kingdom in Malabar, might be set up. Knives, swords and spears were secretly manufactured, bands of desperadoes collected and preparations were made to proclaim the coming of the Kingdom of Islam. Soon policemen were obstructed in the course of their duty. Police stations were attacked by the rebels. A number of rifles and shotguns were captured from isolated police posts and Europeans. A few Europeans were murdered. As soon as the administration had been paralysed, the Moplahs declared that Swaraj was established. A certain Ali Musaliar was proclaimed Raja, and Khilafat flags were flown.[179] Every effort made in the first instance to cope with the situation by means of the troops available in the Madras district failed. Therefore, on 22 August 1921, Martial Law was declared and by the end of November the rebellion was quelled.

It seems that by this time there were better grounds for the declaration of Martial Law than those in the five districts of the Panjab province. In fact, the declaration of Martial Law in the Malabar district satisfied the test of necessity, a necessity to suppress a formidable Moplah rebellion. The measures adopted by the government for the suppression of the Moplah rebellion were generally approved, and provoked few complaints even in the Indian press. However, Martial Law was withdrawn from Malabar on 25 February 1922.

(c) The Declaration of Martial Law in Sholapur in May 1930

Riots broke out in Sholapur on 7 May 1930 following the arrest of M.K. Gandhi on 6 May: a large crowd threw stones at the District Superintendent of Police and a small body of armed police, and liquor and

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179. Williams, L.F. Rushbank, India in 1921-22, Calcutta, 1922, pp.73-74.

toddy shops were wrecked. After the arrest of six or eight persons in connection with the riots, the District Magistrate and the police found the road blocked by a large crowd who were carrying Congress flags, sticks and stones. The District Magistrate and the police were continually stoned. The police fired, some persons were wounded and the crowd thereupon revenged itself by murdering an Excise Sub-Inspector and by attacking a police station (Mangalwar Police Chowki) where two police constables were killed. The unarmed police were disorganised and many of them did not report for duty for days. Troops had to be requisitioned. On 8 May, a company of military arrived. No further outrages took place although on 11 May a police station within two hundred yards of a military post was looted and its contents were burnt on the road. Further military assistance arrived on 12 May. Yet the District Magistrate, Mr. Knight, considering that it was not possible to carry on the normal civil administration, reported to the facts to the Government of Bombay and with their approval handed over charge of the town to the military authorities at 8.30 pm on 12 May. In the evening of the same day Martial Law was proclaimed. Later, on 15 May, the Governor-General issued at Simla the Sholapur Martial Law Ordinance No.IV of 1930 reciting that "an emergency had arisen in Sholapur which made it necessary to provide for the proclamation of Martial Law in the town of Sholapur and its vicinity". In accordance with the provisions of Section 2 of the Ordinance and of an order made by the Government of Bombay on 17 May, Martial Law was proclaimed at 3.45 pm on 18 May.

What seems interesting is that Martial Law had already been declared in Sholapur on 12 May before the Sholapur Martial Law Ordinance was passed and Martial Law was declared under it on 18 May. Moreover, it

was the District Magistrate, not the Governor-General who decided in the first instance that there was an emergency necessitating the declaration of Martial Law.

It is contended that after 8 May 1930, there was no serious disturbance in the town of Sholapur; certainly on 12 May, the town was completely quiet. No firing was admittedly resorted to after 8 May. Yet Mr. Knight, as the senior executive officer, on 12 May without any justification whatsoever, handed over the control of Sholapur to the military authorities and Martial Law was proclaimed. Even when the civil authorities found themselves unable to cope with the situation the next stage was to invoke the aid of the military forces under Section 129 of the Criminal Procedure Code (which empowers, in times of disorder, a Magistrate to call in the military to suppress a riot) without abdicating their function. But in this case, without taking the assistance of the military authorities, they were in fact placed in charge of the town and Martial Law was unjustifiably declared on 12 May when rioting had admittedly ceased and peace restored. In Emperor v. Chanappa Shantirappa and others,[180] the question of the necessity for declaring Martial Law in Sholapur was discussed by the learned Judges of the Bombay High Court. Chief Justice Beaumont observed:

> "If I thought it necessary definitely to determine whether the condition of affairs on the 12th constituted such a state of insurrection amounting to war as to justify handing over the control of Sholapur to the military, I should require some further evidence (other than the facts stated in the affidavit of Mr. H.F. Knight, the District Magistrate of Sholapur, dated 16 August 1930, which were relied on as establishing the necessity for handing over control to the military) on the matter, I am not altogether satisfied that it would not have

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180. Indian Law Reports, Bombay Series, Vol.LV, 1931, P.263.

> been possible for the civil authorities to have got the situation under control by calling in the military in aid of the civil authority".[181]

Another Justice, Madgavkar, held that "abdicating himself in favour of the military with the abolition of the ordinary law...is not the first stage in the suppression of any disorder but the last resort of the civil power",[182] when all other means are exhausted. After pointing out that "on the question of necessity in the present case, the only material, strictly speaking, is the affidavit of the District Magistrate",[183] the learned Judge observed:

> "While I am satisfied that the unarmed police had become disorganised and an addition to the armed force at the disposal of the executive was necessary, the point on which I am not satisfied is why, as in the case of similar riots in Ahmedabad in 1921, military aid alone did not suffice, without the handing over of charge by the civil authority to the military, which in law makes all the difference possible".[184]

It may be noted here that Sholapur remained under Martial Law for about seven weeks. On 30 June 1930, Martial Law was withdrawn.

(d) The Proclamation of Martial Law in Peshawar in 1930

The disturbances in Peshawar began on 23 April 1930 when serious rioting broke out directly as a result of the arrest of members of the provincial Congress committee. At a time when acute tension prevailed in Peshawar itself, a formidable incursion of Afridi tribesmen, who posed as liberators, from beyond the frontier into Peshawar took place on the night of 4/5 June. They (the Afridis) were forced by ground troops and from the air, to withdraw into the hills without having actually

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181. Ibid., pp.282-283.
182. Ibid., pp.295-296.
183. Ibid., p.298.
184. Ibid., p.300.

achieved any material result from their raid. Nevertheless, the second Afridi attack on Peshawar took place on 9 August. Action was taken against armed Afridis both by ground troops and aeroplanes, which also attacked the villages in the Bara and Waran valleys that allowed them (the Afridis) to pass. By 12 August, harassed by the operations conducted by the military and air force, and discouraged by the absence of support from other tribes, the Afridis began to realise they had no prospect of success and, three days later, almost all of them had filtered back over the border.[185] Yet Martial Law was proclaimed in the district of Peshawar on 16 August 1930 under the (first part of the) Martial Law Ordinance, 1930 (No.VIII of 1930).

It is evident that Martial Law was imposed in Peshawar at a time when the crisis produced by the Afridi incursion had passed. Thus there was no necessity to proclaim Martial Law to repel force by force, to restore law and order. Even the then Government of India admitted this fact when it was stated:

> "With the failure of the second Afridi attempt to enter Peshawar, the most dangerous phase of the Frontier disturbances may be said to have been over - though it should be noted that it was the welcome given to the invaders by the villagers around the city that finally decided the authorities, on the 15th of August, that it was necessary to establish martial law".[186]

It appears that although the local authorities succeeded in clearing the district of Peshawar of all Afridis, it was believed that a serious situation still existed in the district because of the presence of the hostile villagers around the city who gave every assistance within their

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185. India in 1930-31, published by the Government of India, Calcutta, pp.16-19.
186. Ibid., p.20.

means to the intruders. Thus Martial Law was declared as a deterrent against the possible renewal of danger. Nevertheless, after the declaration of Martial Law, no danger of a sufficiently serious nature occurred to justify it. It may be that the proclamation of Martial Law acted as an effective deterrent and tended to prevent the Afridis from making further incursions. However, in spite of the absence of serious disturbances, Martial Law remained in force for about five months. Since no special courts were set up during the continuance of Martial Law in Peshawar, although the (second part of the) Martial Law Ordinance No.VIII of 1930 provided for the constitution of five classes of special courts to deal with the offences declared under the Ordinance, this was interpreted by many critics as proof that there had been no need for the declaration of Martial Law. Martial Law was abrogated on 24 January 1931.

(e) The Declaration of Martial Law in Sind in 1942

In 1942, the Hurs, a criminal tribe of Sind and the neighbouring states, terrorised certain parts of Sind by committing murder, sabotage and dacoity. The civil authorities found it difficult to cope with the situation. A special force of troops was sent to the area to aid the civil authorities in restoring law and order. Under the common law power of the Executive to repel force by force, the Military Commander was given instructions to take all necessary steps for the rapid restoration of civil security and order. In order to achieve this objective, the Military Commander declared Martial Law in certain parts of Sind on 1 June 1942.

It is to be noted that no legislative provision was enacted for the promulgation and administration of Martial Law in Sind as had been done on previous occasions. In other words, Martial Law was proclaimed and

enforced in Sind without resort to legislation. However, Martial Law remained in force up to 31 May 1943.

The Martial Law (Indemnity) Ordinance, 1943 (XVIII of 1943), indemnified all servants of the Crown as well as persons who acted under orders of the servants of the Crown for any act done in the Martial Law area in order to maintain or restore order or to carry into effect any Regulation, order or direction issued by the Martial Law authority provided that the act was done in good faith and in the reasonable belief that it was necessary for the purpose intended to be served thereby. The Ordinance also validated orders for the seizure and destruction of property passed by the Martial Law authority of the Crown, and sentences of Martial Law courts.

(iii) Martial Law in Pakistan

(a) Martial Law in Lahore in 1953

In Pakistan, which came into existence in August 1947 as a separate state for the Muslim minority of the Indian subcontinent, Martial Law was proclaimed for the first time in the city of Lahore on 6 March 1953, when orthodox Muslims resorted to direct action against Ahmediyas.[187] The objects of the anti-Ahmediya agitation, which was organised by the Majlis-i-Ahrar-i-Islam (an orthodox Muslim organisation) and wholeheartedly joined by the Jamaat-i-Islam, were three in number: the Ahmediyas to be declared a separate non-Muslim minority; Sir Muhammad Zafrullah Khan, the then Foreign Minister, who was an Ahmediya, to be removed from the cabinet; and all Ahmediyas to be relieved of key posts in the country.

187. Ahmediyas (or Qadianis or Mirzais) form a sect, which has its origins in the Panjab, founded in 1901 by Mirza Ghulam Ahmed who claimed to be a prophet as well as to be the promised Messiah and as such, the fundamental difference between the Ahmediyas and the Muslims is on the finality of the Prophet Muhammad (S).

The agitators began direct action on 27 February 1953. Mass demonstrations interrupted normal life in Lahore and other towns in the Panjab. By 4 March 1953, certain areas of the walled city of Lahore had been taken over by the agitators and the police had lost all control of the situation. By 6 March, communications were disrupted and the supply of electricity was partly cut. Civil administration for all practical purposes ceased to exist. In accordance with the instructions of the central government, the General Officer-Commanding Tenth Division, Major-General Muhammad Azam Khan, proclaimed Martial Law at 1.30 pm on 6 March 1953. The military forces restored order in a matter of six hours.

It is noteworthy that the Martial Law imposed in Lahore was an extra-constitutional act as the interim Constitution of the country, the Government of India Act, 1935 (which was adopted as the interim Constitution of both India and Pakistan with certain modifications under the Indian Independence Act, 1947) did not contain any provision for the declaration of Martial Law. However, like the 1942 Martial Law of Sind, Martial Law was proclaimed in Lahore under the common law doctrine of necessity without recourse to any legislation. This proclamation of Martial Law satisfied the test of necessity, the necessity to restore law and order.

Although under Martial Law during 1953 in Lahore, ordinary criminal courts were permitted to exercise jurisdiction (under Martial Law Regulation 2) in respect of offences other than those created by the Regulations or connected with the disturbances, offences created by Martial Law Regulations were tried by Special and Summary Military Courts (under Regulation 1[a]) composed wholly of military officers.

Seventeen days after the declaration of Martial Law, on 23 March 1953, Chief Martial Law Administrator Azam Khan declared that the first phase of Martial Law, which was to restore law and order, was over and

that the second phase, the object of which was a constructive one, had begun. Thus after the restoration of law and order, the Martial Law administration launched 'the cleaner Lahore campaign' to give a better look to the city. Some of the noteworthy army achievements were improved sanitary conditions, effective eradication of hoarding and black-marketeering and enforcement of traffic regulations.

Therefore, it is clear that the Martial Law administration failed to realise that Martial Law owes its existence to necessity and the justification of all acts done under Martial Law depends on their being necessary to restore law and order. It did not keep in view that improved administration, not on the grounds of military necessity, is not the object of Martial Law. The sole duty of the Martial Law administration is to restore a situation that will enable the civil authority to resume control. Since the restoration of law and order was achieved by 24 March 1953, the continuation of Martial Law thereafter in Lahore for constructive purposes was unjustifiable. Although the Martial Law (Indemnity) Ordinance, 1953, (II of 1953), promulgated by the Governor-General acting under Section 42 of the Constitution Act on 9 May 1953, empowered the central government to withdraw Martial Law, the government waited till 13 May 1953 to abrogate Martial Law, although the necessity for it was ended by 24 March, when the Martial Law area had become sufficiently tranquil to permit the civilian authority to run the administration. However, the Indemnity Ordinance indemnified the servants of the Crown and other persons in respect of acts done by them in good faith under Martial Law, and validated sentences passed by the Military Courts.

(b) Martial Law in Pakistan in 1958

Parliamentary government in Pakistan was ended by a coup d'état on 7 October 1958, when Major-General Iskander Mirza, the first President of the Islamic Republic of Pakistan under the Constitution of 1956, placed the country under Martial Law. In his Proclamation of Martial Law, the President stated the circumstances which led him to declare Martial Law in order "to save Pakistan from complete disruption". The reasons given for declaring Martial Law were: political leaders had become 'ruthless in their struggle for power', corrupt, opportunist, unscrupulous, and malignant; the country faced a shortage of food; the smuggling of food, medicines and other necessities of life was rampant and the 1956 Constitution was unworkable.

It is noteworthy that these facts were not previously regarded in the Commonwealth as justifying a proclamation of Martial Law. Under the common law, the imposition of Martial Law, as has been mentioned earlier, was only justified by necessity to suppress riot, rebellion or insurrection and to restore peace and order. Evidently, Mirza's Proclamation made no mention of any riot, rebellion or insurrection. The country was tranquil. The civil courts were open and exercising their ordinary jurisdiction fully and freely. Yet Martial Law was declared throughout Pakistan apparently out of the so-called necessity to inculcate a civic sense in the people and to purify social life. Commenting on the imposition of this Martial Law, the then Chief Justice of the West Pakistan High Court, Kayani, said: "If martial law means enforcing on the people a sense of citizenship then you need it".[188]

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188. Justice Kayani expressed this view in an address to the Karachi and West Pakistan Bar Associations in December 1958, The Dawn, Karachi, 16 December 1958.

President Mirza not only imposed Martial Law, he also abrogated the 1956 Constitution, dismissed the central and provincial governments, dissolved the National and Provincial Assemblies and banned all political parties. It is difficult to interpret all these as being "meant merely to steady the country through a brief squall". It seems that Mirza proclaimed Martial on 7 October 1958 as a trump card in his contest with political rivals when he did not foresee any chance of becoming President for the second time after the General Election scheduled for February 1959 and to obviate any public opposition he might encounter for abrogating the Constitution and banning political parties.

It can be said that, whatever may have been the motive of Iskander Mirza in declaring Martial Law on 7 October, the proclamation of Martial Law did not satisfy the common law doctrine of necessity, i.e., a necessity to restore law and order.

It is noteworthy that the only reference to Martial Law in the 1956 Constitution was in Article 196,[189] which provided that laws of indemnity might be passed in respect of any act done "in connection with the maintenance or restoration of order in any area in Pakistan where martial law was in force". However, there was a significant lacuna in the Constitution which made no other provision in respect of the imposition or definition of Martial Law. It is strange that the constitution-makers

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189. Article 196, which was placed under 'Emergency Provisions' in Part XI of the 1956 Constitution, and was in all essentials a reproduction of the provisions of Article 34 of the Indian Constitution, provided that "Nothing in the Constitution shall prevent Parliament from making any law indemnifying any person in the service of the Federal or the Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan where martial law was in force, or validating any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area".

saw no need to provide definitions or controls in relation to Martial Law. Nevertheless, it can be assumed that, under Article 196 of the 1956 Constitution of Pakistan, Martial Law could only be declared under the common law doctrine of necessity.

It is to be noted that Mirza's Proclamation of 7 October for the first time in the history of Martial Law administration in the subcontinent placed the entire country under Martial Law in times of peace, whereas previously Martial Law had been declared in a part of the country in times of emergency and confined only to the disturbed area.

However, President Mirza's Proclamation of 7 October 1958 was an extra-legal act inconsistent with the 1956 Constitution of Pakistan. Had the Constitution remained in force, the Proclamation would have been wholly void, for the Constitution did not permit its abrogation or the imposition of Martial Law in times of peace. Nevertheless, twenty days after the proclamation of Martial Law, on 27 October 1958, the Pakistan Supreme Court in the State v. Dosso[190] accorded legal recognition to the action taken by Iskander Mirza. In order to interpret some of the provisions of the Laws (Continuance in Force) Order, 1958,[191] which was promulgated by President Mirza on 20 October 1958 and provided a legal framework for continuity of the legal system after the abrogation of the 1956 Constitution, Chief Justice Munir in Dosso's case considered it "necessary to appraise the existing constitutional provision in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern states".[192] Thus the learned Chief Justice,

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190. All Pakistan Legal Decisions, Supreme Court, Vol.X, 1958, p.533.
191. The general effect of its the Laws(Continuance in Force Order) promulgation was the validation of the laws, other than the annulled 1956 Constitution and restoration of the jurisdiction of all courts including the Supreme Court and the High Courts.
192. All Pakistan Legal Decisions, Supreme Court, 1958, p.538.

who delivered the main judgment of the majority comprising the court, began his judgment with a discussion of certain theoretical assumptions to be adopted in the case and observed:

> "It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order.... But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success....Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change....If the territory and the people remain substantially the same...the revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d'état is an internationally recognised legal method of changing a Constitution".[193]

"After a change of the character I have mentioned", the learned Chief Justice continued, "has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution."[194]

In support of his view, Chief Justice Munir quoted Professor Hans Kelsen of the (Analytical) Positivist School of Jurisprudence, who said:

> "From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated...it is never the Constitution merely but always the entire legal order that is changed by a revolution.

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193. Ibid., pp.538-539.
194. Ibid., p.539.

> This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only de facto but also de jure. No jurist would maintain that even after a successful revolution the old Constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order - to which no political reality any longer corresponds - has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new Constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognised as valid norms".[195]

Then, the Chief Justice, Munir, proceeded to observe:

> "If what I have already stated is correct, then the revolution having been successful it satisfies the test of efficacy and becomes a basic law - creating fact. On that assumption the Laws (Continuance in Force) Order, however transitory and imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of the judicial decisions have to be determined".[196]

Thus Chief Justice Munir held that President Mirza's Proclamation of 7 October 1958, by which the 1956 Constitution was annulled and Martial Law was declared, constituted an 'abrupt political change', not within the contemplation of the said Constitution, in other words a revolution, that the revolution had been a successful one and that a revolution was an internationally recognised legal method of changing a Constitution. Ultimately, the learned Chief Justice accorded its approval to the new regime of Iskander Mirza on the grounds of its 'efficacy' and 'success' and held the Laws (Continuance in Force) Order, 1958, was the instrument which defined a "new legal order"

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195. Cited in ibid., pp.539-540.
196. Ibid., p.540.

It is interesting to mention here that Chief Justice Munir himself, as he subsequently disclosed in November 1968, had a hand in the drafting of the Laws (Continuance in Force) Order, 1958. Being asked by President Mirza, he had to "scrutinise the draft" of the Laws (Continuance in Force) Order and "suggested certain modifications, particularly with reference to the Superior Courts' power to issue writs and validation of the judgements which had been delivered after the Proclamation".[197] Therefore, it can be said that by doing so, the learned Chief Justice had already committed himself to granting legal recognition to the regime of Iskander Mirza and its Laws (Continuance in Force) Order. So, he had to find some basis for giving his approval to the extra-constitutional action that had been taken by Mirza and relied, instead of the rule of the common law, on Kelsen's Theory of the Law and the State.

It is pertinent to note that the then Chief Justice of the Pakistan Supreme Court, Muhammad Munir, during his Chief Justiceship of the Lahore High Court for the first time gave in Pakistan a learned discussion of the concept of Martial Law in Muhammad Umar Khan v. the Crown[198] in 1953. In that case, he said that "In constitutional jurisprudence, martial law is used at least in four different senses:[199] firstly to mean the law relating to discipline in the armed forces of the state, secondly, to mean military government in occupied territory, thirdly, to mean the rights and obligations of the military under the common and statute law of the country to repel force by force while assisting the civil authorities

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197. Munir, Muhammad, "Days I Remember", The Pakistan Times, 11 November 1968; Chaudhury, Nazir, Hussain, Chief Justice Muhammad Munir, His Life, Writings and Judgments, Lahore, 1973, p.87.
198. Pakistan Law Reports, Lahore, Vol.VI, 11, 1953, p.825.
199. Ibid., p.828.

to suppress riots, insurrections, or other disorders in the land, and lastly, to mean the law applied by the general commanding the army, who takes over in times of riot, rebellion or insurrection as the civil authorities become powerless to deal with it and completely ousts or subordinates civil authorities in the country, during the period of his occupation".[200] He also held that "Martial Law is the law of military necessity, actual or presumed in good faith".[201]

Yet in Dosso's case, while giving legal sanction to the Martial Law imposed by Iskander Mirza, the learned Chief Justice did not enter into any discussion to show into which of the four categories the Martial Law imposed in Pakistan on 7 October 1958 would fall, or whether, in the existing circumstances, the imposition of Martial Law in Pakistan could at all be justified under the common law doctrine of necessity. Instead resort was had to Professor Kelsen's 'General Theory of the Law and State' for the proposition that a victorious revolution or a successful coup d'état was an internationally recognised method of changing a Constitution, notwithstanding that the 1956 Constitution of Pakistan had provisions for its own amendment. It seems that by holding the Proclamation of 7 October to be a revolution (not within the contemplation of the Constitution), Chief Justice Munir apparently followed Iskander Mirza, who, on 10 October 1958, had claimed that his authority was revolutionary in origin without sanction of law or of the Constitution.[202]

It is evident that the decision in Dosso's case was based primarily on Kelsen's General Theory of Law. It should be stressed here that the learned Chief Justice failed to realise the fact that the theory propounded

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200. Ibid., pp.828-838.
201. Ibid., p.827.
202. The Asian Recorder, 25-31 October 1958, p.2310.

by Kelsen in its abstract form was at best a theory - merely a jurist's proposition about law - and was not a part of the national legal order of any state. Kelsen himself was aware of the fact that he did not lay down any legal norm or legal norms which are "the daily concerns of judges". As he himself wrote, in replying to certain criticisms launched against his Pure Theory of Law by Professor Julius Stone of the Unversity of Sydney, Australia:

> "Never, not even in the earliest formulation of the Pure Theory of Law did I express the foolish opinion that the propositions of the Pure Theory of Law 'bind' the judge 'in the way in which legal norms bind him' (the quotation is from Professor Julius Stone). Insofar as the judge in performing his function of applying and creating law adopts a theory of law, his position is the same as that of any other lawyer. And as far as the lawyers are concerned, I tried, of course, to convince them that my theory is correct....But this does not mean that I considered the propositions of the Pure Theory of Law as legally binding".[203]

He also stated:

> "The essence of my view of the relationship between the validity and efficacy of legal norms is that 'the efficacy of the legal order is only the condition of validity, not the validity itself...' positing (setzung) of the norms and efficacy (Wirksamkeit) of the norms are 'conditions of the validity'; efficacy in the sense that the established legal norms must be by and large obeyed and, if not obeyed, applied; otherwise the legal order as a whole just as a single norm, would lose its validity".[204]

It is noteworthy that the question of the legality of the declaration of Martial Law, or of the abrogation of the 1956 Constitution or of the Laws (Continuance in Force) Order, 1958, was not directly challenged in Dosso's case. Moreover, the case was decided within twenty days of the imposition of Martial Law. Sufficient evidence and relevant material

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203. Kelsen, Hans, "Professor Stone and the Pure Theory of Law", Stanford Law Review, Vol.XVII, 1965, p.1134.
204. Ibid., pp.1139-1140.

were not placed before the Court for the purpose of ascertaining whether the so-called revolution or the coup d'état had by then succeeded.

Therefore, it can be said that, since the question of the legality of the imposition of the Martial Law in 1958, or the legality of the Laws (Continuance in Force) Order, 1958, or the question of the accomplishment and success of the revolution had not been raised in Dosso's case, it was not strictly necessary for the Supreme Court to accord its legal sanction to the Martial Law declared or the Laws (Continuance in Force) Order on the basis of Kelsen's Theory of Law or to uphold the success of the revolution by accepting Mirza's Proclamation of 7 October. "Indeed, it was the recognition by the Court which made the new Government de jure..."[205] as "however effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognise the Government as de jure".[206] It is widely believed that the effects of such a recognition were to encourage revolutions and to hold out the promise to future adventurers that if their acts of treason are crowned with success, the courts will act as their accomplices. As Justice Fieldsend, A.J.A., of the Appellate Division of the Rhodesian High Court observed in Madzimbamuto v. Lardner-Burke N.O. and Another:[207]

> "Nothing can encourage instability more than for any revolutionary movement to know that, if it succeeds in snatching power, it will be entitled ipso facto to the complete support of the pre-existing judiciary in their judicial capacity".[208]

However, in view of the removal of President Iskander Mirza by his

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205. Justice Yaqub Ali in Asma Jilani's case, All Pakistan Legal Decisions, Supreme Court, 1972, p.246.
206. Ibid., p.229.
207. South African Law Reports, Vol.II, 1968, p.284.
208. Ibid., p.430

appointee Chief Martial Law Administrator, Ayub Khan, only twenty days after the Proclamation of 7 October 1958, on the night of 27 October (on that very day the judgment in Dosso's case was delivered), the legal recognition given to the regime of Mirza in Dosso's case on the grounds of its 'efficacy' and 'success' proved to have been premature.

The decision in Dosso's case was to hold good for nearly fourteen years, from 27 October 1958 until 20 April 1972 when the judgment in Asma Jilana v. Government of the Panjab[209] overruled it. The decision in "Dosso's case was to be rejected, not only because the Supreme Court there had been wholly premature in finding that President Iskander Mirza has effectively abrogated the 1956 Constitution, but also because Kelsen's doctrine of the law-annulling effect of revolution and coups d'état is not a rule or principle of law to be applied by courts and judges, but merely a theory about law (and a controverted one at that)".[210] The Chief Justice, Hamoodur Rahman, whilst rejecting the decision in Dosso's case, observed that:

> "...the learned Chief Justice [Munir]...erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is...wholly unsustainable, and...it cannot be treated as good law either on the principle of stare decisis or even otherwise".[211]

Thus the decision in Asma Jilani's case "rests on a long-awaited judicial recognition of the fallacies inherent in any such 'application' of Kelsen's theory of revolution and legal discontinuity as has become

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209. All Pakistan Legal Decisions, Supreme Court, Vol.XXIV, 1972, p.139.
210. Annual Survey of Commonwealth Law, 1972, p.53.
211. All Pakistan Legal Decisions, Supreme Court, 1972, p.183.

common in Commonwealth Courts since Dosso's case[212] in 1958..."[213] and straightforwardly accepts "one critique of Kelsenian jurisprudence that is really and properly telling in a judicial context - viz., that a theory professing to be 'pure' of all normative reference to values and all practical principles and implications is betrayed, on its own terms, if it is put to normative use as a practical principle for guiding judicial decision and action".[214]

However, Martial Law, which had been proclaimed in Pakistan on 7 October 1958, was withdrawn on 8 June 1962. It is noteworthy that Mirza, only eight days after the declaration of Martial Law, on 15 October 1958, expressed his intention to withdraw Martial Law within the shortest possible time and declared that, thereafter the country would be administered for some time by a National Council of twelve to fifteen persons.[215] This announcement was in conformity with a hint given in the Proclamation of 7 October that until alternative arrangements

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212. The Dosso's case, with its apparent misinterpretation of Kelsen's Theory of Law, was totally accepted by the Chief Justice, Udo Udoma, in Uganda v. Commissioner of Prisons, ex parte Matovu (Eastern Africa Law Reports, Uganda, 1966, pp.535, 538-539). It was approvingly referred to in Madzimbamuto v. Lardner-Burke and another (South African Law Reports, Vol.II, 1968, pp.313-318, 327-329) by the Chief Justice Sir Hugh Beadle of the Appellate Division of the Rhodesian High Court. When the Madzimbamuto's case came before the Judicial Committee of the Privy Council, Lord Reid, referring to the judgment of Muhammad Munir in Dosso's case (as well as to the judgment of Chief Justice Sir Udo Udoma in Motovu's case of Uganda) held: "Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results" (All England Law Reports, Vol.III, 1968, p.574) which also appears to lend support to the decision in Dosso's case. Chief Justice Sir Hugh Beadle of Rhodesia again approvingly referred to the Dosso's case in R. v. Ndhlovu and Others (South African Law Reports, Vol.IV, 1968, p.522).
213. Annual Survey of Commonwealth Law, 1972, p.52.
214. Ibid., pp.53-54.
215. The Asian Recorder, 15-21 November 1958, p.2350.

were made, Pakistan would come under Martial Law. However, Mirza's associate in the coup d'état, General Ayub Khan, had a different idea because on 17 October 1958 Ayub Khan issued a press statement to the effect that there would "be no premature lifting of Martial Law" until the political, social, economic and administrative mess in the country had been cleared up.[216] Even a few days after assuming the Presidency, Ayub Khan expressed his intention to use Martial Law as a base for introducing major reforms, as he said:

> "We want martial law cover for the reforms we want to introduce, such as settlement of refugees... and land reforms. For the bulk of the population, it is a good thing, but it is bound to hurt some".[217]

Thus it is clear that Ayub Khan had gone a long way beyond the common law purpose of Martial Law, the purpose to restore law and order and to establish peace and security. His avowed purpose was to achieve social and economic reforms and to purify social life. Thus the so-called Martial Law Administration of Ayub Khan had no precedent in the history of the common law.

(c) Martial Law in Pakistan in 1969

For the third time in the nearly twenty-one-and-a-half-year history of Pakistan, Martial Law was declared on 25 March 1969 by General A.M. Yahya Khan, Commander-in-Chief of the Pakistan Army. He had not wrested power from the constitutional government of Ayub Khan. It was, in fact, Ayub himself who had voluntarily relinquished his office of President in the wake of widespread political unrest. The agitation, which had erupted late in 1968 following the tenth anniversary of Ayub's

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216. Ibid., p.2349; Khan, Muhammad Ayub, Friends not Masters, London, 1967, p.86.
217. The Dawn, Karachi, 31 October 1958; Khan, Muhammad Ayub, Friends not Masters, 1967, p.86.

accession to power, gathered momentum every day and was accompanied by widespread violence, riot and resistance to law throughout the country. The opposition parties demanded, inter alia, the replacement of the presidential form of government with a parliamentary government, the introduction of direct election for the members of the National and Provincial Assemblies, replacing the existing indirect "basic democracy" system (in which 120,000 members of urban and rural councils would elect the President and the members of the National and Provincial Assemblies), dismemberment of the "One Unit" scheme[218] in West Pakistan, abolition of the principle of parity between East and West Pakistan, full regional autonomy for the provinces and the ending of the State of Emergency that was declared in 1965 during the Indo-Pakistani war.

Ayub conceded the demands of the opposition parties, with the exception of those relating to the abolition of the One-Unit scheme in West Pakistan and greater autonomy for East Pakistan. He also announced his decision not to seek re-election for the third term (the Presidential election was scheduled for winter 1970). Yet the political leaders who had now succeeded in building up an anti-Ayub agitation throughout the country decided to press their advantage further and wished to overthrow his regime altogether. Meanwhile, the political situation of the country continued to deteriorate progressively.

Ayub gave his reasons for stepping down from the Presidency in his letter of 24 March 1969 addressed to Yahya. He stated, inter alia, that "all civil administration and constitutional authority in the country had become ineffective" and "the country has plunged into an

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218. The amalgamation of the four provinces of the Panjab, North West Frontier Province, Sind, Baluchistan into the province of West Pakistan (on 4 October 1955) was known as the One-Unit scheme.

abyss of senseless agitation" which "has made it impossible for the Government to maintain any semblance of law and order or to protect the civil liberties, life and property of the people". Since the situation went "beyond the capacity of the civil government to deal with", the "Defence Forces must step in" as they "represent the only effective and legal instrument...to retrieve the situation..." Therefore, Ayub called upon the Commander-in-Chief of the army to discharge his "legal and constitutional responsibility...to save it (the country) from internal disorder and chaos...to preserve the security and integrity of the country and to restore normal social, economic and administrative life". The aforesaid letter of 24 March was followed by Ayub's last address to the nation broadcast over the radio network at 7.15 pm on 25 March 1969. His radio address described the existing situation in the country in the same vein.

It is to be noted that under Article 30 of the 1962 Constitution, the President had the power to proclaim an emergency at a time when the security or economic life of Pakistan was threatened by internal disturbances. Yet without resorting to such power, Sandhurst-trained soldier-statesman, Ayub, handed over the administration to a fellow-Pathan, General Yahya Khan. This handover was a parting kick from Ayub to the politicians who, in the preceding four months, had harassed and humiliated him. However, under the 1962 Constitution, the President had no power to hand over the country to the Commander-in-Chief of the army. Article 16 of the Constitution only empowered the Speaker of the National Assembly to assume the office of acting President, in case the sitting President wished to resign or step down.

However, Yahya Khan's Proclamation of Martial Law, issued on 25 March 1969, more or less repeated what Ayub had said in his farewell address to

the nation. Later, on 26 March 1969, Yahya in his radio broadcast said that his "sole aim in imposing martial law" was "to protect life, liberty and property of the people and put the Administration back on the rails", "to bring back sanity and to ensure that the Administration resume its normal functions to the satisfaction of the people" and to put an end to "administrative laxity and chaos". At the same time, he claimed that the only object of the armed forces was to create "conditions conducive to the establishment of a constitutional government". The prerequisite for such a government was a "clean and honest administration" which would ensure "a sane and constructive political life" and "a smooth transfer of power to a government elected freely and impartially on the basis of adult franchise".

Thus it is clear that unlike the 1958 declaration of Martial Law in Pakistan, in 1969 Martial Law was not proclaimed by the civil authority. Although the 1962 Constitution did not specify by whom and in what circumstances Martial Law could be proclaimed, it seems that under Article 223-A[219] of the Constitution, which empowered Parliament to make laws of indemnity in respect of any act done in connection with Martial Law administration, there was some scope for imposing Martial Law for the sake of the "maintenance or restoration of order in any area in Pakistan". However, since Martial Law was declared on 25 March 1969

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219. Article 223-A of the 1962 Constitution, the only Article which contained the words Martial Law and which was virtually the reproduction of Article 196 of the 1956 Constitution, provided that "Nothing in this Constitution shall prevent the Central Legislature from making any law indemnifying any person in the service of the Central or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan where Martial Law was in force, or validating any sentence passed, punishment inflicted, forfeiture ordered or other act done under Martial Law in such area".

to quell riots and acts of indiscipline and to restore law and order, it is evident that it satisfied the common law doctrine of necessity.

It is interesting to note that, although Martial Law was proclaimed to restore law and order, a large number of offences, which were created under Martial Law Regulations between 25 March 1969 and 20 March 1971, had nothing to do with the purpose of securing peace and security. Some of the offences so created were smuggling;[220] adulteration of food, drink, or drugs;[221] improper acquisition of property,[222] etc.

Yahya not only proclaimed Martial Law, but, taking a leaf out of Mirza's book, abrogated the 1962 Constitution of Pakistan, dissolved the National and Provincial Assemblies, and dismissed the central and provincial cabinets. Although Yahya prohibited political activities temporarily, unlike Mirza, he did not ban the political parties.

Yahya's abrogation of the 1962 Constitution was an extra-constitutional act as the Constitution did not permit its abrogation. The outgoing President had only asked Yahya, as pointed out earlier, to perform his "legal and constitutional responsibility" of saving the country from "internal disorder and chaos". In fact, by abrogating the Constitution, Yahya Khan deprived himself of the right to perform his so-called "legal and constitutional responsibility". It is noteworthy that when Martial Law was imposed by the British government in India in five districts of the Panjab in 1919, in Malabar in 1921, in Sholapur in 1930, in Sind in 1942 and by the Pakistan government in Lahore in 1953, there was no question of abrogating the fundamental law of the country. However, in Asma Jilani v. Government of the Panjab,[223]

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220. Martial Law Regulation No.23.
221. Martial Law Regulation No.36.
222. Martial Law Regulation No.37.
223. All Pakistan Legal Decisions, Supreme Court, Vol.XXIV, 1972, p.139.

in which the Supreme Court of Pakistan felt it necessary to consider the legal recognition that had been given to successive manoeuvrings for usurpation of power under the pseudonym of Martial Law by the decision in Dosso's case, Chief Justice Hamoodur Rahman declared that the imposition of Martial Law in 1969 and the abrogation of the 1962 Constitution were illegal. As he observed:

> "...The Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of any agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the state in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the state....Whatever was done in March 1969, either by Field-Marshal Muhammad Ayub Khan or General Agha Muhammad Yahya Khan was entirely without any legal foundation....On the stepping aside of the constitutional President the constitutional machinery should have automatically come into effect and the Speaker should have taken over as Acting President until fresh elections were held for the choice of a successor. The political machinery would then have moved according to the Constitution and the National and Provincial Assemblies would have taken steps to resolve the political disputes, if any, if the Military Commander had not by an illegal order dissolved them. The Military Commander, however, did not allow the constitutional machinery to come into effect but usurped the functions of Government and started issuing all kinds of Martial Law Regulations, Presidential Orders and even Ordinances...therefore, there can be no question that the military rule sought to be imposed upon the country by General Agha Muhammad Yahya Khan was entirely illegal....The Martial Law introduced by him was illegal".[224]

It is interesting to note that President Zulfiqar Alli Bhutto, who had replaced Yahya as President on 20 December 1971, had announced on

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224. Ibid., pp.190-198.

14 April 1972 that Martial Law would be withdrawn on 20 April 1972 and the judgment in Asma Jilani's case was delivered on the same day.

However, the 1969 Martial Law regime witnessed the disintegration of Pakistan and, as such, the birth of Bangladesh as a new, sovereign and independent state.

CHAPTER II

The Imposition of Martial Law in Bangladesh, 1975-1979

I. The Coup d'Etat and the Proclamation of Martial Law in August 1975

The Constitution (Fourth Amendment) Act, 1975, as has been discussed earlier,[1] changed the fundamental character of the 1972 Constitution of Bangladesh. It replaced parliamentary democracy with a presidential form of government, curbed the independence of the judiciary, abolished judicial power to enforce fundamental rights, invested the President with the power of vetoing a Bill passed by Parliament, made the procedure for the impeachment of the President very difficult and gave the President the power of declaring Bangladesh a one-party state, a power which he exercised to establish a one-party state from February 1975. Sheikh Mujibur Rahman used the phrase 'second revolution' to describe this adroit political manoeuvre, which proclaimed him President of Bangladesh for a five-year term from 25 January 1975 to 25 January 1980.

Under the Fourth Amendment, an initiative to introduce a motion for impeaching the President on a charge of violating the Constitution or of grave misconduct required the support of at least two-thirds of the total number of Members of Parliament, and had to be passed by at least three-fourths of the total number of Members. Moreover, as Bangladesh had become a one-party state from 24 February 1975, all Members of Parliament were members of the National Party headed by President Sheikh Mujib. In these circumstances, a constitutional change of government had become wellnigh an impossibility. Consequently, it seemed to Mujib's opponents that the only course open to them to remove Mujib from power

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1. See supra, Chapter I, pp. 29-31.

was by violent means or assassination. Eventually, a group of forty-seven army officers, who were in the main majors, captains, and lieutenants under the leadership of six majors - Shariful Hossain Dalim, S.H.M.B. Nur,[2] Farook Rahman, Khandaker Abdul Rashid, Abdul Hafiz and M. Huda - supported by more than one thousand troops under their command carried out a coup in the early morning of 15 August 1975, and assassinated Sheikh Mujib.

Thus the politics of the 'second revolution' came to an abrupt end only about seven months after its inception. In fact, the August coup was a culmination of a long period of disenchantment with the Awami League regime of Sheikh Mujib because of its "corruption, mismanagement and autocratic proclivities". However, the coup was announced on the morning of 15 August over Radio Bangladesh Dhaka by Major (retd.) Shariful Hossain Dalim, one of the coup leaders, in these words:

> "I am Major Dalim announcing the fall of the autocratic government of Sheikh Mujib. Sheikh Mujib has been killed and the armed forces have seized power in the greater interest of the country under the leadership of Khandaker Moshtaque Ahmed, who has taken over as President of Bangladesh. Martial Law is declared".[3]

It is evident from the foregoing announcement that Martial Law was declared by Major Dalim, and not by Khandaker Moshtaque Ahmed in whose name the armed forces had seized power. But the Proclamation made on 20 August 1975 by Khandaker Moshtaque Ahmed, who was Minister for Trade

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2. Both Major Dalim and Nur, who were sacked by Sheikh Mujib in July 1974 after they had arrested some Awami League politicians in Comilla district of Bangladesh for alleged involvement in smuggling, bore personal grudges against Sheikh Mujib.
3. Quoted in Lifschultz, Lawrence, "The Army's Blueprint for a Takeover", Far Eastern Economic Review, 5 September 1975, p.16; Far Eastern Economic Review, Asia 1976 Yearbook, p.110.

and Commerce in Sheikh Mujib's cabinet at the time of the coup and a senior Vice-President of the National Party, stated that he had "placed, on the morning of the 15th August 1975, the whole of Bangladesh under Martial Law by a declaration broadcast from all stations of Radio Bangladesh".

It is to be noted that in an interview[4] with the author, Moshtaque went on to say that he had not declared Martial Law, that he had no connection or association with the coup, that he had no prior knowledge of it and that he had first heard the news of the coup and the declaration of Martial Law over the radio. According to him, the coup leaders chose to use his name because of his political prestige and his differences with Mujib in certain policy matters. He further asserted that he had been taken on the morning of 15 August 1975 by one of the coup leaders from his house to the Dhaka Radio Station and, after about three hours of discussion, he had agreed to accept the office of President on the condition that he would establish a civil administration, that the 1972 Constitution of Bangladesh would remain in force, that Parliament would remain in existence, and that the army would return to barracks giving him a free hand to run the country.

However, we have a somewhat different version of the involvement of Moshtaque in the coup from one of the coup leaders, Major Farook. In November 1975, while in Thailand, Farook disclosed that he had planned the August coup, that he himself had drawn up the tactical plan for the coup, and that Moshtaque knew roughly what was going to happen although he did not know the detailed plan.[5]

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4. The interview with Khandaker Moshtaque took place on 10 October 1984.
5. The Asian Recorder, 10-16 December 1975.

Whatever his involvement in the coup, Moshtaque in his broadcast[6] to the nation over radio and television on 15 August 1975 justified the action of the armed forces in seizing power.

In his address, Moshtaque accused Sheikh Mujibur Rahman of conspiring "to monopolise power and cling to it permanently" instead of devoting his efforts to improve the lot of the people. He further alleged that Mujib had ignored the task of nation-building and had frittered away his energy in endless moves on the political chess board while corruption and nepotism were allowed to run rampant and the resources of the country were concentrated in the hands of a few favoured persons. As regards the country's economy, Moshtaque said that it was on the brink of collapse. The jute industry was almost destroyed and people had become helpless victims of hunger and starvation. He also declared that all avenues for the expression of the grievances of the people were closed. Furthermore he asserted that the coup had become inevitable as the suffocating political atmosphere created by Mujib had made its impossible for a peaceful and constitutional change of government.

Therefore, it is clear that Moshtaque, like a typical leader of a coup d'état, sought to justify the extra-constitutional action of the army by quoting the misdeeds of the overthrown regime of Mujib with which he had been associated first as a Minister for Irrigation and Flood Control up to 1973 and later as a Minister for Trade and Commerce until the August coup. However, it can scarcely be denied that many of Moshtaque's statements could be objectively justified with regard to the prevailing condition of the country. It is noticeable that Moshtaque did not pose as the saviour of the nation, but gave all the credit to the armed

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6. The Bangladesh Times, Dhaka, 16 August 1975.

forces for rescuing the country from political and economic chaos.

However, in the true tradition of a coup leader, Moshtaque made alluring promises for the future when he said:

> "Justice has to be established in the country and the values have to be rehabilitated in the society so that a man could establish himself with dignity. Our Government will take the necessary steps quickly for the achievement of these goals and will extend strong support to measures taken at individual and collective levels to fulfil this objective...this Government has no compromise with corruption, nepotism or social vices".[7]

II. The Justification of the Promulgation of Martial Law

Although Martial Law was declared in Bangladesh on 15 August 1975, immediately after the assassination of Sheikh Mujib, no proclamation was issued, as had been done in Pakistan in 1958 and in 1969 by Iskander Mirza and General Yahya Khan respectively, stating the circumstances which had paved the way for it. It is noteworthy that even Moshtaque, in his address of 15 August 1975 to the nation, made no reference whatsoever to the declaration of Martial Law or its continuance, although he had justified the overthrow of the government of Mujib by the armed forces.

It is worth mentioning that the Proclamation, which was issued on 6 April 1979 and contained the declaration of the withdrawal of Martial Law, described the causes of the promulgation of Martial Law in these words: "in the interest of peace, order, security, progress, prosperity and development of the country, the whole of Bangladesh was placed under Martial Law on the 15th August 1975".

In fact, Martial Law was declared in Bangladesh at a time when the country was peaceful and the civil courts were open and exercising their

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7. Ibid.

ordinary jurisdiction in the normal way. In view of the common law doctrine of necessity, under which the imposition of Martial Law could be justified out of the necessity to suppress riot, rebellion or insurrection, and to restore peace and order, the promulgation of Martial Law on 15 August 1975 in Bangladesh in peace-time cannot be justified. In this respect, the observations of Justice Cornelius of the Pakistan Supreme Court in the Province of East Pakistan v. Md.Mehdi Ali Khan[8] are noteworthy:

> "We think of Martial Law generally in terms of military occupation...within the municipal sphere, as the entrustment of plenary powers to the armed forces for the purpose of restoring law and order in a part of the municipal territory where conditions have reached a point of disturbance beyond the capacity of the civil authorities to control. It is not at all common to find Martial Rule being introduced over a whole country in circumstances of general peace".[9]

A similar view was expressed by Justice Hamoodur Rahman in Asma Jilani v. Government of the Panjab and another:[10]

> "...Martial Law as a machinery for the enforcement of internal order...is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government only where a situation has arisen in which it has become impossible for the civil courts and other civil authorities to function... The maxim inter armes leges silent applies in the municipal field only where a situation has arisen in which it has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil courts are sitting and civil authorities are functioning, the establishment of Martial Law cannot be justified".[11]

However, it seems that Martial Law was declared in Bangladesh on 15 August 1975 to meet any disturbances which might arise as a consequence

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8. All Pakistan Legal Decisions, Supreme Court, Vol.XI, 1959, p.387.
9. Ibid., p.439.
10. All Pakistan Legal Decisions, Supreme Court, Vol.XXIV, 1972, p.139.
11. Ibid., p.187.

of the assassination of Sheikh Mujib and the military takeover. It is to be noted that Martial Law was proclaimed at a time when Bangladesh was already under an emergency which had been imposed on 28 December 1974, but the emergency powers evidently seemed to the authorities to be inadequate to deal with the situation.

It should be stressed here that not only in Bangladesh, but in many other countries (such as Pakistan), the usual practice by which Martial Law comes into existence is that a group of army officers (sometimes in partnership with some politicians) overthrow a legitimate civilian regime by means of a coup d'état and proclaim Martial Law, not for the purpose of restoring law and order and for establishing peace and security, but to obviate any public opposition to their extra-constitutional acts. The authorities on Constitutional Law in Great Britain do not deal with this kind of Martial Law. However, in 1963 Justice Murshed of the East Pakistan High Court in Lt.-Col. G.L. Bhattacharya v. the State[12] held, with reference to the imposition of Martial Law in Pakistan in 1958, that the declaration of Martial Law after a revolution constituted a new departure and had little to do with 'Constitutional Martial Law'. He observed that there is a

> "kind of Martial Law brought about by a successful revolution which had abrogated an 'existing Constitution' thereby bringing about a total new dispensation...[this] kind of Martial Law, that is, one brought by a revolution or a coup d'état... is outside the scope of constitutional law... What had happened on the 7th of October 1958, was in fact, a revolution and coup d'état which imposed a Martial Law on the entire country. This kind of revolution or imposition of Martial Law constitutes a class apart and has nothing to do with 'Constitutional' Martial Law".[13]

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12. Pakistan Law Reports, Dhaka series, Vol.XIII, 1963, p.377.
13. Ibid., pp.431, 420-421.

It is to be noted that although Martial Law was declared in Bangladesh on 15 August 1975, the basic norm or the total legal order of the country, the 1972 Constitution of the People's Republic of Bangladesh, was neither abrogated nor suspended. The Martial Law government decided to govern the country by means of the 1972 Constitution and Proclamation and Martial Law Regulations. The Constitution remained the fundamental law of the country subject to the Proclamations, Martial Law Regulations or Martial Law Orders. (The position of the 1972 Constitution under the new regime will be examined in greater detail at a later stage in this chapter.) The judiciary continued to function normally, subject to any limitations placed on its jurisdiction by the Martial Law Authorities. The judges of the Supreme Court were not required to take a new oath of office under the Martial Law regime.

Therefore, it appears that, since the existing legal order was not destroyed and replaced by a new one, the change-over which occurred in Bangladesh on 15 August 1975 cannot be described as a 'revolution' in Kelsenian terms.[14] In fact, it seems that the military takeover in Bangladesh was in the nature of a constitutional deviation rather than a 'total new dispensation', and the declaration of Martial Law by the army was a precautionary measure against possible resistance to the regime.

The 1975 Martial Law of Bangladesh can, therefore, be described as Martial Law sui generis - fundamentally different from Martial Law in the sense in which it is generally used in the common law. It is in a class by itself and, to repeat Justice Murshed's phrase, "has nothing to do with Constitutional Martial Law".

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14. For Kelsen's view in respect of revolution, see supra, Chapter I, pp.93-94.

III. The Legality of the Imposition of Martial Law

The declaration of Martial Law in Bangladesh in 1975 was an extra-legal act inconsistent with the 1972 Constitution of Bangladesh. The 1972 Constitution does not envisage the imposition of Martial Law. Throughout the text of the Constitution, no reference has been made to Martial Law. Although the term 'Martial Law' had duly occurred in Article 196[15] of the 1956 Constitution and Article 223-A[16] of the 1962 Constitution of Pakistan, the Articles which enacted provisions for passing an Act of Indemnity in relation to acts done in connection with Martial Law administration, it has significantly been omitted from corresponding Article 46[17] of the 1972 Constitution of Bangladesh that empowered Parliament to pass an Act of Indemnity in respect of any act done in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh. This shows that although in Pakistan Articles 196 and 223-A of the 1956 and 1962 Constitutions respectively, recognised the possibility that Martial Law might be imposed under the common law doctrine of necessity for the purpose of "the maintenance or restoration of order in any area in Pakistan", no such recognition was given in Bangladesh where the phrase Martial Law was omitted from the analogous Article 46 of the 1972 Constitution.

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15. See, supra, Chapter I, p.91.
16. See, supra, Chapter I, p.104.
17. Article 46 of the 1972 Constitution of Bangladesh states that "Notwithstanding anything contained in the foregoing provisions of this Part [i.e., Part III which guarantees some important fundamental rights to the citizen], Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area".

Therefore, it appears that in the 1972 Constitution of Bangladesh, there is no provision whatsoever for the imposition of Martial Law under any circumstances, even for the sake of restoring law and order. Thus it can be strongly argued that the declaration of Martial Law in Bangladesh in 1975 was illegal.

However, it is noteworthy that, unlike the cases of Dosso[18] and Asma Jilani[19] (the cases in which the legality of the imposition of Martial Law in Pakistan in 1958 and 1969 was examined), in Bangladesh the legality of the declaration of Martial Law in 1975 was not discussed by the Supreme Court in any case either during the continuance of, or even after the withdrawal of Martial Law.

It is true that if, during the continuance of Martial Law, the Supreme Court, established under the 1972 Constitution of Bangladesh, had declared that the imposition of Martial Law on 15 August 1975 was illegal, it might itself have been suspended or had its jurisdiction restricted, or the judges concerned might have been removed by the new regime. Moreover, it is improbable that the judgment of the Court as to the legality of Martial Law would have made the slightest difference to the continuance of the Martial Law in practice. In this context, the observations of Justice Fieldsend, A.J.A. of the Appellate Division of the Rhodesian High Court in Madzimbamuto v. Lardner-Burke N.O. and another[20] are worth quoting:

> "It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality".[21]

It should, however, be added that after the withdrawal of Martial Law, when the threat to the existence or jurisdiction of the Supreme Court

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18. See, supra, Chapter I, pp.92-94.
19. see, supra, Chapter I, pp.105-106.
20. South African Law Reports, Vol.II, 1968, p.284.
21. Ibid., p.430.

has disappeared, it could have determined the legality of the declaration of Martial Law in Bangladesh in 1975 as it interfered with many decisions of Martial Law courts.

IV. The Legality of the Assumption of the Office of President by Khandaker Moshtaque Ahmed

Khandaker Moshtaque Ahmed, in whose name the August coup was announced, was sworn in as the President of the country by the acting Chief Justice of the Supreme Court, Syed A.B. Mahmud Hossain, at Bangabhaban (official residence of the President) in Dhaka in the afternoon of 15 August 1975.

It is to be noted that the assumption of the office of President by Khandaker Moshtaque was not in accordance with Article 55 of the 1972 Constitution, according to which the Vice-President will succeed the President if there is a vacancy until a new President is elected. Moreover, the administration of the oath of office to the President by the acting Chief Justice was also contrary to the provisions of Form I of the Third Schedule of the Constitution, which required the President to be sworn in by the Speaker of the House of the Nation. It is noteworthy that the oath of office of the President was administered by the acting Chief Justice at a time when the Speaker of the House had not ceased to hold office, since Parliament had not then been dissolved by Moshtaque. (The continuance and ultimate dissolution of Parliament will be discussed at a later stage in this chapter.)

Eventually, Khandaker Moshtaque Ahmed issued a Proclamation[22] on 20 August 1975, five days after the declaration of Martial Law, in an attempt to legalise the new situation. In fact, this Proclamation was a brief but comprehensive document which completed the legal and constitutional formalities of his taking over "all and full powers of

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22. The Proclamation of 20 August 1975 is reproduced in the appendix of the thesis.

the Government of the People's Republic of Bangladesh with effect from the morning of 15 August 1975". This Proclamation, however, was itself unconstitutional.

The Proclamation of 20 August 1975, which provided the legal framework for Moshtaque's new government, stated that with effect from the morning of 15 August 1975 he had suspended the provisions of Articles 48[23] and 55[24] and modified the provisions of Article 148[25] and Form I[26] of the Third Schedule of the 1972 Constitution to the effect that the oath of office of the President of Bangladesh would be administered by the Chief Justice of Bangladesh and that the President might enter upon office before he took the oath.

Therefore, it is clear that these amendments were introduced by this Proclamation in order to provide a retrospective legal sanction for Moshtaque's assumption of, and succession to, the office of the President.

V. The Position of the 1972 Constitution of Bangladesh

Unlike the 1956 and 1962 Constitutions of Pakistan abrogated on 7 October 1958 and 25 March 1969 respectively, the 1972 Constitution of the People's Republic of Bangladesh was not abrogated at the time of the proclamation of Martial Law on 15 August 1975, neither was it suspended at any time.

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23. Article 48 of the 1972 Constitution relates to the election of the President of the country.
24. Article 55 states, inter alia, that if a vacancy occurs in the office of President or if the President is unable to discharge the functions of his office on account of absence, illness or any other cause, the Vice-President shall act as President until a new President is elected to fill such vacancy enters upon his office, or until the President resumes the functions of his office, as the case may be.
25. Article 148 provides for taking the oath of office before entering upon the office of President.
26. Form I of the Third Schedule of the Constitution required the President to take the oath administrered by the Speaker.

Although the 1972 Constitution remained in force throughout the period of Martial Law, it was reduced to a subordinate position to that of Proclamation of 20 August 1975, known as the First Proclamation. The unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the First Proclamation and Martial Law Regulations or Orders made by the President. As the Proclamation declared that "the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me [i.e., the President] in pursuance thereof, continue to remain in force".[27] Moreover, it was stated that the First Proclamation and the Martial Law Regulations and Orders should have effect, notwithstanding anything continued in the 1972 Constitution or in any law for the time being in force.[28]

Therefore, it is evident that the Constitution of Bangladesh was allowed to remain in force on the condition that the Proclamation, Martial Law Regulations and Orders, made by the President, would prevail over the provisions of the Constitution during the Martial Law period. In other words, under the First Proclamation the Constitution lost its character as the supreme law of the country. In this respect, the observations of Justice Fazle Munim in the case of Halima Khatun v. Bangladesh[29] are worthy of note:

> "What appears from the Proclamation of August 20, 1975, is that, with the declaration of Martial Law on August 15, 1975, Mr. Khandaker Moshtaque Ahmed who became the President of Bangladesh assumed full powers of the Government and by clauses (d) and (e) of the Proclamation made the Constitution of Bangladesh, which was allowed to remain in force, subordinate to the Proclamation and any Regulation or Order as may be made by the President in pursuance thereof... It may be true that whenever

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27. Clause (e) of the First Proclamation.
28. Claude (d) of the First Proclamation.
29. Dhaka Law Reports, Supreme Court, Vol.XXX, 1978, p.207.

> there would be any conflict between the Constitution and Proclamation or a Regulation or an Order the intention, as appears from the language employed, does not seem to concede such superiority to the Constitution. Under the Proclamation which contains the aforesaid clauses the Constitution has lost its character as the Supreme Law of the country. There is no doubt, an express declaration in Article 7(2) of the Constitution to the following effect: 'This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is consistent with this Constitution that other law shall to the extent of the inconsistency be void'. Ironically enough, this Article, though it still exists, must be taken to have lost some of its importance and efficacy. In view of clauses (d), (e) and (g) of the Proclamation the supremacy of the Constitution as declared in that Article is no longer unqualified. In spite of this Article, no constitutional provision can claim to be sacrosanct and immutable. The present constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation".[30]

Therefore, it is evident that the 1972 Constitution of Bangladesh ceased to exist as the Supreme Law of the country as it was circumscribed by the First Proclamation and Martial Law Regulations or Orders made by the President (later by the Chief Martial Law Administrator).

Although the President took an oath under (Form I of) the Third Schedule of the 1972 Constitution "to preserve, protect and defend the Constitution", he amended the Constitution from time to time during the Martial Law period by issuing Proclamations (Amendments) Orders. It is noteworthy that, under Article 142 of the 1972 Constitution, only Parliament could amend any provisions of the Constitution and by a majority of not less than two-thirds of the total number of its Members. Moreover, at any time when Parliament stood dissolved or was not in

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30. Ibid., p.218.

session, the President had no authority under Article 93 of the 1972 Constitution to make and promulgate any Ordinance for altering or repealing any provision of the Constitution.

VI. The Position of Other Laws

Along with the 1972 Constitution, all laws in force, before the declaration of Martial Law on 15 August 1975, were to continue in force subject to the Martial Law Regulations and Orders made by the President. The Proclamation of 20 August 1975 declared that "All Acts, Ordinances, President's Orders and other Orders, Proclamations, rules, regulations, bye-laws, notifications and other legal instruments in force on the morning of the 15th August 1975, shall continue to remain in force until repealed, revoked or amended".[31]

Thus the legal continuity of the country was not interrupted by the 1975 Martial Law regime of Bangladesh. In this respect, it followed the constitutional practice in the subcontinent where at any time an existing legal order had ceased to be operative, whether legally or illegally, the new dispensation allowed the existing laws to continue in force. Beginning from the Government of India Act, 1919 (consolidated in 1924) down to the Laws (Continuance in Force) Order, 1958, and the Proclamation of Martial Law by General Agha Muhammad Yahya Khan, issued on 25 March 1969, the existing laws continued to be valid in this way.

VII. The Successive Coups and Their Impact on the Discipline of the Armed Forces

By announcing the overthrow of the government of Sheikh Mujib on 15 August 1975, Major Dalim unknowingly opened the flood-gates of the battle for power in the Bangladesh army. Between 15 August 1975 and

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31. Clause (f) of the First Proclamation.

6 April 1979, Bangladesh witnessed eight successive coup attempts and mutinies. Of these, four took place between November and December 1975; three between March and April 1976; and two between September and October 1977. The only mutiny which was successful was the Soldiers' Uprising of 7 November 1975. Although, preceding this uprising, there had been a successful coup on 3 November 1975, that coup proved very short-lived and, in fact, lasted for only four days. Before we discuss these coups in detail, it may be useful to examine the immediate impact of the August coup upon the chain of command in the Bangladesh army.

In the August coup of 1975, which was planned and carried out by junior officers mainly of the rank of major, none of the higher echelons was involved.[32] This coup was a classic example of the way in which an elected government can be overthrown by a handful of junior army officers. Although the senior officers of the army were not involved in the coup plan, the three chiefs of the armed serviced accepted a fait accompli, reportedly at (the majors') gun-point. They made brief broadcasts declaring their allegiance to the new government which had been set up under Khandaker Moshtaque Ahmed, and urged their respective forces to carry out the instructions of the government in a disciplined manner.[33]

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32. It is alleged that Major-General Ziaur Rahman, the then Deputy Chief of Army Staff, was approached on 20 March 1975 by Major Rashid (one of the coup leaders) to support and lead the coup already worked out by the junior officers and was reported to have said, "I am a senior officer. I cannot be involved in such things. If you junior officers want to do it, go ahead", World in Action, Granada Television, August 1976, quoted in Lifschultz, Lawrence and Bird, Kai, "Bangladesh: Anatomy of a Coup", Economic and Political Weekly, 8 December 1979, p.2003.
33. The Bangladesh Times, Dhaka, 16 August 1975.

However, during the first few days of the August coup, the majors, who had carried out the coup and whose real strength lay in the personal loyalty they commanded from their troops, began to behave like generals. They refused to demobilise their troops or to subordinate themselves to their superiors, presumably apprehending that they would be disarmed. Instead of going back to barracks, they stayed with President Moshtaque at the Presidential palace (called Bangabhavan) guarded by tanks and apparently continued to play a vital role in the policy-making decisions of the government.

Therefore, it is clear that the senior officers of the army failed to re-establish their authority over the majors and bring them back to active military duty. Thus the August coup not only eliminated Sheikh Mujib, but also shattered the chain of command in the army. It raised the fundamental question as to who ruled the state - the army, or the civilian President - and further as to who ruled the army, the supreme command or the majors.

However, shortly after the coup, President Moshtaque took steps adroitly to isolate the majors, to form an alliance with the supreme command by means of new appoints, to merge the Jatiya Rakkhi Bahini with the regular army, and to rectify "the past neglect and derogation" of the country's defence services.

Firstly, Moshtaque removed the existing Chief of Army Staff, Major-General Shafiullah, who had been appointed by Sheikh Mujib to this post in January 1974 and who was junior in rank of Ziaur Rahman. Major-General Shafiullah was replaced on 24 August 1975 by the then Deputy Chief of Army Staff, Major-General Ziaur Rahman, who had declared the independence of Bangladesh on 26 March 1971 and had played a vital role in the War of Liberation. The elevation of Ziaur Rahman satisfied those

critics who had felt that Mujib had done an injustice to Zia by disregarding his senority over Shafiullah and his role in the fight for freedom. However, Brigadier H.M. Ershad, a Pakistani repatriate, was promoted to the rank of major-general and appointed as Deputy Chief of Army Staff. Another brigadier, Q.K. Dastagir, was also promoted to major-general and made Director-General of the border patrols, the Bangladesh Rifles, in place of Khalilur Rahman, who had been a major-general of the Pakistan army and was appointed to the aforesaid post by Sheikh Mujib. Moreover, Moshtaque created two new posts - the Defence Adviser to the President, and Chief of Defence Staff in the Ministry of Defence. The post of Defence Adviser was filled on 24 August 1975 by General M.A.G. Osmani, who had resigned as the Chief of Army Staff in January 1974 during the regime of Sheikh Mujib and had been Commander-in-Chief of the Liberation Army. The other less sensitive post, the office of the Chief of Defence Staff, was given to Major-General Khalilur Rahman. Thus Moshtaque built up a chain of command in the army favourable to himself by removing Mujib's appointees and replacing them by his own nominees, on whom he could rely for unqualified support.

Secondly, Moshtaque promulgated an Ordinance providing for the absorption into the army of the members of the Jatiya Rakkhi Bahini (the National Security Force), a paramilitary force created by Mujib as a countervailing force to the regular army on the basis of recruitments drawn from an organisation affiliated with the Awami League and commonly referred to as Mujib's private army. The Ordinance, called the Jatiya Rakkhi Bahini (Absorption in the Army) Ordinance, 1975, came into force on 3 September 1975 and provided that any members of the Rakkhi Bahini willing to serve in the army and found suitable would be appointed in the army under terms and conditions determined by the government. Thus the

Ordinance provided for the pacification of the most abrasive paramilitary force and removed, according to many critics, a potential Indian fifth column.[34]

Third, and finally, President Moshtaque announced in September 1975 that steps would be taken to give a "place of honour" and to provide reasonable "fringe benefits" to those members of the armed forces who had valiantly fought in the War of Liberation. Subsequently, it was further declared that a high-powered committee would be set up in each service headquarters in order to review the cases of "undue benefits" (i.e., premature promotion, and fringe benefits) granted to defence personnel, or of "victimisation" (i.e., premature retirement and arbitrary removal from service) to see whether they had been done in violation of departmental rules, normal practices and conventions and to take remedial measures.[35] But no application was required to be submitted for this purpose by the defence service personnel.

It seems that the object of Moshtaque in announcing such moves was not only to rectify "the past neglect and derogation" of the country's defence services, but also to win over their unquestioned loyalty to his new regime. It may be that the majors persuaded Moshtaque to announce these steps to suit the cases of fifteen young officers including Major Dalim and Major Nur, who had been sacked in 1974 by the previous regime.

(i) The Coup of 3 November

Moshtaque's army appointments and other steps to have a solid

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34. The Jatiya Rakkhi Bahini was considered "a potential Indian fifth column" as their officers had been initially trained by Indian army officers in their headquarters at Savar and later trained at Dehra Dun - India's Sandhurst.
35. The Bangladesh Times, Dhaka, 9 and 10 September 1975.

alliance among, and backing from, the armed forces came to nothing because he himself was overthrown as a result of the coup which took place on 3 November 1975.

This counter-coup was engineered by Brigadier Khaled Mosharraf, who had been appointed as the Chief of the Army's General Staff by Sheikh Mujib and who had retained that position under Moshtaque. He arrested Chief of Army Staff Major-General Ziaur Rahman and Air Vice-Marshal G.M. Tawab. He also asked the majors, who were staying with the President at the Presidential palace guarded by tanks, to surrender. An uneasy and tense situation developed but, at last, a compromise was struck through the mediation of General Osmani, Defence Adviser to President Moshtaque. It was agreed that seventeen of the officers actively involved in the August coup would fly into exile - to Bangkok.[35(a)]

However, before their departure, the "August coup majors" assassinated four ministers of Sheikh Mujib's cabinet - Tajuddin Ahmed, A.H.M. Kamruzzaman, Mansur Ali and Sayed Nazrul Islam - inside the Dhaka Central Prison. This was an unprecedented event in the history of Bangladesh. However, this action of the majors showed that they had wished to foil Khaled's power bid and wipe out the possibility of a 'pro-Mujib' and 'pro-Indian' regime.

Confusion and pandemonium prevailed in the country from 3 to 4 November 1975, and no one knew who was running the country - President Moshtaque or the counter-coup leaders. However, on the night of 4 November, power changes were formalised. The coup leader, Khaled

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35a. Mattern, William, "Bangladesh: Day of the Generals", Far Eastern Economic Review, 14 November 1975, pp.10-11; Mattern, William, "Bangladesh: Burying the Memory of Mujib", Far Eastern Economic Review, 21 November 1975, pp.18, 20.

Mosharraf, was promoted to the rank of major-general and was appointed as Chief of Army Staff in place of Major-General Ziaur Rahman. On the next day, a Revolutionary Council was set up consisting of the four service chiefs and the Chief of Defence Staff. At the instance of the counter-coup leaders of 3 November, President Moshtaque on 6 November 1975 named his own successor, Chief Justice A.M. Sayem of the Bangladesh Supreme Court, under the Proclamation (First Amendment) Order, 1975.[36]

(ii) The Soliders' Uprising of 7 November 1975

Khaled Mosharraf was destined to hold power for no more than four days as his coup quickly gained the stigma of being an India-backed and pro-Mujib putsch. Leaflets were circulated among the soldiers of the army at the Dhaka Cantonment by the Jatiya Samajtantrik Dal (National Socialist Party) and Sammabadi Dal (Communist Party) describing the coup of 3 November as an attempt by the Delhi-Moscow axis to establish their control over Bangladesh, and urging the soldiers to revolt against Khaled Mosharraf. On 7 November 1975, the soldiers of the Dhaka Cantonment revolted en masse against Khaled Mosharraf's putsch, reportedly at the initiative of the soldiers belonging to the Biplobi Gano Bahini (Revolutionary People's Army) - a cell of the military front of the Jatiya Samajtantrik Dal in the Bangladesh Army.[37] Khaled Mosharraf was killed

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36. The Proclamation (First Amendment) Order, 1975 (Proclamation Order No.II of 1975) issued on 6 November 1975 and deemed to have come into effect on 20 August 1975, empowered an incumbent President, in case of his inability to discharge the functions of the office of President for any reason or in case of his willingness to vacate the office of President, to nominate his successor.
37. On 5 November 1975, the Biplobi Gano Bahini distributed thousands of leaflets (issued by the Biplobi Shainik Sangstha - Revolutionary Soldiers' Organisation) throughout the country's military cantonments urging the soldiers to cease being pawns of officers' "selfish and ambitious scrambles for power through staging one putsch after another" and to ready themselves for a general uprising. It is said that under (retired) Lieutenant-Colonel Abu Taher's leadership, the JSD activated its military organisation, the Revolutionary People's Army and Revolutionary Soldiers' Organisation. It is also claimed that Abu Taher was the mainspring of the soldiers' uprising of 7 November of 1975; Maniruzzaman, Talukdar, :Bangladesh in 1975: The Fall of the Mujib Regime and its Aftermath", Asian Survey, Vol.XVI, 1976, p.125.

by the mutineers. Ziaur Rahman was freed from captivity and took over as the Chief of Army Staff.

Although the Jatiya Samajtantrik Dal and their associates within the army claimed that they had set the wheels of the rebellion in motion, many observers believed that the Soldiers' Uprising of 7 November was spontaneous as a reaction to the Indian-backed coup of 3 November. However, the mutiny of the soldiers on 7 November 1975 was the first of its kind to have taken place since the Sepoy Mutiny of 1857 under the British Raj.

Despite the fact that Justice A.M. Sayem was a nominee of Khaled Mosharraf, he was retained as President by the leaders of the new coup on the grounds of his neutral position and solid judicial experience.

However, the soldiers had a two-fold objective: the first was to overthrow Khaled Mosharraf and to release Major-General Ziaur Rahman; the second objective sought to oust "the bourgeois officers from the upper echelons of the army" and eradicate "the power of the bourgeoisie in the state". The release of Zia was a symbol of the uprising, while the demands of the soldiers were the principal basis of the revolt. These demands of the soldiers were twelve in number and were put forward in the form of a leaflet.

The demands of the soldiers called for the immediate "release of all political prisoners", the removal of differences as well as discrimination between officers and soldiers; an end of recruitment of officers from the country's privileged elite through special schools and the introduction of the selection of officers from among the ranks of the common soldiers, and changing the existing "British rules and regulations", especially the abolition of the 'batman' system in which rank-and-file sepoys were used as household servants by higher officers.

A number of economic demands were put forward, such as improved wages for soldiers and an end to the rent payments for their accommodation. However, the most important of the "Twelve Demands" was a call for the establishment of new organs of military authority and decision-making.[38]

Thus unlike the two coups which preceded it, the uprising of 7 November 1975 was revolutionary in nature because of the radical character of the "Twelve Demands" put forward by the soldiers. Such demands had never been made by any regular army in South Asia. The source can be traced back to Bangladesh's War of Liberation in 1971, when many Bengali officers and soldiers of the Pakistan army participated in fighting for the freedom of Bangladesh and came into contact with the members of various radical groups that had fundamentally changed their traditional ideas in respect of the military structure and the polity at large.

However, ultimately, the government refused to fulfil the so-called radical demands thrown up by the Soldiers' Uprising of 7 November. Nineteen leaders of the Jatiya Samajtantrik Dal (JSD), including (retired) Lieutenant-Colonel Abu Taher who was reportedly the leader of the uprising, were arrested. (Their trial, held under the Special Martial Law Tribunal Regulation, 1976, will be discussed in Chapter V.) By 25 November 1975, discipline was restored in the Bangladesh army and two of the army battalions were disarmed because of their strong affiliation with the Jatiya Samajtantrik Dal. Thus the "principal basis of the revolt" ended in a dismal failure.

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38. Lifschultz, Lawrence, "The Twelve Demands", Far Eastern Economic Review, 5 December 1975, p.33.

(iii) Other Insignificant Coup Attempts of 1975 and 1977[38a]

A few insignificant coup attempts and mutinies took place between 13 November 1975 and 30 September 1977. These, in chronological order, were as follows:

(a) The mutiny of the Bangladesh navy at Chittagong on 13 November 1975.

(b) The mutiny at the naval base at Chittagong in early December 1975.

(c) The mutiny of the soldiers of the Chittagong Brigade in March 1976.

(d) The rebellion of one of the August coup leaders, Colonel Farook Rahman, at the Bogra Cantonment in April 1976.

(d) The attempted coup of Air Vice-Marshal M.G. Tawab in 1976.

(e) The revolt of the rightest military elements at the Bogra Cantonment on 29-30 September 1977.

These sporadic and unco-ordinated mutinies were suppressed without much difficulty by the government.

(iv) The Coup Attempt of 2 October 1977

A more important coup was attempted at Dhaka on 2 October 1977, when a group of non-commissioned air force officers, junior commissioned officers and soldiers from the army succeeded in capturing a number of air force officers and executed eleven of them by firing squad. The rebels, who had declared themselves to be members of a People's Army, briefly captured the Dhaka Radio Station and announced a revolution of

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38a. Lifschultz, Lawrence, "Mutiny on Behalf of the People", Far Eastern Economic Review, 5 December 1975, p.34; Hearst, David, "Ziaur Shrugs off the Coup-makers", Far Eastern Economic Review, 25 June 1976, p.21; The Bangladesh Times, Dhaka, 5 October 1977.

the workers, peasants and students. However, the government succeeded in putting an end to this uprising within a matter of a few hours.[38b]

In comparison with the other sporadic uprisings mentioned earlier, it seems that the attempted coup of 2 October 1977 at Dhaka was a planned effort to overthrow the Government of Bangladesh with a view to a radical restructuring of both the military system and the polity of the country.

The various coup attempts within a short period of time made the government acutely aware that it had to take stern action to depoliticise the army in order to safeguard the stability of the country. Consequently, the government promulgated the Martial Law Tribunal Regulation, 1977. Its provisions, and the trials held under it, will be examined in Chapter V.

VIII. The Structure of the Martial Law Administration

(i) The Initial Retention of the Structure of the Civil Administration

Despite the fact that Martial Law was declared throughout the country and that Moshtaque had assumed the office of the President of Bangladesh on 15 August 1975, he neither assumed the office of Chief Martial Law Administrator nor appointed any Martial Law Administrators. In fact, unlike Iskander Mirza of Pakistan in 1958, he retained the structure of the previous civil administration. He appointed Mohammadullah, who was the first Speaker of the House of the Nation and at the time of the August coup was Minister for Land Reforms and Land Administration in Mujib's cabinet, as Vice-President of Bangladesh. He formed a civil cabinet, taking ten of the eighteen ministers and eight of the nine ministers of state of the assassinated President Mujib's cabinet.

38b. The Asian Recorder, 22-28 October 1977, p.13989 (corrected p.101435); The Bangladesh Times, Dhaka, 4 October 1977.

Therefore, soon after the August coup, with the retention of most of the ministers of the deposed government, it became evident that the majors, who led the coup, had hardly looked beyond the immediate removal of Sheikh Mujib and they had no programme about what would follow after they had toppled the government of Mujib. About this Daniel Burger wrote:

> "The coup was carried off without either clear-cut political ideas or leading personalities capable of lifting the whole affair above a purely operational level and bringing a new order out of the potential for chaos it has opened up".[39]

(ii) The Assumption of the Power of Issuing Martial Law Regulations

It is to be noted that, although President Moshtaque retained the structure of civil administration and did not assume the office of Chief Martial Law Administrator, unlike Iskander Mirza of Pakistan, he assumed on 20 August 1975 the power to make Martial Law Regulations and Orders. He could issue Martial Law Regulations and Orders:

(a) Providing for setting up special courts or tribunals for the trial and punishment of any offence under such Regulations or Orders and of offences under any other law;

(b) Prescribing penalties for offences under such Regulations or Orders and special penalties for offences under any other law;

(c) Empowering any court or tribunal to try and punish any offence under such Regulation or Order; and

(d) Barring the jurisdiction of any court or tribunal from trying any offence specified in such Regulations or Orders.[40]

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39. Burger, Daniel, "Bangladesh: The Sheikh's Legacy of Confusion", Far Eastern Economic Review, 5 September 1975, p.16.
40. Clause (b) of the First Proclamation, issued on 20 August 1975 by President Moshtaque.

This assumption by President Moshtaque of the power to issue Martial Law Regulations and Orders constituted a clear departure from the usual practice followed in a Martial Law regime where the Martial Law Regulations or Orders are issued by the Chief Martial Law Administrator, as had been done in Pakistan in 1958 and 1969.

However, by promulgating the Proclamation (First Amendment) Order, 1975 (Proclamation Order No.I of 1975) on 19 September 1975, Moshtaque extended the ambit of objects for which Martial Law Regulations and Orders could be issued. Under this Proclamation, he could make Martial Law Regulations and Orders "on any other subject or in respect of any other subject or in respect of any other matter, including any subject or matter specified in, or regulated or provided by the Constitution of the People's Republic of Bangladesh".

Thus President Moshtaque assumed the power of amending the provisions of the 1972 Constitution which, as has been pointed out earlier, had formerly been within the sole jurisdiction of Parliament. It is noteworthy that, unlike Iskander Mirza and Yahya Khan of Pakistan, Moshtaque did not dissolve Parliament. Even after assuming the power of amending the 1972 Constitution, on 16 October 1975 President Moshtaque addressed the members of the House of the Nation (the name of Parliament) at the Presidential palace instead of Parliament House.[41] It seems that the object of convening this meeting was to ascertain the measure of support of the members of Parliament, elected during the regime of Sheikh Mujib, for the new government of Moshtaque. In fact, the presence of 260 Members (out of a total number of 315 Members) of Parliament in the meeting, including Speaker Abdul Malik Ukil and Chief Whip Abdur Rouf, was an encouraging event for the extra-constitutional regime of Moshtaque.

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41. The Bangladesh Times. Dhaka, 17 October 1975.

(iii) The Introduction of Full-fledged Martial Law Administration

However, it was Major-General Ziaur Rahman, the Chief of Army Staff, who for the first time assumed the office of Chief Martial Law Administrator on the morning of 7 November 1975 - the day of the Soldiers' Uprising. Yet by the evening of the same day, he had stepped down from this post[42] perhaps to demonstrate that he was not power-hungry. Thereafter, President Sayem, who had replaced Khandaker Moshtaque Ahmed as President on 6 November 1975, assumed the powers of Chief Martial Law Administrator despite his civilian status. He appointed the Chief of Army Staff, Major-General Ziaur Rahman, the Chief of Naval Staff, Commodore M.H. Khan, and the Chief of Air Staff, Air Vice-Marshal M.G. Tawab, as Deputy Chief Martial Law Administrators "for the effective enforcement of Martial Law". He declared that Martial Law Regulations and Orders would be made by the Chief Martial Law Administrator and all Martial Law Regulations and Orders in force immediately before 8 November 1975 would be deemed to have been made by the Chief Martial Law Administrator and would continue to remain in force until amended or repealed by the Chief Martial Law Administrator.[43] Chief Martial Law Administrator Sayem divided the whole of Bangladesh into seven zones and appointed seven Zonal Martial Law Administrators on 5 December 1975.[44] Later, on 7 February 1976, the whole country was divided into eight zones,[45] in May and August 1976 it was divided into nine[46] and eleven[47] zones respectively. Again it was divided into seven zones[48] in October

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42. Ibid., 8 November 1975.
43. Clauses (a) and (b) of the Proclamation, issued on 8 November 1975 by President Sayem.
44. Order No.856 - Law, Ministry of Law and Parliamentary Affairs and Justice, issued on 5 December 1975.
45. Order No.117 - Law, Ministry of Law and Parliamentary Affairs, issued on 7 February 1976.
46. The Bangladesh Times, Dhaka, 9 May 1976.
47. Ibid., 11 August 1976.
48. Ibid., 2 October 1976.

1976. Accordingly Zonal Martial Law Administrators were also appointed. A Zonal Martial Law Administrator was charged with the duty of preserving general law and order in his zone.[49] However, on 19 October 1976, the Chief Martial Law Administrator divided three zones into seven sub-zones and appointed seven Sub-Zonal Martial Law Administrators.[50]

Thus it is clear that one-time Chief Justice of the Supreme Court of Bangladesh, A.M. Sayem, assumed the task of administering Martial Law (which was unprecedented in the history of Martial Law) and it was he who introduced full-fledged Martial Law administration in the country. Although Martial Law was declared in peace-time and there was no question of suppressing civilian disturbances or rebellion, Sayem brought the military personnel into his system of administration, which led to the gradual politicisation of the army.

However, in his address to the nation over the radio and television network on 7 November 1975, President Sayem declared that the permanent civil servants would have the responsibility to implement the policies of the government.[51] Like most of the senior military officers of the country, civil servants had been trained in the Pakistan traditions of Martial Law. However, it can be said that the post-coup system of government in Bangladesh was a partnership of the military and civil bureaucracy.

(iv) The Dissolution of Parliament

Following the example of the 1958 and 1969 Martial Law regimes of

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49. The Zonal Martial Law Administrators (Functions) Orders, 1975, (Martial Law Order No.II of 1975), issued on 24 December 1975.
50. Order No.1014 - Law, Ministry of Law and Parliamentary Affairs, issued on 19 October 1976.
51. The Bangladesh Times, Dhaka, 8 November 1975.

Pakistan, Justice Abusadat Mohammad Sayem, who "assumed responsibility as the head of a neutral and non-party interim government" on 6 November 1975, in his first address to the nation over radio and television on the night of 6 November announced the dissolution of the House of the Nation to enable his government to accomplish the task of establishing a democratic government through a free and fair general election in the shortest possible time - by the month of February 1977 or if possible, even earlier.[52] The Proclamation of 8 November 1975, which was deemed to be a part of the Proclamation of 20 August 1975, also declared that Parliament would stand dissolved with effect from 6 November 1975.[53]

Thus, almost three months after the proclamation of Martial Law, Parliament was dissolved by the second President of the country under Martial Law. By dissolving Parliament, Sayem freed himself from constitutional restraints and took a giant step along the path of authoritarianism because any checks exercised by Parliament were revoked at one stroke by its dissolution. The persons holding office as Vice-President, Speaker, Deputy Speaker, Ministers and Whips, immediately before 8 November, were also declared to have ceased to hold office with effect from 6 November 1975.[54] Thus the structure of civil administration, which had been retained by President Moshtaque, came to an end.

(v) The Removal of A.M. Sayem as the President and the Chief Martial Law Administrator

Initially President and Chief Martial Law Administrator, A.M. Sayem, was assisted by a three-member council comprising the three service chiefs appointed as Deputy Chief Martial Law Administrators - Major-General

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52. Ibid., 7 November 1975.
53. Clause (c), Proclamation issued on 8 November 1975 by President A.M. Sayem.
54. Clause (d), ibid.

Ziaur Rahman, Commodore M.H. Khan, and Air Vice-Marshal M.G. Tawab. By January 1976, a nine-member Council of Advisers to the President, consisting of the three Deputy Chief Martial Law Administrators and six civilians (three educationists, one former civil servant, one doctor and one female social worker), was set up. Yet the Deputy Chief Martial Law Administrators retained the key portfolios: Chief of Army Staff and DCMLA, Major-General Ziaur Rahman held the charge of the Ministries of Finance, Home Affairs, Information and Broadcasting; Chief of Air Staff and DCMLA Air Vice-Marshal M.G. Tawab held the portfolios of Food, Petroleum, Civil Aviation and Tourism; and Chief of Naval Staff and DCMLA Commodore M.H. Khan remained in charge of the Ministries of Water Resources and Power, Flood Control, and Communication and Transport.

It is noticeable that the most important portfolios - Home Affairs, Finance and Broadcasting - were held by Ziaur Rahman. Hence it was widely believed that he became the virtual wielder of state power and played the de facto role of chief political decision-maker. However, it is noteworthy that Ziaur Rahman was not given charge of the Minstry of Defence. During an interview[55] with the author, President Sayem gave special emphasis to the fact that he had retained in his own hands the Ministries of Defence and Foreign Affairs. He made the point that his aim in retaining the portfolio of Defence was to exercise a close control and supervision over the armed forces. He also constituted an eleven-member National Committee on Defence which would act as the highest policy planning body of the government for the purpose of formulating policies on national defence. Sayem himself was the Chairman of the Committee.

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55. The interview with former President Sayem took place on 4 October 1984.

It is significant, however, that President Sayem's strategy in retaining the portfolio of Defence proved of little use when he was forced to give up first the post of Chief Martial Law Administrator in November 1976 and then that of the President in April 1977. In an interview[56] with the author, Sayem said he was invited on 28 November 1976 by the senior officers of the armed forces to abdicate the office of Chief Martial Law Administrator in favour of Ziaur Rahman. Ultimately, he had to yield to this pressure. On 29 November 1976, the nation was informed that President Sayem felt "that it is in the national interest that the powers of the Chief Martial Law Administrator should be exercised by Major-General Ziaur Rahman, the Chief of Army Staff".[57] Accordingly, the office of the Chief Martial Law Administrator was handed over to Ziaur Rahman with powers to amend the Proclamations, to make Martial Law Regulations and Martial Law Orders, or to do anything or to take any action necessary "in the national interest or for the enforcement of Martial Law".[58]

Thus Ziaur Rahman, who had stepped down from the office of the Chief Martial Law Administrator on the evening of 7 November 1975 at his own will, took up the same post on 29 November 1976 and crowned his de facto powers as Chief Martial Law Administrator with the appropriate titles. The new arrangement made President Sayem even more of a figurehead and confirmed Ziaur Rahman as the country's ultimate authority.

Yet even the office of the Chief Martial Law Administrator was not considered enough by Ziaur Rahman. He now aspired to the post of President. His desire was conveyed to President Sayem through Justice Abdus Sattar, the Special Assistant to the President. This time Sayem

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56. Ibid.
57. The Third Proclamation, issued on 29 November 1976.
58. Ibid.

at once agreed to relinquish the office of President.[59] He resigned from the post on the ground of failing health and nominated Major-General Ziaur Rahman as President of Bangladesh under the Proclamation (First Amendment) Order, 1975 (Proclamation Order No.II of 1975). Ziaur Rahman assumed the office of the President of the country on 21 April 1977.

Thus Ziaur Rahman became the President of Bangladesh only about five months after assuming the office of Chief Martial Law Administrator. It is clear that Ziaur Rahman proceeded step by step in a careful and calculated way, after taking appropriate measures to strengthen his power base in the army. Finally, when he felt confident enough, he did not hesitate to push Sayem out of the office of President as well. However, the assumption of full state powers by Ziaur Rahman is somewhat comparable with that of General Ayub Khan of Pakistan in October 1958. At first, General Ayub Khan was only the Chief Martial Law Administrator, but on 27 October he sent three of his generals - Azam Khan, Burki and Khalid Sheikh - to see President Iskander Mirza and force him to step down as President in his favour.

The new President and Chief Martial Law Administrator, Ziaur Rahman, on 9 November 1977 repealed with immediate effect all orders issued by his predecessor relating to the creation of zones and sub-zones and the appointment of Zonal Martial Law Administrators and Sub-Zonal Martial Law Administrators.[60]

This shows that Ziaur Rahman had no desire to politicise the army officer corps by allowing it to be involved in the Martial Law administration for a prolonged period.

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59. Based on an interview with former President A.M. Sayem which took place on 4 October 1984. Sayem expressed his regret that he could not materialise his earnest desire to hand over power to the politicians by holding a general election.
60. The Bangladesh Times, Dhaka, 10 November 1977.

IX. The Civilianisation of Government and the Withdrawal of Martial Law

So far Zia's actual constituency was the highly politicised faction-ridden army. In June 1978, Ziaur Rahman broadened his constituency by moving into real politics when he contested the Presidential election as a candidate of the "Nationalists' Front", consisting of the government-sponsored Nationalist Democratic Party formed in February 1978 and five other political parties. He won the election, securing 76 per cent of the total votes cast.

Thus Ziaur Rahman became the first President of the country directly elected on the basis of universal adult franchise and the Presidential election was an important step towards the restoration of democratic order.

However, after converting himself into a civilian President, Zia, who did not believe in ideology-oriented politics, in September 1978 transformed the "Nationalists' Party" into a fully-fledged, reorganised governmental party to be known as the Bangladesh Nationalist Party. He then declared the general nineteen-point economic programme as its ideological platform. In order to complete the process of democratic transition, Zia announced 12 February 1979 as the date for a national parliamentary election in which Zia's Bangladesh Nationalist Party won 206 out of 300 seats in Parliament.

Finally, Martial Law was withdrawn when the newly-elected Parliament met for its first session on 6 April 1979, and as such marked Bangladesh's 'transition to democracy'.

X. A Survey of Martial Regulations Issued

A number of Martial Law Regulations, issued during the Martial Law period, created certain offences. The offences so created were: the

possession of illegal arms,[61] corruption and criminal misconduct,[62] the possession of illegally acquired property,[63] the seduction of members of the defence services with a view to subverting or destroying the defence services,[64] non-payment of taxes,[65] criticising the imposition, operation or continuance of Martial Law,[66] creating fear among the public,[67] involvement in prejudicial acts,[68] enhancement of certain rents,[69], smuggling,[70] mischief by fire or explosive substances to jute, etc.,[71] extortion,[72] kidnapping or abducting a person under the age of fifteen,[73] misappropriation of relief goods, etc.,[74] waging war and insurrection,[75] hoarding, profiteering and dealing in the black market.[76]

It is interesting to note here that all the offences created by Regulations were, with very few exceptions (e.g., criticising the imposition, operation and continuance of Martial Law; enhancement of certain rents; misappropriation of relief goods), already offences under the ordinary law of the country. The Martial Law Regulations, in general, only prescribed more severe punishments than the general law for a similar offence. They prescribed penalties ranging from death or life imprisonment to rigorous imprisonment and confiscation of properties. The only

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61. Regulation 10 of the Martial Law Regulation, 1975 (Regulations No.I of 1975)
62. Regulation 11, ibid.
63. Regulation 12, ibid.
64. Regulation 13, ibid.
65. Regulation 14, ibid.
66. Regulation 15, ibid.
67. Regulation 16, ibid.
68. Regulation 17, ibid.
69. Regulation 18, ibid.
70. Regulation 19, ibid.
71. Regulation 21, ibid.
72. Regulation 22, ibid.
73. Regulation 23, ibid.
74. Regulation 24, ibid.
75. Regulation 25, ibid.
76. Regulation 26, ibid.

Regulation which provided punishment with imprisonment for less than five years was Regulation 14. Regulation 14 made the offence of non-payment of taxes punishable with imprisonment for a term which might extend to one year, or with fine, or with both.

However, the creation of offences like corruption and criminal misconduct, the possession of illegally acquired property, smuggling, profiteering and dealing in the black market etc., under the Martial Law Regulations gives the impression that Martial Law had been promulgated to combat anti-social activities. The prescription of more severe punishments for such offences under the Martial Law Regulations, apparently with a view to curbing their commission, has no justification as punishments are not the end of Martial Law, but only a means. It seems that the 1975 Martial Law administration of Bangladesh followed the 1958 and 1969 Martial Law regimes of Pakistan when it provided for severe punishments by creating offences under the Martial Law Regulations which had already been offences under the ordinary law.

However, the severe punishments can have some justification only for those offences the creation of which was necessary for the restoration of law and order and the establishment of civil authority. Under the common law doctrine, all acts which would tend to hinder, delay or obstruct the work of military forces in restoring law and order can be made offences under Martial Law Regulations. As in the Parliamentary Debate on Martial Law in Demerara, Sir James Mackintosh said:

> "When the laws are silenced by the noise of arms, the rulers of the armed force must punish as equitably as they can, those crimes which threaten their own safety and that of society".[77]

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77. Hansard, T.C., The Parliamentary Debates, New Series, London, Vol.XI, March-June 1824, p.1046.

(i) The Possession of Illegal Arms

Whereas under Section 19(f) of the Arms Act (XI of 1878) unlicensed possession of firearms, or ammunition, was punishable "with imprisonment for a term which may extend to three years or with fine, or with both", Regulation 10(1) made the unlicensed "possession of any firearm, ammunition or explosive" punishable with "death, or with transportation for life, or with rigorous imprisonment for a term which may extend to fourteen years". Under the Regulation, the person concerned could "also be liable to fine or to suffer confiscation of the whole or any part of his property".

Thus the punishment provided by the Regulation was much more severe than that of the Arms Act. It is noteworthy that when Martial Law was promulgated in Pakistan in 1969 to restore law and order, Regulation 12, issued by the 1969 Martial Law regime, like that of Regulation 12 of the 1958 Martial Law regime, provided a maximum punishment of fourteen years rigorous imprisonment for "actual or constructive possession of any firearm, ammunition, explosive or sword without a bona fide licence". But the Martial Law government of Bangladesh not only made the offence of possession of illegal arms punishable with rigorous imprisonment which could extend to fourteen years but provided death sentences for the possession of illegal arms. At the same time, it went so far as to provide that a person accused of such an offence so punished could also simultaneously be liable to a fine or to suffer confiscation of the whole or any part of his property.

It seems that the Martial Law regime was actuated to provide for severe punishment because the arms acquired by guerrillas during the Liberation War were still possessed by many of them and were used to commit political murders and other anti-social activities. The repeated calls by the previous government had met with inadequate response, and it seems

that the Martial Law authorities thought that the prescription of more severe punishment would prompt a more positive response from the guerrillas.

It is interesting to note that Regulation 10(2) embodied a very unusual provision to the effect that:

> "Where any firearm, ammunition or explosive is found in any place (place 'includes any house, building, premises, vehicle or vessel') and no person claims it to be his own, the owner or occupier of the place shall, unless he proves to the satisfaction of the Court that he was not aware of the existence of such firearm, ammunition or explosive in such place, be deemed to be a person in possession of such firearm, ammunition or explosive without licence".

Never before in the history of Martial administration in the Indian subcontinent had such a provision been made. By virtue of this Regulation, an innocent person could be implicated for possession of illegal arms for which he was not, in fact, responsible. For example, a person bearing a grudge against another could plant firearms, ammunition or explosive in the place owned by the latter and thus subject him to the punishment provided by Regulation 10(1). This could result in grave injustice and victimisation.

(ii) Smuggling

With regard to the punishment of the offence of smuggling in general, Section 156(8) of the Customs Act, 1969 (IV of 1969) provided that:

> "If any goods be smuggled into or out of Bangladesh, such goods shall be liable to confiscation and any person concerned in the offence shall be liable to a penalty not exceeding ten times the value of the goods; and upon conviction by a Magistrate he shall further be liable to imprisonment for a term not exceeding six years and to a fine not exceeding ten times the value of such goods, and if the Magistrate in his discretion so orders, also to whipping".

Section 25B of the Special Powers Act, 1974, as amended in July 1974 by the Special Powers (Amendment) Act 1974, and the Emergency Powers Rules 1975, made the offence of smuggling "punishable with death, or with transportation for life, or with rigorous imprisonment for a term which may extend to fourteen years" and also with fine.

Yet Regulation 19(1) made not only smuggling but also conspiracy for smuggling punishable, without prejudice to any confiscation or penalty to which the goods or the person concerned could be liable under any law for the time being in force, with "death, or with transportation for life, or with rigorous imprisonment for a term which may extend to fourteen years". The person concerned could also be liable to fine or to suffer confiscation of the whole or any part of his property.

Thus the Regulation went much further than the Special Powers Act and the Emergency Powers Rules in the punishment for the offence of smuggling by providing for the "confiscation of the whole or any part" of the property of the person accused of such an offence. This punishment was not resorted to either by the 1958 or 1969 Martial Law regimes of Pakistan, both of which provided only death as the maximum punishment for "smuggling of all kinds".[78]

However, Martial Law Regulation 19(2) contained a very unusual provision, never enacted by any Martial Law administration of the subcontinent, to the effect that:

> "Where any goods are seized in the reasonable belief that they have been smuggled into Bangladesh in contravention of any prohibition or restriction imposed by or under any law for the time being in force, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods are seized".

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78. Martial Law Regulation 27 of 1958 and Martial Law Regulation 23 of 1969.

Thus this provision was virtually a reproduction of that of Rule 18(2)[79] of the Emergency Powers Rules, 1975 of Bangladesh. However, this stipulation contravened Section 101 of the Evidence Act. 1872:

> "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

Thus under this Section, the accused persons are innocent until proven guilty. It was the prosecution and not the accused which had to prove the offence in respect of any goods seized in the reasonable belief that they were smuggled goods. In this respect, the observations of Justice Muhammad Munir in Shaker Hussain v. the State[80] (of Pakistan) are of direct relevance:

> "Subject to certain exceptions the most important of which is to be found in Section 105 of the Evidence Act, the admitted and otherwise firmly established principle being that, before the prosecution can ask for conviction of a criminal offence, it is its duty to prove each ingredient of the offence beyond a reasonable doubt".[81]

Justice Stone held the same view in the case of the Paper Sales Ltd. v. Chokhani Bros.,[82] when he observed:

> "The law presumes against an illegality, and the burden of proving that an illegality has taken place rests on the party who so asserts".[83]

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79. Rule 18(2) of the Emergency Powers Rules, 1975, provided that "Where any goods are seized in the reasonable belief that they have been smuggled into Bangladesh in contravention of the prohibitions or restrictions aforesaid (i.e., for the time being in force under the provisions of or by virtue of Sections 15 and 16 of the Customs Act, 1969), the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods are seized".
80. All Pakistan Legal Decisions, Supreme Court, Vol.VIII, 1956, p.417.
81. Ibid., p.418.
82. All India Reporter, Bombay, Vol.XXXIII, 1946, p.429.
83. Ibid., p.434.

It is noteworthy, however, that it was only in respect of the offence of smuggling that the existing law relating to burden of proof was changed by the Martial Law regime.

(iii) Hoarding, Profiteering and Dealing in the Black Market

Under Section 25 of the Special Powers Act, 1974, as amended by the Special Powers (Amendment) Act, 1974 (No.LIX of 1974), "the offence of hoarding or dealing in the black market" was punishable "with death, or with transportation for life, or with rigorous imprisonment for a term which may extend to fourteen years" and also with fine.

On the other hand, Regulation 26 made the offences of hoarding, profiteering and dealing in the black market "punishable with rigorous imprisonment for a term which may extend to five years", and also with "whipping not exceeding ten stripes", and the person concerned would further be liable to fine. Moreover, a court convicting of such an offence "shall order the forfeiture to Government of anything in respect of which the offence was committed".

Thus the 1975 Martial Law administration of Bangladesh provided less severe punishment for the offences of hoarding and dealing in the black market than that of the civilian government of 1974. It is to be noted that this is the only instance in which the punishment provided by the Martial Law administration was less severe than that provided by the civilian regime.

(iv) Corruption and Criminal Misconduct

Under Section 5(2) of the Prevention of Corruption Act, 1947, the offence of misconduct was punishable with "imprisonment for a term which may extend to seven years, or with fine, or with both".

Nevertheless, Regulation 11 prescribed more severe punishment for corruption and misconduct committed either before or after 20 August 1975. These offences were made punishable with death, transportation for life, imprisonment for a maximum period of fourteen years and fine or confiscation of the whole or any part of the property of the person concerned.

It is noticeable that Regulation 11 applied not only to current offences, but it was also retrospective in its effect. Thus it was an ex post facto[84] Regulation as it changed the punishment, inflicted a greater punishment than the Prevention of Corruption Act annexed to the offence when committed and imposed new punishments such as death, transportation for life and confiscation of property. With regard to the offences committed before 20 August 1975, Regulation 11 violated the provisions of Article 35(1) of the 1972 Constitution of Bangladesh. As Article 35(1) of the Constitution provided that "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence". This Regulation not only violated the provisions of Article 35(1)

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84. The nature of an ex post facto law has been explained in the Corpus Juris Secundum thus: "An ex post facto law is one which makes criminal and punished an act which was done before the passage of the law and which was innocent when done, aggravates a crime or makes it greater than it was when committed, changes the punishment and inflicts a greater punishment than was prescribed when the crime was committed, or alters the legal rules of evidence and receives less or different testimony than was required to convict at the time the offence was committed. Further, an ex post facto law may be one which, assuming to regulate civil rights and remedies only, in effect imposes a penalty on the deprivation of a right for something which, when done, was lawful, deprives persons accused of crime of some lawful protection or defence previously available to them, such as the protection of a former conviction or acquittal, or of a proclamation of amnesty, or generally, in relation to the offence or its consequences, alters the situation of an accused to his material disadvantage". Corpus Juris Secundum, Vol.XVIA, Constitutional Law, Article 435, pp.140-141.

of the 1972 Constitution, it also contravened the stipulations of the International Agreement in respect of punishment, as Article 7(1) of the European Convention on Human Rights provided that no one could be "imposed" or subjected to "a heavier penalty...than the one that was applicable at the time the criminal offence was committed". Article 15(1) of the International Covenant on Civil and Political Rights, 1966, echoed exactly the same stipulations.

(v) Enhancement of Certain Rent

It is interesting to note that, in 1976, Chief Martial Law Administrator Sayem issued Regulation 18, which prohibited the enhancement of certain rent. This Regulation forbade the increase in rent of any premises which was under one thousand taka per month on 1 December 1975. The breach of the Regulation was made "punishable with imprisonment for a term which may extend to five years". It is noteworthy that never before in the history of Martial Law administration in the subcontinent had such a Regulation been issued.

Conclusion

(i) The Proclamation of Martial Law in 1975, Its Nature and Legality

The foregoing discussion reveals that, for the first time in the history of Bangladesh, Martial Law was declared on 15 August 1975, immediately after the assassination of the President of the country, Sheikh Mujibur Rahman. Martial Law was declared not to restore law and order, but to forestall any possible resistance which might arise consequent upon the assassination of Sheikh Mujib and the seizure of power by the army. It was declared at a time when the country had already been in a State of Emergency imposed on 28 December 1974. It seems that emergency powers were not considered adequate and that Martial Law was declared

as a precautionary measure to meet any public opposition and a possible threat to the newly-established regime.

Martial Law has been proclaimed in many countries, such as Pakistan, by the leaders of a coup d'état after the overthrow of a legitimate civilian regime by force, to obviate any public resistance. The authorities on Constitutional Law in Great Britain do not deal with this kind of Martial Law. It is said that "this kind of Martial Law brought about by a successful revolution constitutes a class apart and has nothing to do with 'Constitutional' Martial Law".[85] In fact, the military takeover in Bangladesh cannot be called a "revolution" in Kelsenian terms as the basic norm or the total legal order of the country, the 1972 Constitution of Bangladesh, was neither abrogated nor suspended. The Constitution remained the fundamental law of the country subject to the Proclamation, Martial Law Regulations or Martial Law Orders. Moreover, the judges of the Supreme Court were not required to take a new oath of office under the Martial Law regime and continued to exercise their normal powers and functions subject to any limitations placed on its jurisdiction by the Martial Law regime.

Therefore, it seems that the military takeover in Bangladesh in August 1975 was in the nature of a constitutional deviation rather than a 'total new dispensation' Martial Law proclaimed in Bangladesh immediately after the military takeover can be described as Martial Law sui generis - fundamentally different from the sense in which it is generally used in the common law. It is unnecessary to say that since Martial Law was proclaimed in peace-time and there was no question of restoring law and order, the proclamation of Martial Law on 15 August 1975 did not satisfy the test of the common law doctrine of necessity.

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85. See supra, p.114.

The declaration of Martial Law in Bangladesh in 1975 was an extra-constitutional act as there is no mention whatsoever of Martial Law in the 1972 Constitution. Unlike Article 196 of the 1956 Constitution and Article 223-A of the 1962 Constitution of Pakistan, the corresponding Article 46 of the 1972 Constitution of Bangladesh, that empowered Parliament to pass an Act of Indemnity in respect of any act done in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh, do not contain the words Martial Law. This omission of the words Martial Law from Article 46 of the 1972 Constitution has thus eliminated the possibility of a constitutional imposition of Martial Law and as the Constitution is the Supreme Law, it surely also excludes invocation of the common law doctrine of necessity as a basis for Martial Law even for the purpose of restoring law and order.

Therefore, it is difficult to find any basis upon which to maintain that the declaration of Martial Law in Bangladesh on 15 August 1975 was legal. Unfortunately this is an issue upon which there is no direct judicial authority. For, unlike the Supreme Court of Pakistan (in the cases of Dosso, Asma Jilani, etc.), the Supreme Court of Bangladesh has had no occasion upon which to examine and determine the legality of the imposition of Martial Law whether during the continuance, or after the withdrawal, of Martial Law. It should be stressed here that, after the withdrawal of Martial Law when the threat to the existence or jurisdiction of the Supreme Court had disappeared, it could have ascertained the legality of the Proclamation of Martial Law in 1975 as it quashed in a number of cases (e.g., in Khandaker Moshtaque Ahmed's case which will be discussed in Chapter V) the sentences passed by Martial Law Courts.

(ii) The Legality of the Assumption of the Office of President by Khandaker Moshtaque Ahmed

The assumption of the office of President by Khandaker Moshtaque Ahmed after the assassination of President Sheikh Mujib and his swearing-in as President by the acting Chief Justice on 15 August 1975 were illegal, being clearly inconsistent withe relevant provisions of the 1972 Constitution. Under this Constitution, if a vacancy occurs in the office of President, the Vice-President is to act as President until a new President is elected and the oath of office of President is to be administered by the Speaker of the House of the Nation.

However, these steps were retrospectively validated when on 20 August 1975, five days after the military takeover, Moshtaque issued a Proclamation in order to legitimise, and provide a legal framework for, his assumption of full powers of government. This proclamation suspended the provisions of the 1972 Constitution relating to the election of President, the appointment of a new President in case of a vacancy. It also modified the provisions of the Constitution concerning the oath of office of President and enacted that the Presidential oath would be administered by the Chief Justice of Bangladesh.

(iii) The 1972 Constitution and Other Laws

Unlike the 1956 and 1962 Constitutions of Pakistan, the 1972 Constitution of Bangladesh was not abrogated by the 1975 Martial Law administration. Neither was it suspended at any time during the Martial Law period (1975-1979). Although the 1972 Constitution remained in force, it ceased to exist as the Supreme Law of the country because it was made subject to the (First) Proclamation and Martial Law Regulations or Orders issued by the Martial Law regime. In case of a conflict between a provision of the 1972 Constitution and the Proclamations, Martial Law Regulations

or Orders, the latter were to prevail. Thus the 1972 Constitution assumed a subordinate status.

Although under the 1972 Constitution only Parliament had the power to amend it and the President had no authority to make and promulgate any Ordinance for altering or suspending any provision of the Constitution, the President assumed on 19 September 1975 the power of making orders on any subject specified in or provided by the 1972 Constitution by promulgating the Proclamation (First Amendment) Order, 1975 (Proclamation Order No. I of 1975). Accordingly, he amended the Constitution from time to time by issuing Proclamations (Amendments) Orders. In fact, this was contrary to his oath of office taken in accordance with (Form I of) the Third Schedule "to preserve, protect and defend the Constitution".

However, following the constitutional practice in the subcontinent, all laws in force before the declaration of Martial Law on 15 August 1975 were to continue in force, subject to the Martial Law Regulations and Orders made by the Martial Law Administration.

(iv) Martial Law Regulations Issued

Like the 1958 and 1969 Martial Law administrations of Pakistan, the 1975 Martial Law administration of Bangladesh created a large number of offences under the Martial Law Regulations, most of which had already been offences under the ordinary law. The Martial Law regime, in general, provided more severe punishments for these offences although punishments are not the end of Martial Law but only a means. Moreover, a large number of offences so created related to anti-social activities. Thus the Martial Law administration of Bangladesh went far beyond the object of Martial Law for which Martial Law Regulations are issued under the common law. It failed to realise that under this law, the creation of offences by the Martial Law Regulations is limited to the necessity for the restoration of law and order.

CHAPTER III

Basic Provisions Relating to Martial Law Courts

The President contemplated in the Proclamation (issued five days after the proclamation of Martial Law, on 20 August 1975), as pointed out earlier, the setting up of a special court or tribunal by issuing Martial Law Regulations or Martial Law Orders for the trial and punishment of any offence under Regulations or Orders or for contravention thereof, and of offences under any other law.[1] Two days after the issue of this Proclamation, on 22 August 1975, the President promulgated the Martial Law Regulations, 1975 (Regulations No.I of 1975) which provided for, inter alia, the creation of two types of special courts, namely (a) Special Martial Law Court and (b) Summary Martial Law Court.

Therefore, it is evident that a new name, i.e. Martial Law Courts, was used for the special courts created to administer Martial Law.[2] However, it seems that the Martial Law regime of Bangladesh provided for the setting up of two kinds of Martial Law Courts following the example of Pakistan where in 1958 and 1969 two types of special courts of criminal jurisdiction, namely the Special Military Court and Summary Military Court had been set up under Regulation 1-A and Regulation 2 respectively.

Regulation 2(1) provided that "The Government may, by notification

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1. Clause b(i) of the Proclamation.
2. Because in the United States of America, such courts are called "Military Commission" (Tovy, Hamilton, Martial Law and the Custom of War, London, 1886, p.101). In England, it was the long custom to apply the name court-martial to such courts indiscriminately. But since the Ex parte David Francois Marais Case (The Law Reports, Appeal Cases, London, 1902, p.109) military tribunal and later on military court (as used in Clifford and O'Sullivan, The Law Reports, Appeal Cases, Vol.II, 1921, p.570) has come to be the accepted name for the courts that are used to administer Martial Law.

in the official Gazette, constitute Special Martial Law Courts and Summary Martial Law Courts for such areas as may be specified in the notification". The government was also empowered to appoint "the Chairman and members of the Special Martial Law Courts and the members of Summary Martial Law Courts".[3]

Thus Regulation 2(1) conferred on the government the power to constitute Martial Law Courts. In this respect, it resembled the Panjab Martial Law Ordinance, 1919 (issued on 14 April 1919 by the Governor-General of India, Lord Chelmsford) which had invested the government with the authority to appoint a 'Commission' to try offences under the Bengal State Offences Regulation of 1804,[4] the Regulation that was extended to the Panjab in 1872.

Later in December 1976, by an amendment,[5] the Chief Martial Law Administrator was substituted for government as the authority to establish Special and Summary Martial Law Courts.

So it is evident that unlike the Martial Law regimes of Pakistan of 1958 and 1969, no Zonal Martial Law Administrator was empowered to set up Martial Law Courts. Rather the Chief Martial Law Administrator was invested with such power following the Peshawar Martial Law Ordinance, 1930 (No.VIII of 1930), which had provided that the Chief

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3. Regulation 2(5).
4. Article 2 of the Bengal State Offences Regulation (Regulation X of 1804) empowered the Governor-General-in-Council to establish Martial Law in any part of the British territories for any period of time while the British government in India might be engaged in war with any native or other power, as well as during the existence of open rebellion against the authority of the government and to hold immediate trial by courts martial of persons (owing allegiance to the British government in India) who might take arms in open hostility to the British government or actually commit an overt act of open rebellion or openly aid or abet the enemies of the British government.
5. The Martial Law (Twenty-Third Amendment) Regulations, 1976, (Regulations No.XXXIII of 1976), issued on 28 December 1976.

Administering authority of Martial Law could convene a Military Court to try certain offences for restoring and maintaining order.

I The Composition of the Martial Law Courts

(i) The Composition of the Special Martial Law Courts

Regulation 2(2) stated that "A Special Martial Law Court shall consist of a Chairman and two other members ...." The chairman of the Court "shall be appointed from among Sessions Judges or Additional Sessions Judges, and of the two other members of such Court, one shall be appointed from among officers of the Defence Services not below the rank of Lieutenant Colonel or equivalent and the other from among Assistant Sessions Judges or District or Additional District Magistrates".[6]

Thus a Special Martial Law Court was to be headed by a sessions judge or additional sessions judge and composed mostly (i.e. two out of three) of judicial officers serving in the Courts of Sessions or Courts of the Magistrates of the first class.[7] Thus the Special Martial Law Court, when consisted of two judges from the Courts of Sessions, bore some resemblance to that of the Commission set up under the Panjab Martial Law Ordinance No. I of 1919 as at least two out of three members of this Commission were to be persons who had served as sessions judges or additional sessions Judges for a period of not less than three years or persons qualified under Section 101 of the Government of India Act, 1915, for appointment as judges of a High Court. However, as the majority of the members of this Special Martial Law Court were to be

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6. Regulation 2(3).
7. Here it may be pointed out that there are five different classes of criminal courts in Bangladesh as provided by Section 6 of the Criminal Procedure Code, namely (1) High Court, (2) Courts of Session (that is Courts of Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge), (3) Courts of Magistrates of the first class, (4) Courts of Magistrates of the second class, and (5) Courts of Magistrates of the third class.

civilians, its decisions could not be dominated by the member representing the defence services.

But nearly six months later, on 12 February 1976, this composition of the Special Martial Law Court was countermanded. The Martial Law (Twelfth Amendment) Regulations, 1976, (Regulations No. VII of 1976) provided that "The Chairman of a Special Martial Law Court shall be appointed from among Sessions Judges or Officers of the Defence Services or Bangladesh Rifles not below the rank of Lieutenant Colonel or equivalent, and of the two other members of such Court, one shall be appointed from among officers of the Defence Services or Bangladesh Rifles not below the rank of Major or equivalent and the other from among Magistrates of the first class".

Therefore, under the new arrangement, a Special Martial Law Court could be headed by officers of the defence services or Bangladesh Rifles. Moreover, as a consequence of this new arrangement, two out of three members of the Special Martial Law Court could be from the officers of the defence services or Bangladesh Rifles and one from among magistrates of the first class whereas there were to be no members from the Courts of Sessions. This possibility of the inclusion of the majority of the members from the defence services or Bangladesh Rifles reduced the chances that the Special Martial Law Court would be impartial and independent in the dispensation of justice as contemplated in Article 10[8] of the Universal Declaration of Human Rights. Because such officers, who would dominate the decision of the Court, were part of the Martial Law administration, or the Executive; they could easily be influenced in

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8. Article 10 of the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on 10 December, 1948, provided that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligation ...."

the discharging of their judicial duties. Moreover, they were career army officers having no legal training or judicial experience to afford the accused the best security for the exercise of a fair judgment. Since Martial Law was not declared under the common law doctrine of necessity to suppress rebellion or insurrection, such composition of the Special Martial Law Court was unjustified in the light of the views expressed by Charles Clode:

> "When necessity arises "for the trial of Civilians by Courts-martial, the Commanding Officer will be careful to compose those Courts, of Men (Civil or Military) whose experience and character afford to the criminal the best security for the exercise of a sound judgment and discretion in the most solemn function of Judicial Administration .... The Court should be formed as near to the model of the highest Criminal Court as possible".[9]

In 1978, the composition of the Special Martial Law Court was again changed by the Martial Law (Twenty-Seventh Amendment) Regulations, 1978 (Regulations No. I of 1978). It provided that "The Chairman of a Special Martial Law Court shall be appointed from among Sessions Judges or Officers of the Defence Services or Bangladesh Rifles not below the rank of Lieutenant Colonel or equivalent, and of the two other members of such Court, one shall be appointed 'from among Assistant Sessions Judges or Officers of the Defence Services' or Bangladesh Rifles not below the rank of Major or equivalent and the other from among Magistrates of the first class".

Therefore, under this amendment a Special Martial Law Court could be composed of two members either from the Courts of Sesssions or from the officers of the defence services and one from among magistrates of

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9. Clode, Charles, The Administration of Justice Under Military and Martial Law, London, 1872, p.167.

the first class. By providing for the possibility of such a Court consisting of two members from the Courts of Sessions and one from among magistrates of the first class, the amendment widened the scope of dispensing fair justice to the accused by judges who were obviously not part of the Martial Law administration. Such a composition of the Special Martial Law Court was unexampled in the history of Martial Law Administration in the subcontinent.

(ii) The Composition of the Summary Martial Law Courts

Regulation 2(2) provided that "... a Summary Martial Law Court shall consist of only one member". Regulation 2(4) stated that "The member of a Summary Martial Law Court shall be appointed from among Magistrates of the first class or officers of the Defence Services not below the rank of Major or equivalent".

This composition of the Summary Martial Law Court resembled that of Summary Military Courts established in Pakistan in 1958 and 1969 under Regulation No.1-A[10] and Regulation No.2[11] respectively. Since there was a scope for constituting this one member-Court with an officer of the defence services having no legal training and who was part of the Executive, this Court, when so constituted, could not be called independent and impartial in dispensing fair justice to the accused.

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10. As Regulation No.1-A, issued on 7 October, 1958, provided that "An Administrator of Martial Law may, by general or special order, empower any Magistrate of the first class or any military or naval or air force officer provided that he has been specially selected for this particular duty to hold a Summary Military Court in his area of administration for the trial of any offence committed in that area ...."
11. Regulation No.2 of 1969 was the exact reproduction of Regulation No.1-A of 1958.

II Provisions Regarding the Trial of Offences by the Martial Law Courts

Elaborate provisions were made for the summary trial of offences by the Martial Law Courts (i) determining the power and jurisdiction of such courts, (ii) providing procedure for taking cognizance of offences both under Martial Law Regulations and ordinary law, (iii) denying the right to be defended by lawyer on trial before a Summary Martial Law Court, (iv) placing the admitting of bail at the will of the prosecution, (v) barring appeal to any court of law against the judgment of the Martial Law Courts, (vi) granting review by way of relief, (vii) providing for the confirmation of death sentences and sentences of life imprisonment by the President, (viii) allowing the transfer of cases from ordinary courts to the Martial Law Courts, and finally (ix) prohibiting all courts, including the High Court and the Supreme Court, from calling into question any order, judgment or the proceedings of the Martial Law Courts.

(i) The Powers and Jurisdiction of the Martial Law Courts

Regulation 2(6) of the Martial Law Regulations, 1975 (Regulations No. I of 1975) provided that "A Martial Law Court may try any offence punishable under these Regulations or under any other law". Later the words 'these Regulations' were replaced by words "any Martial Law Regulation or Order".

Thus Regulation 2(6) introduced identical provisions with regard to the powers of the Martial Law Courts as Regulation No.1-A[12] of

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12. Regulation No.1-A stated, inter alia that "... Special Military and Summary Military Courts shall have the power to try and punish any person for contravention of Martial Law Regulations or Orders or for offences under the ordinary law". When Martial Law was promulgated in Pakistan on 25 March, 1969, the provisions of this Regulation No.1-A were also reproduced intoto in Regulation No.2 of 1969.

Pakistan, issued on 7 October 1958, had provided for. However, Regulation 2(6) invested the Martial Law Courts with a very wide jurisdiction: they were empowered to try not only offences punishable under Martial Law Regulations or Orders but their jurisdiction was also extended to offences punishable under ordinary law or under any special act at the expense of the civilian courts. Thus the Martial Law Courts were given concurrent jurisdiction with the criminal courts over offences under the ordinary law of the land and with any special tribunal over the offences under the special statutes.

But the criminal courts were not given concurrent jurisdiction with the Martial Law Courts to try offences under the Martial Law Regulations although the ordinary criminal courts were retained and they continued with their respective jurisdiction. In other words, while the Martial Law Courts apart from offences under Martial Law Regulation would also try offences under the ordinary law, the ordinary criminal courts would not try cases under Martial Law Regulations. In this respect, the Martial Law government of Bangladesh departed from the tradition of providing the criminal courts with the power to try Martial Law cases as established by the British Martial Law administration in India and the Martial Law regimes of Pakistan in 1958 and 1969.[13]

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13. Because when Martial Law was promulgated in Malabar in 1921 by the British government in India, the ordinary criminal courts were empowered under the Martial Law Ordinance (Ordinance No.II of 1921) to try any offence in respect of which the military commander made such a direction to the court and also any offence against a Martial Law Regulation or Martial Law Order which was not triable by a Summary Court. Similarly, when Martial Law was proclaimed in the town of Sholapur (of India) in May 1930 to suppress riot, ordinary criminal courts, instead of Martial Law Courts, were given power to deal with all offences (of assisting, relieving, concealing or harbouring any mutineer, rebel and rioter) punishable under the Sholapur Martial Law Ordinance No.IV of 1930. The Martial Law Ordinance No.VIII of 1930, under which Martial Law was declared in Peshawar on 16 August, 1930 to cope with a formidable incursion of

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However, since the ordinary courts were allowed to function normally during the Martial Law period, the extension of the jurisdiction of Martial Law Courts to try offences under the ordinary law is difficult to justify. As Justice Mushtaq Hossain in the case of Mir Hassan v. the State[14] observes that:

> during the Martial Law, "when the ordinary courts are open and functioning, persons accused of offences against ordinary law have to be brought before them, and them alone, to be dealt with according to the law".[15]

A similar view was expressed by Robert M. King:

> "It is, however, the duty of those enforcing Martial Law not to interfere unnecessarily with the exercise by the ordinary courts of their civil and criminal functions, in matters not affecting the conduct of the war."[16]

Afridi tribesmen (who posed as liberators) from beyond the frontier into Peshawar, also granted to the ordinary criminal courts the power to try offences against a Regulation or Martial Law Order with the exception of those which were to be tried by the special courts created by the Ordinance. Following this British tradition, the Martial Law regime of Pakistan in 1958 under Regulation Nos.1-A and 2 invested the criminal courts, in addition to their normal jurisdiction, with the power to try and punish any person for contraventions of Martial Law Regulation or Orders although that was countermanded within five months of the promulgation of Martial Law by Martial Law Regulation No.66 (issued on 28 February, 1959). The Martial Law government of Pakistan in 1969 empowered the criminal courts to try only those Martial Law cases which were transferred to them. (Clause C of Martial Law Regulation No.3 of 1969). Martial Law Regulation No.45, which was issued by the Chief Martial Law Administrator on 28 May 1969 and reconstituted Martial Law Regulation No.3, also provided that "Notwithstanding anything contained in these regulations the ordinary courts, including a High Court, shall exercise their respective jurisdiction in respect of (a) offences other than offences created by these regulations; and cases relating to offences created by these regulations which are transferred to such courts for trial".

14. All Pakistan Legal Decisions, Lahore, Vol.XXI, 1969, p.786.
15. Ibid., p.811.
16. King, Robert M., "Martial Law II", The Cape Law Journal, Vol.XVII, 1900, p.136.

This view was also held by the law officers of the Crown, the then Attorrey-General Sir John Campbell (afterwards Lord Campbell) and Solicitor-General Sir R. M. Rolfe (afterwards Lord Cranworth), who were called upon to give an opinion as to the legality of adopting punitive measures against the Canadian insurgents in the rebellion of 1837 to 1838:

> "It is hardly necessary for us to add that, in our view of the case, Martial Law can never be enforced for the ordinary purposes of civil or even criminal justice, except in the latter, so far as the necessity arising from actual resistance compels its adoption."[17]

Regulation 2(7) laid down that "A Special Martial Law Court may pass any sentence authorised by the Regulation or law for the punishment of the offence tried by it, and a Summary Martial Law Court may pass any sentence authorised by the Regulation or law for the punishment of the offence tried by it except death, transportation or imprisonment for a term exceeding five years".

Thus in respect of the powers of imposing sentences by a Special Martial Law Court, this Regulation was, so to say, identical with clause b(ii)[18] of Regulation No.1-A of Pakistan, issued on 7 October, 1958, which had empowered the Special Military Court "to pass any sentence authorised by law or by these Regulations". But Regulation 2(7) invested the Summary Martial Law Court with wider powers of passing sentences of transportation or imprisonment for a term not exceeding

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17. Forsyth, William, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence, London, 1869, p.199.
18. When Martial Law was proclaimed in Pakistan in 1969 and Special Military Court was created under Regulation No.2, this clause b(ii) of Regulation No.1-A of 1958 was reproduced in Regulation No.2 of 1969 as clause B(II).

five years in comparison with clause c(iv)[19] of Regulation No.1-A of Pakistan which had given the Summary Military Court the power to pass only a sentence of transportation or imprisonment not exceeding one year. Thus it is evident that although a magistrate of the first class under Section 32 of the Criminal Procedure Code could pass any sentence of imprisonment for a term not exceeding two years, such a magistrate when appointed to hold a Summary Martial Law Court was empowered under Regulation 2(7) to impose a higher sentence of imprisonment for a term up to five years,

Regulation 3(3), which dealt with territorial jurisdiction of Martial Law Courts, laid down that "Proceedings in respect of an offence triable under these (i.e. Martial Law) Regulations alleged to have been committed by any person may be taken before a Martial Law Court having jurisdiction in the place where that person is for the time being or where the offence or any part thereof was committed".

This Regulation is, so to say, the reproduction of Section 27(2)[20] of the Special Powers Act, 1974, the Act which came into operation on 9 February 1974 and was enacted by the Bangladesh Parliament to provide for "special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith".[21] However, the provisions contained in Regulation 3(3) in the matter of territorial

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19. Clause C(iv) of Regulation No.1-A of 1958 of Pakistan provided that the Summary Military Court "may pass any sentence authorised by law or by these Regulations except death, transportation or imprisonment exceeding one year or whipping exceeding 15 stripes". This was also reproduced in Regulation No.2 of 1969 as clause C(iv).
20. Section 27(2) of the Special Powers Act, 1974 read: "Proceedings in respect of an offence triable under this Act alleged to have been committed by any person may be taken before the Special Tribunal having jurisdiction in the place where that person is for the time being or where the offence or any part thereof was committed."
21. Preamble of the Special Powers Act, 1974.

jurisdiction are, to a great extent, identical with Section 177[22] of the Criminal Procedure Code, which deals with ordinary place of inquiry or trial, except for the words "where that person is for the time being".

Later in 1976 an explanation was added[23] to Regulation 3(3) which provided for extra territorial jurisdiction in respect of an offence triable under the Martial Law Regulations committed outside Bangladesh. As it stated that "when an offence triable under these (i.e. Martial Law) Regulations is committed outside Bangladesh, it shall be deemed to have been committed within the territorial limits of the jurisdiction of the Martial Law Court in which the person committing the offence is found" "or was ordinarily residing before he left Bangladesh".[24]

Although the provisions embodied in this explanation were not dissimilar to the general provisions contained in Section 118[25] of the Criminal Procedure Code relating to the extraterritorial jurisdiction of the criminal offences, the explanation did not embody the two provisoes which were to be found in that Section.[26]

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22. Section 177 of the Criminal Procedure Code provided that "Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed".
23. The explanation was added to Regulation 3(3) by the Martial Law (Ninth Amendment), Regulations 1976, (Regulations No.III of 1976).
24. The words "or was ordinarily residing before he left Bangladesh" were added to the explanation by the Martial Law Regulations No.XXXI of 1976.
25. The general provisions as contained in Section 188 of the Criminal Procedure Code are: when a citizen of Bangladesh commits an offence at any place without and beyond the limits of Bangladesh or when any person commits an offence on any ship or aircraft registered in Bangladesh wherever it may be, he may be dealt with in respect of such offence as if it had been committed at any place within Bangladesh at which he may be found.
26. Proviso 1 of Section 188 of the Criminal Procedure Code speaks of political agents to certify fitness of enquiry into charges. It states that where the offence is committed at any place without and beyond Bangladesh, no charge as to any such offence shall be inquired into in Bangladesh unless the political agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in Bangladesh; and, where there is no political agent,

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(ii) The Procedures of the Martial Law Courts

When Martial Law was proclaimed in the Panjab in 1919, in Malabar in 1919, and in Peshawar in 1930 during British rule in India, provisions were made to the effect that Commissions in the case of the Panjab or the Military Courts in the two other cases would follow the procedure regulating trials by the General Courts-Martial, and the Summary General Courts-Martial respectively as prescribed by the Indian Army Act, 1911.[27] Similarly, in Pakistan when Martial Law was proclaimed in 1958 and 1969, the Special Military Courts and Summary Military Courts constituted were to follow the same procedure as the Field General Court-Martial and Summary Court-Martial respectively convened under the Pakistan Army Act, 1952 except in certain matters.[28] But the Bangladesh Martial Law regime, instead of following this practice, laid down elaborate procedures for trials by the Martial Law Courts, which in most cases bore some resemblance to the procedure of Special Tribunal established under the Bangladesh Special Powers Act, 1974.

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the sanction of the government shall be required.

Proviso 2 provides that any proceedings taken against any person under Section 188 which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in Bangladesh shall be a bar to further proceedings against him under the Extradition Act, 1903, in respect of the same offence in any territory beyond the limits of Bangladesh.

27. Under the Panjab Martial Law Ordinance, 1919, the Commission had to follow in all matters the procedure regulating trials by General Courts-Martial prescribed by the Indian Army Act, 1911. The Malabar Martial Law (Military Courts) Ordinance, 1921 and the Peshawar Martial Law Ordinance 1930 (No.VIII of 1930) laid down that a Military Court would follow the same procedure as a Summary General Courts-Martial convened under the Indian Army Act except that a memorandum of evidence given at the trial and the statement, if any, made by the accused were required to be recorded. The finding and sentence of a Military Court were to be confirmed by the convening officer, and a sentence of death was required to be reserved for confirmation by the General Officer commanding the district.

28. Regulation No.1-A of 1958, and Regulation No.2 of 1969, Pakistan.

(a) The Conditions Requisite for the Initiation of Proceedings

Regulation 3(1) described the conditions requisite for the initiation of proceedings before Martial Law Courts. It provided that: "A Martial Law Court shall take cognizance of an offence on a report in writing made by a Police Officer not below the rank of Deputy Superintendent or an officer of any of the Defence Services not below the rank of Major or equivalent". But there was a proviso to the effect that "no report shall be entertained by a Martial Law Court in respect of an offence under any law, other than these Regulations, if there is no order of the Government directing the making of such report to such Court".

Thus Regulation 3(1) provided a very limited scope for the purpose of taking cognizance of an offence triable both under the Martial Law Regulations and any other law. Unlike the Criminal Procedure Code, this Regulation provided only one procedure for taking cognizance, namely, upon a report of the officers concerned, and precluded the exercise of jurisdiction by any court by taking cognizance suo motu, upon information from any person other than the officer mentioned, or upon receipt of a complaint.[29]

However, the provisions contained in Regulation 3(1) in the matter of taking cognizance of an offence only upon a report of the officers concerned bore some resemblance to Section 27(1) of the Special Powers Act, 1974 inasmuch as the latter also had provided for only one procedure of taking cogniznace, namely on a report in writing

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29. As Section 190 of the Criminal Procedure Code states that District Magistrate, or Sub-Divisional Magistrate, or any Magistrate specially empowered, may take cognizance of an offence upon - (a) receiving a complaint; (b) a police-report in writing; (c) information from any person other than a police-officer; and (d) his own knowledge or suspicion.

made by a police officer not below the rank of sub-inspector.[30]

It is evident that Regulation 3(1) did not provide for the commitment procedure which was the normal procedure under the Criminal Procedure Code. Thus the Summary Martial Law Court could not refer any case to the Special Martial Law Court when it considered that the facts and circumstances of the case called for a greater punishment than it had jurisdiction to impose. However, here it may be pointed out that under Section 193 of the Code of Criminal Procedure, a Court of Session does not take cognizance of an offence as a court of original jurisdiction unless the accused has been committed to it by a competent magistrate.[31] Additional sessions judges and assistant sessions judges try such cases as the government may direct them to try or the sessions judges may make over to them. But when a sessions judge or an additional sessions judge was appointed to act as a chairman of the Special Martial Law Court, or an assistant sessions judge as a member of it, they were to take cognizance of an offence under the ordinary law, apart from Martial Law offences, on a report in writing made by an officer concerned on the order of the government directing the making of such report to such court.

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30. As Section 27(1) of the Special Powers Act, 1974 states that a "Special Tribunal ... shall not take cognizance of any such offence (i.e. offences triable under the Act) except on a report in writing made by a police officer not below the rank of Sub-Inspector."

31. Under the Criminal Procedure Code, any District Magistrate, Sub-Divisional Magistrate or first class Magistrate or any Magistrate specially empowered by the Government may commit any person for trial to the Court of Session or High Court. No person triable by the Court of Session is committed to the High Court (Section 206). After taking evidence and examining the accused, if the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he frames a charge declaring the offence which he is charged with. (Section 210). After examining the witness, the Magistrate may make an order committing the accused for trial by the High Court or Court of Session and, briefly records the reasons for such commitment. But if he is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused. (Section 213).

No guidelines were provided in Regulation 3(1) or by any Martial Law Regulation or Order as to the nature or class of offences under the ordinary law which were to be reported on the direction of the government to any Martial Law Court for taking cognizance. It enabled the government to give such direction arbitrarily, which in effect contravened the right of equality before the law guaranteed by Article 27 of the 1972 Constitution. This aspect will be discussed in greater detail towards the close of this chapter. However, if the Martial Law Court took cognizance of an ordinary offence in the first instance, the question of appeal did not arise, as there was no right of appeal against its decisions. In this context the observation of Justice S. A. Mahmood in the case of Ghazi v. the State[32] is worth quoting:

> "Substantive rights such as right of appeal comes into existence when a civil action is brought and not when cause of action accrues. Similarly such right accrues in criminal cases when cognizance of an offence is taken by a court and not before ...."[33]

Later, on 28 December 1976, Regulation 3(1) was amended by the Martial Law (Twenty-Third Amendment) Regulations, 1976 (Regulations No.XXXIII of 1976). After amendment, the Regulation read:

> "Except as otherwise provided in any Martial Law Regulation or Order, a Martial Law Court shall take cognizance of an offence punishable under any Martial Law Regulation or Order on a report in writing made by a Police Officer not below the rank of Inspector or an officer of the Bangladesh Bureau of Anti-Corruption not below the rank of Inspector or Deputy Assistant Director or an officer of any of the Defence Services not below the rank of any Commissioned Officer".

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32. All Pakistan Legal Decisions, Lahore, Vol.XIV, 1962, p.662.
33. Ibid., p.672.

But there was an exception to the effect that "Martial Law Court may take cognizance of an offence (of smuggling) under Regulation 19 on a report in writing made by a Sub-Inspector of Police or an Assistant Inspector of the Bangladesh Bureau of Anti-Corruption". With regard to the cognizance of a civil offence by a Martial Law Court, it was provided that "A Martial Law Court shall take cognizance of an offence punishable under any other law on a report in writing made by a Police Officer or any Officer of the Bangladesh Bureau of Anti-Corruption if the Chief Martial Law Administrator directs the making of such report to such Court".[34]

Therefore, it is evident that the amended Regulation 3(1) brought about changes in the rank of the officers concerned, on whose report a Martial Law Court would take cognizance of an offence punishable under any Martial Law Regulation or Order. Originally, any police officer not below the rank of deputy superintendent or any officer of any of the defence services not below the rank of major or equivalent had been given the power of making such report. But now any police officer not below the rank of inspector or an officer of any of the defence services not below any commissioned officer was invested with such power. Therefore, the junior officers of both the defence services and the police force were given this power. Moreover, the amended Regulation authorised, for the first time, an officer of the Bangladesh Bureau of Anti-Corruption not below the rank of inspector or deputy assistant director to make such a report. Thus the effect of the amended Regulation 3(1) was that it expanded the number of officers who were empowered to report Martial Law offences to the Martial Law Court.

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34. Regulation 3(1a) as added by the Martial Law (Twenty-Third Amendment) Regulations, 1976.

On the other hand, like the original Regulation 3(1), Regulation 3(1a) did not authorise an officer of any of the defence services not below the rank of major or equivalent to make a report before the Martial Law Court on an offence punishable under ordinary law for taking cognizance by it. Instead, apart from a police officer, any officer of the Bangladesh Bureau of Anti-Corruption was empowered to make such a report. Unlike the original Regulation 3(1), Regulation 3(1a) invested any police officer irrespective of his rank with the power of making a report before the Martial Law Court on a civil offence, following a Section 190(1)(b)[35] of the Criminal Procedure Code. The newly added Regulation 3(1a) also replaced the government by the Chief Martial Law Administrator as the authority to pass an order directing the making of a report before a Martial Law Court on any offence punishable under ordinary law. But like the original Regulation 3(1), no guidelines were provided for the classes of offences punishable under the ordinary law which were to be reported to the Martial Law Court by the officers concerned on the direction of the Chief Martial Law Administrator.

(b) Times of Sittings and Places of the Martial Law Courts

Regulation 3(4) provided that "A Martial Law Court may sit at such times and places as it deems fit or as the Government may direct".

This Regulations was the reproduction of the provisions contained in Section 27(3)[36] of the Special Powers Act, 1974. However, later in

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35. Section 190(1)(b) of the Criminal Procedure Code provided that any District Magistrate, or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence upon a report in writing of facts which constitute such offence made by any police officer.
36. Section 27(3) of the Special Powers Act, 1974, stated that "A Special Tribunal may sit at such times and places as it deems fit or as the Government may direct".

1976 the Chief Martial Law Administrator was substituted,[37] for the government as the authority to direct a Martial Law Court with regard to its time of sittings and places.

(e) Trial in Camera by the Special Martial Law Courts

Almost one year after the Proclamation of Martial Law, provisions were made by the Martial Law (Nineteenth Amendment) Regulations, 1976 (Regulations No.XXIII of 1976), issued on 30 July, 1976, for trial in camera by a Special Martial Law Court. It provided that "if the Chairman of a Special Martial Law Court so decides it may sit in camera".[38] Later, in August 1976, it was provided that "Where a Special Martial Law Court sits in camera, the Chairman of the Court may, if he deems necessary, require any person attending or otherwise participating in the conduct of the trial to make an oath of secrecy that he will not disclose anything that may come to his knowledge in, or in connection with, such trial; and the disclosure of any information in contravention of the oath shall be punishable with imprisonment for a term which may extend to three years and with fine".[39]

The provisions relating to trial in camera did not strictly violate the fundamental right of the accused to a "public trial" because clause 6 of Article 35 of the 1972 Constitution of Bangladesh states that public trial as envisaged in clause 3 of Article 35 will not "affect the operation of any existing law which prescribes any ... procedure for trial". In fact, this preserves the provisions of Section 352 of the

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37. By the Martial Law (Twenty-Third Amendment) Regulations, 1976, Regulations No.XXXIII of 1976, issued on 28 December, 1976.
38. The words in inverted commas were added to Regulation 3(4).
39. The Martial Law (Twenty-First Amendment) Regulations, 1976, Regulations No.XXVI of 1976, issued on 23 August, 1976.

Criminal Procedure Code which, although ensuring that the courts are to be open, provide that "the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court". However, the provisions relating to trial in camera contravened the accepted standards of international human rights of law as contained in Article 10 of the Universal Declaration of Human Rights which read: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him". Thus, by providing provisions for trials in camera, the Martial Law regime acted contrary to the very purpose of public trial, the purpose "to guarantee that the accused would be fairly dealt with and not unjustly condemned".[40] It can be said that publicity in the administration of justice is one of the surest guarantees of liberty.

(d) The Adjournment of Trial by the Martial Law Courts

Regulation 3(6) provided that "A Martial Law Court shall not adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interest of justice".

These provisions contained in this Regulation were exactly identical with those of Section 27(5)[41] of the Special Powers Act, 1974.

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40. Justice Clark in the case of Estes v. Texas, United States Supreme Court Reports, Lawyers' Edition, Second Series, Vol.XIV, p.548.
41. As Section 27(5) of the Special Powers Act, 1974, laid down that "A Special Tribunal shall not adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interest of justice".

The Peshawar Martial Law Ordinance, 1930 (No.VIII of 1930) had also embodied similar provisions.[42] However, unlike the Criminal Procedure Code,[43] Regulation 3(6) did not require the Court to record the reasons for adjournment. Neither did it specify the reasons except the vague words "in the interest of justice" for which adjournment could be made. Instead, it invested the Martial Law Court with the discretionary power to adjourn any trial.

(e) The Summary Trial of the Martial Law Offences

Regulation 3(5) provided that "A Martial Law Court trying an offence under these (i.e. Martial Law) Regulations shall try such offence summarily and in trying such offence such Court shall follow the procedure laid down in the Code of Criminal Procedure, 1898 (V of 1898), ... for summary trial of summons cases".

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42. The Peshawar Martial Law Ordinance, 1930, provided that the Special Tribunals were not bound to adjourn the trial for any purpose unless such adjournment was considered by them to be necessary in the interest of justice.

43. Sections 344(1), 508 and 526(8) of the Criminal Procedure Code deal with the adjournment of trial or inquiry. Section 344(1) provides that "If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court (of Magistrate) may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable ...." Section 508 of the Code states that in every case in which a commission is issued for the examination or taking of the evidence of a witness whose evidence is necessary for the ends of justice, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution of the commission and its return.
Section 526(8) of the Code lays down that if, in the course of any inquiry or trial, or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court his intention to make an application of transfer, the Court adjourns the case or postpones the appeal for a reasonable time for the application to be made and an order to be obtained thereon.

The provisions contained in this Regulation were just the reproduction of Section 27(4)[44] of the Special Powers Act, 1974.

Here it may be pointed out that "summons cases" are those cases which are punishable with imprisonment for six months or under, the rest are all "warrant cases".[45] Since all Martial Law offences, most of which were already offences under ordinary law as pointed out earlier, were punishable with death, transportation or imprisonment for a term exceeding six months, the cases relating to such offences were obviously warrant cases, and they were liable to be tried under warrant procedure as laid down in the Criminal Procedure Code.[46] The trial of such offences under procedure prescribed for summary trial of summons cases meant that the recording of the evidence of the witness or framing of a formal charge was not necessary, although in some cases the recording of the substance of the evidence of each witness was to be made.[47] Here it may be stressed that in a summary trial under the Criminal Procedure Code, "No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction"[48] and if a longer sentence of imprisonment exceeding three months is necessary in the interest of justice, "the procedure prescribed for summons cases shall be followed in summons cases, and the procedure prescribed for warrant cases shall be followed in warrant cases"[49] according to the nature of the offence.

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44. Section 27(4) of the Special Powers Act, 1974 stated that "A Special Tribunal trying an offence under this Act shall try such offence summarily and in trying such offence such Special Tribunal shall follow the procedure laid down in the Code (of Criminal Procedure) for summary trial of summons cases".
45. Clauses (1)(v) and (1)(w) of Section 4 of the Criminal Procedure Code.
46. The warrant procedures are laid down in Sections 252-259 of the Criminal Procedure Code.
47. Sections 263 and 264, the Criminal Procedure Code.
48. Section 262(2), ibid.
49. Section 262(1), ibid.

Later the Martial Law (Twenty-Third Amendment) Regulations, 1976, (Regulations No.XXXIII of 1976) issued on 28 December 1976, stated that "A Martial Law Court shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds". It also provided that "The Chairman of a Special Martial Law Court may make such arrangements as he deems necessary for the making of the memorandum of substance of evidence, writing of judgment and administration of the affairs of the Court".

The provisions embodied in this Regulation in the matter of recording evidence were, so to say, identical with Section 355(1)[50] of the Code of Criminal Procedure. However, since all Martial Law cases were warrant cases, under Section 356 of the Code, the evidence of each witness, not the memorandum of the substance of the evidence, was liable to be taken down in writing.

(f) The Martial Law Courts and Absconding Persons

Regulation 3(7) provided that "If a Martial Law Court has reason to believe that an accused person has absconded or is concealing himself so that he cannot be arrested and produced before it for trial, it may, by order notified in the official Gazette, direct the said person to appear before it within such period as may be specified in the order; and if the said person fails to comply with such direction, he may be tried in his absence and his property may be forfeited to the Government".

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50. Section 355(1) of the Criminal Procedure Code provides that in summons-cases tried before a Magistrate (not summarily) and in trial of certain offences by a Magistrate of the first or second class, "the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Thus it is apparent that, unlike Section 87 of the Criminal Procedure Code, the Regulation did not state the minimum time of thirty days to be given to the accused absconding or concealing himself from the date of the publishing of such an order of the Martial Law Court and did not require the order to be published by (a) publicly reading it in some conspicuous place of the town or village in which the absconding person resides; (b) affixing it to some conspicuous part of the house or homestead in which he resides or to some conspicuous place of such a town or village; and (c) affixing its copy to some conspicuous part of the court-house. Instead Regulation 3(7) gave the Martial Law Court the discretionary power to fix any period within which the absconding person would have to appear before the court and the order of such Court was to be notified in the official Gazette. This was not appropriate particularly because Government's Gazettes were not easily available in villages where most of the accused absconding or concealing themselves lived.

Under Regulation 3(7), the property of the absconding accused would be forfeited to the government if he did not appear before the Martial Law Court within the period specified in its order notified in the official gazette. But under the Criminal Procedure Code, although the court issuing proclamation for compelling appearance of absconding persons was empowered under Section 88(1) at any time to order the attachment of any property belonging to the proclaimed person, "the property under attachment shall be at the disposal of the Government" if the proclaimed person did not appear within the time specified in the proclamation, and such property "shall not be sold until the expiration of six months from the date of the attachment ...."[51] Even, if within two years from the date of the attachment, such a

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51. Section 88(7) of the Criminal Procedure Code.

proclaimed person appeared or was apprehended and brought before the court, and proved to the satisfaction of such a court that he had not absconded or concealed himself, and that he had no notice of the proclamation requiring him to attend within the time specified therein, such property, or if it had been sold, the net proceeds of the sale was, after deducting all costs incurred in consequence of the attachment, delivered to him".[52] Thus, if within two years from the date of attachment, the accused absconding failed to satisfy the court as to the reason for his absence, only then his property under attachment or sale proceeds of such property stood forfeited to government, But Regulation 3(7) provided provision for straight forfeiture of the property of the absconding accused to the government and contained no provision for the restoration of the property to the absconding accused.

Regulation 3(7) empowered the Martial Law Court to try an absconding accused in absentia who had failed to appear before the court in accordance with the time specified in the order notified in the official gazette. But under the ordinary law of the land, there was no provision for the trial of such an accused in his absence.[53]

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52. Section 89 of the Criminal Procedure Code.
53. Under the Code of Criminal Procedure, the court, after issuing a proclamation for compelling appearance of the absconding person and attachment and sale of property of such a person, may proceed under Section 512 if the absconder is an accused person. Section 512 states that "If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the court competent to try or commit for trial such a person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such a person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable".

(g) Trial De Novo

Regulation 5, which put a bar on trial de novo, stated that "A Martial Law Court, unless it otherwise decides, shall not be bound to recall or re-hear any witness whose evidence has already been recorded, or to re-open proceedings already held, but may act with evidence already produced or recorded and continue the trial from the stage which the case has reached".

The provisions contained in this Regulation were just the reproduction of Section 31[54] of the Special Powers Act, 1974. Regulation 5 was also identical with Section 350(1)[55] of the Criminal Procedure Code, with the exception that it did not contain the most important provision which gave the accused the right to demand that the witness or any of them be re-summoned and re-heard.

(iii) Provisions Relating to Legal Representation

With regard to legal representation, Regulation 3(8) stated that "No lawyer shall appear or plead before a Summary Martial Law Court on

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54. Section 31 of the Special Powers Act, 1974, provides that "A Special Tribunal, unless it otherwise decides, shall not be bound to recall or re-hear any witness whose evidence has already been recorded or to re-open proceedings already held, but may act on the evidence already produced or recorded and continue the trial from the stage which the case has reached".

55. Section 350(1) of the Criminal Procedure Code provides that "whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial:
Provided as follows:
(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witness or any of them be re-summoned and re-heard; ...."

behalf of the accused, but the accused may be assisted and advised by any person he chooses who shall be called the friend of the accused".

Thus this Regulation denied the right to a person accused of an offence either under Martial Law Regulation or under ordinary law to be defended by a legal practitioner before a Summary Martial Law Court, but not before a Special Martial Law Court. No such discrimination between the accused persons is recognised under Section 340(1) of the Criminal Procedure Code which states that "Any person accused of an offence before a criminal court, or against whom proceedings are instituted under the Criminal Procedure Code in any such court, may of right be defended by a pleader". However, Regulation 3(8) violated the right of an arrested person to be defended by a lawyer as guaranteed by Article 33(1) of the 1972 Constitution of Bangladesh which provides that "No person who is arrested shall be ... denied the right to consult and be defended by a legal practitioner of his choice". It should be noted here that the right of defence by a legal practitioner given to the arrested person by Article 33(1) extends to defence in a trial in a criminal court as the arrest of a person on the accusation of a crime is a step in an intended criminal proceedings against him and it is at his subsequent trial in the criminal court for the alleged crime he is to be defended by a counsel.

Although an accused before a Summary Martial Law Court was not allowed to be defended by a lawyer, he was allowed to be helped and advised by a person of his own choice who would be called the friend of the accused. But such a friend might have little or no knowledge of law to help and advise the accused person in any substantial way. So no trial for an offence under Martial Law Regulations or under any other law in a Summary Martial Law Court could be fairly conducted and justice accorded to an accused who was not represented by a lawyer. It is generally agreed that any person brought into court cannot be

assured of a fair trial unless counsel is provided for him. The need of an accused person for a lawyer has been forcefully described by Justice Sutherland of the American Supreme Court in the case of Powell v. Alabama.[56] As he observes:

> "The right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated lawyer has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[57]

Thus the denial of the right of the accused to the services of a lawyer in a trial before a Summary Martial Law Court exposed him to the danger of being convicted upon insufficient, irrelevant or inadmissible evidence and without a proper charge. In this context, it may be pointed out that even under Section 113 of the Bangladesh Army Act Rules, 1954, an accused person at a trial by Summary Court-martial could have a "legal adviser" to assist him during the trial.

(iv) Provisions Relating to the Grant of Bail:

With regard to the power of the court to admit to bail, Regulation 6(2) stated that "No person accused or convicted of an offence punishable under these Regulations shall, if in custody, be released on bail by a Court or Tribunal without the consent of the prosecution".

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56. United States Supreme Court Reports, Lawyers' Edition, Vol.LXXVII, p.158.
57. Ibid, p.170.

Thus under this Regulation, the ultimate authority to grant bail in cases relating to offences punishable under Martial Law Regulations was given, instead of to the Martial Law court or tribunal, to the prosecution. Therefore, the granting of bail depended on the will of the prosecution rather than the discretion of the Martial Law Court. But under the Criminal Procedure Code, there was no such restriction on the power of the criminal court to grant bail: no consent of the prosecution was at all necessary. Under it, the power of the High Court or Court of Session to admit to bail was discretionary.[58] This discretionary power was not arbitrary but was judicial and was governed by established principles.[59]

In this context, it may be mentioned here that the restriction imposed by the Martial Law regime of Bangladesh on the power of the Martial Law Court to grant bail had not been resorted to by the Martial Law regimes of Pakistan in 1958 and 1969. For example, Martial Law Order No.8, issued by the Chief Martial Law Administrator of Pakistan on 27 April 1969, provided that "Whereas it is expedient to grant bail, pending investigation or trial, to persons charged under Martial Law Regulation/Orders in certain cases ... the President of the (Special

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58. For example, Section 498 of the Criminal Procedure Code provided that "... the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police-officer or Magistrate be reduced".

59. In exercising the discretionary power of granting bail, the following matters are generally taken into consideration: the seriousness of the charge (i.e. whether the offence charged is heinous and is under public condemnation); the nature of the evidence; the severity of the punishment prescribed for the offence; whether the accused is a habitual offender in the crime with which he is charged, or is, in other respects, of criminal bent of mind; whether on account of his detention his dependents would be deprived of their subsistence; age, health and sex of the accused; whether the accused, if at liberty, would tamper with and destroy the evidence intended to be adduced against him.

Military) Court or the Summary Military Court after examining the case and the gravity of the offence so committed by the accused, may order bail of the accused against appropriate cash or personal sureties. The bail will only be granted when it is not apprehended that the accused would either tamper with prosecution evidence or that he would abscond and the case against him is not of a serious nature". Thus under this Martial Law Order, the principles which governed the decisions of Military Courts to grant bail were not dissimilar to those followed by an ordinary criminal court.[60]

(v) Provisions Relating to Appeal from the Judgment of the Martial Law Courts

Originally Regulation 4(1) of the Martial Law Regulations, 1975 (Regulations No.1 of 1975) provided that "No appeal shall lie from any unanimous judgment or decision of a Special Martial Law Court or from any judgment or decision of a Summary Martial Law Court". But "If any judgment or decision of a Special Martial Law Court is not unanimous, an appeal from such judgment or decision shall lie to an Appellate Tribunal which shall consist of one member to be appointed by the Government from among persons who are or have been Judges of the Supreme Court or of any High Court that functions at any time in the territory of Bangladesh".[61] Such an appeal "shall have to be preferred within fifteen days of the delivery of judgment".[62] The Appellate Tribunal could, "on appeal, confirm, set aside, enhance, vary or modify any judgment or sentence and the decision of such tribunal shall be final".[63] It "shall, for the purpose of hearing an appeal, have the same powers and follow as nearly as possible, the same procedure as are

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60. Ibid.
61. Regulation 4(2).
62. Regulation 4(6).
63. Regulation 4(7).

vested in and followed by the High Court Division under the Code".[64]

Thus it is evident that no appeal was allowed from any unanimous decision of the Special Martial Law Court and from any judgment of the Summary Martial Law Court, including the judgment pronounced by them while trying civil cases. Appeal was provided for only against those decisions or judgments of Special Martial Law Courts which were not unanimous. But, instead of empowering any court of law to hear such an appeal, a separate forum of appeal, i.e. the Appellate Tribunal, was created. However, the provision for a limited appeal to an Appellate Tribunal against the decision of a Martial Law Court was unprecedented in the history of Martial Law Administration in the subcontinent.

Here it may be pointed out that the provisions contained in the Regulation relating to the composition, power and procedure of Appellate Tribunal were, to a great extent, the reproduction of Section 30[65] of the Special Powers Act, 1974 (XIV of 1974).

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64. Regulation 4(8).
65. Originally, under Section 30 of the Special Powers Act, 1974, appeals from the judgments of the Special Tribunal would lie to the High Court Division of the Supreme Court of Bangladesh. But these provisions of Section 30 were amended by the Special Powers (Amendment) Act, 1974 (No.LIX of 1974). And the provisions of this amended Section were largely reproduced in clauses 2, 6, 7 and 8 of Regulation 4. The amended Section 30 provided that: "(1) An appeal from the judgment of, or sentence passed by, a Special Tribunal may be preferred to the Appellate Tribunal ... within thirty days of the delivery or passing thereof ... (2) The Government shall, for the purposes of this Act, constitute an Appellate Tribunal consisting of one member to be appointed by the Government. (3) The member of the Appellate Tribunal shall be a person who is, or is qualified to be appointed as, a Judge of the Supreme Court. (4) The Appellate Tribunal may, on appeal, confirm, set aside, enhance, vary or modify any judgment of, or sentence passed by, a Special Tribunal, including a direction under Section 34A, and the decision of the Appellate Tribunal in an appeal shall be final. (5) The Appellate Tribunal shall, for the purpose of hearing an appeal under this Act, have the same powers and follow, as nearly as possible, the same procedure as are vested in and followed by the High Court Division under the Code. (6) Where a Special Tribunal passes a sentence of death, the proceedings shall be submitted forthwith to the Appellate Tribunal and the sentence shall not be executed unless it is confirmed by

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Whatever limited appeal was provided for against the decision of a Special Martial Law Court that itself was taken away on 28 December 1976 by the promulgation of the Martial Law (Twenty-Third Amendment) Regulations, 1976. As this Regulation read: "No appeal shall lie from any order, judgment or sentence of a Martial Law Court".

Thus the Martial Law regime of Bangladesh ultimately prohibited any kind of appeal against any judgment or sentence including death sentences or sentences of life imprisonment passed in a Martial Law case or a civil case by any Martial Law Court, Special or Summary. Therefore, a person convicted of a Martial Law offence or of a civil offence was denied the right of taking the decision of a Martial Law Court to a court of law or to any appellate authority with a view to ascertaining whether the judgment pronounced against him was sustainable. Since Martial Law was not proclaimed under the common law doctrine of necessity to restore law and order, most of the Martial Law offences were already offences under ordinary law, and above all, the Martial Law Courts were empowered to try ordinary offences, the denial of the right of appeal against judgment of Martial Law Courts cannot be justified.

(vi) Review of Sentences Passed by the Martial Law Courts

Originally, Regulation 4(3) of the Martial Law Regulations, 1975 (Regulations No.1 of 1975) provided that "All proceedings of Special Martial Law Courts shall be submitted to the Government for review ...." But all proceedings of Summary Martial Law Courts were "to be submitted to the Sessions Judge, within whose jurisdiction they held the trial, for review".[66] "The Government or a Sessions Judge, as the case may be,

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the Appellate Tribunal".

66. Regulation 4(4).

may, on review, reduce any sentence".[67] Regulation 4(10) provided that "No lawyer shall appear or plead before the Government or a Sessions Judge at the time of review of a case".

Thus review was granted to the convicts as a remedy against the judgment of Martial Law Courts, the remedy for which there was no provision in the Criminal Procedure Code of Bangladesh. However, it is evident that, although review was granted by way of relief, no particular mode of disposing of a review matter was provided for. This enabled the government and the sessions judges, as the reviewing authorities of the judgments of Special and Summary Martial Law Courts respectively, to dispose of the review as they saw fit. Moreover, the convicts were not given any right of hearing, legal representation or personal appearance at the time of review of the judgments of cases. Therefore, it seems that the review was not a judicial but an administrative review. Since there was no provision for review in the Criminal Procedure Code, it can be said that the Sessions Judge, when acting as the reviewing authority under clauses (4) and (5) of Regulation 4, acted not as a criminal court but as a persona designata.

However, the conferment of the power of reviewing the decisions of Martial Law Courts on the government and the sessions Judge was unprecedented in the history of Martial Law administration in the subcontinent.[68]

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67. Regulation 4(5).
68. For example, when Martial Law was declared in Pakistan in 1958 and in 1969, all proceedings of Special Military Courts, after confirmation by the Administrator, were to be sent to the Judge Advocate-General for final review. (Martial Law Order No.1 of 1958, the provisions of which were exactly reproduced in Martial Law Order No.2 of 1969). Of course, later on 18 April 1959, the Martial Law regime of Pakistan changed the forum of review by promulgating Martial Law Regulation No.66-A which read: "Nothing in this Regulation shall prevent a review of sentence,- (a) by the Deputy Chief Martial Law Administrator where the sentence is not less than seven years' rigorous imprisonment; or (b) by the Martial Law

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However, the Martial Law (Twenty-Third Amendment) Regulations, 1976 (Regulations No.XXXIII of 1976), issued on 28 December 1976 by Major-General Ziaur Rahman who had replaced President A. M. Sayem as the Chief Martial Law Administrator on 29 November 1976, changed the forum of review. With regard to the reviewing authority of the decision of the Special Martial Law Court, it provided that "All proceedings of a Special Martial Law Court shall, immediately after the termination thereof, be submitted to the Chief Martial Law Administrator for review". He "may, on review, set aside, vary or modify any order, judgment or sentence or make orders for retrial of such other orders as he deems necessary for the ends of justice".

Thus the government was replaced by the Chief Martial Law Administrator as the reviewing authority of the judgments of Special Martial Law Courts. Unlike the Chief Martial Law Administrators of Pakistan in 1958 and 1969, the Chief Martial Law Administrator of Bangladesh took such power, perhaps, in order to assume an effective and dominant role in the dispensation of justice and, as such, he widened the scope of the review power. Previously the government as the reviewing authority, could, on review, only reduce any sentence passed by the Special Martial Law Court. But now the Chief Martial Law Administrator might, on review, set aside, vary, or modify any order, judgment or sentence or make orders for retrial or such other orders as he deemed necessary for the ends of justice. Thus he assumed

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Administrator concerned in all other cases - where the Chief Martial Law Administrator sees fit, by general or special order, to direct such review".

With regard to the review of the judgment of Summary Military Courts, clause (c)(v) of Regulation No.1-A of 1958, Pakistan, provided that "The proceedings of every Summary Military Court shall without delay be forwarded for review to the Administrator of Martial Law in the area in which the trial was held". This was reproduced in clause (c)(v) of Regulation No.2 of 1969 of Pakistan.

the ultimate authority of providing relief in respect of judgments of Special Martial Law Courts, the authority which was largely parallel to the powers of Appellate Court[69] in disposing of appeal under the Criminal Procedure Code.

Later on 4 June 1977, The Martial Law (Twenty-Fourth Amendment) Regulations, 1977, (Regulations No.III of 1977) provided that "All proceedings of Special Martial Law Courts shall, immediately after the termination thereof, be submitted to the Government for review". "The Government may, on review, set aside, vary or modify any order, judgment or sentence or make orders for retrial or such other orders as it deems necessary for the ends of justice".

Thus only five months later, the power of review reverted to the government, i.e., the government was substituted for the Chief Martial Law Administrator as the reviewing authority. In an interview, the then Principal Staff Officer (Martial Law Affairs) said that this was done as the task of carrying out review was considered as an additional burden.[70] However, although the Chief Martial Law Administrator was replaced by the government as the reviewing authority, the wide power conferred on the Chief Martial Law Administrator by the Martial Law (Twenty-Third Amendment) Regulations, 1976, was retained.

With regard to the review of sentences passed by the Summary Martial Law Court, the Martial Law (Twenty-Third Amendment) Regulations,

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69. Section 423 of the Criminal Procedure Code empowered the Appellate Court, inter alia, in an appeal from conviction to - (a) reverse the finding and sentence, and (i) acquit or discharge the accused, or (ii) order him to be retried by a court of competent, jurisdiction or committed for trial; or (b) alter the finding, maintaining the sentence; or (c) reduce the sentence; or (d) alter the nature of the sentence but not so as to enhance the same. It may, in an appeal from an order, alter or reverse such order. It may also make any amendment or any consequential or incidental order that may be just or proper.
70. The interview took place in September 1984.

1976 (Regulations No.XXXIII of 1976), the Regulations which replaced the government by the Chief Martial Law Administrator as the reviewing authority of sentences passed by a Special Martial Law Court, provided that "All proceedings of Summary Martial Law Courts shall, immediately after the termination thereof, be submitted to the Zonal Martial Law Administrator, within whose jurisdiction the trials were held, for review". "A Zonal Martial Law Administrator may, on review, set aside, vary or modify any order, judgment or sentence or make order for retrial or such other orders as he deems necessary for the ends of justice". But "no order setting aside any order, judgment or sentence or for retrial shall be made by a Zonal Martial Law Administrator without the prior approval of the Chief Martial Law Administrator."

Thus the sessions judge was replaced by an army personnel having no legal background as the review authority in respect of sentences passed by a Summary Martial Law Court. Therefore, this new forum of review of judgments pronounced by Summary Martial Law Court became identical with that of Summary Military Court constituted in Pakistan during 1958 and 1969 Martial Law.[71] But unlike the 1958 and 1969 Martial Law regimes of Pakistan, the Martial Law regime of Bangladesh defined the scope of the review power of the Zonal Martial Law Administrator. Before the promulgation of the Martial Law (Twenty-Third Amendment) Regulation, 1976, the sessions judge had been given independent power, on review, to reduce any sentence passed by the Summary Martial Law Court. But this Regulation conferred on the Zonal Martial Law Administrator the wider power of review. He could, on review, set aside, vary or modify any order, judgment or sentence or make orders for retrial or such other orders as he deemed fit. Although

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71. Supra, footnote no.68, pp.187-188.

the Zonal Martial Law Administrator could pass an order to vary or modify any order, judgment or sentence of Summary Martial Law Court independently, while to pass the order setting aside any order, judgment or sentence or for retrial, he had to obtain prior approval of the Chief Martial Law Administrator to this effect. But no such restriction whatsoever was imposed by the Martial Law regimes of Pakistan in 1958 and 1969 on the review power accorded to the Martial Law Administrator.[72]

Later the Martial Law (Twenty-Fifth Amendment) Regulations, 1977 (Regulations No.VIIIA of 1977), issued on 14 November 1977, provided that "All proceedings of Summary Martial Law Courts shall, immediately after the termination thereof, be submitted to the Sessions Judge within whose jurisdiction the trials were held, for review". "A Sessions Judge may, on review, set aside, vary or modify any order, judgment or sentence or make orders for retrial or such other orders as he deems necessary for the ends of justice".

Thus the power of review in respect of sentences passed by the Summary Martial Law Court was given back to the sessions judge: Zonal Martial Law Administrator was substituted by the sessions judge as the reviewing authority. The change of the forum of review was inevitable in view of the fact that on 9 November 1977, five days before the promulgation of the Martial Law (Twenty-Fifth Amendment) Regulations, 1977, all orders relating to the creation of zones and the appointment of Zonal Martial Law Administrators had been repealed with immediate effect. Although this change occurred as a result of necessity arising out of such repeal, the return of the power of review to the sessions judge was a healthy step in the direction of the administration of

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72. Ibid.

justice. However, the wide power of review as conferred on the Zonal Martial Law Administrator was also given to the sessions judge. But unlike the Zonal Martial Law Administrator, the sessions judge could independently, on review, pass any order setting aside the judgment or make orders for retrial; no prior approval of the Chief Martial Law Administrator was necessary.

(a) The Finality of the Sentences Passed by the Martial Law Courts upon Review

With regard to the finality of the sentences passed by Martial Law Courts, the Martial Law (Twenty-Third Amendment) Regulations, 1976, provided that "Subject to review, all orders, judgments and sentences of a Martial Law Court shall be final".

Thus the proceedings of Martial Law Courts received finality upon review by the appropriate authority. But under Section 430 of the Criminal Procedure Code, generally all judgments and orders passed by an Appellate Court upon appeal were to be final.

(vii) Confirmation of Certain Sentences Passed by the Special Martial Law Courts

Regulations 4(2) provided that "... all sentences of death or transportation for life shall have to be confirmed by the President".

The conferment on the President of the power to confirm death sentences passed by Martial Law Court was unexampled in the history of Martial Law Administration in the subcontinent.[73] However, apart from

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73. Because, under the Malabar Martial Law (Military Courts) Ordinance, 1921, and the Peshawar Martial Law Ordinance, 1930 (No.VIII of 1930), a sentence of death passed by the Military Court was required to be reserved for confirmation by the General Officer Commanding the district and the General Officer Commanding-in-Chief respectively. Even the Martial Law regime of Pakistan in 1958 made the provisions that all death sentences passed by the Special Military Court were required to be confirmed by Martial Law

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death sentences, the sentences of transportation for life passed by the Special Martial Law Court were also to be confirmed by the President. But under Section 374 of the Criminal Procedure Code, only the death sentences passed by the Courts of Session were liable to be confirmed and the authority for such confirmation was the High Court.

Although the President was empowered to confirm death sentences, he could not pass any other sentence warranted by law or annul the conviction or acquit the accused person or order a fresh trial while discharging his duties[74] as the sentences and judgments of Martial Law Courts were invested with finality on review. It would, therefore, appear that this power of confirmation was conferred on him as a matter of routine without any real significance. Here it may be mentioned that under Article 57 of the 1972 Constitution, the President had the power to grant pardon, reprieve and respite, and to remit, suspend or

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Administrator (Clause b(ii) of Regulation No.1-A, issued on 7 October 1958) although a few days later it was provided that all sentences of death imposed under the Martial Law Regulations both by criminal courts and Special Military Courts were to be kept reserved for confirmation by the Chief Martial Law Administrator (Martial Law Order No.5, issued on 11 October 1958). The 1969 Martial Law Administration also provided that all death sentences passed by the Special Military Court were to be reserved for confirmation by the Chief Martial Law Administrator, Clause B(III) of Martial Law Regulation No.2 of 1969.

74. But under Section 375(1) of the Criminal Procedure Code, if, when proceedings of death sentences passed by the Court of Sessions are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.
Section 376 of the Code states that when a death sentence passed by the Session Judge is submitted to the High Court, it - "(a) may confirm the sentence, or pass any other sentence warranted by law, or (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or (c) may acquit the accused person ...."

commute any sentence passed by any court, tribunal or other authority. But the question of exercising such powers only arose on the submission of mercy petitions to him.

(viii) Provisions for Transfer of Cases

Regulation 3(2) of the Martial Law Regulations, 1975, provided that "The Government may transfer a case from one Martial Law Court to another Martial Law Court or from a Criminal Court or Special Tribunal to a Martial Law Court". Subsequently, the Martial Law Regulations No.XXIII of 1976 also empowered the government to transfer a case from a Special Martial Law Tribunal to a Special Martial Law Court. However, on 28 December 1976, the Martial Law (Twenty-Third Amendment) Regulations, 1976, added an explanation to Regulation 3(2) which read: "A case triable by a Court of Session pending before a Magistrate for inquiry may also be transferred to a Martial Law Court for trial". It also replaced the government by the Chief Martial Law Administrator as the authority of transferring cases.

It is evident that no guidelines were provided in Regulation 3(2) as to which of the cases were liable to transfer from a criminal court or a Special Tribunal to a Martial Law Court. The absence of such a guideline provided the scope for the government/the Chief Martial Law Administrator to exercise the power of transferring cases by a process of picking and choosing. Moreover, no reasons were specified in this Regulation for the transfer of a case from an ordinary court to a Martial Law Court or from one Martial Law Court to another. Provisions were not even made for the hearing of the accused concerned before making such a transfer. Therefore, as a result of such an arbitrary transfer, the accused concerned was deprived of the protection that he

normally enjoyed under Chapter XLIV[75] of the Criminal Procedure Code.

However, the transfer of a case from a criminal court to a Martial Law Court deprived the accused of the right of -

(a) legal representation, if tried before a Summary Martial Law Court,

(b) appeal, and

(c) equality before the law.

(a) As pointed out earlier, under Section 340(1) of the Criminal Procedure Code any person accused of an offence before a criminal court or against whom proceedings are instituted under the Criminal Procedure Code in any such court, may of right be defended by a pleader. But if such a case was transferred from a criminal court to a Summary Martial Law Court, the accused concerned was deprived by Regulation 3(8) of the right to be defended by a lawyer.

(b) It is said that "the right of appeal is not a matter of procedure, but is a substantive right, that the institution of a suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit, that the right of appeal is a vested right and exists as on and

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75. For example, under Chapter XLIV of the Criminal Procedure Code, whenever it appears to the High Court (1) on the report of the lower court, or (2) on the application of a party interested; or (3) on its own initiative that - (a) a fair and impartial inquiry or trial cannot be had in any criminal court, or (b) some question of law of unusual difficulty is likely to arise, or (c) a view of the place in or near which any offence has been committed may be required for satisfactory inquiry or trial, or (d) an order under this Section will tend to the general convenience of the parties or witness, (e) such an order is expedient for the ends of justice, or is required by any provision of this Code: it may order that - (i) any offences be inquired into or tried by any court not empowered under SS.177 to 184, but in other respects competent to inquire into or try such offence; (ii) any particular case or appeal be transferred from a criminal court to any other criminal court of equal or superior jurisdiction, (iii) any particular case or appeal be transferred to and tried before itself; or (iv) an accused person be committed for trial to itself or to a Court of Session. (Clauses 1 and 3 of Section 526). Thus the Criminal Procedure Code did not allow arbitrary transfer of cases, it allowed the transfer on certain specified grounds.

and from the date the lis commences and not by the law that prevails at the date of its decision and that this vested right can be taken away only by subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise".[76] Therefore, since the right to file an appeal is a vested right and it becomes vested the moment a proceeding or lis commences or prosecution is lodged in a court of law, the transfer of a case from the ordinary criminal court to a Martial Law Court would entail the loss of that right to move the superior courts in the normal judicial hierarchy of the country as against the decision of a Martial Law Court there was no right of appeal. Similarly, the transfer of a case from the court of a Special Tribunal to a Martial Law Court deprived the accused of the right to an appeal before an Appellate Tribunal provided for by the Special Powers Act, 1974.

(c) The arbitrary transfer of an ordinary case from a criminal court or a Special Tribunal to a Martial Law Court violated the right of equality before the law as guaranteed by Article 27 of the 1972 Constitution. Because in one case the accused, if tried by a criminal court, could have a lawyer to defend himself and the right of appeal to a superior court whereas in an exactly similar case, another accused would be deprived of the right of appeal if he was tried by a Special Martial Law Court. However, the situation was even worse if the accused was tried by a Summary Martial Law Court as in this case he would be deprived not only of the right of appeal but also the right of legal representation. Thus the arbitrary transfer of a case from an ordinary court to a Martial Law Court led to differential treatment of the persons accused of similar offences. In this respect, the observation of Justice Badrul Haider Chowdhury of the High Court

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76. All Pakistan Legal Decisions, Lahore, Vol.XIV, 1962, p.671.

Division of the Supreme Court (as he then was in 1978) in the case of Haji Joynal Abedin v. the State[77] is worthy of note. He observed that:

> "a law which provides for trial of particular cases by special court or by procedures which differs substantially from the ordinary procedure to the prejudice of the accused is a violation of equality before law if there is no classification and if the enactment does not give any underlying policy to determine as to which cases will go before special court ...."[78]

But in 1981, the same Justice while sitting at the Appellate Division of the Supreme Court of Bangladesh contradicted himself and expressed a totally different view in the case of Ehteshamuddin v. Bangladesh[79]:

> In this case "the transfer (to the Special Martial Law Court) was done by the Chief Martial Law Administrator, whereas, in the case of Haji Joynal Abedin it was done by the Government as the law stood then. Therefore the question of such supplying guide-line to the executive achieved some importance in view of the argument that basis for arbitrary exercise of power has been laid by such a wide conferment of power without supplying any guide-line. In the present case, the Chief Martial Law Administrator has transferred the case and since this power has been conferred upon him, the question of guide-line would not be relevant. He himself has passed the law and then acted under it .... Whether such power of transfer may operate in discriminatory manner ... will be decided in an appropriate case".[80]

It should be stressed here that what is of vital importance is not as to who transfers the case from a criminal court or a Special Tribunal to a Martial Law Court but the fact that in the absence of guidelines the arbitrary transfer contravened the principle of equality before the law.

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77. Dhaka Law Reports, Vol.XXX, 1978, p.371.
78. Ibid., p.395.
79. Dhaka Law Reports, Appellate Division, Vol.XXXIII, 1981, p.154.
80. Ibid., pp.173-174.

(ix) The Exclusion of the Jurisdiction of Civil Courts from Questioning the Judgments or Proceedings of the Martial Law Courts:

Regulation 4(9) of the Martial Law Regulations stated that "... no order, judgment, decision or sentence of a Martial Law Court shall be called in question in any manner whatsoever in or before any Court, including (the High Court[81] and) the Supreme Court". These provisions were not considered enough and, as such, later on 28 December 1976, it was enacted that "No Court, including the High Court and the Supreme Court, shall call for the records of the proceedings of any Martial Law court for any purpose whatsoever".[82]

The above provisions bore resemblance to clause 8 of Regulation No.61,[83] as reconstituted and issued on 4 February 1959 by the Chief Martial Law Administrator of Pakistan, and Article 3(iii)[84] of the Laws (Continuance in Force) Order, 1958, issued on 10 October 1958 by President Iskander Mirza of Pakistan. The effect of these provisions was that no court, including the High Court and the Supreme Court, shall have any normal power to call in question any judgment or sentence of the Martial Law Court even when it involved a death sentence or a sentence pronounced in a criminal case. Even the power of the criminal court to call for and examine the records of any proceeding before Martial Law Court in respect of a case under both ordinary law and

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81. The words within square brackets were added to Regulation 4(9) by the Martial Law (Twenty-Third Amendment) Regulations, 1976.
82. Ibid.
83. Clause 8 of Regulation No.61, as reconstituted on 4 February 1959, provided that "The constitution or jurisdiction of any Military Court whether designated as a Special Military Court or as a Summary Military Court and the proceedings before any such Court, and orders passed or sentences imposed in any such proceedings, shall not, on any ground whatsoever be called in question in any Court, including the High Court and the Supreme Court".
84. Clause (iii) of Article 3 of the Laws (Continuance in Force) Order, 1958, stated that no court nor any person could call or permit to be called in question any finding, judgment or orders of a Special Military Court or of a Summary Military Court.

Martial Law Regulations for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such a court was ended.[85] Thus the jurisdiction of any court to give any form of relief to an accused person during his trial or conviction by a Martial Law Court, whether in a Martial Law case or in a civil case, was completely ended - a state of affairs which is contrary to the principle of natural justice.

Conclusion

To sum up, like the 1958 and 1969 Martial Law regimes of Pakistan, the 1975 Martial Law regime of Bangladesh provided for the setting up of two types of Martial Law Courts, namely the Special Martial Law Court and the Summary Martial Law Court, parallel to the existing civilian courts. Like the Military Courts established in Pakistan during 1958 and 1969 Martial Law, the jurisdiction of Martial Law Courts of Bangladesh was extended to the trial of offences under the ordinary law - which had previously been the exclusive jurisdiction of the civilian courts. Provisions were made for the transfer of cases from ordinary court to Martial Law Court or from one Martial Law Court to another. But no guidelines were provided for such a transfer. As a result, the transfer could be random without any set standards or

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85. But under Section 435 of the Criminal Procedure Code, the High Court, a Sessions Judge, a District Magistrate, or any Sub-Divisional Magistrate specially empowered has power - (1) to call for and examine the record of any proceedings before an inferior criminal court, within its or his jurisdiction, for the purpose of satisfying itself or himself as to ; (i) the correctness, legality, or propriety, of any finding, sentence, or order; (ii) regularity of any proceedings of such court; (2) to direct that the execution of any sentence be suspended, and the accused, if in confinement, be released on bail or on his own bond pending the examination of the record.

criteria, depending on the capricious will of the Government/the Chief Martial Law Administrator which ultimately violated the right of equality before the law. However, unlike the British Martial Law administration in India and the Martial Law regimes of Pakistan in 1958 and 1969, the ordinary criminal courts were not given concurrent jurisdiction to try offences under Martial Law Regulations. The Martial Law Courts comprised members who were career armed forces officers with no legal training or qualification and, as such, could not be expected to exercise a fair judgment. Unlike the previous Martial Law administration in the subcontinent, the detailed procedures of Martial Law Courts were laid down which mostly resembled the Special Powers Act, 1974 of Bangladesh rather than the procedures of any courts-martial under the Army Act. However, as a result of the trial before a Martial Law Court, an accused suffered a number of disabilities. The evidence was not required to be taken in full. The accused could not be defended by a lawyer in a trial before the Summary Martial Law Court. Trials before the Special Martial Law Court could be held in camera. Contrary to the normal procedure, the granting of bail to a person accused or convicted of a Martial Law offence was made subject to the consent of the prosecution. Ultimately, the right of appeal was extinguished. Unlike the British Martial Law administration in India which in Malabar in 1929 and in Peshawar in 1930 had allowed the right of appeal against sentences of death and life imprisonment,[86] even no

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86. As the Malabar Martial Law (Supplementary) Ordinance, 1921 (No.III of 1921) and the Peshawar Martial Law Ordinance, 1930 (No.VIII of 1930), which made provisions for the constitution of Special Tribunals to try any offence connected with the event which necessitated the enforcement and continuance of Martial Law, provided that in case of a sentence of death, transportation for life or for imprisonment for ten years or more, an appeal would lie to the High Court.

provision was made for the right of appeal in case of such sentences. For the first time in the history of Martial Law Administration in the subcontinent, President was invested with the power to confirm death sentences. He was also empowered to confirm sentences of life imprisonment. But he could not interfere with these sentences while exercising the power of confirmation. Only review was provided for by way of remedy. Unlike the Martial Law administration in Pakistan in 1958 and 1969, the powers of review in respect of sentences passed by Summary Martial Law Court and Special Martial Law Court were given to sessions judge and the government. Thus no Justice of the High Court or the Supreme Court was given the power to review any sentence passed by a special Martial Law Court although the sessions judge was invested with the power to review any sentence passed by the Summary Martial Law Court. However, since no personal hearing, legal representation or particular procedure for review was provided for, the remedy of review failed to give the convict any substantial relief. Like the 1958 Martial Law regime of Pakistan, the jurisdiction of the courts, including the High Court and the Supreme Court, was excluded from calling the records of the proceedings or calling in question any order, judgment, decision or sentence of Martial Law Courts. Thus the constitutional and legal safeguards to ensure a fair trial and natural justice disappeared and, indeed, allowed for the miscarriage of justice.

CHAPTER IV

Establishment and Operation of Martial Law Courts

Having considered the basic provisions relating to Martial Law Courts in the previous chapter, attention will now be given to the establishment, composition and functioning of Martial Law Courts. The forthcoming discussion will show how a dual system of justice was established: the new Martial Law Courts existed side by side with the ordinary criminal courts. It will further reveal how, in general, legally trained judges were excluded from Martial Law Courts and how cases were arbitrarily transferred from criminal courts or Special Tribunals to Martial Law Courts or from one Martial Law Court to another. It will in addition demonstrate that sometimes Martial Law Regulations were amended to suit the trial of a particular person and the way in which the Judiciary asserted themselves after the withdrawal of Martial Law. The discussion will also show the manner in which at times the administration of Martial Law justice was carried out.

I The Establishment and Composition of the Special Martial Law Courts

The Martial Law administration of Bangladesh set up ten Special Martial Law Courts for the whole of Bangladesh between 28 August 1976 and July 1977. It constituted the first two Special Martial Law Courts, Special Martial Law Court No.I and II, on 28 August 1975, only thirteen days after the promulgation of Martial law. The composition of these two courts is shown in Table I:

Table I[1]

Name of Court	Chairman	Member from the Armed Forces	Member from the Courts of Sessions
Special Martial Law Court No.I	Sessions Judge	Lieutenant Colonel	Assistant Sessions Judge
Special Martial Law Court No.II	Sessions Judge	Wing Commander	Assistant Sessions Judge

Thus the majority of the members of the Special Martial Law Courts Nos.I and II, including the chairmen, were from the Courts of Sessions. But this composition of the courts was not destined to remain in existence for long. On 25 February 1976, the Martial Law Government renamed the Special Martial Law Court No.I and Special Martial Law Court No.II as Special Martial Law Court No.I, Dhaka and Special Martial Law Court No.II, Dhaka, respectively and changed the original composition of these two courts by virtue of the Martial Law (Twelfth Amendment) Regulations, 1976.[2] The composition of these two Special Martial Law Courts and the other eight Special Martial Law Courts established during the Martial Law period, are shown in Table II:

1. Table I is prepared on the basis of Notification No.1068-JIV/Con-4/75, issued by the Ministry of Law, Parliamentary Affairs, and Justice on 28 August 1975.
2. See supra, Chapter III, p. 158.

Table II[3]

Name of Court	Chairman	Member from the Armed Forces	Member from First Class Magistrate
Special Martial Law Court No.I, Dhaka	Sessions Judge	Squadron Leader	First Class Magistrate
Special Martial Law Court No.II, Dhaka	Wing Commander (who had previously been the member of the court)	Major	First Class Magistrate
Special Martial Law Court No.III, Comilla	Lieutenant Colonel	Major	First Class Magistrate
Special Martial Law Court No.IV, Chittagong	Lieutenant Colonel	Major	First Class Magistrate
Special Martial Law Court No.V, Rang Pur	Lieutenant Colonel	Major	First Class Magistrate
Special Martial Law Court No.VI, Jessore	Sessions Judge	Major	First Class Magistrate
Special Martial Law Court No.VII, Bogra	Lieutenant Colonel	Major	First Class Magistrate
Special Martial Law Court No.VIII, Dhaka	Colonel	Lieutenant Colonel	First Class Magistrate
Special Martial Law Court No.IX, Sylhet	Additional District Judge	Major	First Class Magistrate
Special Martial Law Court No.X, Mymensingh	Additional District Judge	Major	First Class Magistrate

There were nineteen districts in Bangladesh. Although the above ten Special Martial Law Courts were named after eight districts, their jurisdiction was extended for the whole of Bangladesh. Special

3. Table II is prepared on the basis of Notification No.128-JIV/Con-4/75 issued by the Ministry of Law and Parliamentary Affairs on 25 February 1976; The Bangladesh Times, Dhaka, 9 March 1976; Notification No.704-JIV/Con-4/75 issued by the Ministry of Law and Parliamentary Affairs on 1 September 1976; Notification Nos. 321/1(1)/CMLA, 321/1(2)/CMLA, 321/1(3)/CMLA, issued by the Office of the Chief Martial Law Administration on 18 January, 1 May and

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Martial Law Court No.I, while sitting in Dhaka, for example, could try a case from Dhaka district or any other district of the country. It is evident from Table II that the majority of the Special Martial Law Courts were headed by officers of the army and air force. This shows that the Martial Law regime preferred officers of the armed forces without legal qualification or experience to sessions judges as chairmen of the Special Martial Law Courts.

II The Establishment and Composition of the Summary Martial Law Courts

In October 1975, the Martial Law government of Bangladesh constituted nineteen Summary Martial Law Courts for all the nineteen districts of the country. Later, between February 1976 and July 1977, it set up twenty Additional Summary Martial Law Courts.[4] It also set up fifty Summary Martial Law Courts in the fifty sub-divisions of the nineteen districts[5] between 8 September 1976 and 6 November 1976. The composition of these Summary Martial Law Courts are shown below:

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3. (continued)
   1 June 1977, respectively. Here it may be pointed out that Special Martial Law Courts Nos.III, IV, V, VI, VII were set up in 1976 and Special Martial Law Courts Nos.VIII, IX and X were set up in 1977.
4. Two additional Summary Martial Law Courts were established for the district of Dhaka.
5. The fifty Summary Martial Law Courts set up at the sub-divisional level and the Additional Summary Martial Law Court of Tangail district were dissolved on 10 July 1977, the day on which fifteen Additional Summary Martial Law Courts were established. Notification No.322/2/CMLA/7-77 issued by the Office of the Chief Martial Law Administrator, on 10 July 1977.

Table III[6]

Name of Court	No. of Courts Composed of First Class Magistrate	No. of Courts Composed of Major
Summary Martial Law Court at district level	14 Courts composed of First Class Magistrates	5 Courts composed of Majors
Additional Summary Martial Law Court at district level	17 Courts composed of First Class Magistrates	3 Courts composed of Majors
Summary Martial Law Court at sub-divisional level	50 Courts composed of First Class Magistrates	Nil

The above table shows that the majority of the Summary Martial Law Courts were composed of first class magistrates and only a very few consisted of majors, who had no legal experience or training and, as such, could not be expected necessarily to act in accordance with the strict requirements of law.

III Martial Law Courts and Ordinary Courts: A Dual System of Justice

Here it may be recalled that the question of establishing Martial Law Courts arises when it is necessary to administer prompt and speedy justice for the restoration of law and order. Since the 1975 Martial Law of Bangladesh was not declared in time of war, or to suppress open rebellion or armed insurrection amounting to war, the setting up of such a vast number of Summary Martial Law Courts and Special Martial Law Courts cannot be justified. As Chief Justice

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6. Table III is prepared on the basis of various notifications issued by the Ministry of Law and Parliamentary Affairs of Bangladesh in 1975 and 1976 and the Office of the Chief Martial Law Administrator in 1977: Notification Nos.1253-JIV/1T-4/75 (issued on 20 October 1975); 129-JIV/1-T-4/75 (issued on 25 February 1976); 248-JIV/1T-4/75 (issued on 17 April 1976); 724-JIV/1T-3/76 (issued on 8 September 1976); 725-JIV/1T-3/76 (issued on 8 September 1976); 739-JIV/1T-3/76; 740-JIV/1T-3/76; 741-JIV/1T-3/76; 742-JIV/1T-3/76 (these four notifications were issued on 14 September 1976); 803-JIV/1T-3/76 (issued on 13 October 1976); 865-JIV/1T-3/76 (issued on 6 November 1976); 322/1/CMLA/4-c/77 (issued on 10 July 1977).

Muhammad Munir in the case of Muhammad Umar Khan v. the Crown[7] observed:

> "Now the setting up of special military courts with a view to punishing people for contravention of Martial Law Regulations or orders can be justified only to the extent that the orders passed by such courts were during the martial law period considered necessary for the preservation or restoration of order".[8]

Moreover, the ordinary courts of the land were open and effectively functioning. Therefore, they could try the Martial Law offences specified by the Martial Law regime, most of which were already offences under the ordinary law. There was no need to establish Martial Law Courts. As in 1838, the Attorney-General and Solicitor-General, Sir John Campbell and Sir R.M. Rolfe, had given their joint opinion against the trial of Canadian rebels by Martial Law Courts, while the civil courts were open:

> "...we are of opinion that the prerogative (of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors) does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the Irish rebellions of 1798 and 1803, and also of the Irish Coercion Act of 1833".[9]

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7. Pakistan Law Reports, Lahore, Vol.VI, 1953, p.825.
8. Ibid., pp.842-843.
9. Forsyth, William, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence, London, 1869, pp.198-199. Here it may be pointed out that the Irish Parliament in 1799 in the Act of 39 Geo 3, c.11 removed any doubt that might have

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A similar view was expressed by Justice Muhammad Afzal Zullah in the case of Zia-ur Rahman v. the State:[10]

> "When the Courts are open and functioning effectively under the normal law, there is no justification for establishing Special Military Courts for trial of civilians".[11]

Although Martial Law in Bangladesh in 1975 was declared in times of peace and the ordinary courts were open and functioning, even the exercise by the ordinary courts of their civil and criminal functions was interfered with. After the setting up of Martial Law Courts, the cases pending before criminal courts under the ordinary law of the land or the cases pending before Special Tribunals under the Special Powers Act, 1974, were transferred to the Martial Law Courts. The number of cases transferred between 1975 and 1978 from criminal courts or Special Tribunals to Martial Law Courts, or from one Martial Law Court to another or from Special Martial Law Tribunal to Martial Law Court are shown below:

Table IV[12]

Cases Transferred in the Year 1975

Name of Court from Where Cases were Transferred	Name of Court to Which Cases were Transferred	Number of Cases Transferred
Special Tribunal	Special Martial Law Court	4
Courts of Session	" " "	3
Special Magistrate	" " "	2
	Total	9

9. (continued)
existed on the point by specially enacting that persons might be punished according to Martial Law, whether the ordinary courts of justice should or should not at such time be open.

10. All Pakistan Legal Decisions, Lahore, Vol.XXIV, 1972, p.382.

11. Ibid., p.397.

12. Table IV is prepared on the basis of various notifications issued by the Ministry of Law, Parliamentary Affairs and Justice in 1975:

CONTINUED ON FOLLOWING PAGE

Table V[13]

Cases Transferred in the Year 1976

Name of Court from Where Cases were Transferred	Name of Court to Which Cases were Transferred	Number of Cases Transferred
Special Tribunal	Special Martial Law Court	208
Courts of Sessions	" " "	11
First Class Magistrate	" " "	20
Sub-Divisional Magistrate	" " "	15
Special Martial Law Court	" " "	7
Special Martial Law Tribunal	" " "	1
Summary Martial Law Court	" " "	9
Summary Martial Law Court	Summary Martial Law Court	3
Special Tribunal	" " "	41
Courts of Sessions	" " "	5
First Class Magistrate	" " "	75
Sub-Divisional Magistrate	" " "	21
	Total	416

12. (continued)
Notification Nos. 1094-JIV/Sec.-4/75 (issued on 2 September); 1143-JIV/Sec-1/75 (issued on 15 September); 1503-JIV/Sec-1/75 (issued on 29 December).

13. Table V is prepared on the basis of various notifications issued by the Ministry of Law, Parliamentary Affairs and Justice in 1976. Notification Nos: 72-JIV/Sec.1/75 (issued on 29 January); 96-JIV/2T-3/76 (issued on 9 February); 123-JIV/2T-8/76 (issued on 23 February); 162-JIV/2T-2/76 (issued on 5 March); 163-JIV/2T-9/76 (issued on 6 March); 164-JIV/2T-4/76 (issued on 6 March); 171-JIV/2T-12/76 (issued on 10 March); 233-JIV/2T-4/76 (issued on 2 April); 274-JIV/2T-4/76 (issued on 27 April); 197-JIV/7/76 (issued on 19 March); 202-JIV/2T-6/76 (issued on 20 March); 215-JIV/2T-3/76 (issued on 24 March); 230-JIV/2T-11/76 (issued on 31 March); 232-JIV/Sec.1/75 (issued on 1 April); 250-JIV/2T-10/76 (issued on 19 April); 256-JIV/2T-3/76 (issued on 21 April); 274-JIV/2T-4/76 (issued on 27 April); 277-JIV/2T-2/76 (issued on 27 April); 284-JIV/2T-3/76 (issued on 29 April); 295-JIV/2T-17/76 (issued on 4 May); 296-JIV/2T-17/76 (issued on 4 May); 297-JIV/2T-17/76 (issued on 4 May); 325-JIV/2T-10/76 (issued on 12 May); 326-JIV/2T-2/76 (issued on 12 May); 332-JIV/2T-14/76 (issued on 17 May); 346-JIV/2T-11/76 (issued on 24 May); 347-JIV/2T-14/76 (issued on 25 May); 368-JIV/2T-3/76 (issued on 3 June); 370-JIV/2T-14/76 (issued on 3 June); 372-JIV/2T-3/76 (issued on 5 June); 373-JIV/2T-6/76 (issued on 7 June); 376-JIV/2T-17/76 (issued on 7 June); 377-JIV/2T-17/76 (issued on 7 June); 382-JIV/2T-17/76 (issued on 8 June); 418-JIV/2T-3/76 (issued on 12 June); 467-

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Table VI[14]

Cases Transferred in the Year 1977

Name of Court from Where Cases were Transferred	Name of Court to Which Cases were Transferred	Number of Cases Transferred
Special Tribunal	Special Martial Law Court	85
Courts of Sessions	" " "	177
First Class Magistrate	" " "	619
Second Class Magistrate	" " "	1
Resident Magistrate	" " "	2
Sub-Divisional Magistrate	" " "	252
Special Martial Law Court	" " "	70
Summary Martial Law Court	" " "	2
Special Tribunal	Summary Martial Law Court	122
Courts of Sessions	" " "	69
First Class Magistrate	" " "	788
Second Class Magistrate	" " "	17
Sub-Divisional Magistrate	" " "	452
Summary Martial Law Court	Additional Summary Martial Law Court	2
	Total	2658

13. (continued)
JIV/2T-17/76 (issued on 28 June); 471-JIV/2T-17/76 (issued on 28 June); 489-JIV/2T-17/76 (issued on 3 July); 514-JIV/2T-17/76 (issued on 6 July); 525-JIV/2T-17/76 (issued on 6 July); 526-JIV/2T-3/76 (issued on 6 July); 557-JIV/2T-17/76 (issued on 16 July); 565-JIV/2T-17/76 (issued on 19 July); 592-JIV/2T-9/76 (issued on 27 July); 599-JIV/2T-17/76 (issued on 28 July); 626-JIV/Secret-5/76 (issued on 2 August); 634-JIV/2T-17/76 (issued on 5 August); 635-JIV/2T-17/76 (issued on 5 August); 683-JIV/2T-17/76 (issued on 25 August); 686-JIV/2T-17/76 (issued on 26 August); 687-JIV/2T-17/76 (issued on 26 August); 700-JIV/2T-17/76 (issued on 2 September); 766-JIV/2T-17/76 (issued on 29 September); 722-JIV/2T-17/76 (issued on 30 September); 789-JIV/ on-4/75 (issued on 9 October); 804-JIV/2T-2 76 (issued on 13 October); 812-JIV/3M-25/76 (issued on 15 October); 820-JIV/2T-17/76 (issued on 16 October); 825-JIV/2T-17/76 (issued on 20 October); 835-JIV/2T-76 (issued on 25 October); 852-JIV/2T-17/76 (issued on 28 October); 905-JIV/2T-11/76 (issued on 6 November); 876-JIV/2T-17/76 (issued on 10 November); 926-JIV/2T-17/76 (issued on 27 November); 928-JIV/2T-17/76 (issued on 29 November); 931-JIV/2T-17/76 (issued on 30 November); 972-JIV/2T-17/76 (issued on 14 December); 991-JIV/2T-17/76 (issued on 23 December).

14. Table VI is prepared on the basis of various notifications issued by the Office of the Chief Martial Law Administration in 1977. Notification Nos:322/3/CMLA/1-77 (issued on 22 January); 321/3/

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Table VII[15]

Cases Transferred in the Year 1978

Name of Court from Where Cases were Transferred	Name of Court to Which Cases were Transferred	Number of Cases Transferred
Courts of Sessions	Special Martial Law Court	1
First Class Magistrate	" " "	1
Sub-Divisional Magistrate	" " "	7
Special Martial Law Court	" " "	6
Summary Martial Law Court	" " "	1
Additional Summary Martial Law Court	" " "	1
Special Martial Law Court	Summary Martial Law Court	2
	Total	19

These four tables show that the total number of cases transferred from criminal courts or Special Tribunals to Martial Law Courts, or from one Martial Law Court to another was 3102. Out of these 3102 cases, 2998 cases were transferred from ordinary criminal courts and Special Tribunals to Martial Law Courts.

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14. CMLA/2-77 (issued 19 Feb.); 321/3/CMLS/2-77 (issued 27 Feb.); 321/3/(con) CMLA/3-77 (issued on 15 March); 322/3/CMLA/2-77 (issued on 15 March); 321/3/CMLA/2-77 (issued on 10 February); 322/3/CMLA/2-77 (issued on 10 February); 322/3/CMLA/3-77 (issued on 24 March); 322/3/CMLA/4-77 (issued on 17 April); 321/3/CMLA/4-77 (issued on 17 April); 321/3/CMLA/4-77 (issued on 20 April); 322/3/CMLA/4-77 (issued on 20 April); 321/3/CMLA/4-77 (issued on 1 May); 322/3/CMLA/5-77 (issued on 5 May); 321/3/CMLA/5-77 (issued on 15 May); 322/3/CMLA/5-77 (issued on 15 May); 321/3/CMLA/5-77 (issued on 2 June); 322/3/CMLA/5-77 (issued on 2 June); 321/3/CMLA/6-77 (issued on 17 June); 322/3/CMLA/6-77 (issued on 17 June); 321/3/CMLA/7-77 (issued on 4 July); 321/3/CMLA/7-77 (issued on 17 July); 321/3/CMLA/10-77 (issued on 3 October); 321/3/CMLA/10-77 (issued on 2 November); 322/3/CMLA/10-77 (issued on 2 November); 321/3/CMLA/11-77 (issued on 18 November); 322/3/CMLA/11-77 (issued on 18 November).

15. Table VII is prepared on the basis of notifications issued by the Office of the Chief Martial Law Administration in 1978. Notification Nos: 321/3/CMLA/1-78 (issued on 4 February); 322/3/CMLA/2-78 (issued on 10 February); 321/3/CMLA/2-78 (issued on 4 March); 321/3/CMLA/5-78 (issued on 31 May); 321/3/CMLA/8-78 (issued on 30 August); 321/3/CMLA/8-78 (issued on 7 September); 321/3/CMLA/10-78 (issued on 3 November); 321/3/CMLA/10-78 (issued on 12 October).

Since no guidelines were provided in any Martial Law Regulation or Order as to the class of cases liable to be transferred, no criteria whatsoever were followed in transferring such vast numbers of cases from criminal courts and Special Tribunals to Martial Law Courts. In other words, the powers of transferring cases appear to have been exercised arbitrarily. Here it may be recalled that such an arbitrary transfer of cases deprived the accused of the right of (a) appeal; (b) legal representation, if the cases were transferred to a Summary Martial Law Court; and (c) equal protection of law.

As no uniform principle or standard was followed in transferring cases, the same type of cases were transferred arbitrarily sometimes to the Summary Martial Law Court and sometimes to the Special Martial Law Court. This aspect will become clearer from Tables VIII and IX.

Table VIII[16]

Examples of Cases Transferred from the Courts of Magistrate to Summary Martial Law Courts

Name of Law	Examples of Offences
1. The Penal Code, 1860	Dacoity; dacoity with murder; robbery or dacoity with attempt to cause death or grievous hurt; making preparation to commit dacoity; assembling for the purpose of committing dacoity; dishonestly receiving property stolen in the commission of a dacoity; robbery; voluntarily causing hurt in committing robbery; theft; theft in dwelling house; theft after preparation made for causing death, hurt or restraint in order to commit theft; dishonestly receiving stolen property; assault or criminal force in an attempt to commit theft of property carried by a person; extortion; voluntarily causing grievous hurt to extort property or to constrain to an illegal act; murder; attempt to murder; culpable homicide not amounting to murder; causing death by negligence; cheating and dishonestly inducing delivery of property; cheating by personation; forgery for purpose of cheating; forgery of valuable security, will, etc.; using as genuine a forged document; criminal breach of trust; criminal breach of trust by carrier etc.; criminal trespass; house trespass; house trespass in order to commit offence punishable with death; rioting; rioting armed with deadly weapon; voluntarily causing hurt; voluntarily causing hurt by dangerous weapons; voluntarily causing grievous hurt by dangerous weapons.
2. The Arms Act, 1878	Unlicensed manufacturing, converting or selling or keeping, offering or exposing for sale, any arms, ammunition or military stores; unlicensed possession of any arms, ammunition or military stores or possession of arms of any description without license prohibited in certain place.
3. The Explosive Substance Act, 1908	Unlawful and malicious explosion of any explosive substance likely to endanger life or to cause serious injury to property.
4. The Bangladesh Control of Essential Commodities Act, 1956	Contravention (by any person) of the government order providing for regulating or prohibiting the production, supply, distribution etc. of essential commodities.
5. The Customs Act, 1969	Acquiring possession of, or in any way concerning in carrying, removing, harbouring, keeping or concealing or in any manner dealing with any goods unlawfully removed from a warehouse, or for which chargeable duty was not paid.
6. The Prevention of Corruption Act, 1947	Committing or attempting to commit criminal misconduct by any public servant.

16. Table VIII has been prepared on the basis of various notifications issued by the Ministry of Law and Parliamentary Affairs in 1976,

CONTINUED ON FOLLOWING PAGE BUT ONE

Table IX[17]

Examples of Cases Transferred from the Courts of Magistrates to Special Martial Law Courts

Name of Law	Examples of Offences
1. The Penal Code, 1860	Dacoity; dacoity with murder; robbery or dacoity with attempt to cause death or grievous hurt; making preparation to commit dacoity; assembling for the purpose of committing dacoity; dishonestly receiving property stolen in the commission of a dacoity; robbery; voluntarily causing hurt in committing robbery; theft; theft in dwelling house; theft after preparation made for causing death, hurt or restraint in order to commit theft; dishonestly receiving stolen property; assault or criminal force in an attempt to commit theft of property carried by a person; extortion; voluntarily causing grievous hurt to extort property or to constrain to an illegal act; murder; attempt to murder; culpable homicide not amounting to murder; culpable homicide by causing death of person other than person whose death was intended; causing death by negligence; cheating and dishonestly inducing delivery of property; cheating by personation; forgery for purpose of cheating; forgery of valuable security, will, etc.; using as genuine a forged document; criminal breach of trust; criminal breach of trust by clerk or servant; criminal trespass; house trespass; house trespass in order to commit offence punishable with death; rioting; rioting armed with deadly weapon; voluntarily causing hurt; voluntarily causing hurt by dangerous weapons; voluntarily causing grievous hurt by dangerous weapons.
2. The Arms Act, 1878	Unlicensed manufacturing, converting or selling or keeping offering or exposing for sale, any arms, ammunition or military stores; unlicensed possession of any arms, ammunition or military stores or possession of arms of any description without license prohibited in certain place.
3. The Explosive Substance Act, 1908	Unlawful and malicious explosion of any explosive substance likely to endanger life or to cause serious injury to property.
4. The Bangaldesh Control of Essential Commodities Act, 1956	Contravention (by any person) of the government order providing for regulating or prohibiting the production, supply, distribution etc. of essential commodities.
5. The Customs Act, 1969	Acquiring possession of, or in any way concerning in carrying, removing, harbouring, keeping or concealing or in any manner dealing with any goods unlawfully removed from a warehouse, or for which chargeable duty was not paid.
6. The Prevention of Corruption Act, 1947	Committing or attempting to commit criminal misconduct by any public servant.

For footnote 17, please see following page.

The powers of Special Martial Law Courts and Summary Martial Law Courts in the matter of trial of any offence under Martial Law Regulations or under the ordinary law were co-extensive, but there was a restriction on the power of Summary Martial Law Courts in respect of passing sentences. Whereas the Special Martial Law Court was empowered to pass any sentence authorised by Martial Law Regulations or any other law, the Summary Martial Law Court was given power to pass any sentences except the death sentence or sentences of transportation or imprisonment for a term exceeding five years.

Therefore, as a result of the transfer of some cases of the same type to Summary and Special Martial Law Courts, there was every chance of variation in respect of sentences that would be passed by Summary and Special Martial Law Courts against persons accused of similar offences. For example, cases relating to the offence of dacoity with murder were transferred both to Summary and Special

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16. (continued)

and Office of the Chief Martial Law Administrator in 1977. Notification Nos. of 1976: 164-JIV/2T-4/76 (issued on 6 March); 202-JIV/2T-6/76 (issued on 20 March); 256-JIV/2T-3/76 (issued on 21 April); 372-JIV/2T-3/76 (issued on 5 June); 687-JIV/2T-17/76 (issued on 26 August); 700-JIV/2T-17/76 (issued on 2 September); 772-JIV/2T-17/76 (issued on 30 September); 820-JIV/2T-17/76 (issued on 16 October); 876-JIV/2T-17/76 (issued on 10 November).

Notification Nos. of 1977: 322/3/CMLA/1-77 (issued on 22 January); 322/3/CMLA/2-77 (issued on 10 February); 322/3/CMLA/2-77 (issued on 15 March); 322/3/CMLA/3-77 (issued on 24 March); 322/3/CMLA/4-77 (issued on 17 April); 322/3/CMLA/5 (issued on 15 May); 322/3/CMLA/5-77 (issued on 2 June); 322/3/CMLA/11-77 (issued on 18 November.

17. Table IX has been prepared on the basis of different notifications issued by the Ministry of law and Parliamentary Affairs in 1976, and by the Office of the Chief Martial Law Administrator in 1977. Notification Nos. of 1976: 162-JIV/2T-2/76 (issued on 5 March); 163-JIV/2T-9/76 (issued on 6 March); 296-JIV/2T-17/76 (issued on 4 May); 592-JIV/2T-9/76 (issued on 27 July); 686-JIV/2T-17/76 (issued on 26 August); 766-JIV/2T-17/76 (issued on 29 September).

Notification Nos. of 1977: 321/3/CMLA/2-77 (issued on 10 February); 321/3/CMLA/2-77 (issued on 19 February); 321/3/CMLA/3-77 (issued on 15 March); 321/3/CMLA/4-77 (issued on 1 May); 321/3/CMLA/5-77 (issued on 15 May); 321/3/CMLA/6-77 (issued on 17 June); 321/3/CMLA/7-77 (issued on 4 July); 321/3/CMLA/7-77 (issued on 17 July); 321/3/CMLA/10-77 (issued on 2 November).

Martial Law Courts; the offence was punishable under Section 396 of the Bangladesh Penal Code with death, or transportation for life, or rigorous imprisonment for a term which could extend to ten years and fine. In trying such cases, the Summary Martial Law Court could pass the maximum sentence of imprisonment of five years, but the Special Martial Law Court could pass death sentences or sentences of transportation for life or any sentence of imprisonment exceeding five years.

Here it may be recalled that the Martial Law government did not provide in any Regulation for Summary Martial Law Courts to refer cases to the Special Martial Law Courts when the Summary Martial Law Court considered that under the facts and circumstances of a particular case greater punishment than it was competent to pass was necessary. However, between 1976 and 1978, only thirteen cases were transferred by the Government/the Chief Martial Law Administrator from Summary or Additional Summary Martial Law Courts to Special Martial Law Courts. These cases related to the offences under the Penal Code, the Customs Act, the Arms Act, the Explosive Act, the Special Powers Act and the Martial Law Regulations.[18] But in transferring these cases, the consideration was not always that the accused concerned deserved sentences of imprisonment exceeding five years which the Summary Martial Law Court could not pass. For example, on 30 November 1976, Martial Law

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18. Notification Nos.: 250-JIV/2T-10/76 (issued on 19 April 1976); 370-JIV/2T-14/76 (issued on 3 June 1976); 820-JIV/2T-17/76 (issued on 16 October 1976); 931-JIV/2T-17/76 (issued on 30 November 1976); 972-JIV/2T-17/76 (issued on 14 December 1976); 991-JIV/2T-17/76 (issued on 23 Dec. 1976) (all these notifications were issued by the Ministry of Law and Parliamentary Affairs). 321/3/CMLA/7-77 (issued on 4 July 1977); 321/3/CMLA/7-77 (issued on 17 July 1977); 321/3/CMLA/8-78 (issued on 30 August 1978); 321/3/CMLA/10-78 (issued on 12 October 1978) (these notifications were issued by the Office of the Chief Martial Law Administrator).

Case No. 68/76 was transferred[19] from the Summary Martial Law Court, Netrokona of Mymensingh District, to Special Martial Law Court No. I, Dhaka. This case, which related to the offence of criminal breach of trust, was punishable under Section 406 of the Bangladesh Penal Code with imprisonment of either description for a term which could extend to three years, or with fine, or with both. Therefore, it is evident that the Summary Martial Law Court concerned was quite competent to try the case and to pass necessary sentence as it deemed fit. Despite this, the executive order was made to transfer the case and it appears that this was done in order to serve government's purposes rather than the ends of justice.

However, the transfer of the same class of cases from the Courts of Magistrates to both Summary Martial Law Courts and Special Martial Law Courts led to different treatment of the persons accused of similar offences in respect of legal representation. For example, when a case relating to dacoity or attempt to murder was transferred to the Summary Martial Law Court, the accused concerned was denied the right of defending himself by lawyer as ensured by Section 340(1) of the Criminal Procedure Code. But when a similar case was transferred to the Special Martial Law Court, the accused concerned exercised his right of defending by lawyer.

Thus, such an arbitrary transfer of cases from Courts of Magistrates to Martial Law Courts ultimately contravened the provisions of Article 27 of the 1972 Constitution of Bangladesh which provided that "all citizens are equal before law and are entitled to equal protection of law".

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19. Notification No. 931-JIV/2T-17/76, issued by the Ministry of Law and Parliamentary Affairs on 30 November 1976.

It seems that the cases relating to certain offences (e.g. cases relating to dacoity with murder or cases relating to murder punishable with death or transportation for life, and fine) triable by Courts of Sessions pending before magistrates for inquiry were transferred to Martial Law Courts.

Under the Code of Criminal Procedure, the powers of a magistrate of the first class and the Sessions Court in the matter of trial of certain offences are concurrent. But there is a restriction on the power of the magistrate in respect of awarding sentences. Whereas a sessions judge or an additional sessions judge may pass any sentence authorised by law[20] and an assistant sessions judge may pass any sentence authorised by law, except a sentence of death or of imprisonment for a term exceeding seven years,[21] a first class magistrate may pass sentences of imprisonment for a term not exceeding two years and a fine not exceeding one thousand takas.[22] Therefore, when the magistrate considers that under the facts and circumstances of the case, the offender deserves greater punishment, the case is committed for trial to the Court of Sessions.[23] As pointed out earlier, a Court of Sessions does not take cognizance of an offence as a court of original jurisdiction unless the accused has been committed to it by a competent magistrate.[24] But the government/Chief Martial Law Administrator transferred cases from the Courts of Sessions not only to Special Martial Law Courts but also to Summary Martial Law Courts comprised of first class magistrates/majors as detailed in Tables X and XI.

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20. Section 31(2), the Criminal Procedure Code.
21. Section 31(3), ibid.
22. Section 32(1), ibid. Here it is to be noted that the Law Reforms Ordinance, 1978 Ordinance No.XLIX of 1978), issued on 5 December 1978, authorised a first class Magistrate to pass sentences of imprisonment for a term not exceeding three years and a fine not exceeding five thousand takas.
23. Sections 210 and 213, ibid.
24. Section 193, ibid.

Table X[25]

Examples of Cases Transferred from Courts of Sessions to Summary Martial Law Courts

Name of Law	Examples of Offences
1. The Penal Code, 1860	Dacoity; making preparation to commit dacoity; assembling for purpose of committing dacoity; dishonestly receiving property stolen in the commission of a dacoity; attempt to murder; acts done by several persons in furtherance of common intention; rioting; rioting armed with deadly weapon; every member of unlawful assembly guilty of offence committed in prosecution of common object; criminal breach of trust; criminal breach of trust by carrier; criminal breach of trust by public servant or by banker etc.; cheating; cheating by personation; cheating and dishonestly inducing delivery of property; house trespass; forgery; forgery of record of court or of public register, etc.; forgery of valuable security, will, etc.; forgery for purpose of cheating; using as genuine a forged document.
2. The Arms Act, 1878	Unlicensed manufacturing, converting or selling or keeping, offering or exposing for sale, any arms, ammunitions or military stores; unlicensed possession of any arms, ammunition or military stores or possession of arms of any description without license prohibited in certain place.
3. The Prevention of Corruption Act, 1947	Committing or attempting to commit criminal misconduct by any public servant.
4. The Explosive Act, 1884	Manufacturing, possessing or importing an explosive in contravention of the government prohibition.
5. The Customs Act, 1969	Smuggling of goods into or out of Bangladesh.

25. Table X is prepared on the basis of various notifications issued by the Office of the Chief Martial Law Administrator in 1977, Notification Nos: 322/3/CMLA/3-77 (issued on 24 March); 322/3/CMLA/4-77 (issued on 17 April); 322/3/CMLA/5-77 (issued on 5 May); 322/3/CMLA/5-77 (issued on 15 May); 322/3/CMLA/5-77 (issued on 2 June).

Table XI[26]

Examples of Cases Transferred from Courts of Sessions to Special Martial Law Courts

Name of Law	Examples of Offences
1. The Penal Code, 1860	Dacoity; dacoity with murder; robbery or dacoity with attempt to cause death or grievous hurt; making preparation to commit dacoity; assembling for purpose of committing dacoity; dishonestly receiving property stolen in the commission of a dacoity; theft; murder; culpable homicide not amounting to murder; attempt to murder; acts done by several persons in furtherance of common intention; rioting; rioting armed with deadly weapon; every member of unlawful assembly guilty of offence committed in prosecution of common object; criminal breach of trust; criminal breach of trust by public servant, or by banker etc.; cheating by personation; cheating and dishonestly inducing delivery of property; house trespass; forgery; forgery of record of court or of public register, etc.; forgery of valuable security, will, etc.; forgery for purpose of cheating; using as genuine a forged document.
2. The Arms Act, 1878	Unlicensed manufacturing, converting or selling or keeping offering or exposing for sale, any arms, ammunitions or military stores; unlicensed possession of any arms, ammunition or military stores or possession of arms of any description without license prohibited in certain place.
3. The Prevention of Corruption Act, 1947	Committing or attempting to commit criminal misconduct by any public servant.

26. Table XI is prepared on the basis of various notifications issued by the Ministry of Law and Parliamentary Affairs in 1975 and 1976; and by the Office of the Chief Martial Law Administrator in 1977 and 1978. Notification Nos. of 1975: 1094-JIV/Sec.-4/75 (issued on 2 September); 1143-JIV/Sec.-1/75 (issued on 15 September).

Notification Nos. of 1976: 197-JIV/2T-7/76 (issued on 19 March); 230-JIV/2T-11/76 (issued on 31 March).

Notification Nos. of 1977: 321/3/CMLA/10-77 (issued on 3 October); 321/3/CMLA/3-77 (issued on 15 March); 321/3/CMLA/4-77 (issued on 17 April); 321/3/CMLA/4-77 (issued on 20 April); 321/3/CMLA/4-77 (issued on 1 May); 321/3/CMLA/7-77 (issued on 4 July); 321/3/CMLA/11-77 (issued on 18 November); 321/3/CMLA/10-77 (issued on 2 November).

Notification No. of 1978: 321/3/CMLA/1-78 (issued on 4 February).

Tables X and XI show that the same group of cases were sometimes transferred arbitrarily from the Courts of Sessions to both Special Martial Law Courts and Summary Martial Law Courts. Therefore, the same criticism which has been made earlier in connection with the arbitrary transfer of the same type of cases from Courts of Magistrates to Special Martial Law Courts and Summary Martial Law Courts applies here, namely, discrimination with regard to legal representation and chance of variation in respect of punishment that ultimately contravened the right of equality before the law.

As pointed out earlier, the Special Powers Act, 1974, was passed "to provide for special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith". It provided for the creation of a Special Tribunal and stated that "Every Sessions Judge, Additional Sessions Judge and Assistant Judge shall, for the areas within his sessions division, be a Special Tribunal for the trial of offences triable under this Act".[27] A Special Tribunal was to try offences specified by the Act, certain offences punishable under the Penal Code of 1860, offences punishable under the Arms Act, 1878 and the Explosive Substances Act, 1908.[28] Later in 1975, its jurisdiction was extended (by Act I of 1975) to try offences punishable under any rules made under the Emergency Powers Act, 1975. It was to take "cognizance of an offence triable under this Act without the accused being committed to it for trial, but shall not take cognizance of any such offence except on a report in writing made by a police officer not below the rank of Sub-Inspector".[29] The Martial Law

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27. Section 26(2), the Special Powers Act, 1974.
28. Section 26(1), ibid.
29. Section 27, ibid.

regime of Bangladesh also arbitrarily transferred the same group of cases from Special Tribunals to both Special and Summary Martial Law Courts which have been set out in Tables XII and XIII.

Table XII[30]

Examples of Cases Transferred from Special Tribunals to Summary Martial Law Courts

Name of Law	Examples of Offences
1. The Penal Code,	Voluntarily causing hurt in committing robbery; dacoity; dacoity with murder.
2. The Arms Act, 1878	Unlicensed manufacturing, converting or selling or keeping, offering or exposing for sale, any arms, ammunition or military stores; unlicensed possession of any arms, ammunitions, or military stores or possession of arms of any description without license prohibited in certain place.
3. The Explosive Act, 1884	Manufacturing, possessing, using, selling, transporting or importing explosives in breach of the government rules.
4. The Special Powers Act, 1974	Prejudicial act; hoarding or dealing in black market; smuggling; adulteration of, or sale of adulterated food, drink, drugs or cosmetics.

30. Table XII is prepared on the basis of various notifications issued by the Ministry of Law and Parliamentary Affairs in 1976 and by the Office of the Chief Martial Law Administrator in 1977. Notification Nos. of 1976: 171-JIV/2T-12/76 (issued on 10 March); 197-JIV/2T-7/76 (issued on 19 March); 635-JIV/2T-17/76 (issued on 5 August); 825-JIV/2T-17/76 (issued on 20 October); 972-JIV/2T-17/76 (issued on 14 December).

Notification Nos. of 1977: 322/3/CMLA/1-77 (issued on 22 January); 322/3/CMLA/3-77 (issued on 24 March); 322/3/CMLA/4-77 (issued on 17 April); 322/3/CMLA/5-77 (issued on 5 May); 322/3/CMLA/5-77 (issued on 15 May).

Table XIII[31]

Examples of Cases Transferred from Special Tribunals to Special Martial Law Courts

Name of Law	Examples of Offences
1. The Penal Code, 1860	Robbery; voluntarily causing hurt in committing robbery; dacoity; dacoity with murder; robbery or dacoity with attempt to cause death or grievous hurt; attempt to commit robbery or dacoity when armed with deadly weapon; kidnapping or abducting in order to murder; waging or attempting to wage war, or abetting waging of war, against Bangladesh; collecting arms, etc., with intention of waging war against Bangladesh; sedition.
2. The Arms Act, 1878	Unlicensed manufacturing, converting or selling or keeping, offering or exposing for sale, any arms, ammunition or military stores; unlicensed possession of any arms, ammunitions, or military stores or possession of arms of any description without license prohibited in certain place.
3. The Special Powers Act, 1974	Prejudicial act; sabotage; hoarding or dealing in the black market; smuggling; counterfeiting currency notes and government stamps.
4. The Emergency Power Rules, 1975	Prejudicial act; smuggling; carrying and possession of arms, ammunition and explosives.

The same criticisms which have been levelled against the transfer of cases from Courts of Magistrates or Sessions to Martial Law Courts are applicable to transfer of cases from the Special Tribunals to Martial Law Courts.

31. Table XIII is prepared on the basis of various notifications issued by the Ministry of Law and Parliamentary Affairs in 1976 and by the Office of the Chief Martial Law Administrator in 1977. Notification Nos. of 1976: 96-JIV/2T-3/76 (issued on 9 February); 215-JIV/2T-3/76 (issued on 24 March); 248-JIV/1T-4/75 (issued on 17 April); 295-JIV/2T-17/76 (issued on 4 May); 297-JIV/2T-17/76 (issued on 4 May); 325-JIV/2T-10/76 (issued on 12 May); 377-JIV/2T-17/76 (issued on 7 June); 382-JIV/2T-17/76 (issued on 8 June); 489-JIV/2T-17/76 (issued on 3 July); 514-JIV/2T-17/76 (issued on 6 July); 521-JIV/2T-17/76 (issued on 6 July); 557-JIV/2T-17/76 (issued on 16 July); 928-JIV/2T-17/76 (issued on 29 November); 972-JIV/2T-17/76 (issued on 14 December); 991-JIV/2T-17/76 (issued on 23 December).
Notification Nos. of 1977: 321/3/CMLA/3-77 (issued on 15 March);

CONTINUED ON FOLLOWING PAGE

Since the Special Martial Law Court was empowered to pass any sentence including death sentences and sentences of life imprisonment and the Summary Martial Law Court was invested with the power of passing any sentence except death or imprisonment for a term exceeding five years, the transfer of cases from the Special Martial Law Court to Summary Martial Law Court, as it was done in 1978, could not be justified. In February 1978, two Martial Law cases were transferred from Special Martial Law Court No.II, Dhaka, to Summary Martial Law Court, Dhaka.[32] The cases were under Martial Law Regulation No. 19, the Regulation which provided that the persons accused of the offences of smuggling would be "punishable with death, or with transportation for life, or with rigorous imprisonment for a term which may extend to fourteen years, and shall also be liable to fine or to suffer confiscation of the whole or any part of his property". The transfer of these two cases from the Special Martial Law Court to Summary Martial Law Court deprived the accused of the opportunity of legal representation whereas this opportunity of legal representation was recognised in a trial before the Special Martial Law Court. On the other hand, as the cases of accused were transferred from the Special Martial Law Court to Summary Martial Law Court, they were assured of a lesser punishment. It is not quite clear as to what the ulterior motives were of the executive orders in such transfers.

In total eighty-three cases were transferred from one Special Martial Law Court to another Special Martial Law Court from 1976 to

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31. (continued)
321/3/CMLA/4-77 (issued on 17 April); 321/3/CMLA/4-77 (issued on 1 May); 321/3/CMLA/5-77 (issued on 17 May).

32. Notification No. 322/3/CMLA/2-78 issued by the Office of the Chief Martial Law Administrator on 10 February 1978.

1978, out of which eighty were cases under the ordinary law which had been previously transferred to them for trial. But in transferring the cases from one Special Martial Law Court to another, no hard and fast rule was followed. Sometimes cases were transferred from the Special Martial Law Court of one district to the Special Martial Law Court of another district.[33] Sometimes cases were transferred from the criminal courts or Special Tribunal of a district having no Special Martial Law Court of its own to the Special Martial Law Court of a neighbouring district. Later some of these cases were transferred to the Special Martial Law Court of another remote district.[34] It seems such transfer orders were not expedient for the ends of justice. However, at times a good number of ordinary cases were transferred from existing Special Martial Law Courts to newly created Special Martial Law Courts. For example, the districts of Sylhet and Mymensingh had no Special Martial Law Courts of their own. Therefore, some cases under the ordinary law arising in Sylhet district were transferred to the Special Martial Law Court No. III, Comilla and some cases under the ordinary law arising in Mymensingh district were transferred to the Special Martial Law Court Nos. I and II, Dhaka. But after the setting up of Special Martial Law Court No. IX, Sylhet, thirty-nine cases of Sylhet district, which had previously been transferred to the Special Martial Law Court No. III, Comilla, were transferred to it on 17 July 1977.[35] Similarly, shortly after the creation of Special Martial Law Court No. X, Mymensingh, twenty-five cases of Mymensingh district which had been formerly transferred to the Special

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33. Notification Nos.: 347-JIV/2T-14/76 (issued by the Ministry of Law and Parliamentary Affairs on 25 May 1976); 321/3/CMLA/5-77 (issued by the Office of the Chief Martial Law Administrator on 2 June 1977); 321/3/CMLA/1-78 (issued on 4 February 1978 by the Office of the Chief Martial Law Administrator).
34. Notification No. 321/3/CMLA/7-77 issued by the Office of the Chief Martial Law Administrator on 4 July 1977.
35. Notification No. 321/3/CMLA/7-77 issued by the Office of the Chief Martial Law Administrator on 17 July 1977.

Martial Law Court Nos. I and II were transferred back on 17 July 1977 to this newly created Court.[36] Thus, such transfer orders of cases were obviously of general convenience to the parties or witnesses concerned. But later on cases were again transferred from the Special Martial Law Court No. X, Mymensingh, to Special Martial Law Court No. I and II, Dhaka by administrative order of the Chief Martial Law Administrator.[37]

Sometimes the manner in which the cases were transferred from one Special Martial Law Court to another Special Martial Law Court was very curious. For example, one case relating to criminal conspiracy and criminal breach of trust was transferred from the Court of Magistrate, Daulat Pur Sub-division of Khulna district to Special Martial Law Court No. II, Dhaka. Later, on 1 April 1976, this case, numbered as Martial Law case no. 2 of 1976, was transferred to Special Martial Law Court No. VI, Jessore.[38] Apparently it might seem that the case was transferred to this newly-created court for consideration of the general convenience of the parties or witnesses of the case, as the Special Martial Law Court No. VI, Jessore, was nearer to the place of origin of the case. But only one month and nine days later, on 10 May 1976, this case was again transferred from Special Martial Law Court No. VI, Jessore, to Special Martial Law Court No. I, Dhaka.[39] Thus it seems that such transfer orders were not made in the interests of justice or for the general convenience of the accused and witnesses.

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36. Ibid., and Notification No. 321/3/CMLA/7-77 issued by the Office of the Chief Martial Law Administrator.
37. Notification Nos. 321/3/CMLA/10-77 (issued on 2 November 1977); 321/3/CMLA/2-78 (issued on 4 March 1978) and 321/3/CMLA/5-78 (issued on 31 May 1978). These notifications were issued by the Office of the Chief Martial Law Administrator.
38. Notification No. 232-JIV/Sec-1/75 issued by the Ministry of Law and Parliamentary Affairs on 1 April 1976.
39. Notification No. 313-JIV/Secret-1/75 issued on 10 May 1976 by the Ministry of Law and Parliamentary Affairs.

IV. The Functioning of Martial Law Courts

(i) Number of Accused Convicted or Acquitted by Martial Law Courts

In May 1979, the then Home Minister said in Parliament that the number of accused convicted by Martial Law Courts was 2862.[40] Although he disclosed the number of the accused convicted by Martial Law Courts, he did not state the number of the accused sentenced to death by Special Martial Law Courts, or the number of the accused acquitted by Martial Law Courts. According to statistics published in the Bangladesh Press[41] from time to time during the imposition of Martial Law, 47 accused were sentenced to death,[42] and 271 accused were acquitted[43] of various charges, including 64 of the charge of murder.

In view of the number of the accused convicted by Martial Law Courts, it seems that most of the cases tried were ordinary cases transferred to them.[44] As a result of convictions by Martial Law Courts,

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40. The Bangladesh Times, Dhaka, 27 May 1979.
41. It seems that the Bangladesh press did not publish the entire figure relating to the accused who were sentenced to death or acquitted by Martial Law Courts, as the figures given by the Home Minister about the number of convicts don't tally with the figures published in the press.
42. The Bangladesh Times, Dhaka, 6 December 1975; 21 December 1976; 10 February, 30 April, 7 May, 2 September, 8 October and 12 December 1977; 3 March, 6 and 18 August 1978. Out of forty-seven persons sentenced to death, two were sentenced to death for misappropriation of 165 bales of cotton yarn worth over taka 8 lakhs, one for joining an insurrection and waging war against the Government of Bangladesh, eleven for committing dacoity with murder and the remaining for the offence of murder.
43. The Bangladesh Times, Dhaka, 26 September, 6, 13 and 25 December 1975; 12, 13, 15 and 17 February 1976; 9, 10, 14, 23 and 31 March 1976; 1, 3, 8, 9, 17 and 20 April 1976; 1, 4, 16, 20 and 27 May 1976; 1, 3, 4, 8, 17, 23, 28 and 30 June 1976; 29 July 1976; 13 and 20 August 1976; 4, 5, 7, 15, 17, 22 and 23 September 1976; 17, 20 and 27 October 1976; 14, 16, 24 and 25 November 1976; 15, 23 and 26 December 1976; 26 January 1977; 6, 16 and 23 February 1977; 2, 4, 6, 11, 18 and 20 March 1977; 6, 9, 24 and 29 April 1977; 7 and 8 May 1977; 17 July 1977; 7 August 1977; 4 September 1977; 28 December 1977; 3 and 12 March 1978; and 18 August 1978.
44. The number of cases transferred from criminal courts or Special Tribunals to Martial Law Courts was 2998. See supra p.211.

the persons accused of ordinary offences, who ought to have been tried before courts of law, could not exercise their normal rights of appeal. Even those accused who were sentenced to death by the Special Martial Law Courts for offences under the ordinary law were unjustifiably deprived of the opportunity to exercise their rights of appeal.

(ii) Some Specific Examples of Trials by Martial Law Courts

(a) A Murder Case Tried by Special Martial Law Court No. II, Dhaka

A case relating to murder tried by the Special Martial Law Court No. II, Dhaka, will be taken as an example to show the way the dispensation of justice was sometimes carried out.

The Special Martial Law Court No. II convicted and sentenced eight persons to death for murdering a man in broad daylight on 26 May 1976 at a public place in Nawabgonj Police Station of Dhaka district. The Court in its judgment said:

> "The murder case took place after the imposition of Martial Law in the country when the authority had been frantically endeavouring to improve the law and order situation in the country. For bringing abnormalcy in the country, the murderers are to be met with deterrent punishment which is the normal punishment for this offence. We also do not find any grounds for the award of any punishment lesser than the sentence of death though it is very painful to award eight death sentences for the murder of one. But considering the gravity of the offence and the circumstances under which it took place, i.e. a gruesome and cold-blooded murder in broad daylight in a public place, such award of sentence of death to all the convicted persons is essential for the ends of justice".[45]

It is clear from the above observations that the Martial Law Court itself was conscious of the harshness of the punishment meted out to the accused. But the justification offered needs some comment. It is evident that

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45. The Bangladesh Times, Dhaka, 12 October 1978.

the objectives behind the punishment were to underline the authority of the Martial Law regime. It would appear to go beyond the ends of justice to impose eight death sentences for one murder. If the motive was deterrent, life imprisonment, which is also an alternative punishment or sentence for murder, would have been more in keeping with the ends of justice.

(b) The Case of Khandaker Moshtaque Ahmed

The trial of Khandaker Moshtaque Ahmed was of unusual interest, because it was under his leadership that the Armed Forces of Bangladesh had seized power on 15 August 1975, and he it was who had placed the country under Martial Law and assumed the office of President. It is ironical that although Moshtaque in his first address to the Nation a few hours after his assumption of the office of President, on 15 August 1975, declared that his "Government has no compromise with corruption, nepotism, or social vices", later, nearly sixteen months after his forced resignation as President, he was tried and convicted on the charges of corruption and abuse of official position. However, the interesting features of this case are that before the trial of Moshtaque took place, the Martial Law regime had amended certain existing Martial Law Regulations in a calculated manner in order to fulfil the objective it had in mind.

On 8 November 1975, President A.M. Sayem, who replaced Moshtaque as President, promised that the General Election would be held before the end of February 1977. But later, on 21 November 1976, he announced the postponement of the General Election for an indefinite period on the grounds that the general public did not want it. In protest Moshtaque,

who had founded a new political party called the Democratic League, issued a statement, on 26 November 1976, criticisng the postponement of the election and urging the government to allow open political activities in the country and to announce a definite date for the General Election. Three days later, on 29 November 1975, he was arrested in his village home without any warrant and no reason was given for his arrest.

Since a person's right of personal liberty cannot be interferred with by arrest without informing him on what charge or on suspicion of what crime he is arrested, Moshtaque should have been given the grounds of his arrest by the person who made the arrest. As Justice Hidayatullah observed in the State of Madhya Pradesh v. Shobharam:[46]

> "A warrant of a Court and an order of any authority must show on their face the reason for arrest, where there is no such warrant order, the person making the arrest must inform the reason for his arrest".[47]

The reason why a person should be given the grounds for his arrest has been clearly described by Lord Simonds in the case of Christie v. Leachinsky:[48]

> "....it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him....it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? ....Blind unquestioning obedience is the law of tyrants and of slaves.... I would, therefore, submit the general proposition that it is a condition of lawful arrest, that the man arrested should be entitled to know why he is arrested, ... This approach to the question has....a double support. In the first place, the law requires that, where arrest proceeds on a warrant, the warrant should state the charge on which the arrest is made, I can see no valid reason why this safeguard for the subject should not equally be his

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46. All India Reporter, Supreme Court, Vol.LIII, 1966, p.1910.
47. Ibid., 1917.
48. All English Law Reports, House of Lords, Vol.1, 1947, p.567.

> when the arrest is made without a warrant. The exigency of the situation, which justifies or demands arrest without a warrant, cannot....justify or demand either a refusal to state the reason of arrest or a mis-statement of the reason. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may without a moment's delay take such steps as will enable him to regain it. In the second place....common justice and common sense required that the...(person arrested) should know why he should on such and such a day be brought before the King's justices at Westmin ster or wherever it might be....that it is not essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this, and this only, is the qualification which I would impose on the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested. The 'charge' ultimately made will depend on the view taken by the law of his act".[49]

Although clause (2)(d) of Regulation 7, as amended on 1 October 1975 by the Martial Law (Second Amendment Regulations, 1975) authorised the officer concerned "to arrest without warrant any person whom he reasonably suspects of having committed any offence punishable under any Martial Law Regulation or Order and commit him to such custody as the government may, by general or special order, specify", the person so arrested ought to have been produced before a Magistrate. As Section 167 of the Criminal Procedure Code, which was in force and applicable to persons arrested both under the ordinary law and Martial Law Regulation, provided that "Whenever any person is arrested without a warrant, and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the police officer is required to send a copy of the entries in the diary relating to the case along with the accused to the nearest

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49. Ibid., pp.574-576.

Magistrate. The Magistrate to whom the accused is forwarded may authorise the detention of the accused for a term not exceeding fifteen days in the whole, including one or more remands".

But Moshtaque was not produced before any magistrate after his arrest. He was brought to the capital Dhaka from his home district Comilla and lodged in the Central Jail.

Here it is pertinent to note that Moshtaque was arrested on the very day when the Chief of Army Staff assumed the office of the Chief Martial Law Administrator replacing President A.M. Sayem. It is said that this arrest was made on the order of the new Chief Martial Law Administrator. As during an interview,[50] President Sayem said that he was not at all involved in the decision to arrest Moshtaque, and subsequent to Moshtaque's arrest, he attacked the Chief Martial Law Administrator for not consulting him before taking such a step. President Sayem's version receives support from the Chief Martial Law Administrator's own action when one month after the arrest of Moshtaque, on 28 December 1976, he issued the Martial Law (Twenty-Third Amendment) Regulations, 1976 (Regulations No. XXXIII of 1976). This introduced substantial changes in certain existing Regulations and law, apparently to serve the ulterior motives of the military junta.

This amendment superseded the existing law relating to the accused being produced before a magistrate after his arrest as clause 2(a) added to Regulation 7 (which dealt with enquiry and investigation) provided that:

> "An officer making an arrest under paragraph 2(d) of Regulation shall forthwith inform in writing the Zonal Martial Law Administrator, within whose jurisdiction the arrest has been made, of the facts and circumstances relating to such arrest, and if such officer fails to make any report to any Martial Law Court against the person arrested by him within thirty days of the arrest he shall order the release of that person from custody

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50. The interview with President Sayem took place on 4 October 1984.

> unless he obtains in the meantime from the Zonal Martial Law Administrator permission in writing for the keeping of that person in custody beyond that period".

But there was a condition to the effect that "the Zonal Martial Law Administrator may order, subject to such conditions, if any, as he may deem fit to specify, the release of any such person from custody at any time if he is of opinion that it is not necessary for the purpose of enquiry or investigation to keep that person in custody".

Thus, instead of producing Moshtaque before the magistrate, one month after his arrest provision was made to the effect that the report in respect of the person arrested without warrant on reasonable suspicion of having committed any offence punishable under any Martial Law Regulation was to be made to the Zonal Martial Law Administrator, who was an integral part of the Martial Law administration. This new provision did not require the person so arrested to be produced before the Zonal Martial Law Administrator.

By the same Martial Law (Twenty-Third Amendment) Regulations, the Chief Martial Law Administrator took the power of constituting the Martial Law Courts which had previously belonged to the government.[51] Regulation 4(2), which provided for an appeal to the Appellate Tribunal from the decision of Special Martial Law Court which was not unanimous, was amended and the right even to this limited appeal was abolished.[52] Although the provision for review of the judgment of Special Martial Law Courts was not changed, the review body was changed: the Chief Martial Law Administrator was substituted for the government as the reviewing authority.[53] Along with these amendments, 'President' was included in the category of persons mentioned in Regulation 11 against whom cases of corruption and criminal misconduct could be instituted.[54]

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51. Section 2 of the Martial Law (Twenty-third Amendment) Regulations, 1976, Regulations No. XXXIII of 1976.
52. Section 4, ibid.
53. Ibid.
54. Section 6, ibid.

In summary, the position was that cases of corruption and criminal misconduct could be instituted against a person who had previously held the office of President. A Special Martial Law Court could be constituted by the Chief Martial Law Administrator with two of the three members, including the chairman, from the defence forces according to his own choice. The right of limited appeal, against a decision of the Special Martial Law Court which was not unanimous, was now taken away altogether. The Chief Martial Law Administrator himself had the power to review the judgments of Special Martial Law Courts.

The Martial Law (Twenty-Third Amendment) Regulations, 1976,were issued, as pointed out earlier, on 28 December 1976. The very next day, First Information Reports in two cases were filed against Moshtaque on charges of corruption, favouritism, nepotism and abuse of official position under Regulation 11.[55] This immediate lodging of First Information Reports after the promulgation of the said Regulation reveals that the Martial Law regime proceeded to prosecute Moshtaque in a calculated and pre-determined way.

Although there were two Special Martial Law Courts at Dhaka established by the government, the Chief Martial Law Administrator on 18 January 1977 set up a third one in spite of the fact that there were thirteen districts which had no Special Martial Law Court at all. This third Martial Law Court at Dhaka, called Special Martial Law Court No.VIII, Dhaka, tried the three cases relating to Moshtaque. Here it may be recalled that one Colonel, instead of a Sessions Judge, was appointed to head this Special Martial Law Court while a Lieutenant Colonel and a First Class Magistrate were to act as its members.[56]

Only one day after the constitution of this Special Martial Law Court, on 19 January 1977, a charge sheet was submitted in Martial Law Case No.1 of 1977 and on 17 February 1977 a charge sheet was submitted in Martial Law Case No.3 of 1977.

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55. The Bangaldesh Times, Dhaka, 30 December 1976.
56. See supra, p. 204.

The newly-created Special Martial Law Court No. VIII, Dhaka, began hearing the Martial Law Case No. 1 of 1977 against Moshtaque on 7 February 1977. In this case, the allegations against Moshtaque were that during his tenure of office as President, he had various construction works, including electric installations and the sinking of deep tube walls, done in his paternal village house at Daspara, Police Station,Daudkandi of Comilla district and in his private rest house at neighbouring Sandal Pur (maintained by his private family trust) at government expense. He was alleged to have abused his official position by causing the sale of valuable construction materials like marble stones and Burma teak wood from the government stores (on credit-sale basis) at a much lower rate than the prevailing market price and utilised government men and materials for the construction works. It was further alleged that during his tenure Moshtaque as Minister for Commerce and Foreign Trade from 19 February 1974 to 14 August 1975, passed orders for the supply of furniture (worth taka 39,900) from the Trading Corporation of Bangladesh free of cost and it was taken to his private rest house. Thus he obtained pecuniary advantage of a total sum of Taka 6,44,655 by corrupt and illegal means resulting in economic and financial loss to the state.[57]

In this case, the accused Moshtaque contended that these allegations were maliciously false and fabricated; he pleaded not guilty. He submitted his explanation under Section 342 of the Criminal Procedure Code in a written statement. The Court heard the case for ten days and examined seventy-two prosecution witnesses and delivered the judgment on 24 February 1977. It found Moshtaque guilty of the charges brought against him.

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57. The Bangladesh Times, Dhaka, 20 January 1977 and 9 February 1977.

The offenders convicted of offences of corruption and criminal misconduct under Regulation 11 were punishable "with death, or with transportation for life, or with rigorous imprisonment for a term which may extend to fourteen years, and shall also be liable to fine or to suffer confiscation of the whole or any part of his property". But Moshtaque was sentenced to five years' rigorous imprisonment and to pay a fine of Taka one lakh, and in default to suffer rigorous imprisonment for another one year. The Court in its brief judgment in Dhaka said that though Khandaker Moshtaque Ahmed was a former member of Parliament, Cabinet Minister and President of the Republic, he indulged in corruption, and abuse of power, and as such deserved deterrent and exemplary punishment. However, it took a lenient view in consideration of his contribution both during and after the War of Liberation and his old age and therefore sentenced him to five years rigorous imprisonment only.[58]

In connection with Martial Law Case No. 3 of 1977, Moshtaque was produced before the Special Martial Law Court No. VIII on March 12 1977.[59] He pleaded not guilty to the charges of corruption and abuse of official position brought against him. The prosecution case was that Moshtaque Ahmed, while he was a Minister for Commerce and Foreign Trade, illegally issued import licenses worth Taka 60,28,340 to certain new commercial importers and actual users for which there was no provision in the import policy for the relevant shipping periods,[60] and thereby harmed the economic and financial interests of the State.

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58. Ibid, 25 February 1977.
59. Here it is to be noted that in Martial Law Case No. 2 of 1977, the Special Martial Law Court No. VIII acquitted Moshtaque of the charges of corruption and abuse of official position.
60. The Bangaldesh Times, Dhaka, 15 March 1977.

The hearing on the case began on 14 March 1977 and the Court examined ninety-seven prosecution witnesses during the eleven days of hearing. The Court in its judgment (delivered on 31 March 1977) said that "it has been proved beyond all reasonable doubt that the accused Moshtaque Ahmed abused his official position by corrupt or illegal means and has obtained valuable property or pecuniary advantage for himself or for other persons. He has thus caused prejudice to the economic or financial interests of the state and thereby committed an offence punishable under Regulation Eleven of Martial Law Regulation One of 1975 as amended"[61] on 28 December 1976. Therefore, it sentenced Moshtaque to three years' rigorous imprisonment with the direction that this sentence would run concurrently with the sentence (i.e. five years rigorous imprisonment) passed in Martial Law Case No. 1 of 1977. The Court, however, said that though Moshtaque Ahmed was a "prominent public leader and a minister he unfortunately indulged himself in such illegal activities which were not expected out of him. The Court takes a lenient view in punishing the accused, considering his services rendered to the nation during the War of Liberation and also considering his old age."[62]

The Special Martial Law Court in both the judgments recorded that the proceedings of the cases be submitted to the Chief Martial Law Administrator for review as required under Regulation 4(3) of the Martial Law Regulations No. 1 of 1975 as amended on 28 December 1976. The record of the Martial Law Cases Nos. 1 and 3 were sent to the Chief Martial Law Administrator soon after the passing of judgments, i.e. after 24 February and 31 March 1977 respectively.

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61. Ibid., 1 April 1977.
62. Ibid.

Here it may be recalled that on 28 December 1976 the Chief Martial Law Administrator replaced the government as the reviewing authority in respect of the proceedings of Special Martial Law Courts, and on 4 June 1977 the power of review reverted back to the government. Yet the review of Moshtaque Ahmed's cases was not done by the Chief Martial Law Administrator during his tenure (until 4 June 1977) as the reviewing authority. Ultimately the government reviewed the matter and upheld the conviction of the accused in both the cases. It passed the order of review on 6 October 1977 in Martial Law Case No. 1, nearly seven and a half months after the trial. Even the order of this belated review was never communicated to Moshtaque. Later on, on taking a certified copy of the order-sheet of the case, he came to learn about the review.

In contrast, this did not happen in Martial Law Case No. 37 of 1978, in which Ehteshamuddin Ahmed was tried by the Special Martial Law Court No. II, Dhaka, on a charge under Section 302 of the Bangladesh Penal Code on the allegation of murdering his wife. The Court sentenced him to death on 5 August 1978 and thereafter the proceedings were submitted to the government for review and the result of the review was communicated on 29 August 1978.[63] This discriminatory treatment between the convicts suggests how there was an ulterior motive of the Martial Law regime in dealing with Moshtaque.

The manner of disposal of review in the case of Moshtaque shows the absence of the application of judicial mind by the government in disposing of the matter as it was done in a highly condensed manner in spite of voluminous evidence. "So many witnesses have been examined in these cases, but without referring to anything whatsoever, only in

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63. Enteshamuddin v. Bangladesh and others, Dhaka Law Reports, Appellate Division, Vol. XXXIII, 1981, pp.156, 158.

three pages the orders of review have been passed stating that there is nothing to interfere with the judgment of the Special Martial Law Court."[64] Whereas in the case of Ehteshamuddin, review was done by the government elaborately in twenty-nine pages, which evoked a favourable comment by two judges of the Appellate Division of the Supreme Court. Justice Badrul Haider Chowdhury said:

> "....We have gone through the twenty-nine pages of the review note and we are fully satisfied that the review was done fairly and justly".[65]

Another Justice, Rahul Islam, went so far as to say with regard to the order of review passed in the case of Ehteshamuddin:

> "The note (of review) is so elaborate and contains full discussions on point of fact and law, it could very well be termed as a well written judgment by a Court".[66]

Therefore, it appears that in the case of Moshtaque there was no proper review.

The political observers of Bangladesh contended that the ulterior motive that induced the junta to try Moshtaque was political. In their view, the charges which were brought against him could be brought against any person of Bangladesh who had held any high post in the administration of the country.[67] It is widely believed that the trial of Moshtaque was held to eliminate him from the political field as he was considered by the Chief Martial Law Administrator a formidable candidate for Presidency, who after the conviction of Moshtaque in April 1977 assumed the office of President replacing A.M. Sayem

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64. As defence lawyer M.H. Khandker argued in the case of Khandaker Moshtaque Ahmed v. Government of Bangladesh, Dhaka Law Reports, High Court Division Vol. XXXIII, 1981, p.357.
65. Ehteshamuddin v. Bangladesh, Dhaka Law Reports, Appellate Division, Vol. XXXIII, 1981, p.174.
66. Ibid, p.161.
67. In an interview, this view was expressed by a retired major-general who was very much involved in the 1975 Martial Law administration and had been a minister. But he declined to be identified.

and who later in June 1978 contested the election for the office of President and was elected. Many critics of Martial Law justice expressed the view that in a major political trial like Moshtaque's, the sentence to be passed by the Martial Law Court is determined long before the trial starts and that the holding of the trial is no more than the completion of necessary formalities.

Nearly eight months after the withdrawal of Martial Law, on 3 December 1979, writ petitions were filed in the High Court Division of the Supreme Court against two judgments of Special Martial Law Court No. VIII, Dhaka, and against the review made by the government. It was stated in the writ petition that the arrest of Moshtaque was made simultaneously with the assumption of the office of the Chief Martial Law Administrator by the then Chief of Army Staff, that the amendments of Regulation 4 (withdrawing appeal to the Appellate Tribunal in cases where the Special Martial Law Court would be divided in opinion, replacing the government by the Chief Martial Law Administrator as the authority for review) and Regulation 11 (purporting to include President within the mischief of Regulation 11) were effected immediately after the arrest of Moshtaque by the Martial Law (Twenty-Third Amendment) Regulations, 1976, Regulations No. XXXIII of 1976 on 28 December 1976. These amendments, as it was contended by the petitioner, clearly indicated that there was manoeuvring for power, that they were being taken in a calculated manner to entangle the petitioner and to ensure his elimination from the field of political activity, by keeping him behind bars. The Advocate for the petitioner argued that the amendment of Regulation No. 11 of 1975 by the Martial Law Regulations No. XXXIII of 1976, introducing "President" in the category of persons to be covered by the said Regulation, was mala fide.

Justice A.W. Chowdhury of the High Court Division, who delivered the judgment of the Court rejected the contention that the subsequent inclusion of the word "President" in Martial Law Regulation 11 can be termed as mala fide:

> "But merely because of the fact that the President was excluded from Regulation No. 11 at the inception, it cannot be said that the subsequent inclusion of President in the said Regulation No. 11 is mala fide. Moreover, the validity of a law shall not depend upon the mala fide or bona fide of a law".[68]

But after considering the other grievances of the petitioner, the learned Justice held:

> "When the petitioner was arrested there was no charge against the petitioner under Regulation No. 11. F.I.R. (First Information Report) was lodged after a month of his arrest. Regulation No. 11 of Martial Law Regulation No. I of 1975 was amended afterwards. From these facts it may appear that the amendment of Regulation 11 by M.L.R. (Martial Law Regulation) XXXIII of 1975 to include the 'President' was mala fide. These facts however colourful and mala fide might be, this court cannot go into that question in view of the fact that Martial Law Regulations by which the amendments have been made to implicate the President in an offence under Regulation 11 are immune from challenge in any court. These Martial Law Regulations or for that matter any Proclamations, Martial Law Regulations and Orders are protected from challenge or scrutiny by any court in view of the provisions of Articles (d), (e) and (g) of Proclamation dated 20th August 1975.... since the law cannot be struck down on the ground of mala fide, we do not find that the trial and convictions of the petitioner are without any jurisdiction".[69]

Thereafter, with regard to the contention that the review orders made in respect of the cases of Moshtaque did not show the application of the mind of the reviewing authority, the learned Judge observed:

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68. Khandaker Moshtaque Ahmed v. Government of Bangladesh, Dhaka Law Reports, High Court Division, Vol. XXXIII, 1981, p.355.
69. Ibid., p.355.

> "We, however, think that in reviewing the judgments of the Martial Law Courts the Government should exercise its judicial mind that should be apparent on the review order passed by the Government and that is absent in the present cases".[70]

Therefore, it appears that the learned Justice was convinced, in view of the sequence of events, that the amendments concerned and the proceedings were initiated mala fide[71] and the review was not carried out properly. But he failed to provide a remedy by quashing the conviction. Since "the judicial mind having swung in the facts and circumstances of the case to the extent that the proceedings were taken mala fide and in colourable exercise of power, the inevitable inferential consequence was to record the quashment of the conviction".[72] It is true that the Superior Courts cannot call in question the validity of Martial Law Regulations or Martial Law Orders. But mala fide proceedings are not immune from the scrutiny of the Superior Courts notwithstanding any ouster clause in any Proclamation or Martial Law Regulation. As in the case of the State v. Zia-ur Rahman,[73] Chief Justice Hamoodur Rahman of Pakistan observed that:

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70. Ibid., p.358.
71. "Mala fide literally means 'in bad faith'. Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorised by the law under which the action is taken or action taken in fraud of the law are also mala fide". Chief Justice Hamoodur Rahman in the case of Federation of Pakistan v. Saeed Ahmad, All Pakistan Legal Decisions, Supreme Court, Vol. XXVI, 1974, p.170.
72. Justice Badrul Haider Chowdhury of the Appellate Division of the Supreme Court in the case of Khandaker Moshtaque v. Bangladesh, Dhaka Law Reports, Appellate Division, Vol. XXXIV, 1982, p.234.
73. All Pakistan Legal Decisions, Supreme Court, Vol. XXV, 1973, p.49.

> "A mala fide act stands in the same position as an act done without jurisdiction, because, no Legislature when granting a power to do an act can possibly contemplate the perpetration of injustices by permitting the doing of that act mala fide .... Acts done mala fide .... would clearly not be acts 'duly done' and, therefore, the protection would not extend to such acts".[74]

A similar view was expressed in 1965 by Justice Kaikaus of Pakistan in the case of Mohammad Jamil Asghar v. the Improvement Trust:[75]

> "However, with respect to mala fides the jurisdiction of the civil court can never be taken away for a mala fide act is in its very nature an illegal and void act and the civil court can always pronounce an act to be mala fide and therefore void".[76]

To the same effect, there was also a decision of the Appellate Division of the Bangladesh Supreme Court in the case of Ehteshamuddin v. Bangladesh:[77]

> "...when a proceeding or an action taken under the Martial Law Regulation is challenged on the ground of .... mala fide, the Superior Court in exercise of its writ jurisdiction is competent to make the necessary declaration...."[78]

Moshtaque filed appeals against the judgments of the High Court Division in the Writ Petitions (Nos. 928 and 929 of 1979) before the Appellate Division of the Supreme Court. The Appellate Division allowed the appeals and set aside the orders of the High Court Division, and the Special Martial Law Court and the review order of government. The orders of conviction passed on Moshtaque were quashed.

Justice Badrul Haider Chowdhury of the Appellate Division, who delivered the judgment of the Court, accepts the grievances of the appellant with regard to the amendments of Regulations 4 and 11 of Martial Law Regulations No. I of 1975 when he observes:

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74. Ibid., pp.89-89.
75. All Pakistan Legal Decisions, Supreme Court, 1965, p.698.
76. Ibid., p.704.
77. Dhaka Law Reports, Appellate Division, Vol. XXXIII, 1981, p.154.
78. Ibid., p.170.

> "Sequence of events show that the arguments of the learned Advocate (of the appellant) that all steps were being taken 'in a calculated manner' .... and the machinery 'so organised according to the choice of the then Chief Martial Law Administrator' and the constitution of Martial Law Court 'that two of the members including the Chairman from the Army and of his own choice and the Chief Martial Law Administrator himself would review the judgment of such a Court' gives the impression that the celebrated principle .... that justice should not only be done but appear to have been done was not kept in view .... It is further to be observed that all these provisional changes were made not by ordinary legislation process but by Martial Law Regulation which are but executive decree of the head of the Government. The materials on record reveal that all those changes were brought out to achieve a direct purpose of debarring the appellant from elective political activities.".[79]

Thus the learned Justice, in effect, accepted the observation of Chief Justice Lord Hewart in Rex v. Sussex:[80]

> "....a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done .... Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".[81]

However, the learned Justice was convinced with regard to the complaints of Moshtaque that proceedings against him were initiated mala fide. As he held:

> "that the apprehension of the appellant that the proceedings have been initiated mala fide cannot be brushed aside. The learned Judges of the High Court Division thus have veered round this view .... The appellant has by affidavit clearly set out the particulars to build up his arguments on mala fide and these particulars are difficult to be assailed by the respondent .... The cumulative effect of these particulars lead to irresistible conclusion that the proceedings were instituted with ulterior purpose and such proceeding is mala fide .... the circumstances adds to the dimension of the contention that the arrest and subsequent proceeding was

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79. Khandaker Moshtaque Ahmed v. Bangladesh, Dhaka Law Reports, Appellate Division, Vol. XXXIV, 1982, pp.230-231.
80. The Law Reports, King's Bench Division, Vol. 1, 1924, p.256.
81. Ibid., p.259.

> mala fide. Power has not been given to exercise it illegally or with mala fide intention. Mala fide action do not get any protection from a Court of Law. The learned Judges of the High Court Division having come up to this point felt short of giving the remedy which inferentially leads to irresistible conclusion, namely, the quashment of the conviction. Since the conviction is to be quashed it is needless to go into the second point whether the review was done in accordance with law. Suffice it to say that the review was not done by the Chief Martial Law Administrator who was the reviewing authority till 6.6.1977. The only inference that can be drawn by such belated review by an authority e.g., the Government when the Chief Martial Law Administrator was the designated authority is that the apprehension of the accused that the proceedings have been initiated mala fide cannot be repudiated".[82]

Therefore, it is evident that the learned Judge has quashed the conviction in spite of the ouster provision in Martial Law Regulation 4(9), not on the ground that the Special Martial Law Court No. VIII in trying or convicting Moshtaque acted without jurisdiction or that the Court was not properly constituted or acted mala fide, but on the ground that the initiation of the proceeding was mala fide. Thus he accepted the traditional view that proceedings initiated mala fide are not saved from the scrutiny of the Courts by any ouster clause. Here it is to be noted that neither the High Court Division nor the Appellate Division of the Supreme Court entered into the question of whether the Special Martial Law Court No. VIII was justified in convicting Moshtaque on the charges brought against him in view of the evidence adduced. Perhaps it did not do so in view of the decision of the Lahore High Court of Pakistan in the case of Manzoor Elahi v. the State,[83] wherein it was held that "this (the High) Court will have no jurisdiction to determine whether or not a finding, judgment or order of a Military Court was

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82. Dhaka Law Reports, Appellate Division, Vol. XXXIV, 1982, pp.235-237.
83. All Pakistan Legal Decisions, Lahore, Vol. XI, 1959, p.243.

justified .... It is, however, undeniable that, if it cannot be found that the order of the .... Military Court is without jurisdiction, no court of ordinary jurisdiction including this (the High) Court will have jurisdiction to declare that order to be incorrect in spite of the fact that the findings given by the Military Court were full of gross and inexplicable errors of any dimension or the sentence is considered to be of a severity which appeared to be uncalled for. The question whether the evidence before the .... Military Court justified the conviction .... would not be open to determination by (the High) Court....".[84]

It is interesting to note that the Appellate Division of the Bangladesh Supreme Court asserted itself after the withdrawal of Martial Law and the assassination of President Ziaur Rahman, on 17 February 1982, when it gave the judgment that the proceedings against Moshtaque were initiated mala fide and on that basis quashed his conviction.

(c) The Trial of Eric N. Ford

The facts of the case in short are: Eric N. Ford was the commission agent of one accused Bodiur Rahman who was a clearing agent. Bodiur Rahman, along with his two sons who were also clearing agents, was prosecuted by a Summary Martial Law Court of Chittagong consisting of a First Class Magistrate in Case No. 1398 of 1976 (under Sections 419/420 of the Penal Code, Section 156 of the Sea Customs Act read with Special Powers Act and Martial Law Regulation No. 10, 11 and 19 of Regulations I of 1975) for the possession of certain articles, including antiques,

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84. Ibid., pp.246-247.

for alleged smuggling. In the charge-sheet submitted against them by the police officer concerned under Regulation 3, Eric N. Ford was cited as prosecution witness No. 13 in the trial before the Summary Martial Law Court. After the completion of the examination-in-chief and cross-examination of Ford as prosecution witness, the Summary Martial Law Court by an order converted him from the position of witness to that of an accused, tried and convicted him.

It is to be noted here that although, under Section 190 of the Criminal Procedure Code, the magistrate can convert a witness into an accused by taking a fresh cognizance of the case in question, no such power was given to any Martial Law Court by any Martial Law Regulation. Under Regulation 3, a Martial Law Court could take cognizance of any case only upon a report in writing made by a relevant officer. Since Ford was never named either in the First Information Report or in the Charge-Sheet by the police officer concerned as an accused in the case under trial before the said Summary Martial Law Court, and instead he was cited as a witness in the Charge-Sheet for the prosecution, the Court had no lawful authority to try him. A first class magistrate sitting in the Summary Martial Law Court could not exercise his ordinary jurisdiction as magistrate.

(d) A Review Case

Here it may be recalled that the Sessions Judges were empowered to carry out reviews of the cases tried by Summary Martial Law Courts. The Sessions Judge of Bakergonj district in Martial Law Review Case No. 68 of 1978 converted a finding of acquittal passed by the Summary

Martial Law Court into one of conviction although he was not given any such power under Regulation 4(5). Apart from the lack of jurisdiction, the manner in which the same Sessions Judge recorded different findings on two different occasions in the same case is very curious.

The facts of the case are as follows: One Murtaza Ali was convicted by the Summary Martial Law Court, Bakergonj (in Martial Law Case No. 28 of 1977) and sentenced under Regulation No. 11 for corruption and misconduct to suffer imprisonment for one year and to pay a fine of Taka 2,000 and in default to suffer a further imprisonment of three months. The Sessions Judge of Bakergonj, on review, set aside this sentence and sent the case back for retrial under the amended Regulation 4(5) on the ground that there was nothing in the judgment of the Summary Martial Law Court which could warrant the conviction of the accused. Subsequently, on retrial, the Summary Martial Law Court found the accused, on the basis of the evidence already adduced earlier, not guilty of the charges and, as such, passed the order of acquittal on 6 March 1978. This time the same Sessions Judge passed the order on 13 July 1978 setting aside the decision of the Summary Martial Law Court and converted this subsequent finding of acquittal into one of conviction and sentenced the accused to the earlier sentence that had been passed by the Summary Martial Law Court in the first instance. It is not clear as to what caused the same Sessions Judge subsequently to find the accused guilty and to convert the order of acquittal into a conviction when the Summary Martial Law Court on retrial had based his finding upon the self-same evidence already adduced earlier.

Although under the Criminal Procedure Code there is no provision for review, there is power of revision and appeal. Even under the Criminal Procedure Code, the court can convert a finding of acquittal into one of conviction only while exercising its appellate jurisdiction,[85] and cannot exercise such power while acting in its revisional jurisdiction.[86] Obviously the Sessions Judge was not exercising his appellate jurisdiction; rather he was discharging his duties as a reviewing authority in respect of any sentence passed by the Summary Martial Law Court by virtue of Regulation 4(5) as amended on 14 November 1977 by the Martial Law (Twenty-Fifth Amendment) Regulations, 1977. Although this Regulation empowered a Sessions Judge, on review, "to set aside, vary or modify any order, judgment or sentence or make orders for retrial or such other orders as he deems necessary for the ends of justice", no specific power was given to the Sessions Judge to convert a finding of acquittal into one of conviction while reviewing an order, judgment and sentence passed by a Summary Martial Law Court. Therefore, it is clear that the Sessions Judge had no jurisdiction to convert an acquittal into a conviction.

Conclusion

In the light of the foregoing discussion, it can be said that when Martial Law is declared in time of peace and the ordinary criminal courts are allowed to continue their functions, the setting up of Martial Law Courts to try offenders is unjustified. But the Martial Law regime

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85. Section 423(1)(a) of the Criminal Procedure Code.
86. Section 439(4) fo the Criminal Procedure Code.

of Bangladesh established Martial Law Courts as an almost inevitable incident of the resort to Martial Law, declared under the common law doctrine of necessity to restore law and order. Most of the Special Martial Law Courts were composed of majority members from the armed forces and the single member-Summary Martial Law Court sometimes consisted of army majors, who had no experience whatsoever in the administration of criminal justice. The jurisdiction of the ordinary criminal courts was interfered with. The cases under ordinary law were unjustifiably transferred from the criminal courts and Special Tribunals, which were open and functioning effectively, to the Martial Law Courts and this was done in an arbitrary manner. At the same time, the same group of cases was transferred from the criminal courts and Special Tribunals to both Summary Martial Law Courts and Special Martial Law Courts without any set standards or criteria which resulted in different treatments of the same type of cases or accused. Thus persons charged with ordinary crimes were deprived of the benefits (e.g. the right of appeal; the right of legal representation, if tried by a Summary Martial Law Court) of a civil trial. It would have been in line with the norms of justice if the ordinary cases had not been transferred to the Martial Law Courts. However, since the duties of the armed forces were to suppress and subdue the armed opponents of the state, the transfer of cases under the Arms Act, the Explosive Act, the Explosive Substance Act could be said to have some justification. As Justice Ataullah Sajjad said, "Any trial of a citizen by a Military Tribunal should be relatable to the maintenance and discipline of the Armed Forces and other matters connected therewith."[87]

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87. All Pakistan Legal Decisions, Lahore, Vol. XXIV, 1972, p.402.

CHAPTER V

Martial Law Tribunals

Apart from the establishment of Special and Summary Martial Law Courts, the Martial Law Government of Bangladesh also set up Special Martial Law Tribunals in 1976 and Martial Law Tribunals in 1977. The Regulations under which these tribunals were established are:

I. The Special Martial Law Tribunal Regulation, 1976 (Martial Law Regulation No.XVI of 1976); and

II. The Martial Law Tribunal Regulation, 1977 (Martial Law Regulation No.V of 1977).

I. The Special Martial Law Tribunal Regulation, 1976

Ten months after the proclamation of Martial Law, on 14 June 1976, the Chief Martial Law Administrator, President A.M. Sayem, promulgated the Special Martial Law Tribunal Regulation, 1976. This Regulation laid down provisions for the constitution, jurisdiction, power and procedure of a Special Martial Law Tribunal.

(i) The Constitution of the Special Martial Law Tribunal

Regulation 3(1) of the Special Martial Law Tribunal Regulation, 1976, empowered the government to constitute, by issuing a notification in the official Gazette, "a Special Martial Law Tribunal...for the whole of Bangladesh". The tribunal was to consist of a chairman and four other members to be appointed by the government.[1] The chairman of the tribunal was to be appointed from among the officers of the Bangladesh army not below the rank of colonel. Of the four other members, one was to be appointed from among the officers of the Bangladesh navy not below the rank of commander, one from among the officers of the Bangladesh air force not

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1. Regulation 3(2), the Special Martial Law Tribunal Regulation, 1976

below the rank of wing-commander and the remaining two were to be first-class magistrates.[2]

Thus the majority of the members of the tribunal (three out of five members, including the chairman) were officers of the armed forces who had no legal training or experience. Although two of the members were magistrates, no provision was made to include any member from the Judiciary as had been done in the case of the Special Martial Law Court.[3] However, the fact that the majority of the members of the tribunal was from the armed forces carried the risk of miscarriages of justice, as such officers were part and parcel of the Martial Law administration or the Executive.

(ii) The Jurisdiction of the Tribunal

Regulation 3(4) of the Special Martial Law Tribunal Regulation invested the tribunal with the power to try any offence, whether committed before or after 14 June 1976, punishable -

(A) Under Chapters VI[4] or VII[5] of the Penal Code, 1860;

(B) Under the Army Act, 1952, the Air Force Act, 1953, the Navy Ordinance, 1961, or any rules or regulations made thereunder; or

(C) Under Regulations 13[6] or 17[7] of the Martial Law Regulations, 1975 (Regulations No.I of 1975).

Moreover, the tribunal was empowered to try such other offences as were punishable under any other Martial Regulation or law for the time being in force as the government might direct by order in writing.

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2. Regulation 3(3), ibid.
3. See supra, Chapter III, pp.157-160.
4. Chapter VI of the Penal Code deals with offences against the state.
5. Chapter VII of the Penal Code deals with offences against the army, navy and air force.
6. Regulation 13 provides penalty for inciting the defence service towards mutiny.
7. Regulation 17 deals with prejudicial acts.

It is to be noted that such a tribunal with such extensive jurisdiction was never provided for before by any other Martial Law Regulation in the history of Martial Law administration of the subcontinent. It seems that in order to try army, air force and navy personnel as well as civilians by a single tribunal for similar offences, the promulgation of a Regulation such as the Special Martial Law Tribunal Regulation, 1976, was a necessity.

(iii) The Power and Procedure of the Tribunal

(a) The Initiation of Proceedings

Regulation 4(1) of the Special Martial Law Tribunal Regulation embodied the conditions requisite for the initiation of proceedings before the tribunal. It provided that "The Tribunal shall take cognizance of an offence on a report in writing made by a police officer not below the rank of Inspector". But there was a priviso to the effect that "no report under this Regulation shall be made by a police officer except with the prior permission of the Government".

Thus like Martial Law Courts,[8] the tribunal was to take cognizance upon a report of the officer concerned. Unlike the Criminal Procedure Code,[9] Regulation 4(1) of the Special Martial Law Tribunal Regulation provided only one procedure for taking cognizance of an offence, namely, upon a report made by a police officer not below the rank of inspector. It is noticeable that although the tribunal was empowered to try any offence punishable under the Army Act, the Air Force Act, the Navy Ordinance and the Martial Law Regulations, no member of the armed forces was given the power of making a report before it. However, an officer of the armed forces had been given the power of making a report before the Martial Law Courts in respect of Martial Law offences.[10] Thus it is clear

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8. See supra, Chapter III, p.168.
9. Ibid.
10. Ibid.

that Regulation 4(1) provided a very limited scope for the purpose of taking cognizance of an offence triable by the tribunal.

(b) Times and Places of the Sittings of the Tribunal

Regulation 4(2) of the Special Martial Law Tribunal Regulation provided: "The Tribunal may sit at such times and places as the Government may direct..."

Thus this Regulation was virtually a reproduction of the provisions contained in Regulation 3(4)[11] of the Martial Law Regulations, 1975.

(c) Trial in Camera

The Special Martial Law Tribunal Regulation, 1976, also provided for trial in camera. It stipulated that "if the chairman so decides, the Tribunal shall sit in camera".[12]

> "Where the Tribunal sits in camera, the Chairman of the Tribunal may require any person attending or otherwise participating in the conduct of the trial to make an oath of secrecy that he will not disclose anything that has come to his knowledge in, or in connection with such trial; and disclosure of any information in contravention of the oath shall be punishable with fine and with imprisonment for a term which may extend to three years."[13]

These provisions relating to trial in camera were almost identical with those of the Martial Law (Nineteenth Amendment) Regulations, 1976, and the Martial Law (Twenty-First Amendment) Regulations, 1976.[14] Therefore, the discussion which has been made earlier in connection with the trial in camera by Special Martial Law Courts applies here.[15]

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11. See supra, Chapter III, p. 172.
12. Regulation 4(2), The Special Martial Law Tribunal Regulation, 1976.
13. Regulation 4(10), ibid.
14. See supra, Chapter III, p. 173.
15. Ibid. PP. 173-174

(d) Continuation of Trial in the Absence of Some Members of the Tribunal

Regulation 4(3) of the Special Martial Law Tribunal Regulation provided:

> "If, in the course of a trial, not more than two members, other than the Chairman, of the Tribunal are, for any reason, unable to attend any sitting thereof, the trial may continue before the other three members, including the Chairman".

Thus the chairman's presence at the Special Martial Law Tribunal was a sine qua non for trying any cases. No trial could be held in the absence of the chairman. Such was not the situation in the case of a trial by a three-member Special Martial Law Court as it was provided that "If in the course of a trial any one of the members of a Special Martial Law Court is, for any reason, unable to attend any sitting thereof, the trial may continue before the other two members".[16]

(e) Majority Decisions

Regulation 4(6) of the Special Martial Law Tribunal Regulation, 1976, stated, "In the event of any difference of opinion among the members of the Tribunal, the opinion of the majority shall prevail".

(f) The Power of the Tribunal

Regulation 4(7) of the Special Martial Law Tribunal Regulation, 1976, provided' "The Tribunal may pass any sentence authorised by the Martial Law Regulations or law for the punishment of the offence tried by it". Thus this Regulation was substantially a reproduction of the provisions of Regulation 2(7) of the Martial Law Regulations, 1975, in respect of the Special Martial Law Court.[17]

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16. Regulation 4(a) as inserted in the Martial Law Regulations, 1975, by the Martial Law (Amendment) Regulations, 1975, issued on 11 September 1975.
17. See supra, Chapter III, p.164.

(g) Bar on Trial de Novo

Regulation 4(4) of the Special Martial Law Tribunal Regulation, 1976, stated:

> "The Tribunal shall not, merely by reason of a change in its membership or the absence of any one or two members thereof from any sitting, be bound to recall or rehear any witness whose evidence has already been recorded, or to reopen proceedings already held and may act on the evidence already given or produced before it".

The provisions contained in this Regulation were virtually a reproduction of those of Regulation 5 of the Martial Law Regulations, 1975.[18]

(h) The Manner of Taking Evidence

Regulation 4(5) of the Special Martial Law Tribunal Regulation, 1976, stated:

> "The memorandum of the substance of the evidence of each witness shall be taken down by the Chairman, or by such other member of the Tribunal as the Chairman may direct, and shall be signed by him or by such member, and shall form part of the record".

The provisions embodied in this Regulation resembled those of Regulation 5(a) and Regulation 7(a) of the Martial Law Regulations, 1975, which were added by the Martial Law (Twenty-Third Amendment) Regulations, 1976.[19] They were also, largely, identical with sub-sections (1) and (2) of Section 355[20] of the Criminal Procedure Code.

(i) Appeal from the Judgment of the Special Martial Law Tribunal

Regulation 4(8) of the Special Martial Law Tribunal Regulation, 1976, provided: "No appeal shall lie to any authority whatever from any decision or judgment of the Tribunal". Thus there was no scope for legal

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18. Ibid., p. 180.
19. Ibid., p. 177.
20. For sub-section (1) of Section 355 of the Criminal Procedure Code, see ibid. Sub-section (2) of Section 355 states that "Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record".

redress by way of appeal against any judgment or sentence, including death sentences, or sentences of life imprisonment, passed by the Tribunal.

(j) Applications of Certain Provisions of Regulations No.I of 1975

Regulation 5 of the Special Martial Law Tribunal Regulation, 1976, stated:

> "The provisions of [original] Regulations 3, 4, 6 and 8 of the Martial Law Regulations, 1975 (Regulations No.I of 1975), shall, so far as they are not inconsistent with the provisions of this Regulation, apply to the proceedings of the Tribunal and all matters relating thereto as if the Tribunal were a Special Martial Law Court constituted under the said Regulations".

Thus the Special Martial Law Tribunal, like a Special Martial Law Court, was to try an offence under Martial Law Regulation No.XVI of 1976 summarily and in trying such an offence it was to follow the procedure laid down in the Code of Criminal Procedure, 1898, for summary trial of summons cases.[21] The tribunal could try an absconding accused in absentia if he had failed to appear before it in accordance with the time specified in the order notified in the official gazette. The property of the absconding accused might also be forfeited to the government.[22] However, a person accused of an offence under the Regulation would enjoy the right to be defended by a legal practitioner before the tribunal.[23] All proceedings of the tribunal were to be submitted to the government for review and all sentences of death or transportation for life passed by it would have to be confirmed by the President.[24] The government could, on review, reduce any sentence.[25] An accused or one convicted of an offence punishable under the Regulation could not, if in custody, be released on bail by any court or tribunal

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21. Regulation 3(5), the Martial Law Regulations of 1975.
22. Regulation 3(7), ibid.
23. Regulation 3(8), ibid.
24. Original Regulation 4(3), ibid.
25. Original Regulation 4(5), ibid.

without the consent of the prosecution.[26] The provisions of the Criminal Procedure Code so far as they were not inconsistent with the provisions of the Regulation, were to apply to the proceedings of the tribunal.[27] No order, judgment, decision or sentence of a Special Martial Law Tribunal could be called in question in any manner whatsoever in or before any court, including the Supreme Court.[28]

II. The Establishment and Composition of the Special Martial Law Tribunal No.1

Within minutes of the promulgation of the Special Martial Law Tribunal Regulation, 1976, on 14 June 1976, the Government of Bangladesh constituted a Special Martial Law Tribunal and appointed its chairman and members.[29] Colonel Yusuf Haider of the Army Headquarters was appointed as Chairman of the Tribunal, while Wing-Commander Mohammad Abdul Rashid of the Administration Wing, Jessore Air Base, Acting-Commander Siddique Ahmed of the Naval Headquarters and two First-Class Magistrates of Dhaka (Sadar South and North), Mohd. Abdul Ali and Hasan Morshed, were appointed as its members.

It is to be noted that the Government Notification announcing the formation of the Tribunal gave no further details as to who would be tried before it. However, it is obvious that the government had an ulterior motive in establishing the Tribunal immediately after the promulgation of the Regulation in so far as it was meant to deal with selected cases of arrests made after the Soldiers' Uprising of 7 November 1975.

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26. Regulation 6(2), ibid.
27. Regulation 8, ibid.
28. Original Regulation 4(9), ibid.
29. Notification No.430-JIV/1T-2/76 issued on 14 June 1976 by the Ministry of Law and Parliamentary Affairs.

III. The Trial of a Conspiracy Case by the Tribunal

On 15 June 1976, the day following the formation of the Tribunal, the members of the Tribunal visited the Dhaka Central Prison to select a courtroom inside it. Two days later, on 17 June, the Chairman of the Special Martial Law Tribunal directed eleven persons, of whom four were civilians[30] and seven members of the army and air force,[31] to appear before the Tribunal sitting in Dhaka Central Prison on or before 21 June 1976. If they failed to appear, they were to be tried in absentia and their property was to be confiscated.[32]

It is worthy of note that although the Tribunal was empowered to fix any period within which the absconding person would have to appear before it, it seems that the discretion was exercised arbitrarily as the persons concerned were given only four days for their appearance. It may be recalled here that under Section 87 of the Criminal Procedure Code, the absconding accused was to be given the minimum period of thirty days to appear before the court from the date of the publication of such an order.

However, the Tribunal was first convened on 21 June 1976 and charges were brought against thirty-three military and civilian men. Most of them were already under dentention since November 1975, and eighteen out of the thirty-three accused were members of the armed forces. The charges brought against each of the accused were:

(A) Conspiracy to overawe the government by means of criminal force (under Section 121A of the Penal Code); and

(B) Prejudicing and interfering with the discipline of, or the performance of duty by, the members of the defence services, seducing the members of the defence services

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30. The four civilians were: Serajul Alam Khan Dada, Sharif Nurul Ambia, Engineer Anwar Siddique and Mohiuddin.
31. The seven members of the army and air force were: Corporal Altaf Hossain, Nayek Subedar Mohammad Jafaluddin, Havildar M.A. Barek, Naik A. Bari, Sergeant Syed Rafiqul Islam, Flight-Seargeant Kazi Rokanuddin and Sergeant Kazi Abdul Kader.
32. The Bangladesh Times, Dhaka, 18 June 1976.

> from their duty and allegiance to government, and attempting to induce such members to commit mutiny or to indulge in anti-state activities (under Regulation 13 of the Martial Law Regulations, 1975).

After charging the accused in its opening session, the Tribunal adjourned for eight days to permit defence lawyers to prepare and organise their defence for the conspiracy case of State v. Major (retd.) M.A. Jalil and others. The defence lawyers, who met their clients on the day proceedings began, protested to the Tribunal for allowing so little time to prepare the defence. The accused, most of whom were in preventive detention for several months, had been denied access to legal counsel and communication with relatives. No interviews or private consultations were permitted either. The accused were able to give instructions to their lawyers for their defence only while in the courtroom.[33]

In view of the gravity and complicated nature of the offences with which the accused were charged, it seems that the period of eight days was not sufficient to enable the defence lawyers to acquaint themselves with the facts or law of the case and defend the accused satisfactorily. In this respect, the observations of Justice Muhammad Munir in Khadim v. the Crown,[33a] in which only eleven days were given for taking the necessary steps to defend the accused in the murder trial, are noteworthy:

> "Such unseemly hurry makes defence in important cases of crime impossible and is likely to affect the result of the trial. It also detracts from the public confidence in the administration of justice".[34]

However, it seems that the accused in the conspiracy case did not, in fact, have the kind of legal assistance that is contemplated in Section 340(1)

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33. Only one accused - Hasanul Huq Enu - was allowed to meet his lawyer, Zulmat Ali Khan, privately. Based on an interview with defence lawyer S. Chaklader

33a. All Pakistan Legal Decisions, Lahore, Vol.VI, 1954, p.69.

34. Ibid., p.72.

of the Criminal Procedure Code as the right of legal defence given by that Section extends to access to the counsel for private consultation and to affording the latter sufficient time and opportunity for the preparation of a proper defence. In this context, the comments of a leading authority on constitutional law of India are of direct relevance:

> "Assistance of counsel is effective only where the accused is afforded a reasonable opportunity to consult with counsel and counsel is afforded such opportunity to consult with the accused and to prepare his defence".[35]

A similar view was also expressed by Justice Muhammad Munir in Khadim v. the Crown:[36]

> "Section 340 of the Code of Criminal Procedure gives to an accused person the right to a reasonable opportunity to defend himself by counsel".[37]

Article 14(3)(b) of the International Covenant on Civil and Political Rights, 1966, also requires that "in the determination of any criminal charge against him, everyone shall be" given "...adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

It is to be noted that the total number of the accused in the conspiracy case was forty, of whom seven were pardoned in order that they could become approvers (state witnesses). The manner in which they were pardoned was curious. On 15 June 1976, the day on which the members of the Tribunal visited the Dhaka Central Prison to select a courtroom inside it, the charge-sheet was submitted which showed these approvers as accused Nos.1-7 in column No.3. On the same date, all the seven petitions for pardon were filed and signed on the typed and carbon copies of a single

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35. Basu, Durga Das, Commentary on the Constitution of India, Calcutta, Vol.I, 3rd edition, 1955, p.283.
36. All Pakistan Legal Decisions, Lahore, 1954, p.69.
37. Ibid., p.71.

proforma. The First Information Report and the statements of these petitioners before the magistrate, recorded under Section 164 of the Criminal Procedure Code, had the same wording. However, all the seven co-accused were pardoned on that very day of 15 June by the Tribunal.[38]

It would, therefore, appear that a deliberate and assiduous effort was made to persuade all these seven co-accused to turn state witnesses. It is worthy of note that, although the Tribunal granted pardons to the seven co-accused, the Special Martial Law Tribunal Regulation, 1976, had given no such power to it. Consequently, the provisions of Section 337[39] of the Criminal Procedure Code regarding the granting of pardons ought to have come into operation as it was laid down that the provisions of the Criminal Procedure Code, which has been mentioned earlier, in so far as they were not inconsistent with the provisions of this Regulation, would apply to the proceedings of the Special Martial Law Tribunal.

However, the trial reopened on 29 June 1976. It started with the evidence or statement of prosecution witness No.1, Fakhrul Alam, a member of the air force and approver in this case. Thus the statement of this witness became the basis of the case. The Deputy Superintendent of Police of the Criminal Investigation Department, Safiuddin Ahmed, who was both complainant and investigation officer, was produced before the Tribunal as the last prosecution witness. It is interesting to note that the DSP,

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38. Based on the notebook of a defence lawyer, Sharifuddin Chaklader.
39. Under Section 337 of the Criminal Procedure Code, a District Magistrate can tender pardon at any stage of investigation, inquiry or trial even though he himself may not be holding such inquiry or trial. District Magistrate also include the Additional District Magistrate on whom all the powers of the District Magistrate have been conferred under Section 10 of the Code. A Magistrate First-Class, not being the District Magistrate, can tender pardon only (a) in which the offence is under investigation if he has jurisdiction in the place where the offence might be inquired into and tried, and the sanction of the District Magistrate has been obtained therefore, and (b) in the case where the offence is under inquiry or trial before him.

who had lodged the First Information Report on 4 June 1976 at 1600 hours, admitted in the course of cross-examination that he had not held any investigation, and that he had not visited any of the alleged places of secret meetings of the conspirators to draw a sketch map of the spots.[40] Moreover, the DSP did not even produce certain persons - Monsur and Rezwan - on the basis of whose information he had lodged the First Information Report.[41] Therefore, it seems that he himself was deliberately used as a tool.

The prosecution alleged that, from August 1974 to November 1975, some leaders of the now defunct Jatiya Samajtantrik Dal, Major (retd.) M.A. Jalil, A.S.M. Abdur Rab (both released on 8 November 1975), Serajul Alam Khan, Professor Anwar Hossain, Hasanul Huq alias Ino, Lt.-Colonel (retd.) Abu Taher and Major Ziauddin Ahmed (deserter) with several others had conspired to wage war aginst the Government of Bangladesh, to overthrow it through violent means and to undo completely the achievements of the glorious revolution of 7 November 1975, a revolution of the people and of the armed forces of Bangladesh. In pursuance of the conspiracy, Lt.-Colonel (retd.) Abu Taher and some of his associates seduced or tried to seduce members of the defence forces with a view to subverting and destroying the defence forces and replacing them by the so-called Biplobi Gano Bahini (Revolutionary People's Army), an armed wing of the Jatiya Samajtantrik Dal (National Socialist Party). They conducted political study classes, distributed prejudicial books, leaflets and funds to the defence forces. It was the principal aim of the conspirators to eliminate and destroy the regular forces and replace them by the so-called Biplobi Gano Bahini.[42]

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40. Based on the notebook of a defence lawyer, Sharifuddin Chaklader.
41. Ibid.
42. The Bangladesh Times, Dhaka, 18 July 1976.

The trial on the basis of the charges of conspiracy to overthrow the government and of incitement of the defence services to mutiny occurred at a time when there had been three governments in the preceding year (1975), each succeeding other by force of arms. It is curious that, at no stage of the trial did the prosecution specify which government the accused had allegedly conspired to overthrow from August 1974 to November 1975, as there was a succession of governments from 15 August to 7 November 1975.[43] Therefore, it is evident that the charges were imprecise. It may be mentioned here that the August coup of 1975 was staged by six majors under the leadership of Khandaker Moshtaque Ahmed and not by any of the accused in this case. None of the accused joined Brigadier Khaled Mosharraf on 3 November 1975 to oust the government of Moshtaque. One of the accused, namely Lt.-Colonel Abu Taher, was only involved in the Solders' Uprising of 7 November 1975 that led to the overthrow of Mosharraf's four-day-old coup and the release of the deposed Chief of Army Staff, Major-General Ziaur Rahman, from captivity imposed on him. It is said, as pointed out earlier, that Abu Taher, commander of the Biplobi Shainik Sangstha (the Revolutionary Soldiers' Organisation), set in motion the soldiers' mutiny on the morning of 7 November. However, this Soldiers' Uprising of 7 November installed the existing government in power and the day was later declared a public holiday as the National Revolution and Solidarity Day.

The defence lawyer, Ataur Rahman, who defended all the thirty-three accused (of whom two were tried in absentia) in this case, argued that there could not have been any conspiracy after the successful completion of the Soldiers' Uprising of 7 November. He argued that the cause of this conspiracy case could be traced to the failure of the government to fulfil the 'Twelve Demands'[44] of the soldiers issued by them on the morning of

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43. Based on the notebook of the defence lawyer, Sharifuddin Chaklader.
44. See supra, Chapter II, pp.129-130.

7 November, which set forth a philosophy of the role which soldiers should play in a revolutionary army. According to him, the Investigation Officer was used as a tool in this case merely to supply the First Information Report which had no basis in fact.[45]

Advocate Ataur Rahman's argument attempted to show the hollowness of the charge of conspiracy, as some of the accused were in fact outside Bangladesh when the alleged conspiracy was said to have taken place. For example, Flight-Seargeant Kazi Abdul Kader (who was ultimately acquitted) was, during the conspiracy period, doing a course at the Aeroflot Aviation School, Kirovograd, Ukraine, USSR, together with one of the members of the Tribunal, M.A. Rashid.[46] So the story of the state witnesses (approvers) that he attended secret meetings of conspirators was absolutely false. The approver, Abul Kalam, who implicated Dr. Akhlaqur Rahman, Professor of Economics at the Jahangir Nagar University, Bangladesh, in the case could not identify him the court. Although it was alleged that contact was made with Dr. Akhlaqur Rahman (who was ultimately acquitted) over the telephone, it turned out that he had no telephone service at his residence.[47]

It is noteworthy that not only were the defence lawyers given inadequate time to prepare the defence and denied facilities for private consultations with the accused, but they were also not allowed to take any papers relating to the case out of the Dhaka Central Prison. They were not even given copies of the evidence recorded by the Tribunal. Thus the defence lawyers were deprived of the necessary opportunity to study

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45. Based on the notebook of defence lawyer, Advocate Sharifuddin Chaklader.
46. Wing-Commander Mohammed Abdul Rashid, a member of the Tribunal, confirmed this fact.
47. Based on the notebook of Advocate Sharifuddin Chaklader.

relevant documents. They were searched at the prison gate, which was itself degrading to them. They had to take an oath of secrecy and were required not to disclose anything learnt in the course of, or in connection with, the trial proceedings.[48]

There were no defence witnesses in the case. One of the accused, Lt.-Colonel Abu Taher, made an application to the Tribunal to summon President A.M. Sayem, three Deputy Chief Martial Law Administrators, namely, Major-General Ziaur Rahman, Rear-Admiral M.H. Khan and Air Vice-Marshal M.G. Tawab, and General (retd.) M.A.G. Osmani as defence witnesses, but the application was rejected. Even the application filed on 3 July 1976 by the accused Abu Taher's lawyer for an opportunity to cross-examine prosecution witness Fakhural Alam (with whose evidence the trial had begun) in depth, was rejected.[49]

These decisions violated the provisions of Article 3(d) of the European Convention on Human Rights which provides that everyone charged with a criminal offence has the minimum right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 14(3)(e) of the International Covenant on Civil and Political Rights, 1966, echoed exactly the same stipulations.

However, on 15 July 1976, the Tribunal ended its secret proceedings. The Chief prosecutor, A.T.M. Afzal, concluded his argument at 4.00 pm on 14 July 1976 with the sentence that "the prosecution has established the case" without specifying the range of punishment to be passed against each of the accused.[50] The Tribunal delivered the judgment at 3.00 pm

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48. Based on an interview with defence lawyer Sharifuddin Chaklader.
49. Based on the notebook of Advocate Sharifuddin Chaklader, a defence lawyer.
50. Ibid.

on 17 July 1976. Only one accused, Lt.-Colonel (retd.) Abu Taher, was sentenced to death, while Major (retd.) M.A. Jalil and Abu Yusuf Khan (brother of Abu Taher), were sentenced to life imprisonment. Fourteen other accused were sentenced to various jail terms ranging from twelve years to one year and the remaining sixteen were acquitted.

It is noteworthy that the convictions of the accused were reached solely on the basis of evidence given by seven co-accused who had turned state witnesses. There was no independent evidence to corroborate their depositions.[51] Therefore, it seems that the testimony at the trial was hardly sufficient to justify convictions especially when they resulted in severe penalties such as death and life imprisonment. Although under Section 133 of the Evidence Act an accomplice is a competent witness against an accused person and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the rule of caution demands that the evidence of an approver should be supported by independent corroborative evidence implicating the accused in the crime. In fact, the rule of prudence is to be found in illustration (b) of Section 114 of the Evidence Act which provides that "The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars". Therefore, it seems that the Tribunal did not exercise this discretion judicially in convicting the accused merely on the basis of testimony of the approvers uncorroborated in material particulars by other independent evidence. In this context, the observations of Justice Inamullah in Yaru v. the State[52] are of direct relevance:

> "An approver is undoubtedly a competent witness under the Evidence Act. His evidence, however, cannot be acted upon as a rule of prudence unless it is corroborated in material particulars by other independent evidence. The reason for this caution is that the approver has participated in the commission of the offence himself. Such independent

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51. Ibid.
52. All Pakistan Legal Decisions, Karachi, Vol.XI, 1959, p.662.

> corroboration need not cover the whole of the prosecution story. It would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details. ' In such a case corroboration does not afford the necessary assurance for the conviction".[53]

A similar view was expressed by Justice Rahman of the Pakistan Supreme Court in Ghulam Qadir v. the State:[54]

> "As a matter of strict law, the uncorroborated testimony of an accomplice could, if accepted, form the basis of a conviction in a criminal case. However, in the course of judicial precedents, a rule of prudence has been evolved under which it is always insisted that there ought to be independent corroboration of an approver's statement on material points suggesting a link between accused persons and the crime before such a statement could be accepted as a safe foundation for their conviction. The reason for the rule is obvious. There is always danger of substitution of the guilty by the innocent in such cases and it is realised that it would be extremely risky to act upon the statement of a self-confessed criminal who while trying to save his own skin, might be unscrupulous to accept suggestions of others to implicate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner. But the corroboration required would depend on the facts and circumstances of each particular case and no hard-and-fast rules can be laid in his behalf. Surely one of the factors calling for consideration may be circumstance that the approver had no ostensible motive to involve any of the accused persons falsely in the case".[55]

It is to be noted that the judgment of the Tribunal was not unanimous. One member of the Tribunal gave a note of dissent with the judgment delivered by the majority. He sentenced Lt.-Colonel (retd.) Abu Taher to seven years rigorous imprisonment. In an interview[55a] with the author, the member of the Tribunal, who had given a note of dissent, claimed that two of the three Deputy Chief Martial Law Administrators asked him to pass death sentences against three of the accused, namely Lt.-Colonel (retd.) Abu Taher, Major (retd.) M.A. Jalil and A.S.M. Abdur Rab.

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53. Ibid., p.665.
54. All Pakistan Legal Decisions, Supreme Court, Vol.XI, 1959, p.377.
55. Ibid., pp.380-381.
55a. The interview with the member of the Tribunal, who does not wish to be identified, took place on 4 October 1984.

Usually the proceedings of the cases tried by Special Martial Law Courts or Special Martial Law Tribunals were to be received by the Ministry of Law and Parliamentary Affairs in due course during office hours for review. But this did not happen in the conspiracy case. There was an unusual and unprecedented haste in reviewing the sentences passed against the accused and confirming the sentences of death and life imprisonment.

At about 8.00 pm on 17 July 1976, only five hours after the pronouncement of the judgment the Chairman of the Tribunal took all the papers relating to the case to Bangabhavan (the Presidential palace). It is to be noted that this was done outside office hours. However, immediately thereafter a formal meeting of the Chief Martial Law Administrator, Deputy Chief Martial Law Administrators, Home Minister, and Director-General of National Security Intelligence, was held and the judgment was read out. Then the Secretary, Ministry of Law and Parliamentary Affairs was asked to carry out the review in such a way as to support the sentences of death and life imprisonment.[56]

During an interview[57] with the author, the Secretary claimed that, as he was asked to submit the review on the following day (i.e., on 18 July), he could not go through all the evidence recorded by the Tribunal. Consequently, he had to use very guarded words in supporting the sentences. He wrote that "the evidence as analysed by the Tribunal" would justify the conviction of the accused. In other words, he did not analyse the evidence himself, but simply let himself be guided by the analysis of evidence made by the tribunal. In accordance with the wishes of the President, the Secretary submitted to him his three-page review on

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56. Based on an interview with A.R. Chowdhury, the then Secretary of Ministry of Law and Parliamentary Affairs. The interview took place on 3 October 1984.
57. Ibid.

18 July which was a Sunday, the weekly holiday. Although the Secretary supported the conviction, he made recommendations to the President to commute the sentences in view of the revolutionary activities of the convicts, especially those of Abu Taher, from 1974 to 7 November 1975. The basis of his recommendations was that the activities of the accused during that period had contributed directly first to the rescue of Ziaur Rahman on the morning of 7 November 1975 (the day of the Soldiers' Uprising) and to his subsequent installation in power as Chief of the Army Staff and one of the three Deputy Chief Martial Law Administrators.

However, after receiving the review, the President consulted all the three Deputy Chief Martial Law Administrators. At one time, one of the Deputy Chief Martial Law Administrators told the Secretary that he had given all the credit for the Soldiers' Uprising[58] of 7 November 1975 to Lt.-Colonel (retd.) Abu Taher. Ultimately the last page of the review which contained the recommendations for the commutation of the sentences was struck out. On the very Sunday of 18 July, the President confirmed the death sentence passed against Abu Taher and the sentences of life imprisonment passed against M.A. Jalil and Abu Yusuf Khan by the Special Martial Law Tribunal on the previous day.[59] Thus the review body was deliberately used as tool to serve the ulterior purpose of the Martial Law administration.

This description as to how the sentences were confirmed on a public holiday, (i.e., on 18 July) is supported by press reports as the Bangladesh dailies published the news of the President's confirmation of the sentences

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58. See supra, Chapter II, pp.128-130.
59. Based on an interview with A.R. Chowdhury, the then Secretary of Ministry of Law and Parliamentary Affairs. The interview took place on 3 October 1984.

of death and life imprisonment on Monday, 19 July 1976, quoting an official announcement.[60]

On 18 July 1976, one day after the passing of the judgment, the wife of the convicted Lt.-Colonel (retd.) Abu Taher, Mrs. Lutfa Taher, petitioned to the President under Article 57 of the 1972 Constitution for granting pardon in respect of the death sentence passed against her husband by the Special Martial Law Tribunal No.I in Special Martial Law Tribunal Case No.1 of 1976. In this petition,[60a] Mrs. Lutfa Taher stated, inter alia, that in spite of her best efforts she had not been allowed to have an interview with her husband either before or during the trial. As a result of which, she had neither been able to obtain the full details of the charges levelled against him nor was she able to arrange for his proper legal defence. She further stated that no copy of the Order Sheet, First Information Report, Charge Sheet, the depositions of prosecution witnesses or the Judgment and Order were made available to her. This petition for clemency was rejected by the President, although his decision was never communicated to the petitioner.

In contrast, in Ehteshamuddin v. Bangladesh,[61] as has been pointed out earlier, the accused was sentenced to death on 5 August 1978 by the Special Martial Law Court No.II, Dhaka, in Martial Law Case No.37 of 1978 for murdering his wife. Thereafter the proceedings were submitted to the government for review and the result of the review was communicated on 29 August 1978. The government after review placed the proceedings

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60. For example, the Bangladesh Times, Dhaka, wrote, "According to an official announcement, the President and Chief Martial Law Administrator has confirmed the sentence of death passed by the Special Military [sic] Tribunal in respect of Lt.-Colonel (retd.) Abu Taher....The President has also confirmed the sentences of transportation for life...in respect of Major (retd.) M.A. Jalil and Mr. Abu Yusuf Khan".

60a. The mercy petition was made available to the author by Abu Yusuf Khan, a brother of Lt.-Colonel (retd.) Abu Taher who had also been sentenced to life imprisonment in the conspiracy case and later released in 1984.

61. Dhaka Law Reports, Appellate Division, Vol.XXXIII, 1981, p.154.

of the case before the President for confirmation of the death sentence. The death sentence was confirmed on 21 September 1978. Six days later, on 27 September 1978, a mercy petition was filed to the government under Sections 401 and 402 of the Criminal Procedure Code. The convict's father was informed on 8 June 1979 that it had been rejected.[62]

Therefore, it is clear that in Ehteshamuddin's case it took about a month to carry out the review, nearly a month for the confirmation of the death sentence, and almost eight-and-a-half months for the consideration of the mercy petition. But in the conspiracy case tried by the Special Martial Law Tribunal No.I, everything was done in one single day. Thus the extraordinary speed with which the whole affair was conducted suggests that the Martial Law administration had a political motive in bringing the conspiracy case to a hasty conclusion.

However, in turning down the petition for clemency submitted by Abu Taher's wife, President (Justice) Abusadat Mohammad Sayem himself acted contrary to his own judgment which had been delivered in 1970 in the case of The State v. Purna Chandra Mondal.[63] In that case, he observed:

> "...Section 340 of the code of Criminal Procedure... confers a right on every accused person brought before a criminal court to be 'defended' by a lawyer, which is not the same thing as being 'represented' by a lawyer. That right evidently extends to access to the lawyer for private consultations and also affording the latter an adequate opportunity of preparing the case for the defence. A last-moment appointment of an Advocate for defending a prisoner accused of a capital offence...results...in a denial to the prisoner of the right conferred on him by Section 340 of the Code....The denial of this right must be held to have rendered the trial as one not according to law, necessitating a fresh trial".[64]

At an interview,[65] the author drew President Sayem's attention to the contradiction of his approach to the two cases, i.e., the conspiracy case

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62. Ibid., pp.172 and 174.
63. Dhaka Law Reports, Vol.XXII, 1970, p.289.
64. Ibid., pp.291-292.
65. The interview with former President Justice A.M. Sayem took place on 4 October 1984.

and Purna Chandra's case. Sayem replied that in Purna Chandra's case he had been acting in his capacity as a High Court Judge, but in the conspiracy case he had been discharging his responsibility as the President of Bangladesh. As President he had to take into account considerations other than those of pure justice. According to him, after the revolution, it had not been safe to keep the leaders of the revolution alive from the administrative point of view. Sayem added that the reasons of state had dictated that the death sentence should be passed against Abu Taher because he had been the root cause of deep and widespread trouble. Abu Taher had tried to destroy the armed forces by creating dissension and disunity among the soldiers and wished to replace the regular armed forces by the so-called Biplobi Gano Bahini - Revolutionary People's Army - an armed wing of the Jatiya Samajtantrik Dal. President Sayem felt that there should have been more than one death sentence. Had there been more than one death sentence, there would not have been any further arguments or controversy over the issue. He reminded the author that during the whole of his tenure as the Chief Martial Law Administrator (from November 1975 to November 1976) and as President of Bangladesh (from November 1975 to April 1977) only one person was hanged.

Therefore, it is evident that the Martial Law administration was most anxious to eliminate Abu Taher from the political scene by fair means or foul, because he was considered a threat to the regime.

It is to be noted that, since the Special Martial Law Tribunal Regulation, 1976, did not contain any provisions as to the procedure to be followed regarding the execution of death sentences, the provisions of ordinary law were to apply in this respect.[66] In accordance with the

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66. See supra, p.258.

provisions of Section 381[67] of the Criminal Procedure Code, the Special Martial Law Tribunal was to issue, after receiving the confirmation of a death sentence, a warrant to the Superintendent of the prison concerned in the Form XXXV of Schedule V of the Code authorising and requiring him "to carry the said sentence into execution by causing the...[convict] to be hanged by the neck until he be dead..."[68] On the other hand, the Jail Code, 1919, provided for the conferment on the Superintendent the authority of fixing the date of execution from twenty-one to twenty-eight days of receiving such a warrant or information. As it was stated:

> "The Superintendent of the jail will be authorised to fix the date of execution not less than twenty-one days or more than twenty-eight days ahead of the date on which he received such intimation....Mercy petition will be within seven days".[69]

But these provisions were not followed in respect of the execution of Abu Taher. Only three days after the confirmation of the death sentence, on 21 July 1976, he was hanged in Dhaka Central Prison. This shows that the Martial Law government was prepared to go to any lengths to achieve its political object.

IV. The Martial Law Tribunal Regulation, 1977

On 4 October 1977, the Chief Martial Law Administrator, President Ziaur Rahman, who had replaced A.M. Sayem as the Chief Martial Law Administrator on 29 November 1976 and as the President on 21 April 1977, promulgated the Martial Law Tribunal Regulation, 1977 (Martial Law Regulation No.V of 1977). This Regulation contained provisions for the constitution, jurisdiction, power and procedure of a Martial Law Tribunal.

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67. Section 381 of the Criminal Procedure Code provides that "When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary".
68. Form XXXV of Schedule V of the Criminal Procedure Code.
69. Sub-rule VI of Rule 991 of the Jail Code, 1919.

(i) The Constitution of the Martial Law Tribunal

Regulation 4(1) of the Martial Law Tribunal Regulation, 1977, empowered the government to constitute, by issuing notification in the official Gazette, "such number of Martial Law Tribunals as it may deem fit and each such Tribunal may be for such area or areas or for trial of such cases or classes of cases as may be specified in the notification or as the Government may direct". A tribunal was to consist of a chairman and four other members to be appointed by the government.[70] The chairman was to be appointed from amongst the officers of the defence services and the four other members were to be appointed from amongst the junior commissioned officers and non-commissioned officers of the Bangladesh army or their equivalent in the other defence services and other persons enrolled under the Defence Service Laws.[71]

Thus unlike the Special Martial Law Tribunal, all the members of a Martial Law Tribunal were officers of the defence services.

(ii) The Jurisdiction of the Tribunal

Regulation 4(4) of the Martial Law Tribunal Regulation, 1977, empowered the tribunal to try any offence, whether committed before or after 4 October 1977, punishable -

(a) Under Chapters VI or VII of the Penal Code, 1860;

(b) Under The Army Act, 1952, the Air Force Act, 1953, the Navy Ordinance, 1961, or any rules or regulations made thereunder; or

(c) Under Regulations 13 or 17 of the Martial Law Regulations, 1975 (Martial Law Regulations No.I of 1975).

Thus like the Special Martial Law Tribunal, a Martial Law Tribunal was invested with the power to try any offences under the Military Laws and certain offences under Martial Law Regulations and the Penal Code.

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70. Regulation 4(2), the Martial Law Tribunal Regulation, 1977.
71. Regulation 4(3), ibid.

(iii) The Grant of Bail

Regulation 5(2) of the Martial Law Tribunal Regulation, 1977, provided:

> "No person accused or convicted of an offence punishable under this Regulation shall, if in custody, be released on bail by any Court or Tribunal without the consent of the prosecution".

Thus these provisions relating to the grant of bail were a reproduction of those of Regulation 6(2)[72] of the Martial Law Regulations, 1975. It may be recalled here that the stipulations of Regulation 6(2) concerning the grant of bail had also been adopted by the Special Martial Law Tribunal Regulation, 1976.

(iv) The Power of the Tribunal

Regulation 6(9) of the Martial Law Tribunal Regulation, 1977, stated:

> "A Tribunal may pass any sentence authorized by the Martial Law Regulations or Laws for the punishment of the offence tried by it".

Thus this Regulation is exactly identical with that of Regulation 4(7)[73] of the Special Martial Law Tribunal Regulation, 1976.

(v) The Procedure of the Tribunal

(a) The Initiation of Proceedings

Regulation 6(1) of the Martial Law Tribunal Regulation, 1977, specified:

> "A Tribunal shall take cognizance of an offence on a report in writing made by any officer of any of the Defence Services, or by any junior commissioned officer of the Bangladesh Army or equivalent in the other Defence Services".

Thus the Regulation provided only one procedure for taking cognizance of an offence by a Martial Law Tribunal, namely, upon a report of the

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72. See supra, Chapter III, p. 182.
73. See supra, p. 255.

officer concerned. It is significant that, whereas the Special Martial Law Tribunal had been allowed to take cognizance of an offence only upon a report of a police officer not below the rank of inspector, the Martial Law Tribunal was permitted to take cognizance of the same offence merely on a report of an officer of the defence services.

(b) Trial in Camera

The Martial Law Tribunal could sit in camera in accordance with the decision of its chairman.[74]

> "Where a Tribinal sits in camera, the Chairman may require any person attending or otherwise participating in the conduct of the trial to make an oath of secrecy that he shall not disclose anything that has come to his knowledge in, or in connection with, such trial; and disclosure of any information in contravention of the oath shall be punishable with imprisonment for a term which may extend to three years and with fine."[75]

These provisions concerning trial in camera were identical with those of Regulations 4(2)[76] and 4(10) of the Special Martial Law Tribunal Regulation, 1976.

(c) Continuation of Trial in the Absence of Some Members of the Tribunal

Regulation 6(3) of the Martial Law Tribunal Regulation, 1977, provided:

> "If, in the course of a trial, not more than two members, other than the Chairman, are, for any reason, unable to attend any sitting thereof, the trial may continue before the other three members, including the Chairman".

Thus this Regulation is exactly a reproduction of the provisions contained in Regulation 4(3)[77] of the Special Martial Law Tribunal Regulation, 1976.

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74. Regulation 6(2), the Martial Law Tribunal Regulation, 1977.
75. Regulation 7, ibid.
76. See supra, p.254.
77. Ibid., p.255.

(d) Bar on Trial de Novo

Regulation 6(4) of the Martial Law Tribunal Regulation, 1977, provided:

> "A Tribunal shall not, merely by reason of a change in its membership or the absence of any one or two members, thereof from any sitting, be bound to recall or rehear any witness whose evidence has already been recorded, or to reopen any proceedings already held, and may act on the evidence already given or produced before it".

These provisions were precisely the same as those of Regulation 4(4)[78] of the Special Martial Law Tribunal, 1976.

(e) The Manner of Taking Evidence

Regulation 6(5) of the Martial Law Tribunal Regulation, 1977, laid down:

> "The memorandum of the substance of the evidence of each witness shall be taken down by the Chairman, or by such other member as the Chairman may direct, and shall be signed by him or such other member, and shall form part of the record".

This Regulation was exactly a reproduction of the provisions of Regulation 4(5)[79] of the Special Martial Law Tribunal Regulation, 1976.

(f) Summary Trial

Regulation 6(6) of the Martial Law Tribunal Regulation, 1977, provided:

> "A Tribunal trying an offence under this Regulation shall try the offence summarily, in so far as it may be, in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 (Act V of 1898), for summary trial of summons cases".

These provisions were similar to those of Regulation 3(5)[80] of the Martial Law Regulations, 1975. The provisions of Regulation 3(5) had also been adopted by the Special Martial Law Tribunal Regulation, 1976.

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78. See supra, p.256.
79. Ibid.
80. See supra, Chapter III, p. 175.

(g) Legal Representation

Regulation 6(14) of the Martial Law Tribunal Regulation, 1977, stated:

> "No lawyer shall appear or plead before a Tribunal on behalf of the accused but the accused may be assisted and advised by any person he chooses who shall be called the friend of the accused".

This Regulation was a reproduction of the provisions of Regulation 3(8)[81] of the Martial Law Regulations, 1975, with the exception of the words "Summary Martial Law Court". It may be recalled here that the denial of the opportunity to be defended by a lawyer in a trial before a Martial Law Tribunal exposed the accused to the danger of being convicted upon insufficient, irrelevant or inadmissible evidence and without a proper charge. However, it is worthy of note that, whereas a person accused of an offence had been given the opportunity of the services of a lawyer in a trial before a Special Martial Law Tribunal (by the Special Martial Law Tribunal Regulation, 1976), a person accused of the same offence was denied this opportunity in a trial before a Martial Law Tribunal.

(h) Appeal from the Judgment of a Martial Law Tribunal

Regulation 6(12) of the Martial Law Tribunal Regulation, 1977, provided: "No appeal shall lie to any authority whatever from any decision or judgment of a Tribunal".

This Regulation is exactly a reproduction of the provisions of Regulation 4(8)[82] of the Special Martial Law Tribunal, 1976.

(i) The Confirmation of Certain Sentences Passed by the Martial Law Tribunal

Regulation 6(10) of the Martial Law Tribunal Regulation, 1977, stated:

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81. Ibid., pp.180-181.
82. See supra, p. 256.

"All sentences of death or transportation for life shall have to be confirmed by the Chief Martial Law Administrator".

Thus unlike the sentences of death or transportation for life passed by the Special Martial Law Court and the Special Martial Law Tribunal, the death sentences or sentences of transportation for life passed by the Martial Law Tribunal were to be confirmed by the Chief Martial Law Administrator. However, it seems that the power of confirmation given to the Chief Martial Law Administrator was merely a matter of routine as he was not empowered, instead of confirming a sentence of death or transportation for life, to pass any other sentence warranted by law, or set aside the conviction or acquit the convicted person. Perhaps realising this fact, only two days after the promulgation of the Martial Law Tribunal Regulation, 1977, on 6 October 1977, the Martial Law Tribunal (Amendment) Regulation, 1977, was issued to invest the Chief Martial Law Administrator with such powers. As it was enacted:

> "When a sentence of death or transportation for life is submitted to the Chief Martial Law Administrator for confirmation, he may either confirm the sentence or reduce it or set it aside or vary or modify it..."

Thus unlike the President, who as the confirming authority had no power to interfere with a sentence of death or transportation for life passed by the Special Martial Law Court and the Special Martial Law Tribunal, the Chief Martial Law Administrator could either confirm a death sentence or a sentence of transportation for life passed by the Martial Law Tribunal or reduce it or set it aside or vary or modify it as he saw fit.

It may be recalled here that the only remedy provided against the judgment of the Sepcial Martial Law Courts and the Special Martial Law Tribunal was review by the government, but no such remedy was provided by the Martial Law Tribunal Regulation, 1977, against the judgment of a Martial Law Tribunal. This contravened the provisions of Article 14(5)

of the International Covenant on Civil and Political Rights, 1966, which provided that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

However, it appears that, in the absence of review as a redress, the Chief Martial Law Administrator, as the confirming body, became the ultimate authority to give some relief at his discretion to a person against whom a sentence of death or transportation for life was passed by a Martial Law Tribunal.

V. The Establishment of the Martial Law Tribunals

Immediately after the promulgation of the Martial Law Tribunal Regulation, 1977, the Government of Bangladesh set up Martial Law Tribunals to try those members of the army and air force who had been involved in the abortive coup attempts in Bogra on 30 September 1977 and in Dhaka on 2 October 1977.[83] But the government notice announcing the formation of the tribunals gave no further details as to the number of mutineers arrested who would be dealt with by these tribunals. Nor was the total number of tribunals established given.

VI. The Trial of Cases by the Martial Law Tribunals

The tribunals started trying cases from 7 October 1977.[84] On 18 October 1977, it was announced that so far 460 army and air force personnel had been tried by the Martial Law Tribunals. It was also mentioned that out of these 460 persons, 37 had been executed, 20 had been sentenced to life imprisonment and 340 had been given various terms of rigorous imprisonment while the remaining 63 had been acquitted.[85] The

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83. The Bangladesh Times, Dhaka, 10 October 1977.
84. Ibid.
85. The Bangladesh Times, Dhaka, 19 October 1977.

announcement added that the trials were continuing. Eight days later, on 26 October 1977, another announcement was made to the effect that the Martial Law Tribunals had concluded the trial of persons belonging to the Bangladesh army who had been involved in the attempted coup at the Bogra Cantonments on 30 September 1977. It was further reported that fifty-five persons had been sentenced to death and sentences of life imprisonment had been passed against fourteen persons. Eighteen persons had been sentenced to various jail terms while fourteen had been acquitted.[86]

However, it is noticeable that the government announcement of 26 October 1977 made no mention of the completion of trial of those persons who had been involved in the coup attempt in Dhaka on 2 October 1977. It therefore meant that the trials of those persons were continuing. It was also evident from a government notification,[87] issued on 28 October 1977, which constituted Martial Law Tribunal No.XXXII for the whole of Bangladesh with Major Mohammad Zainul Abedin as its chairman. However, it is to be noted that the government made no further announcement about the progress of the trial of those persons who had been involved in the coup attempt in Dhaka. There were no further reports in the national press either.

It is worthy of note that, in February 1978, the American press published only the total number of persons executed for their involvement in the two coup attempts of 1977 and quoted as its source a confidential cable from the American Embassy in Dhaka despatched on 19 January 1978 by chargé d'affaires Alf E. Bergeson to the State Department. It was stated that:

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86. The Bangladesh Times, 27 October 1977.
87. Notification No.519-JIV/Sec-2/77, Ministry of Law and Parliamentary Affairs (Justice Branch).

> "Our best estimate, drawn from sources available to the embassy as a whole, is that 217 military personnel were executed in the aftermath of the coup attempt. We think it is possible that 30-34 of these may have been executed prior to formalization of military courts".[88]

An even higher figure was cited by the British press, according to which about 600 persons, mostly from the air force, were executed.[89] It further stated that more than 800 armed forces personnel had been convicted by the Martial Law Tribunals - in some cases little more than kangaroo courts - after the uprisings in Bogra on 30 September and in Dhaka on 2 October 1977.

During an interview[90] with the author, a retired major-general, who was very closely associated with the Martial Law administration, said that the total number of army and air force personnel executed for their involvement in the two unsuccessful coup attempts would be a little more than 200, although he could not remember the exact figure. Thus this version lends support to the statistics concerning the executions published in the American press. However, the capital sentences carried out in the aftermath of abortive coups were the first mass executions anywhere in the subcontinent.

It is noteworthy that the Martial Law Tribunals held their proceedings in camera. In almost all the cases, sentences were passed on the basis of insufficient evidence. At an interview[91] with the author, a retired air force officer, who had given evidence before such a tribunal, said that, in many cases, the armed forces personnel had been convicted merely on the

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88. The Washington Post, 10 February 1978.
89. The Sunday Times, 5 March 1978.
90. The interview with the (retired) major-general, who does not wish to be identified, took place in September 1984.
91. The interview with the (retired) air force officer (group-captain) took place on 4 October 1984. He wishes to remain anonymous.

evidence that arms had been seen in their hands on 30 September or on 2 October 1977. This shows that the tribunals were more interested in convicting the accused and making an example of them through severe punishment rather than dispensing justice.

It may be recalled here that there were eight coups and mutinies, three of them successful and five abortive, between 15 August 1975 and 2 October 1977. It seemed as if the raison d'être of the army was to manufacture endless coups while their professional duty was simply to defend the country against foreign aggression. In view of the successive coups and counter-coups, many believed that the stern action taken by the Martial Law government to execute a considerable number of the members of the armed forces had been essential to depoliticise the soldiers and restore discipline in the army. It was also believed that the government had at least staged trials of a sort when the accused appeared before courts, whereas in the coups and counter-coups there had been many killings which were completely unaccounted for, with not even a show of trial. In this context, these executions seemed to be the lesser of the two evils as the objective was to restore discipline in the army by stern measures.

Conclusion

(i) The Special Martial Law Tribunal Regulation, 1976

The foregoing discussion reveals that for the first time in the history of Martial Law administration in the subcontinent, the Special Martial Tribunal Regulation, 1976, provided for the creation of a Special Martial Law Tribunal with a wide jurisdiction to try offences not only under the Martial Law Regulations, but also under the Penal Code and Military Laws. The majority of the members of the tribunal were officers of the armed forces who had no legal training, qualification or experience. Since they were part and parcel of the Martial Law administration, they

could not always be expected to discharge their duties in an impartial manner. Moreover, no provision was made to include any members from the Judiciary. The trial was to be held under summary procedures. The tribunal before the tribunal could be held in camera. Bail was very difficult to obtain as it depended upon the consent of the prosecution rather than the discretion of the tribunal. The minimum safeguard of the right of appeal to a court of law was denied. Only review was granted to the accused as a relief against the judgment of the tribunal, yet this review did not lie to a court of law but to the government. Thus there was a clear absence of legal safeguards to protect the accused in a trial before the tribunal against the miscarriage of justice.

(ii) The Conspiracy Case Tried by the Special Martial Law Tribunal No.I

The foregoing discussion also shows that, in the trial of the accused of the conspiracy case, the requisites of a fair trial were not observed. Thus during the trial the accused were deprived of the opportunity to have private consultations with their lawyers. The lawyers were given too little time to prepare and organise the defence. Even a copy of the deposition of the state witnesses was not supplied to the defence counsels. The prayer for calling witnesses by accused Abu Taher was rejected. Permission to cross-examine one important witness for an additional hour was refused. The charges against the accused, which were imprecise, were not proved by sufficient evidence. There was no independent testimony to support the deposition of the approvers. The trial was held in camera. Attempts were made to influence the members of the tribunal. The review body, the Secretary of the Ministry of Law and Parliamentary Affairs, was used as a tool of the Martial Law administration to serve its ulterior motive. The confirmation of the sentences of death and life imprisonment by the President was made on a public holiday. In fact, there was an

unprecedented and unseemly haste in carrying out review and confirming the sentences; they were done in a matter of a single day and outside official hours. Only three days after the confirmation of the death sentence (and four days after the pronouncement of the judgment), Abu Taher was hanged on 21 July 1976 in clear violation of the provisions of the Jail Code.

Thus the observation of Justice Clark in Estes v. State of Texas[92] that "History had proven that secret tribunals were effective instruments of oppression",[93] came true in respect of the accused in the conspiracy case. However, it is to be noted that the trial in camera within the confines of prison was an entirely new development in Bangladesh. Never before was such a major trial held in the history of either Bangladesh or former East Pakistan. When Abu Taher was hanged in Dhaka Central Prison, his was the first political execution in Bengal since 1934 and in Bangladesh since its inception. It also became a prelude to the mass execution of the members of the armed forces, involved in the two abortive coups, that followed in 1977.

(iii) The Martial Law Tribunal Regulation, 1977

The foregoing discussion further demonstrates that, like the Special Martial Law Tribunal, the Martial Law Tribunals were given jurisdiction to try offences under the Military Laws and certain offences under Martial Law Regulations and the Penal Code. Yet, unlike the members of the Special Martial Law Tribunal, all the members of the Martial Law Tribunals were officers of the defence services. Unlike the Special Martial Law Tribunal, the Martial Law Tribunals were to take cognizance of an offence only

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92. United States Supreme Court Reports, Lawyers' edition, second series, Vol.XIV, p.543.
93. Ibid., p.548.

upon a report of the officer concerned of the defence services. Review was denied to the accused as a relief against the judgments of the Martial Law Tribunals, a relief which had previously been allowed from the judgments of the Special Martial Law Tribunal and the Martial Law Courts. Although an accused before a Special Martial Law Court and a Special Martial Law Tribunal had been given the opportunity to defend himself by a lawyer, this opportunity was denied to an accused before a Martial Law Tribunal like that of an accused before a Summary Martial Law Court. Unlike the sentences of death and life imprisonment passed by the Special Martial Law Courts and the Special Martial Law Tribunal, a death sentence or a sentence of life imprisonment pronounced by the Martial Law Tribunals was to be confirmed by the Chief Martial Law Administrator. The Chief Martial Law Administrator as the confirming authority could either confirm such a sentence or reduce it, or set it aside, or vary or modity it. But no such powers had been given to the President, the confirming authority of the sentences of death or life imprisonment passed by the Special Martial Law Courts and the Special Martial Law Tribunal. However, the other provisions relating to the procedure of the Martial Law Tribunals were identical with those of the Special Martial Law Courts and the Special Martial Law Tribunal. Thus a Martial Law Tribunal could sit in camera in accordance with the decisions of its chairman. The trial before it was to be held under summary procedures which meant that only what was deemed to be 'substantial evidence' needed to be recorded. The minimum safeguard of the right of appeal against the judgment of a Martial Law Tribunal was denied. Bail could not be granted without the consent of the prosecution. Thus there was a conspicuous absence of legal safeguards to ensure a fair trial and to protect the accused persons from grave injustices.

(iv) The Trial of Cases by the Martial Law Tribunals

Martial Law Tribunals were established to try the members of the army and the air force who had been involved in the abortive coups of 30 September 1977 in Bogra and 2 October 1977 in Dhaka. The trials were held in camera. It is said that, in many cases, the accused were convicted on the basis of inadequate evidence. This shows that the tribunals were more interested in inflicting punishment on the accused to serve as a deterrent rather than dispensing justice. Thus the basic purpose of holding trials to endeavour to ascertain the truth or discover the guilt was not kept in view. However, in accordance with the judgments of the tribunals, more than 200 members of the army and the air force were executed in the aftermath of the two unsuccessful coups. They were the first mass executions ever carried out anywhere in the subcontinent.

CHAPTER VI

The Judicial Role, with Particular Reference to the Protection of Civil Rights, under Martial Law (1975)

The following discussion will show how the civilian regime of the Awami League, prior to the proclamation of Martial Law in August 1975, changed the constitutional provisions relating to the appointment, and removal of the judges of the Supreme Court. It will also show how the powers of appointment, control and discipline of subordinate judicial officers were vested in the hands of the President. Similarly, it will further reveal how the powers of the High Court to enforce fundamental rights were taken away by the Awami League regime. All these measures taken by the Awami League administration in January 1975 had the effect of curtailing the power and independence of the Judiciary.

The discussion will also demonstrate how the 1975 Martial Law regime restored the independence of the Judiciary through fresh constitutional provisions and ordinances in respect of appointment, removal, control and remuneration of the judicial officers. In addition, it will show that although the Martial Law government restored the power of the Judiciary to enforce fundamental human rights, it yet imposed serious restrictions on the judicial powers.

I The Independence of the Judiciary in Bangladesh

(i) The Importance of Judicial Independence

The term 'Independence of the Judiciary' means the independence and freedom of judges in discharging their duties, their freedom from interference by the Executive or Legislative organs with the exercise of their functions. "Judicial independence", says J. A. G. Griffith, "means that judges are not dependent on Governments in any ways which might influence them in coming to decisions in individual cases."[1]

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1. Griffith, J. A. G., The Politics of the Judiciary, London, 1977, p.29.

That is to say, the judges should be in a position to arrive at their decisions free from interference and apprehension for suffering personally as a result of exercising their judicial powers. Thus the independence of the Judiciary presupposes a highly advanced stage of development in the Judiciary where courts are the supreme authority, submitting to no other power but only to their own sense of justice.

In a free society professing the Rule of Law, it is essential that the absolute independence of the Judiciary should be guaranteed. A country may ensure all kinds of equality in the Constitution but unless and until the common man finds that the Judiciary upholds the constitutional guarantees independently and earnestly, the roots of the Rule of Law cannot go deep into the society. The independence of the Judiciary, which is principally a result of the application of the doctrine of Separation of Powers, is indispensable to secure the people against the intentional, as well as unintentional, usurpations of the Executive and Legislative departments. One of the Conclusions of the International Conference of Jurists, held in Bangkok in 1965, emphasized the importance of independence of the Judiciary thus: "The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened and, independent and courageous Judiciary and upon adequate provision for the speedy and effective administration of justice". The First Judicial Conference of the Americas, held in the city of San Juan Bautista de Puerto Rico in May 1965, also solemnly declared: "A vigorous and independent Judiciary is a fundamental requisite, a basic element for the very existence of any society that respects the Rule of Law ...."

The Judiciary contributes vitally to the preservation of the social peace and order by settling legal disputes and thus promotes a harmonious and integrated society. The quantum of its contribution,

however, largely depends upon the willingness of the people to present their problems before it and to submit to its judgments. What matters most, therefore, is the extent to which people have confidence in judicial impartiality. So the independence of the Judiciary is essential for maintaining the purity of justice in the social system and enabling it to earn public confidence in the administration of justice. "The independence of the judiciary lends prestige to the office of a judge and inspires confidence in the general public."[2] "... Nothing", rightly says Viscount Bryce, "does more for the welfare of the private citizen, and nothing more conduces to the smooth working of free government, than a general confidence in the pure and efficient administration of justice between the individual and the State as well as between man and man".[3] "In all countries", he further adds, "cases, sometimes civil, but more frequently criminal, arise which involve political issues and excite party feeling. It is then that the courage and uprightness of the judges become supremely valuable to the nation, commanding respect for the exposition of the law which they have to deliver".[4] Referring to the importance of the independence of the Judiciary, an eminent authority, namely, Henry Sidgwick, has gone so far as to say that "in determining a nation's rank in political civilisation, no test is more decisive than the degree in which justice as defined by the law is actually realised in its judicial administration; both as between one private citizen and another, and as between private citizens and members of the Government".[5]

In order to enable the Judiciary to play an effective and vital

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2. Robson, W. A., Justice and Administrative Law, London, 3rd edn., 1951, p.47.
3. Bryce, James, Modern Democracies, Vol.II, New York, 1921, p.389.
4. Ibid., p.384.
5. Sidgwick, Henry, The Elements of Politics, London, 2nd edn., 1897, p.481.

role, a democratic state must provide for the following to ensure its independence. The Judiciary must be free from any interference from Executive; a suitable provision for the appointment of judges must be made; the judges must enjoy security of tenure, pay and condition and must be able to look forward to adequate prospects of advancement and promotion.

(ii) Independence of the Judiciary Under the Constitution of Bangladesh, 1972, and Under Martial Law, 1975

The 1972 Constitution of Bangladesh provides for the separation of the Judiciary from the Executive. Article 22 of the Constitution states that "The State shall ensure the separation of the judiciary from the executive organ of the State". In fact, this proposition lays down the foundation of the doctrine of the Rule of Law in Bangladesh. However, the Constitution also provides that, subject to its provisions, "the Chief Justice (of the Supreme Court) and the other Judges shall be independent in the exercise of their judicial functions".[6]

(a) Appointment of Judges of the Supreme Court

(aa) Provisions Relating to the Appointment of Judges as in Force before the 1975 Martial Law

The Supreme Court of Bangladesh, which comprises the Appellate Division and the High Court Division, is the highest court of judgment in Bangladesh. With regard to the appointment of the judges of the Supreme Court, the 1972 Constitution originally provided that "The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice".[7]

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6. Article 94(4), the 1972 Constitution of Bangladesh.
7. Article 95, ibid.

Thus this procedure for the appointment of the Chief Justice and other judges of the Supreme Court was in accordance with the suggestion of the International Congress of Jurists, held in New Delhi in January 1959, that, whatever body actually makes judicial appointment, it is desirable that the Judiciary should itself co-operate or at least be consulted.[8]

However, the Constitution (Fourth Amendment) Act, 1975, passed on 25 January 1975 by Parliament during the Awami League regime, enacted that "The Chief Justice and other judges shall be appointed by the President".[9]

Thus the President's obligation to consult the Chief Justice while appointing puisne judges of the Supreme Court was dispensed with.

(ab) Provisions Relating to the Appointment of Judges as Amended by the 1975 Martial Law Regime

The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No.IV of 1976), issued by the President and the Chief Martial Law Administrator, A. M. Sayem, on 28 May 1976, replaced the Supreme Court with two separate Courts, namely the High Court and the Supreme Court.[10] However, with regard to the appointment of Supreme Court judges, this Second Proclamation Order continued provided that "The Chief Justice of the Supreme Court shall be appointed by the President and other judges shall be appointed by the

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8. Clause II of the Report of Committee IV, International Congress of Jurists, 1959.
9. Article 14(1) of the Constitution (Fourth Amendment) Act, 1975.
10. It may be noted here that the High Court as a separate Court was to have all powers, functions, and jurisdictions as were originally conferred on the High Court Division of the Supreme Court by the 1972 Constitution. On the other hand, the Supreme Court was to exercise appellate and advisory jurisdictions and power to review any judgment pronounced or orders made by it as were originally bestowed on the Appellate Division of the Supreme Court.

President after consultation with the Chief Justice".[11] With regard to the appointment of High Court judges, it was provided that "A Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of the Supreme Court and, except where the appointment is that of Chief Justice, with the Chief Justice of the High Court".[12]

Thus in exercising his power of appointment, the President was to consult the Chief Justices of the Supreme Court and the High Court who were in the best possible position to assess the probable fitness of the men likely to prove successful on the bench. However, the provisions relating to the appointment of judges of the Supreme Court were a reproduction of the provisions contained in Article 50(1)[13] of the 1962 Constitution of Pakistan. Similarly, the provisions relating to the appointment of judges of the High Court were identical with those of Article 92(1)[14] of the 1962 Constitution of Pakistan except the words "with the Governor of the Province concerned".

Later, the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.I of 1977), which was issued on 27 November 1977 by President Ziaur Rahman, restored the Supreme Court as it was originally in the Constitution, with two divisions, namely

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11. Article 4 of the Second Proclamation (Seventh Amendment) Order, 1976.
12. Ibid.
13. Article 50(1) of the 1962 Constitution of Pakistan, which was in fact the reproduction of Article 149(1) of the 1956 Constitution of Pakistan, provided that "The Chief Justice of the Supreme Court shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice."
14. Article 92(1) of the 1962 Constitution of Pakistan, which was virtually the reproduction of Article 166(1) of the 1956 Constitution, stated that "A Judge of a High Court shall be appointed by the President after consultation - (a) with the Chief Justice of the Supreme Court; (b) with the Governor of the Province concerned; and (c) except where the appointment is that of Chief Justice - with the Chief Justice of the High Court".

the Appellate Division and the High Court Division.[15] It provided that "The Chief Justice and other Judges shall be appointed by the President".[16]

Therefore, it is evident that this Proclamation Order freed the President from the obligation of consulting the Chief Justice in making appointments of the judges of the Supreme Court and restored the method of appointment as it was introduced by the Constitution (Fourth Amendment) Act, 1975. This left the door too wide open for the President, who could not be expected to know the bar properly, to exercise his power of appointing judges of the Supreme Court. He was likely to be moved by political considerations and to measure fitness in terms of political eminence rather than judicial quality. Thus the President's power of appointment was not invested with safeguards to ensure that appointments would be made only with the needs of the office in view.

(b) Provisions Relating to the Appointments, Control and Discipline of Subordinate Courts Both Before and After the 1975 Martial Law

Regarding the appointment of subordinate judicial officers, it was originally laid down in the Constitution that "Appointments of persons to offices in the judicial services or as magistrates exercising judicial functions shall be made by the President - (a) in the case of district judges, on the recommendation of the Supreme Court; and (b) in the case of any other person, in accordance with rules made by the President in that behalf after consulting the appropriate Public Service Commission and the Supreme Court".[17]

Therefore, it is evident that the methods of appointment of persons to offices in the judicial services or as magistrates exercising

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15. The powers, functions and jurisdiction of the Supreme Court were, in effect, restored as it was originally in the 1972 Constitution of Bangladesh.
16. Article 2 of the Second Proclamation (Tenth Amendment) Order, 1977.
17. Article 115 of the 1972 Constitution of Bangladesh.

judicial functions were also in conformity with the proposal of the International Congress of Jurists held in New Delhi that, whatever body actually makes judicial appointment, it is desirable that the Judiciary should itself co-operate or at least be consulted.[18]

Later, the Constitution (Fourth Amendment) Act, 1975 enacted that "Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf".[19]

Thus the President was given wide and unfettered power to appoint such subordinate judicial officers. He could not always be expected to take a non-partisan stance. He could sometimes use his power of appointment to elevate members of his own party.

However, the Martial Law regime did not change the system of appointments introducd by the Constitution (Fourth Amendment) Act, 1975, relating to the appointment of persons to offices in the judicial service or as magistrates exercising judicial functions.

Article 116 of the 1972 Constitution originally provided that "The control (including the power of posting, promotion and grant of leave) and discpline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court".

It appears that this procedure was well calculated to maintain the integrity and independence of the subordinate courts for it empowered the highest court of justice in Bangladesh, the Supreme Court, only to control and discipline such courts.

By the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975),

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18. Supra, footnote 8, p.293.
19. Article 19, the Constitution (Fourth Amendment) Act, 1975.

the Supreme Court was replaced by the President as the authority to control and discipline subordinate courts.[20] The conferment of such powers on the President made it possible that a political protégé would be too rapidly promoted.

Later, the Second Proclamation (Fifteenth Amendment) Order, 1978 (Order No.IV of 1978), issued by the President and the Chief Martial Law Administrator, Ziaur Rahman, on 18 December 1978, provided that "The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court".

Therefore, it is evident that some restriction was imposed on the unfettered power of the President to control and discipline subordinate courts. It was made obligatory that the President should consult the Supreme Court in exercising such powers. Thus although the Martial Law regime did not restore the original power of the Supreme Court to control and discipline subordinate courts, it gave the Supreme Court the opportunity to express its opinion with regard to such matters.

(c) Tenure of Office of Judges of the Supreme Court

(cc) Provisions Relating to the Tenure of Office of Judges of the Supreme Court as in Force Before the 1975 Martial Law

Nothing can contribute so much to the firmness and independence of the Judiciary as permanency in office since it enables the judge to decide a case without fear of the consequences regardless of whether the decision does or does not please some other person or persons.

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20. Article 20, ibid.

Therefore, once appointed, a judge should obviously hold office for a long term, preferably for life or during good behaviour. He should be removable during his tenure only for misconduct. Such removal must of necessity be made a difficult process, involving careful consideration by more than one person; otherwise a judge cannot acquire that habit of independence requisite in his office. The guarantee of personal independence shields the judge from any personal political pressure on the part of the Executive.

Considering this reality, it was originally enacted in the 1972 Constitution of Bangladesh that "A judge of the Supreme Court shall hold office until he attains the age of sixty-two years".[21] "A judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity".[22] Parliament might by law regulate the procedure in relation to its resolution for removal, investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court.[23]

Thus it is evident that under the original constitutional provisions, the permanency of tenure of the judges of the Supreme Court was ensured. They were to hold office for a long term and could not be removed during their tenure, even for misbehaviour or incapacity, by the President acting alone. The support of an absolute majority of at least two-thirds of the total number of Members of Parliament was necessary to pass an effective resolution for removal. Thus the procedure for the removal of the judges of the Supreme Court was made difficult and

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21. Article 96(1), the 1972 Constitution of Bangladesh.
22. Article 96(2), ibid.
23. Article 96(3), ibid.

cumbersome, providing an important safeguard of the rule of law.

Although the Constitution (Fourth Amendment) Act, 1975, kept intact the original provision of the Constitution that a judge of the Supreme Court would hold office until he attains the age of sixty-two years, it introduced a new provision that "A judge may be removed from his office by order of the President on the ground of misbehaviour or incapacity".[24] There was a condition to the effect that "no judge shall be removed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him".[25]

Therefore, the tenure of the office of judges of the Supreme Court was, in effect, made dependent on the will of their appointing authority, the President. This provided the scope for the President to remove judges he did not like and to appoint those he favoured and thus to have cases decided according to his own preference. Thus the independence of the Judiciary virtually came to an end.

(cd) Provisions Relating to the Tenure of Office of Judges of the Supreme Court and the High Court as Amended by the 1975 Martial Law Regime

Later, the Second Proclamation (Seventh Amendment) Order, 1976, which separated the High Court from the Supreme Court, laid down that "a Judge of the Supreme Court shall hold office until he attains the age of sixty-five years".[26] But "a Judge of the High Court shall hold office until he attains the age of sixty-two years".[27] "A Judge of the Supreme Court or of the High Court shall not be removed from his office except by an order of the President made pursuant to a resolution

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24. Article 15, the Constitution (Fourth Amendment) Act, 1975.
25. Ibid.
26. Article 4, the Second Proclamation (Seventh Amendment) Order, 1976.
27. Ibid.

of Parliament passed by a majority of not less than two-thirds of the total number of members of Parliament on the ground of proved misbehaviour, or incapacity".[28] "Parliament may by law regulate the procedure in relation to a resolution ... (of removal) and for investigation and proof of the misbehaviour or incapacity of a Judge of the Supreme Court or of the High Court".[29] "A Judge of the Supreme Court or of the High Court may resign his office by writing under his hand addressed to the President".[30]

Thus the Martial Law regime made a distinction in respect of the tenure of office between the judges of the Supreme Court and the judges of the High Court. It gave the judges of the Supreme Court longer tenure of office (i.e. sixty-five years) than it was originally provided by the Constitution (i.e. sixty-two years). Moreover, the original procedure for removing the judges of the Supreme Court, which was dropped by the Constitution (Fourth Amendment) Act, 1975, was reinstated.

Later, the Proclamations(Amendment) Order, 1977 (Proclamations Order No.I of 1977), issued by the Chief Martial Law Administrator, Ziaur Rahman, only a day after his assuming the office of the President, on 22 April 1977, changed this method of removal of judges of the Supreme Court and the High Court. As it provided that a judge of the Supreme Court or of the High Court was only to be removed from office by the President on the recommendation of the Supreme Judicial Council.[31] The Supreme Judicial Council "... shall consist of the Chief Justice of Bangladesh, and the two next senior Judges of the Supreme Court".[32]

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28. Ibid.
29. Ibid.
30. Ibid.
31. Article 2 of the Proclamations (Amendment) Order, 1977.
32. Ibid.

But "if, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge of the Supreme Court who is next in seniority to those who are members of the Council shall act as such member".[33] "The functions of the Council shall be - (a) to prescribe a Code of Conduct to be observed by the Judges of the Supreme Court and of the High Court; and (b) to inquire into the capacity or conduct of a Judge of the Supreme Court or of the High Court or of any other functionary who is not removable from office except in like manner as a Judge of the Supreme Court or of the High Court".[34] "Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge of the Supreme Court or of the High Court - (a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or (b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding".[35] "If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall by order, remove the Judge from office".[36] For the purpose of such an inquiry "the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court".[37] However, "A Judge of the Supreme Court or of the High Court may resign his office by writing under his

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33. Ibid.
34. Ibid.
35. Ibid.
36. Ibid.
37. Ibid.

hand addressed to the President".[38]

It seems that this amendment of the procedure for removing the judges of the Supreme Court and the High Court was necessary in view of the fact that Parliament had been dissolved on 8 November 1975 and, as such, the removal of judges by an order of the President made pursuant to a resolution of Parliament passed by a majority of not less than two-thirds of the total number of Members of Parliament on the grounds of proved misbehaviour or incapacity was not possible. However, the Proclamations (Amendment) Order introduced substantial changes in the removal procedure of the judges from their offices. This change was a salutary step towards the independence of the Judiciary of Bangladesh as the independent constitutional body, the Supreme Judicial Council, provided security of tenure to judges. This new procedure for removing a judge was well calculated to maintain the integrity and independence of the Judiciary for it only empowered the most senior judges of the Supreme Court to perform disciplinary functions, rather than leaving it to the whim of the Executive or to the control of the Legislature.

This new method of removal of judges of the Supreme Court and the High Court by the President on the recommendation of the Supreme Judicial Council was in conformity with the suggestion of the International Congress of Jurists held in New Delhi in 1959 that "The reconciliation of the principle of irremovability of the Judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial".[39] Moreover,

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38. Ibid.
39. Clause IV of the Report of Committee IV, International Congress of Jurists held in New Delhi in 1959.

this procedure for removing the judges resembled the procedure that had been introduced by Article 128 of the 1962 Constitution of Pakistan.[40]

Later, the Second Proclamation (Tenth Amendment) Order, 1977, which merged the High Court with the Supreme Court, incorporated into it the provisions for the Supreme Judicial Council with regard to the

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40. Article 128 of the 1962 Constitution of Pakistan provided that

> "(1) There shall be a Supreme Judicial Council of Pakistan, in this Article referred to as 'the Council'.
> (2) The Council shall consist of
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> (a) the Chief Justice of the Supreme Court;
> (b) the two next most senior Judges of the Supreme Court; and
> (c) the Chief Justice of each High Court.
>
> (3) If, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act as a member of the Council due to illness or some other cause, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2) of this Article shall act as a member of the Council in his place.
> (4) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.
> (5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court -
>
> (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
> (b) may have been guilty of gross misconduct, the President shall direct the Council to inquire into the matter.
>
> (6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion -
>
> (a) that the Judge is incapable of performing the duties of his office or has been guilty of gross misconduct; and
> (b) that he should be removed from office, the President may remove the Judge from office.
>
> (7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article."

removal of judges of the Supreme Court.[41] Under this new Proclamation, a judge was to "hold office until he attains the age of sixty-two years".[42] Thus the original tenure of office of judges was restored.

(d) Remuneration and Privileges of Judges of the Supreme Court

(dd) Provisions Relating to the Remuneration and Privileges of Judges as in Force Before the 1975 Martial Law of Bangladesh

If the judges are to be independent, they should be given adequate salaries and granted appropriate privileges so that they remain free from any outside pressure or temptation to better their pecuniary conditions by illegal means. Their salaries and privileges must not be reduced or withheld during their tenure of office. In this respect, the views expressed by the International Congress of Jurists held in New Delhi in 1959, is noteworthy:

> "It is implicit in the concept of the independence of the Judiciary that provision should be made for the adequate remuneration of the Judiciary and that a judge's right to the remuneration settled for his office should not during his term of office be altered to his disadvantage."[43]

Considering this concept, the 1972 Constitution of Bangladesh provides that the remuneration, privileges and other terms and conditions of service of a judge of the Supreme Court "shall not be varied to ... (his) disadvantage ... during his term of office."[44]

These provisions resembled those of Article 175(1) of the 1956

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41. Article 2(4) of the Second Proclamation (Tenth Amendment) Order, 1977.
42. Ibid.
43. Clause I of Report of Committee IV, International Congress of Jurists held in New Delhi in 1959.
44. Clauses (2) and 4(e) of Article 147 of the 1972 Constitution of Bangladesh.

Constitution of Pakistan.[45]

Only three and a quarter months after the 1972 Constitution came into effect on 22 March 1973, the Supreme Court Judges (Terms and Conditions of Service) Order, 1973, (President's Order No. 21 of 1973) was promulgated. This Order provided that "There shall be paid to the Chief Justice a salary of Taka 2,500 per mensem and to every other Judge a salary of Taka 2,000 per mensem".[46] "The Chief Justice shall be entitled to a rent-free and furnished residence and shall be exempt from payment of any charges in respect of such residence including electric, water and gas charges, municipal tax and local rates."[47] Similarly, "Every Judge shall be entitled to a rent-free and furnished residence and shall be exempt from payment of any charges in respect of such residence including electric, water and gas charges, municipal tax and local rates, or a residence allowance of Taka 850 per mensem in lieu thereof."[48] "The Chief Justice and every other Judge shall be entitled to free transport for attending Court or to other official business or a car allowance of Taka 650 per mensem in lieu thereof."[49] They "shall be entitled to telephone at their residence free of all charges."[50] "The Chief Justice and every other Judge and their families shall be entitled to medical facilities admissible under the Special Medical Attendance Rules, except that they and their families shall be entitled to receive medical treatment at their residence."[51] "Subject to the

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45. As Article 175(1) of the 1956 Constitution of Pakistan provided that "The remuneration and other conditions of service of a Judge of the Supreme Court or of a High Court shall not be varied to his disadvantage during his tenure of office.
46. Article 3, the Supreme Court Judges (Terms and Conditions of Services) Order, 1973.
47. Article 4, ibid.
48. Article 5, ibid.
49. Article 6, ibid.
50. Article 7, ibid.
51. Article 8, ibid.

provisions of this Order, the Chief Justice and every other Judge shall be entitled to all the privileges and allowances and to all the rights in respect of leave, pension, gratuity and provident fund to which the Chief Justice and the other Judges of the Supreme Court were entitled immediately before"[52] 22 March 1973. "The Chief Justice and every other Judge shall be exempt from payment of income tax on their salaries and on any allowances payable to them under this Order."[53]

It should be noted here that the judges of the Supreme Court were given a salary which was well above average. The remuneration payable to them is to be charged upon the Consolidated Fund[54] and "so much of the annual financial statement as relates to expenditure charged upon the Consolidated Fund may be discussed in, but shall not be submitted to, the vote of Parliament".[55] Besides giving a guarantee of a reasonable salary, the judges were granted considerable privileges so that they could maintain a good standard of living without resorting to corruption.

(de) Provisions Relating to the Remuneration and Privileges of Judges as Amended by the 1975 Martial Law Regime

The Supreme Court Judges (Terms and Conditions of Service) (Amendment) Ordinance, 1975 (Ordinance No.LIII of 1975), which was issued by President Abusadat Mohammad Sayem on 27 November 1975, and was deemed to have come into force on 1 August 1974, provided that the Chief Justice of the Supreme Court would be paid a salary of Taka 3,000 per mensem and every other judge a salary of Taka 2,500 per mensem.[56] It also enacted

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52. Article 9, ibid.
53. Article 10, ibid.
54. Article 88(b)(ii), the 1972 Constitution of Bangladesh.
55. Article 89(1), ibid.
56. Article 2, the Supreme Court Judges (Terms and Conditions of Service) (Amendment) Ordinance, 1975.

that

> "The Chief Justice and every other Judge shall be entitled to the use of official transport on the same terms as are admissible to a Secretary to the Government or, in lieu thereof, a car allowance of Taka 650 per mensem."[57]

Therefore, it is evident that the Martial Law regime enhanced the salary of the Chief Justice of the Supreme Court from Taka 2,500 to Taka 3,000 per month and that of other judges from Taka 2,000 to Taka 2,500 per month. Previously the Chief Justice and every other judge was entitled to free transport for attending court or other official business. But under the new provisions, they "shall be entitled to the use of official transport on the same terms as are admissible to a Secretary to the Government".

Later, on 13 August 1976, President A. M. Sayem promulgated the Supreme Court and the High Court Judges (Remuneration and Privileges) Ordinance, 1976 (Ordinance No.LXV of 1976) which repealed the Supreme Court Judges (Terms and Conditions of Service) Order, 1973. Yet the provisions relating to the privileges in respect of residence and telephone as provided by the Supreme Court Judges (Terms and Conditions of Service) Order, 1973, were enacted in the new Ordinance.[58] Moreover,

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57. Article 3, ibid.
58. The new Ordinance, the Supreme Court and the High Court Judges (Remuneration and Privileges) Ordinance, 1976, provided that:

> "3. (1) There shall be paid to the Chief Justice of the Supreme Court a salary of Taka 3,000 per mensem and to every other Judge, including the Chief Justice of the High Court, a salary of Taka 2,500 per mensem.
>
> (2) No income-tax shall be payable in respect of salary payable to a Judge.
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> 4. The Chief Justice of the Supreme Court would be paid a sumptuary allowance of Taka 700 per mensem; a Judge, other than the Chief Justice, of the Supreme Court would be paid Taka 600 per mensem and the Chief Justice of the High Court Taka 500 per mensem.

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the provisions concerning salary and use of official transport were the same as they had been under the Supreme Court Judges (Terms and Conditions of Service) (Amendment) Ordinance, 1975. But the new Ordinance for the first time provided for the payment of a sumptuary allowance of Take 700 per month to the Chief Justice and of Taka 600 per month to other judges of the Supreme Court. Similarly, the Chief Justice of the High Court was to be given a sumptuary allowance of Taka 500 per month. Apart from the inclusion of medical facilities as had been granted before by the Supreme Court Judges (Terms and Conditions of Service) Order, 1973, the new Ordinance went so far as to lay down that "such medical facilities shall continue to be admissible after the Judge has retired or otherwise ceased to held office".[59]

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5. A Judge shall be entitled to, and provided with, -

   (a) a furnished residence free from the payment of any rent and charges on account of municipal taxes and local rates and of the use of electricity, water and gas and, until such residence is provided, a Judge shall be paid a residence allowance of Taka 850 per mensem;

   (b) an official transport on the same terms as are admissible to a Secretary to the Government and, until such transport is provided, a Judge shall be paid a car allowance of Taka 650 per mensem; and

   (c) a telephone at his residence at Government expense.

6. A Judge and the members of his family shall be entitled to medical facilities admissible under the Special Medical Attendance Rules, except that he and the members of his family shall be entitled to medical treatment at the residence of the Judge; and such medical facilities shall continue to be admissible after the Judge has retired or otherwise ceased to hold office.

7. Subject to the provisions of this Ordinance, a Judge shall be entitled to all the rights, privileges and allowance in respect of leave, pension, gratuity and provident fund as were admissible to him immediately before" 13 August 1976.

59. In fact, these provisions were first laid down in Article 2 of the Supreme Court Judges (Terms and Conditions of Service) (Amendment) Ordinance, 1976 (Ordinance No.XXXI of 1976) which was issued by President A. M. Sayem on 12 May 1976.

II Restrictions Imposed on the Powers and Jurisdiction of the Judiciary by the Martial Law Regime

The Proclamation of 20 August 1975, which was issued by President Khandaker Moshtaque Ahmed and provided the legal framework for the new order, stated that:

> "no Court, including the Supreme Court, or tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order (or other order)[60] made by me in pursuance thereof, or any declaration made by or under this Proclamation, or mentioned in this proclamation to have been made, or anything done or any action taken by or under this Proclamation, or mentioned in this Proclamation to have been done or taken, or anything done or any action taken by or under any Martial Law Regulation or Order (or other order)[61] made by me in pursuance of this Proclamation."[62]

Thus all courts, including the Supreme Court, were precluded from questioning any Proclamation, Martial Law Regulations or Order or any action taken by or under them. These provisions resembled those of Article 3[63] of the Laws (Continuance in Force) Order, 1958, and of Article 5[64] of the Provisional Constitution Order, 1969, issued by President Iskander Mirza of Pakistan on 10 October 1958, and Chief Martial Law Administrator General Yahya Khan on 31 March 1969 respectively.

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60. The words within first brackets were inserted after the words "Regulations or Order" by Proclamation Order No.I of 1975.
61. Ibid.
62. Clause (g) of the Proclamation.
63. Article 3 of the Laws (Continuance in Force), Order, 1958, provided that "No court or person shall call or permit to be called in question - (i) the Proclamation (ii) any Order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation ...."
64. Article 5 of the Provisional Constitution Order, 1969, stated that "No Court, tribunal or other authority shall call or permit to be called in question: (a) the Proclamation; (b) any Order made in pursuance of the Proclamation or any Martial Law Regulation or Martial Law Order ...."

Here it may be recalled that Regulation 4(9) provided that no court, including the High Court and the Supreme Court, should have any power to call in question any order, judgment, decision or sentence of a Martial Law Court. The calling for the records of the proceedings of such a Court by any court, including the High Court and the Supreme Court, was prohibited by the Martial Law (Twenty-Third Amendment) Regulations, 1976.

Nearly two years after the proclamation of Martial Law, on 6 March 1977, the Courts' Jurisdiction (Restriction) Regulation, 1977 (Martial Law Regulation No.XXXIV of 1977) was issued by the Chief Martial Law Administrator, Ziaur Rahman. This Regulation imposed serious restrictions on the powers of the High Court and other courts of the country.

Clause 2 of the Courts' Jurisdiction (Restriction) Regulation, which placed limitation on the power of the High Court to make 'interim orders',[65] provided that:

> "(1) Notwithstanding anything contained in the Constitution, where on an application made before the High Court under clause (2)[66] or sub-clause (a)[67] of clause (3) of article 102 of the Constitution an interim order is prayed for, the High Court shall not make an interim order unless the person

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65. See infra, footnote 76 of this chapter.
66. Clause 2 of Article 102 of the 1972 Constitution of Bangladesh as amended by the Second Proclamation (Seventh Amendment) Order, 1976, provided that "The High Court, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution".
67. Sub-clause (a) of Clause (3) of Article 102 of the 1972 Constitution as amended by the Second Proclamation (Seventh Amendment) Order, 1976, stated that "The High Court may, if satisfied that no other equally efficacious remedy is provided by law -

(a) on the application of any person aggrieved, make an order -

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or authority against whom or which the interim order is prayed for has been given a reasonable notice of the application and has been given an opportunity of being heard, and the High Court is satisfied that the interim order would not have the effect of prejudicing or interfering with any measure designed to implement any development plan or programme or any development or public work, or of being otherwise harmful to the public interest ...."[68]

Similarly, Clause 3(1) of the Regulation provided that "The Court shall not make or pass an order of temporary or ad-interim injunction unless ...." it "is satisfied that the order of temporary or ad-interim injunction would not have the effect of prejudicing or interfering with any measure designed to implement any development plan or programme or

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(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect."

68. Almost similar provisions were inserted in clause 4 of Article 102 of the 1972 Constitution by the Second Proclamation (Tenth Amendment) Order, 1977 (issued by President Ziaur Rahman on 27 November 1977) which also rearranged Article 102 that contains the power of the High Court Division to issue certain orders and directions; clause 4 provides that "Where on an application made under clause (1) (previously clause 2, see footnote 66) or sub-clause (a) of clause (2) (previously sub-clause a of clause (3), see footnote 67) an interim order is prayed for and such interim order is likely to have the effect of -

(a) prejudicing or interfering with any measure designed to implement any development programme, or any development work; or

(b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b)."

These provisions resemble those of sub-clauses (a) and (b) of clause 4 of Article 98 of the 1962 Constitution of Pakistan as amended by the Constitution (First Amendment) Act, 1963 (I of 1964).

any development, or public work, or of being otherwise harmful to the public interest."

Clause 4 of the Regulation, which imposed severe restrictions on the power of the courts to issue writs, injunctions, etc., in certain cases, stated:

"(1) Notwithstanding anything contained in the Constitution or in any other law for the time being in force or in paragraphs 2 and 3, no Court, including the High Court, shall -

(a) entertain any petition, plaint, application or prayer which asks for any writ, injunction or other order seeking to prohibit or restrain the Government or any Public Service Commission or other authority constituted by or under the Constitution or any other law or any corporation or other statutory body from making any appointment to any post or service or from conducting any test, examination or other proceeding for selection of candidates for appointment to any post or service or from performing any other functions in respect of such appointment, test, examination or other proceeding; or

(b) issue, make or pass on any petition or in any suit or other proceeding any writ or any temporary or ad-interim injunction or any other order or direction which prohibits, restrains, obstructs or in any manner interferes with, or has the effect of prohibiting, restraining, obstructing or in any manner interfering with, the making of any appointment to any post or service or the conduct of any test, examination or other proceeding or the performance of any function connected therewith.

(2) All petitions, suits and legal proceedings pending in any Court including the High Court in which any such writ, injunction or order as is referred to in clause (a) of sub-paragraph (1) has

been asked for, in so far as it relates to such writ, injunction or order, shall abate forthwith and shall not be further proceeded with.

(3) Any writ, injunction, order or direction made, passed or issued in contravention of clause (b) of sub-paragraph (1), shall be void ...."

Therefore, it is evident that restrictions were imposed on the powers of the High Court and other courts to make interim orders and to pass temporary or ad-interim injunctions respectively that would have the effect of prejudicing or interfering with any measure designed to implement any development plan or programme or any development or public work, or of being otherwise harmful to the public interest. Similarly, limitations were placed on all courts, including the High Court, to issue, make or pass any writ or any temporary or ad-interim injunction or any other order or direction that would prohibit, restrain, obstruct or in any manner interfere with the making of any appointment to any post or service or the conduct of any test, examination or other proceeding or the performance of any function connected therewith. The courts, including the High Court, were even prohibited to receive or entertain any petition, plaint, application or prayer which would ask for any writ, injunction or other order seeking to restrain the government, or any Public Service Commission or other statutory body or any corporation from making any appointments to any post or service or from conducting any test, examination or other proceeding for selection of candidates for appointment to any post or service or from performing any other functions connected therewith. These provisions struck at the very root of the judicial power of the courts to hear and determine any matter or controversy which is brought before them, even if it is to decide whether they have the jurisdiction to determine

such a matter or not. It denied to the courts the performance of their judicial function, a step opposed to the concept of law as it is essentially within the jurisdiction of courts to determine whether their jurisdiction to try a dispute is precluded by law. In this context, the observation of Justice Badrul Haider Chowdhury of the High Court Division of the Supreme Court in the case of Haji Joynal Abedin v. the State[69] are worthy of note:

> "the judicial power of the superior courts can never be taken away. This power exists as long as the court exists. This power is available even where the jurisdiction of the superior courts have been barred."[70]

Similar views were expressed by Chief Justice Hamoodur Rahman of Pakistan in the case of Asma Jilani v. Government of the Panjab[71] in connection with the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969 (President's Order No.3 of 1969, issued on 30 June 1969) that no court, tribunal or other authority, including the Supreme Court and a High Court would receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by, any Special Military Court or Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law Authority:

> "... 'judicial power' is different from 'jurisdiction' and so far as judicial power is concerned it must exist in Courts as long as the Courts are there ... these provisions of the Presidential Order No.3 of 1969, which seek to take

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69. Dhaka Law Reports, Vol.XXX, 1978, p.371
70. Ibid., p.384.
71. All Pakistan Legal Decisions, Supreme Court, Vol.XXIV, 1972, p.139.

> away the judicial power itself . . .(are) 'absurdities'... that the Courts have and must have the power to determine all questions of their own jurisdiction. It is a proposition so well-settled that no one can challenge it... that the Constitution can confer or restrict the jurisdiction of even superior Courts but this is not the same thing as saying that it can also restrict or curtail the judicial power, because, that in effect would be denying to the Court the very function for which it exists, i.e. to decide a controversy even if it relates to its own jurisdiction."[72]

In the same case, Justice Sajjad Ahmad declared similar views even more forcefully and clearly:

> "... Order No.3 of 1969 must be struck down, as it seeks to destroy the judicial power which vests inherently and constitutionally in the judicature of the country .... The totality of judicial power resides in the judicature of Pakistan, whose powers for dispensation of justice as the trustee of the Society, are indestructable, and cannot be taken away by the arbitrary will of an individual. To the judiciary is committed the duty of being the watch-dog of the actions and virtues of the other co-ordinate limbs of the State . . . while the jurisdiction of superior Courts may be regulated by the Constitution, any effort to destroy the judicial power is a senseless exercise.... The absurdity of Order No.3 of 1969 is heightened by its presumptuous effort to lay down that no Court, including the Supreme Court and the High Court, shall even receive or entertain any complaint, petition or application or other representation whatsoever against or in relation to the exercise of any power or jurisdiction by any Special Military Court or Summary Military Court or any Martial Law authority or any person exercising the authority or jurisdiction from Martial Law authority. It can never be disputed that the Courts alone have the power to determine all questions of their own jurisdiction, including the negative that they do not have the jurisdiction."[73]

It should be stressed here that never before in the history of Martial Law Administration in the subcontinent was such a Regulation (i.e. the Court's Jurisdiction (Restriction) Regulation, 1977) issued restricting

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72. Ibid., p.198.
73. Ibid., p.261.

the jurisdiction of ordinary courts, including the superior courts, to supervise the functions of the civilian administration of the country. During the previous Martial Law regimes in the subcontinent, the jurisdiction of civil courts was excluded only to the extent of questioning the legitimacy of the Martial Law administration. For example, the Sholapur Martial Law Ordinance, 1930 (IV of 1930) and the Peshawar Martial Law Ordinance, 1930 (No.VIII of 1930), promulgated by the British government in India, allowed civil courts to continue to function in the Martial Law administration area provided they, in the exercise of their jurisdiction, did not interfere with the Martial Law Regulations and Martial Law Orders. The Laws (Continuance in Force) Order, 1958 (President's Order (Post-Proclamation) Order No.I of 1958 of Pakistan), which allowed the Supreme Court of Pakistan and the High Courts of the Provinces to continue to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, provided that "No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administrator of Martial Law, or any person exercising powers or jurisdiction under the authority of either".[74] Similarly, the (Pakistan) Provisional Constitution Order, 1969, stated that "No judgment, decree, writ, order or process whatsoever shall be made or issued by any Court or tribunal against the Chief Martial Law Administrator or a Deputy Chief Martial Law Administrator or any Martial Law Authority exercising powers or jurisdiction under the authority of either".[75]

However, it is evident that the constitutional provisions

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74. Article 2(5) of the Laws (Continance in Force) Order, 1958.
75. Article 3(4) of the Provisional Constitution Order of Pakistan, 1969.

relating to the writ jurisdiction of the High Court Division[76] of the Supreme Court were neither abrogated nor suspended; only restrictions were imposed on such powers by the First Proclamation and the Martial Law Regulations. Since the Proclamation, Martial Law Regulations and Orders were to have effect notwithstanding anything contained in the 1972 Constitution and the Constitution was allowed to remain operative subject to the Proclamation, Martial Law Regulations and Orders, the Constitution as such assumed the status of subordinate legislation like any other law. Therefore, the writ jurisdiciton of the High Court Division of the Supreme Court as provided for by Article 102 of the Constitution was to be exercised subject to the restriction imposed by the Proclamation and the Martial Law Regulations. As Justice Ruhul

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76. It should be pointed out that Article 102 of the 1972 Constitution of Bangladesh, which was originally almost the same to that of Article 98 of the 1962 Constitution of Pakistan, speaks of powers of High Court Division to issue certain orders and directions and not various kinds of prerogative writs such as habeas corpus, mandamus, prohibition, quo warranto and certiorari that can be issued by it. Although the names of various writs have not been used in Article 102, the true content of each of the major writs has been set out in self-contained propositions. See supra, footnotes 66 and 67. In addition to those described in footnotes 66 and 67, Article 102 also provided that the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law - "(b) on the application of any person, make an order -

    (i) directing that a person in custody be brought before it so that it may satisfy itself, that he is not being held in custody without lawful authority or in an unlawful manner; or

    (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office".

    Further it is to be mentioned that the powers to issue orders and direction has not been conferred on the Appellate Division of the Supreme Court. Therefore, no writ or petition for an 'order' or direction can be moved directly to the Appellate Division except in appeal by leave under Article 103 of the Constitution.

Islam in the case of Banladesh v. Haji Joynal Abedin[77] observes:

> "So long the Constitution is in force as the supreme law of the country, any act done or proceeding taken by a person purporting to function in connection with the affairs of the Republic or of a local authority may be made the subject-matter of review by the High Court in exercise of its writ jurisdiction as conferred by Article 102 of the Constitution. The moment the country was put under Martial Law, the above noted constitutional provision along with other civil laws of the country loses its superior position[78] .... The writ jurisdiction of the High Court Division as conferred under Article 102 of the Constitution is to be exercised subject to the bar put under the Proclamations and the Martial Law Regulations."[79]

But the provisions of the Martial Law Regulations that excluded the jurisdiction of any court, including the High Court Division and the Appellate Division of the Supreme Court, to question orders, judgments, sentences or proceedings of a Martial Law Court, were in extremely general terms. It was not in all cases that the court's jurisdiction with regard to orders, judgments or sentences of a Martial Law Court had been taken away. While the High Court Division would not and could not interfere if the order or sentence passed by a validly constituted Martial Law Court was within its jurisdiction, there was no ouster of jurisdiction where the order or sentence of the Martial Law Court was in excess of or without jurisdiction. If a Martial Law Court passed a sentence on a person it could not try, or tried an offence it had not the power to try, or passed a sentence it was not competent to pass, the sentence would be without jurisdiction and would not enjoy the immunity from scrutiny by the High Court Division. By no declaration could such a sentence be saved from scrutiny as the

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77. Bangladesh Supreme Court Reports, Vol.III, No.1, January 1979, p.21.
78. Ibid, p.35.
79. Ibid, p.40.

sentence was a nullity and the High Court Division exercising its jurisdiction under Article 102 of the Constitution could strike down the sentence. Similarly, when a Martial Law Court was not properly constituted, that is to say, was coram non judice or acted mala fide, the High Court Division in exercise of its writ jurisdiction under Article 102 was competent to make the necessary declaration. Because the ouster provision in the Martial Law Regulation was never meant to give protection to judgments delivered, orders made, or proceedings taken without jurisdiction, or coram non judice or mala fide. In this context, the observations of the then Chief Justice, Hamoodur Rahman, of Pakistan in the case of Federation of Pakistan v. Saeed Ahmad[80] are noteworthy. As he says:

> "... that acts done, proceedings taken or orders made incompetently without jurisdiction would not be covered by the ouster clause .... Indeed, mala fide acts stand on the same footing as acts done without jurisdiction. Similarly, acts coram non judice also stand on the same footing, because, these words literally mean that they have been done by an authority or a body exercising judicial or quasi-judicial powers which was not properly constituted even under the law under which it was set up and that its decision is not a decision of a competent authority. If this be so then such acts do not also qualify for validation and they have not been saved from scrutiny by the ouster clause, no matter how widely that ouster clause may be worded".[81]

The above view was echoed by Justice Ruhul Islam of the Appellate Division of the Bangladesh Supreme Court in the case of Ehteshamuddin v. Bangladesh,[82] when he observed:

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80. All Pakistan Legal Decisions, Supreme Court, Vol.XXVI, 1974, p.151.
81. Ibid, p.168.
82. Dhaka Law Reports, Appellate Division, Vol.XXXIII, 1981, p.154.

> "The moment any Martial Law Court is found to have acted without jurisdiction, more precisely, has taken cognizance of an offence not triable by such Courts under the Martial Law Regulation, or the Martial Law Court is not properly constituted, the Superior Court's power to declare the proceedings wholly illegal and without any lawful authority in exercise of its power under Article 102 of the Constitution cannot be denied. The power of the superior Courts can be extended to examine jurisdiction of Martial Law Court when it is found that it is coram non judice[83]... when a Martial Law Court ... has acted mala fide, the power of the superior Courts under Article 102 of the Constitution in a appropriate case may be exercised".[84]

This view was also held by Justice Badrul Haider Chowdhury in the same case:

> "No ouster clause can operate to oust the jurisdiction of a superior Court, unless the superior Court itself is satisfied that by such ouster clause the jurisdiction is ousted because the actions that had been performed are not mala fide or in excess or in coram non judice and in violation of the statute".[85]

Therefore, it is clear that, in spite of the exclusion of the jurisdiction of courts by express words, the superior courts could still retain the jurisdiction to question the proceeding taken without jurisdiction, coram non judice or mala fide. In fact, this view was consistently followed by the Appellate Division of the Supreme Court of Bangladesh in a number of other cases. For example, in civil petition no. 42 of 1980 in the case of Ismail Howlader v. Government of Bangladesh[86] where no challenge was made against the order of a Special Martial Law Court on the ground of mala fide or coram non judice, the Appellate Division observed that:

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83. Ibid., p.164.
84. Ibid., p.170.
85. Ibid., p.172.
86. Unreported.

> "The order of the Martial Law Court cannot be challenged ... except on the ground of male fide or want of jurisdiction ... (the) two principle requisites for interference with an order of Martial Law Courts".[87]

Similarly, in criminal appeal no. 24 of 1980 in the case of Government of Bangladesh v. Syed A. M. Mahbubur Rashid[88] (arising out of writ petition no. 805 of 1979), the Appellate Division held that the Supreme Court had "the power ... to interfere with a decision of Martial Law authorities or Martial Law Court in case of total absence of jurisdiction or in the case of mala fide exercise of power".[89]

Thus the views of the superior courts of Pakistan and Bangladesh with regard to ouster provision are in conformity with that of Lord Thankerton of the Judicial Committee of the Privy Council in the case of Secretary of State v. Mask and Company,[90] wherein the latter had observed:

> "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."[91]

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87. Ibid.
88. Unreported.
89. Ibid.
90. All India Reporter, Privy Council, Vol.XXVIL, 1940, L.R., 67I, A, p.105.
91. Ibid., p.110.

III The Judicial Role in the Protection of Fundamental Rights

(i) Nature of the Fundamental Rights Guaranteed by the 1972 Constitution of Bangladesh

Like most Constitutions of the World, the 1972 Constitution of Bangladesh guarantees 'Fundamental Rights' under Part III. The object of their incorporation into the Constitution, as indicated in the Preamble, is that:

> "... it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."

Some of the fundamental rights guaranteed in the Constitution are limited to citizens, while some are applicable to all persons, citizens and non-citizens alike.

The rights which are available to all persons are: (i) Protection of right to life and personal liberty;[92] (ii) Safeguards as to arrest and detention;[93] (iii) Prohibition of forced labour;[94] (iv) Protection in respect of trial and punishment;[95] (v) Freedom of religion;[96] and (vi) the Right to constitutional remedies.[97]

The rights given to citizens only are: (i) Equality before the law;[98] (ii) Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth;[99] (iii) Equality of opportunity in

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92. Article 32, the 1972 Constitution of Pakistan
93. Article 33, ibid. It may be noted that some of the safeguards as to arrest and detention do not apply to an enemy alient. Article 33(3)(a).
94. Article 34, ibid.
95. Article 35, ibid.
96. Article 41, ibid.
97. Article 44, ibid.
98. Article 27, ibid.
99. Article 28, ibid.

public employment;[100] (iv) Abolition of titles, honours and decorations;[101] (v) Right to protection of law;[102] (vi) Freedom of movement;[103] (vii) Freedom of assembly;[104] (viii) Freedom of association;[105] (ix) Freedom of thought and conscience, and of speech;[106] (x) Freedom of profession or occupation;[107] (xi) Rights to property[108] and Protection of home and privacy of correspondence.[109]

It is generally acknowledged that the individual can have no absolute or unfettered right. Only a few of the fundamental human rights can be stated in the form of absolute propositions. Most of them require qualification in the general interests of society, particularly in a welfare state, where the individual's interest is considered to be subordinate to the public welfare. "There cannot be any such thing as absolute or uncontrolled liberty," observes Justice Mukherjee in A. K. Gopalan v. the State of Madras,[110] "wholly freed from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community .... What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."[111]

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100. Article 29, ibid.
101. Article 30, ibid.
102. Article 31, ibid.
103. Article 36, ibid.
104. Article 37, ibid.
105. Article 38, ibid.
106. Article 39, ibid.
107. Article 40, ibid.
108. Article 42, ibid.
109. Article 43, ibid.
110. The Supreme Court Reports, India, Vol.I, 1950, p.88.
111. Ibid., pp.253-254.

Following this principle, the 1972 Constitution of Bangladesh has struck a balance between guaranteeing individual rights and protecting the collective interest of the community. In respect of some of the rights, no limitations can be imposed by the Legislature. In other words, certain rights have been stated in absolute terms without reference to restrictions or qualifications. In respect of certain other rights, the Legislature has been permitted to make valid exceptions within the limits imposed by the Constitution. Some rights, however, have been practically left to the discretion of the Legislature.

The rights which are immune from any limitation by the Legislature are: (i) Equality before the law; (ii) Prohibition of forced labour; (iii) Freedom from punishment under an ex post facto legislation;[112] (iv) Religious safeguards in educational institutions,[113] and (v) Freedom of thought and conscience.

Reasonable restrictions may be imposed by law in respect of: (i) Freedom of movement, (ii) Freedom of assembly; (iii) Freedom of association; (iv) Freedom of speech; and (v) Freedom of religion. They may be imposed in respect of these rights on certain specified grounds, e.g. "in the public interest", "in the interest of public order or public health" "in the interest of morality or public order", "in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

The rights which have been practically left to the discretion of the Legislature by using phrases "save in accordance with law", "save

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112. Article 35(1), the 1972 Constitution of Bangladesh.
113. Article 41(2), ibid.

by authority of law" and "except in accordance with law" are: (i) Protection of right to life and personal liberty, (ii) Right to protection of law, and (iii) Protection of property rights.[114] Any restrictions may also be imposed by law upon the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Similarly, the right to acquire, hold, transfer or otherwise dispose of property may be subjected to any restrictions. Since the word 'reasonable' has not been used to qualify the expression 'restrictions' used in respect of these two rights, it is likely to impair the power of the court to intervene even if restrictions with regard to any such rights would appear to be entirely unreasonable.

It may be mentioned here that the fundamental rights which have been incorporated into the 1972 Constitution of Bangladesh in general resemble those in the Constitutions of Pakistan, 1956 and 1962.[115]

(ii) Provisions for the Judicial Enforcement of the Fundamental Rights under the 1972 Constitution of Bangladesh

A mere declaration and insertion of fundamental rights in the Constitution is meaningless unless an effective and easy remedy or machinery is provided in the Constitution itself for enforcing these rights, or unless their enjoyment is effectively guaranteed by a provision for judicial process and judicial review. "The basic

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114. Clause 1 of Article 42 of the 1972 Constitution. This clause provides inter alia, that "... no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law".

115. The fundamental rights as guaranteed by the 1956 Constitution of Pakistan are to be found in Part II of the Constitution. The 1962 Constitution of Pakistan, instead of inserting fundamental rights as had been provided in the 1956 Constitution incorporating certain "principles of law-making" which could not be enforced in a court of law. Later, the Chapter on Fundamental Rights was inserted in the Constitution by the Constitution (First Amendment) Act, 1963. See Part II, Chapter I of the Constitution.

principle", says Justice Hamoodur Rahman in Saiyyid Abul A'la Maudoodi v. the Government of West Pakistan,[116] "underlying a declaration of Fundamental Rights in a Constitution is that it must be capable of being enforced not only against the Executive but also against the legislature by judicial process".[117] The importance of guaranteeing remedies to enforce fundamental rights was recognised in the Universal Declaration of Human Rights in the following words: "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the Fundamental Rights granted to him by Constitution or by law".[118]

Hence the 1972 Constitution of Bangladesh has invested the courts with the power to declare laws inconsistent with or made by the 'State'[119] in derogation of the fundamental rights to be void.[120] The Bangladesh Constitution not only expressly provides for judicial review of legislation in regard to its conformity with fundamental rights but also guarantees a constitutional remedy for the enforcement of these rights.

Originally, Article 44 of the Constitution, which is included in

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116. All Pakistan Legal Decisions, Supreme Court, Vol.XVI, 1964, p.673.
117. Ibid., p.783.
118. Article 8 of the Universal Declaration of Human Rights. The Universal Declaration was adopted on 10 December 1948 by the General Assembly of the United Nations and contained a list of 30 Human Rights as "a common standard of achievement for all people and nations".
119. The term "State" has been used in Article 152 of the 1972 Constitution of Bangladesh to include "Parliament, the Government and statutory public authorities".
120. Article 26 of the Constitution provides that "(1) All existing law inconsistent with the provisions of this Part (Part III) shall, to the extent of such inconsistency, become void on the commencement of this Constitution; (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void. (3) Nothing in this article shall apply to any amendment of this Constitution made under article 142." It may be mentioned here that clause 3 was added to Article 26 by (Article 2 of) the Constitution (Second Amendment) Act, 1973 (Act. No. XXIV of 1973) passed on 22 September 1973.

Part III entitled "Fundamental Rights" provided that "(1) The right to move the Supreme Court in accordance with clause (1) of article 102 for the enforcement of the rights conferred by this Part is guaranteed. (2) Without prejudice to the powers of the Supreme Court under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers". Article 102(1) in its original form stated that "The High Court Division, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution".

Thus Article 44 of the 1972 Constitution of Bangladesh was almost a reproduction of clauses (1) and (3) of Article 32[121] of the 1949 Constitution of India. Similarly, the provisions relating to the powers of the High Court Division to enforce fundamental rights were, to a great extent, a reproduction of those of clause (2)(c) of Article 98[122] of the 1962 Constitution of Pakistan, as inserted by

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121. As clause 1 of Article 32 of the Indian Constitution provides that "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part (Part III) is guaranteed". And clause (3) of Article 32 states that "Without prejudice of the powers conferred on the Supreme Court by clause (1) ... Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court ...."

122. As clause (2)(c) of Article 98 of the 1962 Constitution provided that the High Court could, if it was satisfied that no other adequate remedy was provided by law - "on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government, exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the fundamental rights conferred by chapter 1 of Part II of the Constitution".

Article 6 of the Constitution (First Amendment) Act, 1963 (1 of 1964).

However, Article 44(1) provided a guaranteed remedy for the enforcement of fundamental rights, and this remedial right is itself made a fundamental right by being included in Part III of the Constitution. The "significant aspect is that", as Justice Badrul Haider Chowdhury in Haji Joynal Abedin v. State,[123] "Article 44 finds with Part III of the Constitution and Part III is captioned as 'Fundamental Rights'. Therefore the guarantee in the Article 44 itself is a fundamental right".[124] The guarantee for the enforcement of fundamental rights was given through the High Court Division of the Supreme Court. Thus the High Court Division of the Supreme Court was made the guardian and guarantor of fundamental rights and, as such, could not refuse to entertain applications or petitions for the issue of directions or orders or writs to enforce the fundamental rights so long as they remained in force. The appeal from an order of the High Court Division with regard to enforcement of fundamental rights lay to the Appellate Division of the Supreme Court, if leave to appeal was granted by it under Article 103(3), or a certificate to appeal was granted by the High Court Division under Article 103(2) of the Constitution. Moreover, without prejudice to the powers of the Supreme Court to issue these orders or directions, Parliament could by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court in this respect. Perhaps the object of these provisions was to provide easy and speedy remedy for the enforcement of the fundamental rights.

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123. Dhaka Law Reports, Vol.XXX, 1978, p.371.
124. Ibid., pp.392-393.

(iii) The Suspension of Fundamental Rights During the Emergency

(a) Constitutional Provisions

The need for an emergency provision and suspension of fundamental rights and the remedies for their enforcement during an emergency is obvious. When the state's very life is in jeopardy, internally or externally, the rights of the individuals must not obstruct the government in taking any action necessary for the protection and safety of the state, for if the state survives, these rights survive, and if the state does not survive, these rights do not survive. "However precious the personal liberty of the subject may be", says Lord Atkinson in Rex v. Halliday,[125] "there is something for which it may well be, to some extent sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement".[126] Therefore, apart from enacting the procedure for the amendment of the Constitution to suspend or abolish fundamental rights, most of the Constitutions of the world lay down provisions for the suspension of enforcement of some of the fundamental rights in an emergency declared by the head of the Executive.

Hence the Constitution (Second Amendment) Act, 1973 (Act No. XXIV of 1973, passed on 22 Sept. 1973), which for the first time inserted provisions for the proclamation of emergency as pointed out earlier,[127] provides for the suspension of some of the fundamental rights and enforcement of fundamental rights during an emergency proclaimed at a time when the security or economic life of Bangladesh is threatened by war or external aggression or internal disturbance. A newly

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125. The Law Reports, Appeal Cases, London, 1917, p.260.
126. Ibid., p.271.
127. Supra, Chapter I, p.27.

inserted Article 141B provides:

> "While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

Article 141C states:

> "(1) While a Proclamation of Emergency is in operation, the President may, by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. (2) An order made under this article may extend to the whole of Bangladesh or any part thereof. (3) Every order made under this article shall, as soon as may be, be laid before Parliament."

Thus these provisions almost exactly reproduced clauses (9) and (10) of Article 30[128] of the 1962 Constitution of Pakistan, as

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128. As the newly inserted clause 9 of Article 30 of the 1962 Constitution of Pakistan provided that "Nothing contained in paragraphs 5, 6, 7, 8, 9 and 13 (i.e. freedom of movement, freedom of assembly, freedom of association, freedom of trade, business or profession, freedom of speech, and right to acquire hold and dispose of property respectively) of the fundamental rights conferred by chapter 1 of Part II of this Constitution shall, while a Proclamation of Emergency is in force, restrict the power of the State as defined in Article 5 of this Constitution to make any law or to take any executive action which it would but for the provisions contained in the said paragraphs, be competent to make or to take, but any law so made shall to the extent of incompetency, cease to have effect, and shall be deemed to have been repealed, at the time

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inserted by the Constitution (Fifth Amendment) Act, 1965 (Act No.XVII of 1965).

However, while the proclamation of an emergency is in force, only the fundamental rights of freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience and of speech, freedom of profession or occupation and rights of property guaranteed in Articles 36, 37, 38, 39, 40 and 42 respectively can be suspended so as to remove the restrictions imposed by these Articles on the power of the Legislature to make any law or the Executive to take any action. Thus in respect of these fundamental rights, the authority of the Legislature and the Executive is made wider, but all other rights remain unaffected. If the Legislature makes laws or the Executive takes actions which are inconsistent with the rights guaranteed by those Articles, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under those Articles because as soon as the emergency is lifted, those Articles which were suspended during the emergency are automatically revived and begin to operate. Article 141B, however, makes it clear that things done or omitted to be done during the

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when the Proclamation is revoked.
Clause (10) of Article 30 stated that "While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any Court for the enforcement of such of the fundamental rights conferred by Chapter 1 of Part II of this Constitution as may be specified in the Order, and any proceeding in any Court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan".

emergency cannot be challenged even after the emergency is over.

Clause (1) of Article 141C empowers the President to issue an order suspending the right to move any court for the enforcement of such of the rights conferred by Part III of the 1972 Constitution as may be specified in the order for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. Thus the order need not be restricted to the fundamental rights mentioned in Article 141B. Although Article 141C does not purport to suspend expressly any of the fundamental rights, the suspension of the constitutional remedies for the enforcement of such of the rights as are specified in the order in effect results in the suspension of these rights during the period the order is in operation. Clause 1 of Article 141C and the Presidential Order issued under it constitute a sort of blanket ban against the institution of fresh proceedings and continuance of all pending proceedings for the enforcement of rights specified in the order. Any pending proceeding, which remains suspended during the time when the order is in operation, may be revived when the said order ceases to be operative.

(b) Suspension of the Enforcement of Fundamental Rights During the Proclamation of Emergency, 1974

Here it may be recalled that President Mohammadullah issued a Proclamation of Emergency on 28 December 1974 as he was satisfied that a grave emergency existed in which the security and economic life of Bangladesh were threatened by internal disturbance. As a consequence of this Proclamation, the President passed an Order on the same day which declared that "the right of any person to move any court for the enforcement of the rights conferred by article 27, 31, 32, 33, 35, 36, 37, 38, 39, 40, 42 and 43 of that Constitution, and all proceedings pending in any court for the enforcement of the said

rights, shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 141A thereof on the 28th December, 1974, is in force".[129]

Thus the Presidential Order issued under clause (1) of Article 141C of the 1972 Constitution suspended the enforcement of most of the fundamental rights which is depicted in the following Table I

Table I

Fundamental Rights Whose Enforcement was Suspended	Fundamental Rights Whose Enforcement Remained Unaffected
(i) Equality before the Law; (ii) Right to protection of law; (iii) Protection of right to life and personal liberty; (iv) Safeguards as to arrest and detention; (v) Protection in respect of trial and punishment; (vi) Freedom of movement; (vii) Freedom of assembly; (viii) Freedom of association; (ix) Freedom of thought and conscience and of speech; (x) Freedom of profession or occupation; (xi) Rights to property; and (xii) Protection of home and privacy of correspondence	(i) Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth; (ii) Equality of opportunity in public employment; (iii) Abolition of titles, honours and decorations; (iv) Prohibition of forced labour; (v) Freedom of religion; and (vi) Right to enforcement of fundamental rights (partially unaffected).

Table I shows that the enforcement of twelve of the fundamental rights in a court of law was suspended for the period during which the Proclamation of Emergency was in force while only six were available for enforcement. However, the prohibition in respect of the initiation of fresh proceedings and the suspension of pending proceedings for the enforcement of certain rights, e.g. freedom of profession, or

129. Notification No. 3(51)/74-CD(CS), issued by the Ministry of Law, Parliamentary Affairs, and Justice.

occupation, and rights to property, are difficult to justify as the Emergency was declared in times of internal disturbance.

(iv) Taking Away the Power of the High Court Division to Enforce Fundamental Rights Before the 1975 Martial Law

The citizen's right to move the High Court Division of the Supreme Court for the enforcement of the fundamental rights was taken away by the substitution of the original Article 44 by a new one inserted by the Constitution (Fourth Amendment) Act, which was passed during the Awami League regime only twenty-nine days after the Proclamation of Emergency, on 25 January 1975. The newly inserted Article 44 provided that "Parliament may by law establish a constitutional court, tribunal or commission for the enforcement of the rights conferred by this Part" III of the Constitution. The Fourth Amendement also omitted the provisions of the original Article 102(1) under which the High Court Division could give directions or orders to any person or authority for the enforcement of any of the fundamental rights guaranteed by the 1972 Constitution of Bangladesh.

Thus the High Court Division of the Supreme Court, which is likely to command respect both of the rulers and the ruled more than any other constitutional court, tribunal or commission to be set up under an Act of Parliament, was deprived of the role of "a sentinel on the qui vive" with regard to fundamental rights. The power of enforcing fundamental rights, which is essentially a function of the Judiciary, was taken away from the hands of the High Court Division. Instead the Constitution (Fourth Amendment) Act provided for a unique and unprecedented machinery (constitutional court, tribunal or commission) for the enforcement of fundamental rights. This marked a clear-cut departure from the normal constitutional pattern followed elsewhere in relation to enforcing fundamental rights. However, since

the Fourth Amendment was passed during the emergency in January 1975 and the enforcement of all the important fundamental rights was suspended in December 1974, the setting up of a constitutional court, tribunal or commission by Parliament, during the civilian regime preceding the imposition of Martial Law in August 1975, did not arise.

(v) Restoration of the Power of the High Court Division to Enforce Fundamental Rights and Ultimate Restoration of Suspended Enforcement of Most of the Fundamental Rights by the 1975 Martial Law Regime

The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No.IV of 1976), issued on 28 May 1976 by President A. M. Sayem, provided, inter alia, that "The right to move the High Court in accordance with clause (2) of article 102, for the enforcement of the rights conferred by this Part (i.e. Part III entitled as 'Fundamental Rights') is guaranteed". "Without prejudice to the powers of the High Court under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers". Clause 2 of Article 102 of the 1972 Constitution, as amended by the Second Proclamation (Seventh Amendment) Order, 1976 stated that "The High Court, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution". Later clause 2 of Article 102 was rearranged as clause 1 of Article 102 and the High Court Division was substituted for the High Court as the machinery for the enforcement of fundamental rights by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.I of 1977), issued on 27 November 1977.

Thus the right of the citizen to move the High Court Division, and the power of the High Court Division to give directions or orders to any person or authority for the enforcement of any of the fundamental rights conferred by Part III of the Constitution, were restored by the Martial Law regime.

Although the right of the citizen to move the High Court Division and the power of the High Court Division to give directions or orders to any person or authority for the enforcement of the fundamental rights were restored, the Proclamation of Emergency, and the Presidential Order suspending the enforcement of most of the fundamental rights in a court of law were not repealed. Therefore, in view of clause (f) of the Proclamation of 20 August 1975, which provided that all Acts, Ordinance, President's Order and other Orders, Proclamations, rules, regulations, by-laws, notifications and other legal instruments in force on the morning of 15 August 1975 would continue to remain in force until repealed, revoked or amended, it is obvious that the Proclamation of Emergency and the Presidential Order suspending the enforcement of most of the fundamental rights remained in force. But the restoration of the right of the citizen to move the High Court Division and the power of the High Court Division to give directions or orders to any person or authority for the enforcement of the fundamental rights and the amendment of certain provisions of the Emergency Power Rules, 1975, with regard to preventive detention[130] was interpreted by the High Court Division of the Supreme Court to mean repeal of the Proclamation of Emergency and the Presidential Order of 28 December 1975 by implication and

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130. The amendment of certain provisions of the Emergency Power Rules, 1975, relating to preventive detention would be discussed in the next chapter

consequent re-appearance of fundamental rights. As in Haji Joynal Abedin v. the State[131] Justice Badrul Haider Chowdhury observes:

> "It will be seen that Article 33 (which deals with safeguards as to arrest and detention) ... was mentioned in the Presidential Order dated 28.12.74. Article 33(4)(5) of the Constitution prohibits any law providing for preventive detention unless it ensures four things in case of preventive detention, namely (1) right to be informed regarding the grounds of his detention, (2) right of the representation, (3) reference to Advisory Board and (4) action upon the report of the Advisory Board. These rights are essentially rights within the concept of fundamental rights.... (If) the Proclamation and Presidential Order dated 28.12.74 is still in force, then the rights mentioned in Article 33(4)(5) are not available.... By amendment of the Emergency Powers Act (Sic) on 18.8.77 communication of the grounds of the detention order and constitution of Advisory Committee and a reference thereto and the action upon the report of this Advisory Committee have been provided for. As already been noted these are essential concepts within the fundamental rights. If these rights are available by amendment of the Emergency Powers Act (Sic) then the fundamental rights have been re-conferred. If not, how was it necessary for a regime during Martial Law to confer the rights upon the citizens which have been taken away by Proclamation of Emergency under Constitution. Either the Proclamation of Emergency and Presidential Order is dead or alive. If it is dead then the rights have re-appeared. If it is not, the rights simply are not there. Assuming that these Proclamations and Orders are still alive then how this Emergency Powers Act (Sic) was amended for bringing into the conception of fundamental rights and how correspondingly Articles 44 and 102 of the Constitution were amended by Martial Law Order for the enforcement of these rights?.... Re-conferment of these two provisions in its original character and colour by (the) Second Proclamation (7th Amendment) Order dated 28.5.76 which was reiterated by the Second Proclamation (10th Amendment) dated 27.11.77 bringing the entire jurisdiction in its original position and introducing the provisions of Article 33 into the Emergency Powers Act (Sic), the opinion is the fundamental rights which were taken away ... have been reconferred by these two Martial Law Proclamations. If Article 33 had been reconferred there is no doubt that other rights are also available because proclamation said that such proclamation is in force until it is amended, revoked and repealed. It is a

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131. Dhaka Law Reports, Vol.XXX, 1978, p.371.

> case of repeal by implication .... (Thus) the fundamental rights have re-appeared and Article 44 has given guarantee for the enforcement of these rights through the machinery of Article 102 of the Constitution."[132]

It seems that the learned Justice misinterpreted the position. The more realistic approach would be that although the High Court Division got back the power to give direction or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution, this power could be exercised in relation to only those fundamental rights which were available for enforcement. There can be no question of re-appearance of the suspended fundamental rights as a result of the restoration of the right of the citizen to move the High Court Division for the enforcement of any of the fundamental rights. The citizen could move to the High Court Division for the enforcement of only those rights whose enforcement were not suspended by the Presidential Order of 28 December 1976. This analysis also receives support from the attitude of the then politicians of the country as the restoration of suspended fundamental rights was put forward by the politicians as one of the prerequisites to participate in the parliamentary election to be held early in 1979.[133] At last, on 27 December 1978, the Martial Law regime decided to concede this demand: the President and the Chief Martial Law Administrator, Ziaur Rahman, ordered restoration of those fundamental rights[134] that had been suspended on 28 December 1975 by

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132. Ibid., pp.391-392.
133. The Ittefaq, Dhaka, 8 December 1978.
134. The Asian Recorder, 8-14 January 1979, p.14683 (corrected page 101435).

a Presidential Order issued in consequence of the Proclamation of Emergency. It is interesting to note that the President passed such an order without revoking the Proclamation of Emergency although the Presidential Order of 28 December 1975 suspending the right of the citizen to move for the enforcement of most of the fundamental rights provided that such right "shall remain suspended for the period during which the Proclamation of Emergency issued ... on the 28th December, 1974, is in force".[135] However, eleven months later, on 27 November 1979, the Emergency proclaimed on 28 December 1975 was revoked.

Conclusion

(i) The Independence of the Judiciary

The foregoing discussion reveals that originally the 1972 Constitution of Bangladesh attempted to ensure the independence of the Judiciary. Later the Constitution (Fourth Amendment) Act, 1975, passed during the Awami League regime, curbed the independence of the Judiciary to a great extent. The tenure of office of the judges of the Supreme Court was placed at the mercy of the President. The President was substituted for the Supreme Court as the authority to control and discipline subordinate courts. However, the Martial Law regime of 1975 restored the independence of the Judiciary. Although the Martial Law regime did not restore the original power of the Supreme Court to control and discipline subordinate courts, it made it obligatory for the President to consult the Supreme Court while exercising the power of controlling and disciplining subordinate courts, It guaranteed security of tenure to the judges of the

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135. See supra, p.333.

Supreme Court ultimately by establishing the Supreme Judicial Council, consisting of the Chief Justice of Bangladesh, and the two next senior judges, on whose recommendation a judge of the Supreme Court was to be removed by the President. Moreover, the Martial Law regime provided better remuneration and privileges for the judges of the Supreme Court. It enhanced the salaries of the Chief Justice and other judges. Provisions were made for the first time to pay them a sumptuary allowance and the medical facilities enjoyed by them were allowed to continue after their retirement or "otherwise ceasing to hold office". The judges were accorded the privilege to use official transport on the same terms as are admissible to a Secretary to the Government. All these provisions strengthened their freedom, improved their financial position and reduced their likely temptation to resort to corruption.

(ii) Curtailment of the Powers of the Judiciary

Although the Martial Law administration adopted various measures to restore the independence of the Judiciary, it severely curtailed the jurisdiction of the Judiciary by various Proclamations and Martial Law Regulations. Where the Martial Law regime required a free hand and where interference by the courts might prove a hindrance or an inconvenience, the jurisdiction of the courts was specifically excluded. However, as a result of the imposition of restrictions on the power of the judiciary, the Superior Courts in Bangladesh had to work from 1975 to 1979 under conditions which were not conducive to the discharge of their duties of administering justice and protecting the innocent from injury and usurpation. Yet they gave a liberal interpretation to the Proclamation and the Martial Law Regulations which restricted their jurisdictions. They consistently held the

view that, in spite of the ouster provisions, the power of the superior courts could not be taken away if the proceeding taken was without jurisdiction or coram non judice or mala fide. In other words, when a proceeding before a Martial Law Court or an action taken under the Martial Law Regulation is challenged on the ground of want of jurisdiction or mala fide, the superior court, in exercise of its writ jurisdiction, was competent to make the necessary declaration. Thus the Superior Courts in Bangladesh did not wish to depart from the traditional view taken with regard to the provisions providing for exclusion of the jurisdiction of courts.

(iii) Fundamental Rights and Judicial Powers

The foregoing discussion also shows that the fundamental rights guaranteed by the 1972 Constitution of Bangladesh are neither indefensible nor permanent, for certain fundamental rights as well as their enforcement may be suspended during a proclamation of emergency and may be taken away or abridged by an amendment of the Constitution. In fact, the Presidential Order, issued as a consequence of the Proclamation of Emergency on 28 December 1974 during the regime of the Awami League, suspended the enforcement of most of the fundamental rights. Later, on 25 January 1975, the Constitution (Fourth Amendment) Act, 1975, took away the constitutional rights of the citizen to move the High Court Division of the Supreme Court and the power of the High Court Division to issue directions or orders to any person or authority for the enforcement of the fundamental rights. But the Martial Law regime by promulgating the Second Proclamation (Seventh Amendment) Order, 1976, not only restored this right of the citizen and the power of the High Court, ultimately in December 1978, it also lifted the prohibition in respect of

enforcement of most of the fundamental rights imposed by the Presidential Order of 28 December 1974.

CHAPTER VII

Laws of Preventive Detention: Before and After the Imposition of Martial Law (1975)

I. Definition of Preventive Detention

Preventive detention means the detention of a person, without trial in a court of law, by an order of the Executive, not with a view to bringing a criminal charge against him, but with the intention of preventing him from engaging in activities prejudicial to the safety and security of the State. It is "used to describe detention by order of an authority empowered under a statute on his subjective satisfaction that the person detained is likely to act in a manner prejudicial to one or more of the matters described in the statute, such as national defence or public order. Normally the authority acts on information supplied by police or other public authority without taking any evidence."[1] Thus preventive detention is an extraordinary measure, as a man's personal liberty is taken away by the Executive not because of his commission of an offence but because of the apprehension of the Executive that he is about to commit acts which are detrimental to the maintenance of public order and peace, defence and security of the State. "Preventive justice", says Lord Atkinson in Rex v. Halliday[2], "as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England[3]....preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable

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1. Gledhill, Alan, Pakistan: The Development of its Laws and Constitution, London, 2nd edn., 1967, p.198
2. The Law Reports, Appeal Cases, London, 1917, p.260
3. Ibid., p.273

he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof."[4]

Thus preventive detention is not a punitive but a precautionary measure. The word 'preventive' is used in contradistinction to the word 'punitive'. To quote the views of Lord Finlay, expressed in Rex v. Halliday,[5] "one of the most obvious means of taking precautions against dangers .... as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy .... The measure is not punitive but precautionary."[6] Thus the question of punitive detention arises after an offence is actually committed, whereas the question of preventive detention comes before the actual commission of a harmful act and is based merely on a reasonable apprehension or probability.

"The object of preventive detention," observes Justice Mukherjee in A.K. Gopalan v. The State of Madras,[7] "is not to punish a man for having done something but to intercept him before he does it to prevent him from doing it. No offence is proved, nor any charge formulated, and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence."[8] Therefore "any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State."[9]

Thus preventive detention has four salient features, namely, (i) it is detention and not imprisonment, (ii) it is detention by the order of the Executive and not by any kind of judicial officer; (iii)

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4. Ibid., p.275
5. Ibid., p.260
6. Ibid., p.269
7. The Supreme Court Reports, India, vol.I, 1950, p.88
8. Ibid., p.249-250
9. Lord Finlay in Rex v. Halliday, The Law Reports, Appeal cases, London, 1917, p.265

it is not made after any formal enquiry as to prejudicial acts which a person detained was likely to commit; and (iv) the object is not punitive but preventive.

II. Necessity of Preventive Detention

The use of preventive detention is alleged to be justified by the fact that there may be a person, who indulges in activities calculated to encourage violence and public disorder, against whom a judicial trial cannot be initiated as the evidence in possession of the authorities will not be sufficient to found a legal charge or to secure his conviction by legal proof; but the evidence is deemed sufficient to place him in detention in the interests of the state. If the Executive leaves him at liberty and is obliged to go through the lengthy process of collecting evidence to support a judicial conviction, it may or may not succeed, but the person concerned may succeed in his object to cause harm to the safety and security of the State. Hence his liberty has to be taken away temporarily, in the interests of the State, without trial. As Professor Alan Gledhill says, preventive detention "is an administrative necessity....and likely to cause less human misery than might result from likely alternative measures to deal with persons who cannot be successfully prosecuted for their activities, though they are a menace to public security and order."[10] Thus one of the most effective ways of preventing a man from committing prejudicial acts is to detain him although "in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is....inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm."[11]

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10. Gledhill, Alan, Fundamental Rights in India, London, 1955, p.126
11. Lord Atkinson in Rex v Halliday, The Law Reports, Appeal Cases, London, 1917, p.273

Therefore,preventive detention in case of such an emergency as war is well recognised. There are very few persons who will dispute its necessity during a war. To say in the words of Lord Atkinson, as pointed out earlier, "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement".[12] In recent times, the necessity of having provisions for preventive detention in time of peace has been felt in newly independent countries to prevent anti-social and subversive elements from imperilling the welfare of the State.

III. The Possible Abuse of the Power of Detention

The power of preventive detention carries with it the risk of abuse of power. The ruling party may misuse it in time of peace for its own benefit to suppress opposition, to keep the critics of its policy behind bars. "Vested with this power of proscription", says Lord Shaw of Dunfermline in Rex v. Halliday,[13] "and permitted to enter the sphere of opinion and belief, they, who alone can judge as to public safety and defence, may reckon a political creed their special care, and if that creed be socialism, pacifism, republicanism, the persons holding such creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime. The inmost citadel of our liberties could be thus attacked."[14] In the same case, with regard to Regulation 14B of the Defence of the Realm (Consolidation) Regulations made under the Defence of the Realm Consolidation Act, 1914, Lord Dunedin said, "....preventive measures in the shape of internment

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12. Ibid., p.271
13. Ibid., p.260
14. Ibid., p.293

of person likely to assist the enemy may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has...., in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard."[15] Later in this chapter (and in the next chapter) it will be seen that the courts can act as a check on the exercise of the power of detaining persons by the Executive mainly for political purposes and the courts can help those who are innocent victims of the Executive.

IV. Preventive Detention and the 1972 Constitution of Bangladesh

The law providing for preventive detention was introduced in the Indian subcontinent by the British government in India.[16] Such a law was considered necessary by the British Indian government to maintain law and order, and suppress subversive political activities of the people. But after achieving independence in August 1947, the Governments of India and Pakistan continued to resort to laws authorising the detention of a person without trial[17] although the framers of the Constitutions of both India and Pakistan provided for certain limitations on the power of the Legislature to enact provisions for preventive detention and that of the

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15. Ibid., p.271
16. Some of the laws providing for preventive detention enacted by the British Government in India are: (a) the Bengal State Prisoners' Regulation III of 1818, (b) the Madras State Prisoners' Regulation II of 1819, (c) the State Prisoners' Act III of 1858 for Madras and Bombay, (d) the Defence of India Act, 1915, (e) the Defence of India Act, 1939
17. Some of the laws relating to preventive detention enacted in India after independence are: (a) the Preventive Detention Act, 1950, (b) the Internal Security Act, 1971, (c) the National Security Act, 1980. Similar laws enacted in Pakistan after independence are, for example, (a) the Pakistan Public Safety Ordinance, 1949, (b) the Security of Pakistan Act, 1952, (c) the Defence of Pakistan Rules, 1965

Executive to detain a person without trial.[18]

But the 1972 Constitution of Bangladesh, which ensures that "No person shall be deprived of life or personal liberty save in accordance with law",[19] did not originally contemplate any kind of preventive detention and, as such, the question of providing for restrictions on legislation in respect of preventive detention did not arise. As Article 33 of the Constitution, that contained safeguards as to arrest and detention, stated:

> "(1) A person who is arrested shall not be detained in custody unless he has been informed of the grounds of his arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.
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> (2) Every person who is arrested and detained in custody shall be brought before a Court within twenty-four hours of his arrest (excluding the time required to transport him to the Court), and shall not be further detained save by order of the Court.
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> (3) Nothing in the foregoing clauses shall apply to an enemy alien."

Later, on 22 September 1973, this original Article 33 of the Constitution was replaced by a new one by the Constitution (Second Amendment) Act, 1973. This newly inserted Article empowered the Legislature to pass laws relating to preventive detention and provided certain safeguards to mitigate the harshness of law for preventive detention by placing restrictions on legislative power. The amended Article provided as follows:

> "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and

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18. See Article 22 of the 1949 Constitution of India, Article 7 of the 1956 Constitution of Pakistan and Article 2 of the 1962 Constitution of Pakistan
19. Article 32 of the 1972 Constitution of Bangladesh

be defended by legal practitioners of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person - (a) who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order: provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

(6) Nothing in clause (3) or clause (5) shall affect dure to be followed by an Advisory Board in an inquiry under clause (4)."

Thus the amended Article 33 of the Bangladesh Constitution is almost the same as Article 2[20] of the 1962 Constitution of Pakistan. It deals with two distinct matters, namely (i) persons arrested under the ordinary law, and (ii) persons detained under the law of preventive detention. In fact, it embodies two limitations on the powers of the legislature in depriving a person's liberty. Firstly, clauses (1) and (2) of the Article lay down conditions with which laws providing for arrest and detention with the object of bringing a person to trial for a criminal offence must comply. Secondly, clauses (4) and (5) impose

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20. As Article 2 of the 1962 Constitution of Pakistan, which was almost a reproduction of Article 7 of the 1956 Constitution, provided that:
(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice.
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
(3) Nothing in sub-paragraphs (1) and (2) shall apply to a person - (a) who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention.
(4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention.
Explanation - In this sub-paragraph 'the appropriate Advisory Board' means - (i) in the case of a person detained under a Central Law, a Board consisting of a Judge of the Supreme Court, who shall be nominated by the Chief Justice of that Court, and a senior officer in the service of Pakistan, who shall be nominated by the Governor of that Province.
(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order: provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose."

certain limitations on the power of the legislature to pass laws providing for detention. As a matter of fact, these two clauses lay down certain fundamental principles as to preventive detention.

(i) Safeguards regarding Arrest

(a) The Right to be informed of the Grounds of Arrest and the Right to be defended by a Legal Practitioner

Clause (1) of Article 33 gives an arrested person two fundamental rights: (i) the right to be informed, as soon as may be, of the grounds of his arrest, and (ii) the right to consult and to be defended by a legal practitioner of his choice. They are the twomandatory privileges available to the arrested person and operate as constitutional requirements to be followed subsequent to the arrest. The object of the right to be informed of the grounds is that on learning the grounds of arrest, the person arrested or detained may be in a position to make an application to the competent court for bail or to move the High Court Division of the Supreme Court for a writ of habeas corpus or other appropriate writs or orders or directions under Article 102 of the 1972 Constitution. The right to consult a lawyer of his choice from the moment of arrest is a fundamental right of great importance as it enables "the arrested person to be advised about the legality or sufficiency of the grounds for his arrest. The right of the arrested person to be defended by a legal practitioner of his choice postulates that there is an accusation against which he has to be defended".[21]

It may be recalled here that Section 340(1) of the Criminal Procedure Code confers on a person accused of an offence before a criminal court, or against whom proceedings are instituted under the Code in any

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21. Justice Das in State of Punjab v Ajaib Singh, All India Reporter, Supreme Court, 1953, p.15

such court, the right to be defended by a lawyer. But this right is not a guaranteed right and is always subject to amendment and repeal by ordinary legislation. Moreover, this right is limited to an accused person in his trial in a criminal case. But the right given by clause 1 of Article 33 is general and not limited to a person accused of an offence before a criminal court but applies to all persons who are arrested. Thus the Constitution has conferred a much wider and more effective right, which cannot be taken away by any enactment of the legislature without the Constitution being altered.

(b) The Right to be produced before the nearest Magistrate after Arrest

Clause 2 of Article 33 gives a person arrested and detained in custody the (i) right to be produced before the nearest magistrate within twenty-four hours of his arrest, the time necessary for the journey from the place of arrest to the court being excluded, and (ii) the right not to be detained in custody beyond the period of twenty-four hours without the authority of the magistrate. The underlying object of producing an arrested person before a magistrate is to ensure to him the magisterial scrutiny of the prima facie justification of his arrest and detention and also afford him an opportunity to meet a judicial officer at the earliest opportunity so as to place before him his grievance, if any. In fact, an arrested person is assured of a judicial verdict as to the validity of his arrest as early as possible. Thus clause 2 of Article 33 gives protection against arbitrary arrest as it guarantees that the Executive cannot place any person under detention at its own will and pleasure for an indefinite period.

It may be mentioned here that clause 2 of Article 33 only affirms and gives constitutional foundation to the provisions of Section 61[22] and

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22. Section 61 of the Criminal Procedure Code states: "No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a

167[23] of the Criminal Procedure Code regarding the production of an arrested person before a magistrate within twenty-four hours of his arrest and his detention beyond this period save by an order of the magistrate.

Thus clauses (1) and (2) together ensure to an arrested person (i) the right to be informed of the grounds of his arrest, (ii) the right to legal assistance, (iii) the right to be produced before the nearest magistrate within twenty-four hours, and (iv) the right not to be detained beyond this period, except by an order of the magistrate.

(ii) Enemy Alien and Détenu

Clause 3 of Article 33 curtails the scope of the four rights guaranteed by clauses (1) and (2). As under it, the four rights embodied in clauses (1) and (2) are applicable only to the citizens and aliens, not to a person who is an enemy alien during the existence of hostilities between the People's Republic of Bangladesh and a foreign State. Similarly, the aforesaid rights are not applicable to any person who is arrested or detained under any law providing for preventive detention.

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magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court."

23. Section 167 provides that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well-founded, the police officer is required to send a copy of the entries in the diary relating to the case along with the accused to the nearest magistrate. The magistrate to whom the accused is forwarded may authorise the detention of the accused for a term not exceeding fifteen days in the whole, including one or more remands.

(iii) Safeguards regarding Preventive Detention

(a) The Advisory Board

Clause 4 of Article 33 of the 1972 Constitution imposes restrictions upon the power of Parliament to enact a law of preventive detention providing for detention beyond six months unless the sufficiency for the cause of the detention is investigated by an Advisory Board within the said period of six months. An embargo is imposed that a law providing for preventive detention shall not authorise the detention of a person for a period exceeding six months without the concurrence of an Advisory Board. It is evident that clause 4 does not expressly provide for the creation of any special machinery or independent body for the purpose of reviewing every executive order of detention which is to be found in the laws of many democratic countries.[24] It speaks of an Advisory Board, but the question of such a Board arises only when a person is to be detained for a longer period than six months. It is only in cases where the period of detention exceeds six months that the opinion of the detaining authority is made subject to a quasi-judicial review by an Advisory Board consisting of two sitting judges, or person qualified to be judges of the Supreme Court, and a senior officer in the service of

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24. For example, under the American Internal Security Act, 1950, (popularly known as McCarron Act), every order of detention is reviewable by the Detention Review Board. The Act empowers the Attorney-General to issue a warrant for the arrest of any person whom he believes to be dangerous in an emergency like war. The arrested person is brought before a preliminary hearing within forty-eight hours of his arrest when he may be represented by a counsel and may introduce evidence. The hearing officer may issue a detention order if he finds that there is a probably cause for detention. Against the order of detention, the détenu may appeal to the Detention Review Board which may modify, confirm or revoke the detention order and may indemnify the detainee for loss of income. In proceedings before the Detention Review Board, the Attorney-General is required to furnish the detainee with the particulars of evidence against him as full as possible. A détenu aggrieved by the order of the Board is entitled to a judicial review by way of appeal to the Federal Court of Appeals. It is evident that this elaborate procedure is designed to reduce the possibility of abuse of power and to safeguard the rights of the individual.

Bangladesh. Thus the Constitution fails to give a person detained in preventive custody for less than six months any quasi-judicial protection from a hasty, or ill-considered order of the detaining authority. In other words, the Constitution seeks to rely on the discretion of the detaining authority alone for a period of six months. In this respect, the observations of Justice Kayani in Ghulam Muhammad Khan Londkhawar v. The State,[25] with regard to clause 4[26] of Article 7 of the 1956 Constitution of Pakistan, which corresponds to clause 4 of Article 33 of the Bangladesh Constitution, are worth quoting:

> "if preventive detention is to exceed three months, it must have the approval of an Advisory Board....This reduces the 'satisfaction' of Government to a period of three months, and it is pertinent to remark that the halo of subjectiveness and immunity from judicial scrutiny with which the judicial authority has surrounded it since the last Great War, both here and in England, has suffered perceptibly in visual charm by reason of this constitutional safeguard. It is as though the Constitution were saying to the detaining authority: 'I appreciate the occasional urgency of a situation when you may be called upon to take away the liberty of a citizen on your own responsibility for law and order, but my experience of your past, what with your implicit trust in police reports and what with your doubtful morals in the political field, constrains me to rely on your discretion for no more than three months."[27]

It is regrettable that the Constitution does not make it obligatory that every law providing for preventive detention should invariably provide for an Advisory Board. Thus if the period of preventive detention in an Act is less than six months, a provision for the constitution of an Advisory Board would not be necessary.

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25. All Pakistan Legal Decisions, Lahore, vol.IX, 1957, p.497
26. Clause 4 of Article 7 of the 1956 Constitution of Pakistan stated that "No law providing for detention shall authorise the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention".
27. All Pakistan Legal Decisions, Lahore, 1957, p.504

However, the function of the Advisory Board itself is only to report to the Executive branch of the Government, after examining the materials placed before it by the Government only, and hearing the détenu in person, whether there is sufficient cause for keeping a person in detention for more than six months. The report of the Board must, however, be before the expiration of six months from the date of detention. But the Advisory Board has not been given any power to express any opinion as to how much longer than six months, if at all, the détenu should be kept in custody. Of course, if it reports against detaining a person any further, the detained person cannot be kept in detention over the six months period and should be forthwith released. The Government is bound to accept the report that there are not sufficient grounds for detention beyond six months. Thus the reference to the Advisory Board is a safeguard against Executive vagaries and high-handed action in detaining persons without trial. It is a procedural check on the arbitrary exercise of the power of detention by the Executive.

It may be mentioned that the opinion of the Advsiory Board does not make the detention valid, if it is ultra vires of the Constitution or contrary to the Preventive Detention Act, or mala fide. Nothwithstanding the report of the Advisory Board, the writ of habeas corpus lies in the High Court against the order of detention. The power of the High Court to determine the validity of the order of detention will be considered towards the close of this discussion under the Special Powers Act, 1974.

It is pertinent to mention here that the Bangladesh Constitution does not prescribe the maximum period of detention. Unlike Article 22(7)[28]

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28. Article 22(7) of the Indian Constitution provides that "Parliament may by law prescribe - ....(b) the maximum period for which any person may in any class or class of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)." Clause 4 of Article 22 states that "No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless - (a) an Advisory Board consisting of persons who

of the 1949 Constitution of India, Article 33 of the Bangladesh Constitution even does not state that Parliament may prescribe the maximum period for which any person be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board in an inquiry with a view to reporting to the Government whether a détenu is liable to be detained for a period of more than six months. This makes it possible to pass any Preventive Detention Act providing for detention for an unlimited period and allowing the Advisory Board to follow any procedure it likes, however arbitrary it may be, in discharging its duties.

(b) The Communication of Grounds of Detention and the Right of Representation

Clause 5 of Article 33 confers two distinct though interrelated procedural rights on a détenu, namely (i) the right to be informed, as soon as may be, of the grounds of his detention, and (ii) the right to be afforded the earliest opportunity to make a representation against the order of preventive detention. Grounds, which means the conclusions drawn by the authorities from the facts or particulars, must be in existence when the order of detention is made. There can be no satisfaction of the detaining authority if there are not grounds for the same. As Justice Fazle Munim observed in Golam Kabir v. Government of Bangladesh[29] that:

> "Grounds must....offer the basis upon which the detaining authority must be satisfied that it was necessary to make the order of detention. Necessarily, they must exist at or before the time the order was being made." [30]

An identical view was expressed by Chief Justice Kania of the Indian

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are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7)...."

29. Dhaka Law Reports, vol.XXVII, 1975, p.199
30. Ibid., p.216

Supreme Court in the case of the State of Bombay v Atma Ram Shridhar Vaidya:[31]

> "It is obvious that the grounds for making the order are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made."[32]

The obligation to furnish grounds by the detaining authority is inextricably connected with the right extended to the détenu to have an earliest opportunity to make a representation. The obligation to communicate the grounds is coupled with a duty to supply as soon as possible such particulars which would enable an effective and intelligent representation at the earliest opportunity. As Justice Kemaluddin Hossain of the Appellate Division of the Supreme Court of Bangladesh observed in Abdul Latif Mirza v Government of Bangladesh[33] that:

> "Grounds (to be supplied to the detenu)....must be clear, precise and give such information to the detenu that he could make a representation; it must not be vague or indefinite and that the grounds must be relatable to existing facts."[34]

To the same effect, there was an observation of Justice A.S. Chowdhury of the East Pakistan High Court in Rowshen Bijaya Shaukat Ali Khan v. Government of East Pakistan:[35]

> "Making a representation clearly requires that he (the détenu) should be provided with grounds with sufficient clarity in order to enable him to make an effective representation against his detention[36]....on the basis of which the authority concerned may make an order of release and the grounds must be furnished in such a manner that a layman can understand what are the grounds on which he is being detained."[37]

A similar view was expressed by Chief Justice Kania of the Indian Supreme Court in the case of the State of Bombay v. Atma Ram Shridhar Vaidya:[38]

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31. All India Reporter, Supreme Court, 1951, p.157
32. Ibid., p.161
33. Dhaka Law Reports, Appellate Division, vol.XXXI, 1979, p.1
34. Ibid., p.10
35. All Pakistan Legal Decisions, Dhaka, vol.XVII, 1965, p.241
36. Ibid., p.247
37. Ibid., p.256
38. All India Reporter, Supreme Court, 1951, p.157

> "It is....clear that if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that objection....Without getting information sufficient to make a representation against the order of detention, it is not possible for the man to make the representation. Indeed, the right will be only illusory but not a real right at all."[39]

It may be noted here that although clause 5 of Article 33 confers on the détenu the right to have the earliest opportunity of making representation against the order of detention, it does not specify to whom the representation is to be made or how the representation is to be dealt with. It seems that clause 5 contemplates that the representation is to be made before the detaining authority. However, since the détenu is not placed before a magistrate and there is no remedy by trial, this right of representation is valuable as it gives a person detained in preventive custody an opportunity to establish his innocence.

(c) Non-disclosure of Facts

"Facts" means the evidence or data from which conclusions are derived; it is the evidence upon which the bases of the allegations are to be established. While clause 5 of Article 33 makes it obligatory upon the detaining authority to communicate the grounds to the détenu, the proviso to that clause gives the detaining authority a wide discretion not to disclose facts which it considers to be against the public interest to disclose. The discretion to withhold certain facts from disclosure implies that other facts, to which no such objection applies, must be disclosed. Thus all grounds have to be disclosed, not all facts, particularly those which, in the opinion of the detaining authority it is undesirable should be disclosed, in the public interest. It appears that the proviso to clause 5 of Article 33 is based on the doctrine enunciated by Lord Maugham in Liversidge v. Anderson[40] in connection with Regulation

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39. Ibid., pp.161-162
40. The Law Reports, Appeal Cases, London, 1942, p.206

18B of the Defence (General) Regulations, 1939, which vested the power to issue detention orders in the Home Secretary, who was answerable to the House of Commons for his actions:

> "It is beyond doubt that he (the Home Secretary) can decline to disclose information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed....there must be a large number of cases in which the information on which Secretary of State is likely to act will be of a very confidential nature."[41]

In the same case, Lord Macmillan held that:

> "....the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him."[42]

However, it seems that the conferment on the detaining authority of the power to determine whether the disclosure of any fact would be against the public interest practically renders the so-called constitutional safeguard of making a representation illusory as there is the possibility of an arbitrary withholding of all material facts, which will not enable the détenu to make an effective representation to establish his innocence. It would have been better if the Constitution had provided for the scrutiny of the action of the Executive by a court of law, especially during peace-time, in order to determine whether the facts withheld by the detaining authority were really in the public interest or were actuated by a capricious act. In fact, Justice Hamoodur Rahman of the Supreme Court of Pakistan claimed this power of the court even in the absence of such a provision in the Defence of Pakistan Rules, 1965, in Mir Abdul Baqi Baluch v. Government of Pakistan[43] when he observed that:

> if any materials upon which the detaining authorities had purported to act "is of a nature for which privilege can be claimed, then that too would be a matter for the court to

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41. Ibid., p.221
42. Ibid., p.254
43. All Pakistan Legal Decisions, Supreme Court, vol.XX, 1968, p.313

> decide as to whether the document concerned is really so privileged."[44]

Similarly, with regard to the wide latitude given to the detaining authorities in the matter of the disclosure of facts, Justice Chagla in Sushila v. Commr. of Police, Greater Bombay[45] held that

> "the exercise of the discretion vested in the detaining authority....may be challenged on the ground that the discretion has been exercised arbitrarily, capriciously or mala fide"[46] and the court would be entitled to see whether the exercise of discretion was tainted in any way."

It may be mentioned here that, as in the 1956 and 1962 Constitutions of Pakistan and in the 1949 Constitution of India, preventive detention has found a place in the 1972 Constitution of Bangladesh in the Part on 'Fundamental Rights'. It is evident that clauses (4) and (5) of Article 33 of the Bangladesh Constitution, which has given legal recognition to preventive detention, embody certain special constitutional safeguards regarding persons detained under the law relating to preventive detention. They only require certain safeguards to be incorporated and read into any law that provides for preventive detention. In view of the fact that preventive detention is a normal feature of our Constitution, and no express provision is to be found in the Constitution as to when a law providing for preventive detention can be passed, it seems that Parliament can legislate on this subject, not only in times of emergency, but also in times of peace for reasons of public safety, public interet, public order, defence and the security of Bangladesh.

V. Preventive Detention and the Criminal Procedure Code

Preventive detention, as contemplated in clauses (4) and (5) of Article 33 of the Bangladesh Constitution, has reference to detention made by an order of the Executive, not to detention made by an order of

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44. Ibid., p.325
45. All India Reporter, Bombay, 1951, p.252
46. Ibid., p.254

court, purporting act under a law authorising such detention. So this kind of preventive detention is quite distinct from that ordered under the provisions of the Criminal Procedure Code although the Code, in certain cases, seeks to achieve an object similar to that attained by preventive detention ordered by the Executive.[47] While an order for detention under the provisions of the Criminal Procedure Code is issued by a magistrate, on the basis of sufficient reasons established by the evidence and after full judicial enquiry, an order for detention under the preventive detention law is issued in general by an executive authority without full inquiry and merely on the ipse dixit of a police officer. This detention under the Criminal Procedure Code can be avoided by giving security, whereas in preventive detention under an executive order there is no such choice. A person detained under the provisions of the Criminal Procedure Code has the right of moving the Supreme Court in appropriate cases for relief and has also the right to defence by a lawyer of his own choice, but a détenu under a preventive detention law is not required to be produced before any court and has no right to defence by a legal practitioner of his own choice.

VI. Preventive Detention and the Special Powers Act, 1974

Only four months and twelve days after the amendment of Article 33 of the 1972 Constitution of Bangladesh, on 5 February 1974, the Special Powers

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47. Chapter VIII of the Criminal Procedure Code contains provisions which are preventive in their scope and object. Under this chapter, security can be demanded for keeping the peace - (a) on conviction (Section 106); and (b) on likelihood of a breach of the peace (Section 107). Security for good behaviour may be taken from - (a) persons disseminating seditious matter (Section 108); (b) vagrants and suspects (Section 109); and (c) habitual offenders (Section 110). When a person fails to give security, the court may order under Section 123 of the Criminal Procedure Code to detain him in prison. The fact that imprisonment follows as the result of a failure or refusal to give security does not make it a punishment inflicted for a crime.

Act was passed by Parliament. The Act came into force on 9 February 1974. Like the Defence of the Realm Consolidation Act of the United Kingdom, 1914, which authorised two kinds of detention - punitive and preventive[48] - the Special Powers Act, 1974, has combined in itself the laws relating to preventive detention as well as to punitive detention. The Special Powers Act itself starts with the statement that it is "An Act to provide for special measure for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith." Thus the Act provides that a person can be subjected to preventive detention if the detaining authority is satisfied that he has indulged, or is about to indulge, in certain prejudicial acts defined in it. At the same time, it provides a special procedure and Special Tribunals for the trial of the offences defined or mentioned in it. There is no bar in the Act to the prosecution of a person who is alleged to have committed any of the offences mentioned in it if he is preventively detained. Thus a person who is held in preventive detention can be simultaneously prosecuted before a Special Tribunal, as is provided by the Special Powers Act, for the commission of any of the offences defined or mentioned in it.

It should be noted here that, whereas in the United Kingdom the Defence of the Realm Consolidation Act was passed at a time of supreme national danger and was limited in its operation to the duration of the First World War, the Special Powers Act in Bangladesh was not passed during any grave emergency, although the government of the day claimed that it was necessary to control the prevailing lawlessness, turbulance, terrorist activities by extreme left-wing groups and the public use of firearms. The Special Powers Act was passed as a piece of permanent legislation. It seems that this Act was passed in clear violation of the

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48. See sub-section 1 of Section 1 of the Defence of the Realm Consolidation Act, 1914

criteria required to be satisfied under international agreement for passing such an Act. International agreements contemplate the passing of laws providing for preventive detention only on the grounds of war or other public emergency threatening the life of the nation and of such a nature that normal measures or restrictions are plainly inadequate; furthermore such a law may be passed on a temporary basis only. As Article 4(1) of the International Covenant on Civil and Political Rights (adopted on 16 December 1966) provides:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation....."

Similarly, Article 15(1) of the European Convention on Human Rights states:

> "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation...."

However, if the Special Powers Act providing for preventive detention was necessary, it could have been passed as temporary legislation which would then have been subject to periodic review by Parliament if its renewal was thought necessary, as had been done in the case of the Indian Preventive Detention Act, 1950.[49]

It is pertinent to mention here that the provisions of the Special Powers Act relating to preventive detention are virtually a reproduction of those of the Indian Maintenance of Internal Security Act, 1971, passed to "provide for detention in certain cases for the

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49. Originally enacted as a temporary measure for a period of one year only, the Indian Preventive Detention Act, 1950, continued to be on the statute book as a result of periodic extensions and renewals, until it lapsed on 31 December 1969

purpose of maintenance of internal security and matters connected therewith."[50]

(i) Definition of Prejudicial Act

Under the Special Powers Act, an order may be issued detaining any person with a view to preventing him from doing any prejudicial act. Section 2(f) of the Act defines 'prejudical act' thus:

"prejudicial act means any act which is intended or likely -

(i) to prejudice the sovereignty or defence of Bangladesh;

(ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states;

(iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;

(iv) to create or excite feelings of enmity or hatred between different communities, classes or section of people;

(v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;

(vi) to prejudice the maintenance of supplies and services essential to the community;

(vii) to cause fear or alarm to the public or to any section of the public;

(viii) to prejudice the economic or financial interests of the State".

It appears that the definition of prejudicial acts is very wide and inexact. It does not specify the nature of activities that will constitute a prejudicial act. The provisions of Section 2(f) are so wide, sweeping and general that it would be difficult to reach a definite conclusion as to what does or what does not constitute a prejudicial act in a particular case. Whether a particular act does or does not constitute

50. The provisions of Sections 3,4,5,6,7,8,9,10,11,12,13,14 of the Special Powers Act are almost a reproduction of those of Sections 3,4,5,6,7,8,9,10, 11,12,14,15 of the Maintenance of the Internal Security Act, 1971.

a prejudicial act would entirely depend upon the personal assessment or judgment of an individual authority concerned, which may operate to the prejudice or detriment of a person subjected to the order of preventive detention. In short, it can cover any situation and may easily be misused and abused in the interests of the party in power.

(ii) Authorities invested with the Power of Preventive Detention

Section 3 of the Special Powers Act provides:

"(1) The Government may, if satisfied with respect to any person with a view to preventing him from doing any prejudicial act it is necessary so to do, make an order -

(a) directing that such person be detained;....

(2) Any District Magistrate or Additional District Magistrate may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act within the meaning of section 2(f) (iii), (iv), (v), (vi), (vii) or (viii) it is necessary so to do, make an order directing that such person be detained.

(3) When any order made is under sub-section (2), the District Magistrate or the Additional District Magistrate making the order shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as, in his opinion, having a bearing on the matter, and no such order shall remain in force for more than thirty days after the making thereof unless in the meantime it has been approved by the Government...."

Therefore, it is evident that the Executive branch of the government has been given wide and unfettered powers to pass an order to detain any person, whether a citizen or an alien, with a view to preventing him from

committing any prejudicial act. It has been invested with the sole authority to determine whether a particular person should be detained to prevent him from committing any of the activities which come within a generic expression 'prejudicial act'. On the other hand, the district magistrate or the additional district magistrate has been empowered to make an order of detention only if he is satisfied that it is necessary to detain a person with a view to preventing him from committing any prejudicial act with the exception of those acts which are intended or likely - (i) to prejudice the sovereignty or defence of Bangladesh and (ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states. But after making such an order, the district magistrate or additional district magistrate is required to report the fact to the government together with the grounds for passing the order and relevant particulars. The order of detention passed by the district magistrate or the additional district magistrate is to remain in force for thirty days from the date it is passed unless in the meantime it has been approved by the government. Thus the Special Powers Act provides the deprivation of the liberty of the person concerned for thirty days at the discretion of the district magistrate or the additional district magistrate. However, the satisfaction of the district magistrate or the additional district magistrate is made subject to the approval or review by the government. In approving the order of detention made by the district magistrate or the additional district magistrate, the government is to form an independent opinion that the detention is necessary. This serves as a safeguard against possible mistakes or errors of judgment, and acts as a check against the arbitrary exercise of power by the district magistrate or the additional district magistrate. Thus the ultimate powers of preventive detention lie in the hands of the Executive arms of the government. However, it is worth mentioning that an order to detain a person is passed both by the government and by

the district magistrate or the additional district magistrate according to their own respective discretion on a report or information which may not always be true and correct.

It is noteworthy that Section 3 of the Special Powers Act does not use the word "reasonable" to qualify the "satisfaction" of the Government or any District Magistrate or Additional Magistrate in passing order of detention against any person. But whether there is a specific reference to reasonableless or not, it seems that such a power must be exercised reasonably. As it is held in Md. Mukhlesur Rahman v. State[51] that it is now an established principle of law that when an authority makes an order of preventive detention, he must show that there are reasonable grounds for such detention. Similarly in Asmatullah Mia v. Bangladesh,[52] it is observed that it is a fundamental requirement of law that the satisfaction of the detaining authority must be based on sufficient materials.

(iii) The Communication of Grounds for Detention

Section 8 of the Special Powers Act provides that:

"(1) In every case where an order has been made under Section 3, the authority making the order shall, as soon as may be, but subject to the provisions of sub-section (2), communicate to the person affected thereby the grounds on which the order has been made to enable him to make a representation in writing against the order, and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest opportunity of doing so:

Provided that nothing in this section shall require the authority to disclose the facts which it considers to be against the public interest to disclose.

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51. Dhaka Law Reports, vol.XXVIII, 1976, p.172
52. Ibid., p.22

(2) In the case of a detention order, the authority making the order shall inform the person detained under that order of the grounds of his detention at the time he is detained or as soon thereafter as is practicable, but not later than fifteen days from the date of detention."

Thus sub-section (1) of Section 8 of the Special Powers Act has, in fact, incorporated the requirements laid down in clause (5) of Article 33 of the 1972 Constitution of Bangladesh which has been discussed earlier. That is, the authority of making the order of detention is required, as soon as may be, (a) to communicate to the affected person the grounds on which the order has been made in order to enable him to make a representation in writing against the order, (b) to inform such person of his right of making such representation and (c) to afford him the earliest opportunity of doing so. Although clause 5 of Article 33 of the Constitution has left the time limit for the communication of the grounds of detention to the détenu indeterminate, by using the expression "as soon as may be", Section 8(2) of the Special Powers Act has fixed the maximum limit of fifteen days for communicating the grounds of detention to the détenu: it provides that the grounds of detention must be conveyed by the detaining authority to the détenu at the time of his detention, and, if that is not practicable, to inform him as soon as possible thereafter, but not later than fifteen days from the date of detention. This sub-section provides an important protection to the détenu for in this matter he is not at the will of the detaining authority in so far as the grounds of detention must be communicated to him within fifteen days from the date of the order. The provision prevents the detaining authority from taking advantage of the vague expression "as soon as may be" and goes some way towards mitigating the hardship of the arrested person.

(iv) The Constitution of, and Reference to, the Advisory Board

Section 9 of the Special Powers Act states that:

"(1) The Government shall, whenever necessary, constitute an Advisory Board for the purposes of this Act.

(2) The Advisory Board shall consist of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, and such persons shall be appointed by the Government.

(3) The Government shall appoint one of the members of the Advisory Board who is, or has been, or is qualified to be appointed as, a Judge of the Supreme Court to be its chairman."

Section 10 of the Act, which deals with the reference to the Advisory Board, provides:

"In every case where a detention order has been made under this Act, the Government shall, within one hundred and twenty days from the date of detention under the order, place before the Advsiory Board constituted under Section 9 the grounds on which the order has been made and the representation, if any, made by the person affected by the order."

It may be recalled here that clause (4) of Article 33 of the 1972 Constitution of Bangladesh does not expressly provide for the creation of an independent body for the purpose of reviewing executive orders of detention. This lacuna has been removed by the Special Powers Act which provide for the creation of an Advisory Board. Although sub-section (1) of Section 9 empowers the government to constitute an Advisory Board "whenever necessary", it appears that, in fact, the government does not have any discretion in the matter as Section 10 requires the government, in every case where a detention order has been made under the Act, to place before the Advisory Board within one hundred and twenty days from the date

of making the detention order the grounds of detention and the representation, if any, made by the détenu. Therefore, an Advisory Body must be constituted to review or consider all initial orders of detention and the representations made by the détenu. In view of the fact that the grounds on which the detention was made have to be communicated to the détenu soon after his arrest and in any event within fifteen days from the date on which he has been taken into custody, it is quite clear that the maximum limit of one hundred and twenty days for placing the case of the détenu before the Advisory Board is excessive.

Here it may be noted that, like clause (5) of Article 33 of the 1972 Constitution, as mentioned earlier, sub-section (1) of Section 8 of the Special Powers Act does not specify to whom the representation of the détenu is to be made against the order of detention or how the representation is to be dealt with although it confers on the détenu the right to have the earliest opportunity of making such a representation. But in view of the provisions of Section 10, which require the government to place before the Advisory Board "the grounds on which the order has been made and the representation, if any, made by the person affected by the order," it seems that the representation of the détenu against the order of detention is to be made to the government. If the government after considering the representation of the détenu, decides not to release him, the grounds of detention along with his representation must be placed before the Advisory Board under Section 10 of the Special Powers Act.

(v) The Procedure of the Advisory Board

Section 11 of the Special Powers Act provides that:

"(1) The Advisory Board shall, after considering the materials placed before it and calling for such further information as it may deem necessary from the Government or from the person concerned

and after affording the person concerned an opportunity of being heard in person, submit its report to the Government within one hundred and seventy days from the date of detention.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members of the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential."

Thus the function of the Advisory Board is limited to the consideration of the materials placed before it by the government and such further materials as it may call for from the government or from the person concerned and to afford the person concerned an opportunity of being heard in person in order to prepare a report containing, inter alia, its opinion as to whether it approves or disapproves the detention order. The Board has not been given the power to inquire into the accuracy of the materials or information placed before it, or the source from which they have been collected, whether they are verified statements collected from reliable sources and not hearsays or rumours from any quarter, tainted or otherwise. Further it has not been empowered, while approving

the detention order, to express any opinion as to the period for which a détenu should be kept in preventive custody. It seems that the proceedings of the Board are conducted, to a great extent, in a restricted manner. Despite the fact that the détenu has been given the opportunity of being heard in person by the Board, sub-section (4) of Section 11 of the Act does not allow him to be represented before the Board by a legal practitioner. The denial of this elementary right of defence by a lawyer is likely to make an effective representation of the détenu's case difficult, though not impossible. Moreover, the détenu is not allowed to see or have an access to the materials or information placed before the Board, as well as its report, are to be treated as confidential, with the exception of that part of the report which contains the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned. However, the report of the Board is to be submitted to the government within one hundred and seventy days from the date of detention, which is in conformity with the constitutional provision. Thus the government may hold a person in preventive detention for a maximum period of one hundred and seventy days (i.e. five months and twenty days) without the approval of the Advisory Board.

(vi) Action upon the Report of Advisory Board

Section 12 of the Special Powers Act, which deals with the action that is to be taken upon the Report of Advisory Board, provides:

> "(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit: Provided that the Advisory Board shall, after affording the person concerned an opportunity of being heard in person, review such detention order, unless revoked earlier, once in every six months

from the date of such detention order and the Government shall inform the person concerned or the result of such review.

(2) In any case where the Advisory Board has reported that there is in its opinion, no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith."

Thus it is evident that if the Advisory Board reports to the government that there is, in its opinion, sufficient cause for the detention of a person, this will enable the government to continue the detention of the person concerned for an indefinite period; because taking advantage of the lacuna in the 1972 Constitution - which does not prescribe the maximum period of preventive detention - the Special Powers Act, which was passed as a peace-time law and can be resorted to in times of both peace and emergency, does not specify any period for which the detention may last. This is a clear-cut departure from the principle which is generally to be found in the laws of democratic States that preventive detention must be for a period of limited duration as it is an exceptional measure. For example, Section 13 of the Indian Maintenance of Internal Security Act, 1971, provides that "the maximum period for which any person may be detained in pursuance of any detention order which has been confirmed....(by the appropriate government) shall be twelve months from the date of detention...." The provisions of this Section have not been incorporated into the Special Powers Act, 1974, although most of the provisions of the Act relating to preventive detention have been reproduced from the Indian Maintenance of Internal Security Act, 1971. Although in most of the democratic countries, war-time or emergency laws providing for preventive detention have not specified the maximum periods for which persons may be detained in preventive custody, as no one can predict when the war or emergency will end, they normally stipulate that the power of preventive detention will terminate upon the cessation of war or emergency.

For example, in the United Kingdom the Defence of the Realm Regulations and the Defence (General) Regulations, 1939, which were formulated under the Defence of the Realm Consolidation Act, 1914, and the Emergency Powers (Defence) Act, 1939, respectively, invested the Executive with the power of detaining a person in preventive custody, which could only be exercised during the period of war. The restriction of the power to detain to the war years was considered by Lord Dunedin in his judgment in Rex v. Halliday[53] as a "sufficient safeguard".[54] As in the United Kingdom, in the United States the power of preventive detention can only be exercised under the Internal Security Act, 1950, during the currency of an emergency proclaimed by the President pursuant to the invasion of the United States or of its possessions or on the declaration of war against another State, or in the event of insurrection within the United States in aid of a foreign enemy. Similarly, the French Ordinance of 1944 made it clear that the exceptional measure of preventive detention could only last till "the legal cessation of hostilities". Thus all these enactments, in effect, show that a person cannot be detained in preventive custody beyond the period of war or emergency.

Although Section 12(1) of the Special Powers Act does not specify the maximum period of detention, the proviso to this Section provides for review of a detention order by the Advisory Board every six months from the date of such a detention order in which the détenu is to be given an opportunity of being heard in person and thereafter the Government is required to inform the détenu the result of such a review. This may act as a check on the power of the Executive to detain a person

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53. The Law Reports, Appeal Cases, London, 1917, p.260
54. Ibid., p.271

for an indefinite period as the Advisory Board may every six months express its opinion, that there is no sufficient cause for the detention of the person concerned. However, it is not clear as to what will lead the Advisory Board to form such an opinion.

Unlike para 6[55] of Regulation 18B of the Defence (General) Regulations, 1939, which empowers the Secretary of State (Home Secretary) to decline to follow the advice of an Advisory Committee, sub-section (2) of Section 12 of the Special Powers Act contains a salutary provision to the effect that if the Advisory Board expresses its opinion that there is no sufficient cause for the detention of the person concerned, the Government must revoke the detention order and release the person forthwith. Thus the 'satisfaction' of the government, when making a detention order against a person, is made subject to the opinion of the Advisory Board. The binding effect given to the opinion of the Advisory Board means how it is rather more than an "Advisory" Board. In fact, the mandatory force of the opinion of the Advisory Board serves as an important safeguard against the arbitrary exercise of the power of preventive detention by the Executive.

(vii) The Revocation of Detention Orders

Section 13 of the Special Powers Act provides that "A detention order may, at any time, be revoked or modified by the Government."

Unlike Section 3(9)[56] of the Security Act of Pakistan, 1952, which empowered the detaining authority to make a fresh order of detention after it had cancelled the previous one, Section 13 of the Special Powers

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55. As para 6 of Regulation 18B of the Defence (General) Regulations, 1939, provided that "The Secretary of State shall make a report to Parliament at least once in every month as to the action taken under this regulation (including the number of persons detained under orders made thereunder) and as to the number of cases, if any, in which he has declined to follow the advice of any such advisory committee...."
56. As Section 3(9) of the Security Act of Pakistan, 1952, stated that "The revocation, otherwise than on the recommendation of the (Advisory) Board, of an order (i.e. detention order) made under clause (b) of sub-section

Act does not contain such a provision. It only empowers the government to revoke or modify the order of detention made earlier by itself. Perhaps the framers of the Special Powers Act thought that the constitutional requirement of the necessity to obtain the report of the Advisory Board within a period of six months, as embodied in Article 33(5) of the 1972 Constitution of Bangladesh, would be frustrated if the government was allowed to make fresh orders of detention in succession, thereby making the computation of the period of aforesaid six months difficult. Similarly, they may have thought that the computation of the period of one hundred and twenty days from the date of the order of detention, as required by Section 10 of the Special Powers Act for the purpose of referring the case of the détenu to the Advisory Board would be difficult if the government was given the power to make (successive) fresh orders of detention.

(viii) The Temporary Release of Persons Detained

Section 14 of the Special Powers Act, 1974, provides:

"(1) The Government may, at any time, direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may, at any time, cancel his release.

(2) In directing the release of any person under sub-section (1), the Government may require him to enter into a bond, with or without sureties, for the due observance of the conditions specified in the direction.

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(1) against any person, or the expiry of any such order, shall not bar the making against the person and on the same grounds, of a fresh order under that clause."

(3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof."

Thus the government has been given wide and unfettered powers to make orders for the temporary release of a détenu, unconditionally or upon such conditions as the person concerned will accept. The government has also been given the power to cancel an order of release at any time. There are no guidelines as to the way in which these powers of passing order of temporary release or cancellation of release order can be exercised. Since the government is not required to give any reasons or follow any criteria for its action, it possesses virtually arbitrary power to release a détenu or cancel his release order. It seems that the provision for temporary release was designed to induce a person concerned to behave in accordance with the wishes of the government in order to gain its favour and secure his final release.

(ix) Bar on Jurisdiction of Courts

Section 34 of the Special Powers Act provides:

"Except as provided in this Act, no order made, direction issued, or proceeding taken under this Act, or purporting to have been so

made, issued or taken, as the case may be, shall be called in question in any court, and no suit, prosecution or other legal proceeding shall lie against the Government or any person for anything in good faith done or intended to be done under this Act."

Thus all the courts have been precluded from questioning any order of preventive detention made under the Act. Yet this restriction does not protect the order of detention passed in bad faith, in excess of power or in clear violation of the provisions of the Act providing for preventive detention. The cherished right of personal liberty of an individual cannot be taken away at the mere whim of the Executive. If personal liberty is encroached upon arbitrarily, the person concerned has every right under the 1972 Constitution of Bangladesh to test and determine by means of a writ of habeas corpus in the High Court Division the legality of the order by virtue of which he is taken into custody. Article 102(2)(b)(i) of the 1972 Constitution provides that the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law, "on the application of any person, make an order - (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner". Thus the High Court has the power to determine that a détenu is not held without lawful authority or in an unlawful manner. In other words, it is the duty of the High Court to see that the provisions of the Act relating to preventive detention are strictly complied with in detaining a person in preventive custody. In discharging this duty, the High Court cannot be expected to be satisfied on the mere ipse dixit of the detaining authority without having before it the materials upon which the authority has purported to act. In this respect, the observations of Justice Kamaluddin Hossain of the Appellate Division of the Supreme Court of Bangladesh in Abdul Latif

Mirza v. Government of Bangladesh[57] are worth quoting;

> "The Constitution, therefore, has cast a duty upon the High Court to satisfy itself, that a person in custody is being detained under an authority of law, or in a lawful manner. The purpose of the Constitution is to confer on the High Court with the power to satisfy itself that a person detained in custody, is under an order which is lawful.... The Bangladesh Constitution, therefore, provides for a judicial review of an executive action.... The High Court, therefore, in order to discharge its constitutional function of judicial review, may call upon the detaining authority to disclose the materials upon which it has so acted, in order to satisfy itself that the authority has not acted in an unlawful manner."[58]

To the same effect, Justice Hamoodur Rahman of the Supreme Court of Pakistan expressed his views in the case of Mir Abdul Baqi Baluch v. Government of Pakistan[59] with regard to the scope of Article 98(2)(b)(i) of the 1962 Constitution of Pakistan, which is identical with Article 102(2)(b)(i) of the 1972 Constitution of Bangladesh:

> "It is not uncommon that even high executive authorities act upon the basis of information supplied to them by their subordinates. In the circumstances, it cannot be said that it would be unreasonable for the court, in the proper exercise of its constitutional duty, to insist upon a disclosure of the materials upon which the authority had so acted so that it should satisfy itself that the authority had not acted ... without lawful authority or in an unlawful manner. The wording of clause (b)(i) of Article 98(2) shows that not only the jurisdiction but also the manner of the exercise of that jurisdiction is subject to judicial review."[60]

A similar view was expressed by Lord Atkin in the case of Eshugbayi Eleko v. Officer Administering the Government of Nigeria:[61]

> "In accordance with British jurisprudence, no member of the Executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive."[62]

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57. Dhaka Law Reports, Appellate Division, 1979, p.1.
58. Ibid., p.9-10.
59. All Pakistan Legal Decisions, Supreme Court, vol.XX, 1968, p.313.
60. Ibid., pp.324-325.
61. The Law Reports, Appeal Cases, London, 1931, p.662.
62. Ibid., p.670.

VII. Preventive Detention and the Emergency Powers Rule, 1975

It may be recalled here that President Muhammadullah issued a Proclamation of Emergency on 28 December 1974. After the declaration of Emergency, the President promulgated the Emergency Powers Ordinance, 1974, which was to remain in force during the operation of the said Proclamation of Emergency. Yet the Emergency Powers Act, 1975 (Act I of 1975), which was passed by Parliament and which received the assent of the President of 25 January 1975, repealed the Emergency Powers Ordinance, 1974. However, Section 2 of the Emergency Powers Ordinance, which was also reproduced as Section 2 of the Emergency Powers Act, provides:

> "(1) The Government may....make such rules as appear to it to be necessary or expedient for ensuring the security, the public safety and interest and for protecting the economic life of Bangladesh, or for securing the maintenance of public order, or for maintaining supplies or services essential to the life of the community.
>
> (2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower any authority to make orders providing for....
>
> (viii) the apprehension and detention of any person with respect to whom the authority empowered by or under the rules to apprehend and detain is of the opinion that this apprehension and detention are necessary for the purpose of preventing him from acting in a manner prejudicial to Bangladesh's relation with foreign powers, or to the security, the public safety or interest of Bangladesh, the maintenance of supplies and services essential to the life of the community or the maintenance of peaceful condition in any part of Bangladesh;
>
> Explanation - For the avoidance of doubt it is hereby declared that

the sufficiency of the grounds on which such opinion as aforesaid is based shall be determined by the authority forming such opinion;...

(xi) the apprehension and detention in temporary custody of or any person whom the authority empowered by or under the rules to apprehend and detain suspects on grounds appearing to such authority to be reasonable of having acted, being about to act, being likely to act in any such prejudicial manner as is mentioned in clause (viii)..."

In exercise of the powers conferred by this Section, the government framed the Emergency Powers Rules, 1975, which was issued on 3 January 1975, and was also allowed to remain in force by the Emergency Powers Act.

The provisions of the Emergency Powers Rules relating to the powers of detention were virtually a reproduction[63] of those of the Defence of Pakistan Rules, 1965, formulated under the Defence of Pakistan Ordinance, 1965. Rule 5(1)(a) and Rule 30 of the Emergency Powers Rules contained provisions regarding preventive detention.

(i) The Power of the Government to make Detention Orders

Rule 5 of the Emergency Powers Rules provided:

"(1) The Government, if satisfied with respect to any person that with a view to preventing him from acting in a manner prejudicial to the security, the public safety or interest of Bangladesh, Bangladesh's relation with any foreign power, the maintenance of public order, the maintenance of peaceful conditions in any part of Bangladesh or the maintenance of supplies and services essential to the life of the community it is necessary so to do, may make

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63. The provisions of Rules 5(1a), 5(4), and 30 of the Emergency Powers Rules of Bangladesh, 1975, are almost a reproduction of those of Rules 32(1)(b), 32(4), 204(2) and 204(4) of the Defence of Pakistan Rules, 1965

an order -

(a) directing that such person be detained;...

(4) A person who is ordered to be detained under sub-rule (1)(a) shall be detained in such place and under such conditions as to maintenance, discipline and punishment for breaches of discipline as the Government may from time to time determine....

(6) An order under sub-rule (1)(a) may be executed at any place in Bangladesh in the manner provided to the execution of warrants of arrest under the Code...."

It is pertinent to mention here that the grounds for which the Emergency Powers Rules empowered the Government to pass detention orders were not new: they were already the grounds for passing detention orders under the Special Powers Act, 1974.[64]

(ii) The Special Powers of Arrest and Detention

Rule 30 of the Emergency Powers Rules provides:

"(1) Any police officer, or any other officer of Government empowered in this behalf by general or special order of the Government, may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act in a manner prejudicial to the security, the public safety or interest of Bangladesh or the maintenance of supplies and services essential to the life of the community.

(2) Any officer who makes an arrest under sub-rule (1) shall forthwith report the fact of such arrest to the Government, and, pending the receipt of the orders of the Government, may, by order in writing, commit any person so arrested to such custody as the Government may by general or special order

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64. See, supra, pp.365-366.

specify: Provided that - (i) no person shall be detained in custody under this sub-rule for a period exceeding fifteen days without the order of the Government; and (ii) no person shall be detained in custody under this sub-rule for a period exceeding two months.

(3) On receipt of any report made under the provision of sub-rule (2), the Government may, in addition to making such order, subject to the proviso to sub-rule (2), as may appear to be necessary for the temporary custody of any person arrested under this rule, make, in excerise of any power conferred upon it by any law for the time being in force such final order as to his detention, release, residence or any other matter concerning him as may appear to it in the circumstances of the case to be reasonable or necessary."

Thus Rule 30(1) of the Emergency Powers Rules also provided for preventive detention as a police officer or an officer of government could be given the power of arresting without warrant a person whom he reasonably suspected of, inter alia, "being about" to act in a manner prejudicial to the security, the public safety, or interest of Bangladesh or the maintenance of supplies and services essential to the life of the community. Whereas the Defence of Pakistan Rules, 1965, conferred on any police officer or any other officer of government by general or special order of the government the special powers of arrest and detention in times of Emergency declared on the eve of the threatened war with India in 1965,[65] the Emergency Powers Rules of Bangladesh, 1975, conferred on any police officer or any other officer of government such powers in times of emergency declared as a consequence of threatened "internal disturbance". However, the person so arrested could not be detained

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65. See Rule 204(1a) of the Defence of Pakistan Rules, 1965

in custody for a period exceeding fifteen days without the concurrence of the government. Thus the Emergency Powers Rules provided for the deprivation of the liberty of the person concerned for fifteen days at the discretion of a police officer or an officer of the government. It invested the Government with the ultimate authority to make a final order as to the detention or release of the person concerned, after considering the report of the fact of arrest submitted to it. Thus the government had to come to an independent decision with regard to the final orders of detention.

(iii) Non-Existence of the Constitutional Safeguards Regarding Preventive Detention in the Emergency Powers Rules, 1975

It is noteworthy that although the Emergency Powers Rules provided for preventive detention, they did not incorporate any of the safeguards laid down in clauses 4 and 5 of Article 33 of the 1972 constitution. Thus they made no provision for the constitution of an Advisory Board to examine the case of a détenu and to report to the government its opinion whether the person concerned should be detained for more than six months. In other words, no review of the legality of detention by an independent and impartial quasi-judicial body was prescribed. No provision was made for guaranteeing the détenu the right to be informed, as soon as may be, of the grounds on which the order of detention was made, as required under clause 5 of Article 33 of the Constitution. Similarly, the Emergency Powers Rules did not provide for the right of the détenu to have the earliest opportunity of making a representation against the order of detention, as was necessary under the aforesaid clause.

Thus the Emergency Powers Rules provided no machinery for giving any relief against any possible abuse or misuse of the power of preventive detention. It gave the detaining authority the power to detain a person without trial for any length of time, without giving him any reasons or any opportunity even of making a representation against the order of

detention to prove his innocence. These were very extraordinary powers for taking away the most cherished right to personal liberty of a citizen in a most arbitrary manner. Therefore, it is clear that the Emergency Powers Rules violated the constitutional guarantees embodied in clauses 4 and 5 of Article 33 of the 1972 Constitution of Bangladesh.

(iv) The Insertion of the Constitutional Safeguards Regarding Preventive Detention in the Emergency Powers Rules by the 1975 Martial Law Regime

The Special Powers Act, 1974, and the Emergency Powers Rules, 1975, which were enacted during the Government of Sheikh Mujibur Rahman, remained in force after the imposition of Martial Law in 1975. The salutory step taken by the Martial Law administration was that, on 18 August 1977, it introduced certain amendments[66] to the Emergency Powers Rules which fulfilled the constitutional requirements in respect of preventive detention. This amendment of the Emergency Powers Rules provided for the communication of the grounds of detention order, the constitution of the Advisory Committee, references to the Advisory Committee, the procedure of the Advisory Committee and the action to be taken upon the report of the Advisory Committee.

(a) The Communication of the Grounds of Detention Orders

The newly inserted sub-rule 5(A) of the Emergency Powers Rules provided:

> "(1) In every case, where an order of detention has been made under rule 5(1)(a), the Government shall, as soon as may be, but subject to the provisions of sub-rule (2), communicate to

66. Notification No.S.R.O. 278-L/77 issued by the Ministry of Home Affairs, Bangladesh, on 18 August 1977.

the person affected thereby the grounds on which the order has been made to enable him to make a representation in writing against the order, and shall also inform such person of his right of making such representation and afford him the earliest opportunity of doing so:

Provided that nothing in this rule shall require the Government to disclose facts which it considers to be against public interest to disclose.

(2) In the case of a detention order under rule 5(1)(a), the Government shall inform the person detained of the grounds of his detention at the time he is detained or as soon thereafter as practicable, but not later than fifteen days from the date of detention:

Provided that when a person has been already under detention being committed to custody under sub-rule (2) of rule 30, the Government shall inform the person detained of the grounds of his detention at the time the order under rule 5(1)(a) is made."

It may be mentioned here that the provisions of sub-rule 5(A) of the Emergency Powers Rules regarding the communication of the grounds of detention order were virtually a reproduction of those of Section 8[67] of the Special Powers Act, 1974, with the exception of the proviso to clause (2) of sub-rule 5(A).

(b) The Constitution of the Advisory Committee

The newly added sub-rule 5B of the Emergency Powers Rules stated:

"(1) The Government shall, whenever necessary, constitute an Advisory Committee for the purpose of these rules,

(2) The Advisory Committee shall consist of a chairman who shall be judge of the High Court and two other members of

67. See Supra, pp.368-369.

whom one shall be a senior officer in the service of the Republic and the other a person who has, for not less than ten years, held judicial office in the territory of Bangladesh.

(3) The Chairman and the members shall be appointed by the Government."

The above provisions relating to the constitution of the Advisory Committee resembled those of Section 9[68] of the Special Powers Act. However, it may be mentioned here that whereas in Section 9 of the Special Powers Act the machinery to review the cases of detention was called the 'Advisory Board', in sub-rule 5B of the Emergency Powers Rules such a body was termed an 'Advisory Committee', perhaps following the example of para 3[69] of Regulation 18B of the Defence (General) Regulations, 1939. Moreover, the Advisory Board, as discussed earlier, was to consist of a chairman who was, or had been, or was qualified to be appointed as a judge of the Supreme Court and two other members, of whom one was to be of similar qualification to that of the Chairman and the other was to be a senior civil servant. On the other hand, the Advisory Committee under the Emergency Powers Rules was to consist of a chairman who was to be a sitting judge of the High Court and two other members, of whom one was to be a senior civil servant and the other was to be a person who had held judicial office in the territory of Bangladesh for ten years.

(c) Reference to the Advisory Committee

The newly added sub-rule 5C of the Emergency Powers Rules provided:

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68. See supra, p.370.
69. Para 3 of Regulation 18B of the Defence (General) Regulations, 1939, which empowered the Secretary of State to make order of detention, stated that "for the purposes of this regulation, there shall be one or more advisory committees consisting of persons appointed by the Secretary of State."

"In every case where a detention order has been made under rule 5(1)(a), the Government shall, within one hundred and twenty days, from the date of detention place before the Advisory Committee constituted under rule 5B the grounds on which the order has been made and the representation, if any, made by the person affected by the order."

In fact, the provisions of the Emergency Powers Rules concerning reference to the Advisory Committee were a reproduction of those of Section 10[70] of the Special Powers Act.

(d) The Procedure of the Advisory Committee

The newly introduced sub-rule 5D of the Emergency Powers Rules stated that

"(1) The Advisory Committee shall, after considering the materials placed before it and calling for such further information as it may deem necessary from the Government or from the person concerned and after affording the person concerned an opportunity of being heard in person, submit its report to the Government within one hundred and seventy days from the date of detention.

(2) The report of the Advisory Committee shall specify in a separate part thereof the opinion of the Advisory Committee as to whether or not there is sufficient cause for detention of the person concerned.

(3) Where there is a difference of opinion among the members of the Advisory Committee, the opinion of the majority of such members shall be deemed to be the opinion of the Committee.

(4) Nothing in this rule shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Committee; and the proceeding of the Advisory Committee and its

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70. See supra, p.370.

report, excepting that part of the report in which the opinion of the Advisory Committee is specified, shall be confidential."

It is noteworthy that the provisions of sub-rule 5D of the Emergency Powers Rules relating to the procedure of the Advisory Committee were a reproduction of those of Section 11[71] of the Special Powers Act with the exception of the words "Committee" and "rule" as occurred in sub-rule 5D.

(e) Action on Receipt of Report from the Advisory Committee

The newly inserted sub-rule 5E of the Emergency Powers Rules, 1975, laid down:

"(1) In any case where the Advisory Committee has reported that there is, in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person for such period as it thinks fit:

Provided that the Advisory Committee shall, after affording the person concerned an opportunity of being heard in person, review such detention order, unless revoked earlier once in every six months from the date of such detention order, and the Government shall inform the person concerned or the result of such review.

(2) In any case where the Advisory Committee has reported that there is, in its opinion, no sufficient cause for the detention of the person concerned the Government shall revoke the detention order and inform the person to be released forthwith."

It should be noted here that the provisions of sub-rule 5E of the Emergency Powers Rules were the exact reproduction of those of Section 12[72] of the Special Powers Act, barring the word "Committee" in sub-rule 5E.

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71. See supra, pp.371-372.
72. See supra, pp.373-374.

(f) Revocation of Detention Orders

The newly introduced sub-rule 5F of the Emergency Powers Rules stated:

"(1) A detention order may, at any time, be revoked or modified by the Government."

It may be noted here that the provisions of sub-rule 5F relating to the revocation of detention orders reproduced exactly those of section 13[73] of the Special Powers Act, 1974.

Conclusion:

(i) Preventive Detention and the 1972 Constitution of Bangladesh

The foregoing discussion reveals that the 1972 Constitution of Bangladesh did not originally contain any provisions recognising and regulating preventive detention. Later, on 22 September 1973, the Constitution (Second Amendment) Act, 1973, added clauses 4 and 5 to Article 33 which embody certain safeguards in order to mitigate the harshness of preventive detention. Any legislation providing for preventive detention should conform with the requirements of clauses 4 and 5 of Article 33 of the Constitution. Thus the Constitution prohibits any law from authorising the detention of a person in preventive custody beyond six months without the approval of an Advisory Board. It is evident that the Constitution does not expressly stipulate the creation of any independent body to review or consider any initial orders of detention, which is a provision to be found in the legal system of the United States (as seen earlier). It speaks of an Advisory Board, the question of which arises only when a détenu is to be detained for a longer period than six months. Thus the Constitution fails to

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73. See supra, p.376.

contemplate any quasi-judicial protection to a détenu held for a period not exceeding six months against the arbitrary deprivation of his personal liberty by the detaining authority. Moreover, whereas the 1962 Constitution of Pakistan and 1949 Constitution of India require that a law authorising preventive detention shall not authorise the detention of a person for a period exceeding three months without the concurrence of an Advisory Board, the 1972 Constitution of Bangladesh requires the concurrence of an Advisory Board only when a person is to be detained for a longer period than six months. Yet unlike those Constitutions, the Bangladesh Constitution has given the détenu the right of hearing before the Advisory Board. However, the Constitution requires the detaining authority to communicate, as soon as may be, to the détenu the grounds on which the order of detention has been made and the détenu is to be afforded the earliest opportunity to make representation against the order. But the Constitution has given the detaining authority a wide discretion not to disclose facts which it considers to be harmful to the public interest to disclose. This may practically render the constitutional safeguard of making representation illusive as there is the possibility of an arbitrary withholding of all material facts by a detaining authority, which will make an effective representation difficult. It would have been better if the Constitution had provided for judicial scrutiny, especially in times of peace, of the facts withheld by the detaining authority in order to determine whether they were held back really in the public interest.

The Bangladesh Constitution does not precribe the maximum period of detention. Unlike the Indian Constitution, it does not even state that Parliament may prescribe the maximum period for which any person be detained under any law providing for preventive detention. This makes it possible to pass any Act authorising preventive detention for an unlimited period. Moreover, the Constitution does not contain any

provision as to when a Preventive Detention Act is to be passed. Therefore, it seems that Parliament can pass a Preventive Detention Act not only in times of emergency but also in times of peace.

(ii) Preventive Detention and the Special Powers Act, 1974.

Only four months and twelve days after the amendment of Article 33 of the 1972 Constitution, on 5 February 1974, the Bangladesh Parliament passed the Special Powers Act, 1974. Like the Defence of the Realm Consolidation Act of the United Kingdom, 1914, this Act has combined both punitive and preventive provisions. Unlike the Defence of the Realm Regulations, 1914, and the Defence (General) Regulations, 1939, which were formulated in the United Kingdom under the Defence of the Realm Consolidation Act, 1914, and the Emergency Powers (Defence) Act, 1939, respectively providing for prevention detention at a time of supreme national danger and limited to the duration of the World Wars, the Special Powers Act was passed in peace-time. As in India and Pakistan, the power of preventive detetnion in Bangladesh is designed to be used in times of both peace and emergency. Unlike the Indian Preventive Detention Act, 1950, the Special Powers Act has been passed as a piece of permanent legislation. However, the provisions of the Special Powers Act relating to preventive detention are virtually a reproduction of those of the Indian Maintenance of Internal Security Act, 1971. Yet taking advantage of a lacuna in the Constitution, which does not require a law providing for preventive detention to prescribe the maximum period of detention, unlike the Indian Maintenance of Internal Security Act, the Special Powers Act does not specify any limit as to the period for which the detenu can be kept in detention. However, the Special Powers Act incorporates the requirements laid down in clauses 4 and 5 of Article 33 of the 1972 Constitution of Bangladesh. Thus it provides for, inter alia, the communication of the grounds of detention

order to the détenu, the right of representation to the détenu against detention order, and the constitution of an Advisory Board to review the cases of détenus. Although the Constitution left the time for communicating the grounds of detention to the détenu indeterminate by using the vague expression "as soon as may be", the Special Powers Act has prescribed a maximum time-limit of fifteen days for such a communication. Yet it has unjustifiably allowed the Government the maximum period of one hundred and twenty days to place the case of the détenu before the Advisory Board. Whereas the Constitution speaks of an Advisory Board to review only those orders of detention in respect of détenus who are to be detained for a longer period than six months, the Special Powers Act has made a salutary provision requiring the Advisory Board to review every order of detention. Notwithstanding, the Advisory Board has not been given any power to express an opinion as to how long, if at all, the détenu should be kept in custody. Yet unlike the Defence (General) Regulations, 1939, the Special Powers Act contains a provision to the effect that if the Advisory Board expresses its opinion that there is no sufficient cause for the detention of the person concerned, the government must revoke the detention order and release the person forthwith. Thus the opinion of the Advisory Board constitutes an important safeguard against the vagaries and arbitrary action of the detaining authority. However, it is to be noted that the proceedings of the Board are conducted, to some extent, in a restricted manner; because the détenu is not given the right of defence by a lawyer and is denied the access to the materials placed before the Board to help him prepare his defence. The Special Powers Act has invested the Government with the powers to make an order for the temporary release of a détenu and to cancel an order of release at any time. Yet it does not contain any guidelines as to the exercise of such powers. The absence of such guidelines provides the scope for the government to exercise the power of temporary release by a process

of picking and choosing. Similarly, it enables the government to exercise the power of cancelling the order of release arbitrarily.

(iii) Preventive Detention and the Emergency Powers Rules, 1975

Six days after the declaration of emergency, on 3 January 1975, the Awami League government issued the Emergency Powers Rules formulated under the Emergency Powers Ordinance, 1974. These rules empowered the government to pass detention orders on the grounds which had already been the reasons for passing detention orders under the Special Powers Act, 1974. However, the provisions of the Emergency Powers Rules relating to preventive detention were almost a reproduction of those of the Defence of Pakistan Rules, 1965.

(a) Non-Existence of the Constitutional Safeguards regarding Preventive Detention in the Emergency Powers Rules

However, the Emergency Powers Rules did not originally provide for procedural safeguards against the improper exercise of the power of detention as required by clauses 4 and 5 of Article 33 of the 1972 Constitution of Bangladesh. Thus it did not contain any provision at all for communicating the grounds of the detention to a detenu and for affording him the opportunity of making representation against such an order to establish his innocence, in clear violation of the provisions of clause 5 of Article 33 of the Constitution. The framers of the Emergency Powers Rules failed to realise that constitutional "Insistence on making provision for serving grounds is not for more ceremony but really in the interest of justice so that the person deprived of his liberty may have adequate information about the allegations against him and give explanations for securing his release."[74] Moreover, the

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74. Justice A.S. Chowdhury in Rowshan Bijaya Shaukat Ali Khan v. Government of East Pakistan, All Pakistan Legal Decisions, Dhaka, Vol.XVII, 1965, pp.256-257

Emergency Powers Rules did not provide an independent and impartial machinery for the purpose of investigating into the sufficiency for the cause of detention for more than six months in clear violation of clause 4 of Article 33 of the 1972 Constitution. Thus the non-inclusion of the provisions for an independent machinery to review detention orders permitted the detaining authority to deprive the détenu of his most cherished fundamental right of personal liberty in a most arbitrary manner.

(b) The Insertion of the Constitutional Safeguards regarding Preventive Detention in the Emergency Powers Rules by the 1975 Martial Law Regime

The Emergency Powers Rules, 1975, enacted during the rule of the Awami League regime, remained in foce after the imposition of Martial Law in August 1975. Two years and three days after the imposition of Martial Law, on 18 August 1977, the Martial Law regime introduced certain amendments to the Emergency Powers Rules which fulfilled the constitutional requirements in respect of preventive detention. Thus the amendement provided for the communication of the grounds of a detention order, representation by the détenu, the constitution of the Advisory Committee, referente to the Advisory Committee, procedure of the Advisory Committee and the action upon the report of the Advisory Committee. These provisions virtually reproduced those of the Special Powers Act, with the exception of the name and composition of the machinery to review the cases of detention. However, seven months and eleven days after the withdrawal of Martial Law, on 27 November 1979, the government announced that the emergency - proclaimed on 28 December 1974 - had been revoked and that the Emergency Powers Act and the Emergency Power Rules of 1975 had forthwith ceased to exist.

The actual operation of these provisions for preventive detention, and the judicial response in a number of cases, will be the subject of the next chapter.

CHAPTER VIII

The Operation of the Laws Relating to Preventive Detention under the Martial Law Regime

Having discussed the provisions relating to preventive detention in the previous chapter, attention will now be given to the release of *détenus* under general amnesties by the Martial Law regime, and their release by the order of the Superior Courts. The discussion will also depict the cavalier attitude which the detaining authority sometimes adopted towards the *détenus*, and the cynical way in which the spirit of the Court Orders was flouted by the immediate re-arrest of some of the persons released by such orders.

I. The Release of Détenus: The Martial Law Government's Declaration

Only one month and nineteen days after assuming the office of President, on 3 October 1975, Khandaker Moshtaque Ahmed, in a nation-wide address by radio and television, whilst outlining the political programme of his government, declared his decision to release political *détenus* unconditionally after a review of their cases, in order to help create a salutary democratic atmosphere in the country.[1] He further said that no-one would be kept in custody only for his political views and that no person would lose his liberty merely for holding political views different from those of the government. The President also announced that a high-level Review Board had been set up consisting of three eminent former judges[2] of the Supreme Court to examine allegations against political leaders or workers who had been arrested and detained under specific charges. If the allegations or charges were found untrue and unfounded, a political *détenu* would be honourably released.

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1. The Bangladesh Times, Dhaka, 4 October 1975.
2. The Chairman of the three-member Review Board was Justice Abdus Sattar. The other two members were Justice Mujibar Rahman Khan and Justice Abdullah Jabir.

Similarly, on 7 November 1975, President A.M. Sayem, who had replaced Moshtaque Ahmed on 6 November 1975, announced that political leaders and other people who had been detained in preventive custody for reasons of political ideology would be released immediately.[3] He also declared that a high-powered judicial commission would be set up to examine the cases of political prisoners against whom criminal charges were made.

It is clear that both the Presidents, within the space of a month, declared their intentions to release political prisoners after proper review. Since these declarations were made within a very short interval of one month, it would appear that when they were speaking about political prisoners, they were referring mainly to the political détenus held under the preventive detention provisions of the Special Powers Act, 1974, and the Emergency Powers Rules, 1975, by the previous regime, namely the Awami League administration. However, the commitment of both the Presidents to release political prisoners after review demonstrated their intentions not to pursue the politics of repression. In fact, a substantial number of political détenus were released under various amnesties during the Martial Law period (1975-1979).

II. Statistics of Detentions and Releases

It is pertinent to mention here that the exact number of persons detained under the Special Powers Act, 1974, and the Emergency Powers Rules, 1975, and released at various times during the Martial Law period, cannot be precisely ascertained as no official total figures were published and all official records relating to such arrests and releases up to 1982 have been destroyed in accordance with the order of the 1982 Martial Law regime of Bangladesh.[4] However, on some occasions, the 1975 Martial Law

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3. The Asian Recorder, 10-16 December 1975; The Bangladesh Times, Dhaka, 8 November 1975.
4. Information received by the author at an interview with Osman Ghani, Section Officer for the Ministry of Home Affairs, Bangladesh, in October 1984.

regime disclosed the number of persons detained in preventive custody and released under general amnesties. On the other hand, although the Bangladesh press did not publish regularly the news of persons arrested on the grounds of prejudicial activities, it regularly published the statistics about the number of détenus released under various general amnesties. Nevertheless, the number of détenus released under general amnesties and court orders shows that several thousand persons were in detention at some time during the Martial Law period.

The Martial Law government announced in January 1976 that it had released 180 détenus since 1 November 1975 by way of general amnesties.[5] The official statement mentioned that the détenus were released in fulfilment of the government's commitment, as a result of which it had been constantly reviewing the cases of persons detained under the Special Powers Act and the Emergency Powers Rules. Throughout all the months of 1976 except those of April, May and October, the government published statistics about the release of détenus.[6] The statistics published on 16 December 1976 showed that by then 2,827 political détenus had been released under various amnesties declared by the government.[7] Some of the amnesties were declared on solemn occasions, such as Independence Day on 26 March, the first anniversary of the National Revolution and Solidarity Day on 7 November, Victory Day on 16 December, and certain Muslim religious festivals.

In 1977 also, the government released a large number of détenus by way of various amnesties. The official announcement published on 26 March 1977 stated that on the occasion of Independence Day, the government

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5. The Bangladesh Times, Dhaka, 13 January 1976.
6. Ibid., 24 January 1976; 21 February 1976; 9 and 26 March 1976; 5, 29, and 30 June 1976; 1, 6, 9, 16, 18, 20 and 24 July 1976; 11, 18, 25 and 27 August 1976; 8 and 23 September 1976; and 7 November 1976.
7. Ibid., 16 December 1976.

had released 285 political détenus.[8] On 21 April 1977, the government ordered the immediate release of eleven détenus;[9] next day, it ordered the release of 737 more.[10] In August 1977, 250 détenus were set free.[11] The release of 110 détenus was announced on the eve of the Eid-ul-Fitr in September.[12] However, the next three government statements of statistics in 1977 did not give the breakdown of figures of those détenus who were released and those who were under trial. Thus on 5 November the government announced the release of 830 political détenus and prisoners on trial on the eve of the National Revolution and Solidarity Day of 7 November.[13] Again, on 19 November, 800 political détenus and prisoners on trial were set free to mark the occasion of the religious festival of the Eid-ul-Azha.[14] Later, to mark the anniversary of the Victory Day of 16 December, the government announced the release of 935 political détenus and prisoners on trial.[15]

Thus the eight amnesties announced by the government in 1977 involved the release of 3,958 prisoners, an unknown number of whom had been on trial.

In 1978, the government announced the release of political détenus under five amnesties in fulfilment of its commitment. In March, the government ordered the immediate release of 336 political détenus on the eve of Independence Day;[16] in July, 107 détenus on the eve of the religious festival of the Shab-e-Barat;[17] and in September, 99 détenus on the eve of the holy festival of the Eid-ul-Fitr.[18] On the occasion of Victory Day of 16 December, the government released 167 détenus[19] and on 30 December it released 82 détenus.[20]

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8. Ibid., 26 March 1977.
9. Ibid., 22 April 1977.
10. Ibid., 23 April 1977.
11. Ibid., 14 August 1977.
12. Ibid., 14 September 1977.
13. Ibid., 6 November 1977.
14. Ibid., 20 November 1977.
15. Ibid., 16 December 1977.
16. Ibid., 26 March 1978.
17. Ibid., 22 July 1978.
18. Ibid., 3 September 1978.
19. Ibid., 16 December 1978.
20. Ibid., 31 December 1978.

Thus as a result of five amnesties declared by the government in 1978, the total number of détenus released amounted to 791.

In fulfilment of the President's pledge to the nation to release détenus after review, the government ordered the immediate release of 105 détenus on 9 January 1979,[21] and 267 détenus on the following day.[22]

Thus the two amnesties declared by the government in 1979 involved the release of 372 détenus altogether.

The annual statistics relating to the détenus released by the Martial Law government from 1975 to 1979 are shown in the following Table I.

TABLE I

Year of Release	Number of Détenus Released
November 1975 to December 1976	2,827
1977	3,958*
1978	791
1979 (January)	372
TOTAL	7,948

*This figure also includes some prisoners on trial.

It will thus be seen from the above Table that till January 1979, 7,948 détenus were released as published in the Bangladesh press. But in a speech on 30 November 1978, President Ziaur Rahman claimed that his government had released 10,135 political workers, leaders and détenus because "we do not believe in political repression and never took recourse to such method".[23]

21. Ibid., 10 January 1979.
22. Ibid., 11 January 1979.
23. The Bangladesh Times, Dhaka, 1 December 1978.

Yet the President's statement cannot be accepted to mean that no arrests were made during the Martial Law period on the grounds of prejudicial activities. Neither does it mean that the Martial Law government did not exercise the power of preventive detention arbitrarily. Sometimes the release of *détenus* under a general amnesty was followed by new arrests under the Special Powers Act and the Emergency Powers Regulations. However, only in a few cases was the news of such arrests published in the Bangladesh press. The Bangladesh press published, on 26 November 1975, the news of the arrest of nineteen political leaders on the grounds of their alleged prejudicial activities.[24] In 1976, it announced the arrest of thirty-one persons, including certain ex-Members of Parliament and politicians, under the Special Powers Act and the Emergency Powers Rules.[25] The news of the arrest of twenty-five persons, seventeen of whom were alleged to have been members of the underground East Pakistan Communist Party (Marxist-Leninist) on charges of prejudicial activities was published in 1977.[26]

Thus between 1975 and 1977, the Bangladesh press only announced the arrest of seventy-five persons on grounds of prejudicial activities. But in May 1978, a senior minister, Moshiur Rahman, disclosed that by then there were 950 political *détenus* in different jails of the country.[27] Nevertheless, before this disclosure, the press had reported the release of 7,121 *détenus*. On the other hand, on 30 November 1978, President Ziaur Rahman had claimed, as mentioned earlier, that 10,135 political workers, leaders, and *détenus* were freed which was followed by the release of 249 *détenus* in December 1978, and 372 *détenus* in January 1979.

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24. *Ibid.*, 26 November 1975.
25. *Ibid.*, 5 January, 27 February, 4 April, 4 June, 15 October and 1 December 1976.
26. *Ibid.*, 11 January, 1 and 13 March, and 10 August 1977.
27. *The Dainik Barta*, Rajshahi, 5 May 1978.

Thus the total number of détenus released under various amnesties stands at 10,135 + 249 + 372 = 10,756. If we take into account the release of 178 détenus in accordance with the orders of the High Court Division of the Supreme Court,[28] then the total number of détenus released was 10,934. It would, therefore, appear that several thousand persons were detained in preventive custody by the Martial Law regime. In spite of the release of as many as 10,934 détenus by various amnesties and court orders, a considerable number of political prisoners still remained in detention. Fifty days after the withdrawal of Martial Law, on 27 May 1979, the Home Minister said in Parliament that there was a total of 339 détenus in various prisons till April 1979.[29] Out of the 339 détenus, 338 were arrested under the Emergency Powers Rules, while one was held under the Special Powers Act.

Thus the release of 10,934 détenus under various amnesties and court orders, and the detention of 339 détenus till April 1979 show that there were 11,273 persons held in preventive custody at various times during the Martial Law period. But it should be noted here that not all of these détenus were arrested by the Martial Law regime. A considerable number of them were a legacy from the previous civil administration, although the exact number cannot be established because all the relevant official records were destroyed by the 1982 Martial Law regime.

III. Some Examples of the Arbitrary Exercise of the Power of Preventive Detention

i) The Case of Kamrul Ahsan

Sometimes the persons arrested in connection with criminal offences

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28. This figure is prepared on the basis of information collected from the Writ Registers of 1976-1978 of the Supreme Court.
29. The Bangladesh Times, Dhaka, 27 May 1979.

were served the orders of detention in the course of their trial. For example, one Kamrul Ahsan Khan alias Khasru was arrested on 23 August 1976, but no reasons for his arrest were given. Later, he was informed that he was arrested in connection with a criminal case for his assault on the police. He was, however, found not guilty and acquitted by the Special Tribunal on 22 June 1977. Yet while he was in custody and under trial, an order of detention, signed by the Additional District Magistrate of Dhaka under the Emergency Powers Rules on 3 March 1976, was served on him on 15 February 1977.[30]

It is evident that at the time of arrest the person concerned was not served with the order of detention, although when it was eventually served on him it shows that the order had been signed four months and twenty days before his arrest. Moreover, the order was served on the détenu ten months and twelve days after it was signed by the Additional Magistrate concerned. Therefore it seems that the detaining authority deliberately abused the power of detention for ulterior motives, and back-dated the order or simply had the order passed so as to continue his detention in case he was acquitted by the Special Tribunal.

ii) The Case of Mahmudur Rahman

Sometimes the persons acquitted after trial were not released from prison and detention orders were served on them. For example, one Mahmudur Rahman alias Manna was arrested in Dhaka on 18 March 1976. Later, he was made an accused in the conspiracy case of State v. Major (retired) M.A. Jalil and other[31] for conspiring to overthrow the government by means of criminal force and seducing members of the defence services

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30. Ibid., 17 August 1977.
31. See, supra, Chapter V, pp.259-274.

from their duty and allegiance to the government, and attempting to induce such members to commit mutiny or to indulge in anti-state activities. The trial was held in camera in the Dhaka Central Prison by a Special Military Tribunal in July 1976 and the accused was acquitted of the charges brought against him on 17 July 1976. But after his acquittal, an order of detention dated 25 July 1976 was issued by the Additional District Magistrate, Dhaka, under the Emergency Powers Rules, which was read over to the détenu at the Dhaka Central Prison.[32]

It should be stressed here that as Mahmudur Rahman was already in custody, it was not possible for the detaining authority to satisfy himself reasonably that his detention was necessary in order to prevent him from acting in any prejudicial manner. The basis of passing the order of detention by the detaining authority under Rule 30(1) of the Emergency Powers Rules was that if the said order was not passed against him, he might act in a prejudicial manner. Since the said Rule postulated that if an order of detention was not passed against a person, he would be free and able to act in a prejudicial manner, it implies that at a time when the order of detention was passed, the person concerned must have freedom of action. This alone could justify the passing of the detention order. As Mahmudur Rahman was in custody and acquitted of the aforesaid charges, it is clear that the detention order was passed against him for purposes other than those postulated in the Emergency Powers Rules. In this context, the observation of Justice Gajendragadkar of the Indian Supreme Court in the case of Rameshwar Shaw v. District Magistrate, Burdwan and another,[33] in which an order of detention was served on the petitioner under Section 3(1) of the Indian Preventive Detention Act, 1950, in Burdwan Jail where he had been kept as a result of a remand order passed by a

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32. The Bangladesh Times, Dhaka, 9 October 1977.
33. The Supreme Court Reports, India, Vol.IV, 1964, p.921.

criminal court that had taken cognisance of a criminal complaint against him, are noteworthy:

> "...the past conduct or antecedent history of the person on which the authority purports to act, should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary[34]...The first stage in the process is to examine the material adduced against a person to show either from his conduct or his antecedent history that he has been acting in a prejudicial manner. If the said material appears satisfactory to the authority, then the authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented from doing so by an order of detention....It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under Section 3(1)(a) and this basis is clearly absent in the case of the petitioner".[35]

IV. Continued Detention of a Détenu in Spite of a General Amnesty

Although the Martial Law government ordered the immediate release of *détenus* at different times under various general amnesties, some of those *détenus* were not released. For example, Captain Abdul Majed, who was detained under the Emergency Powers Rules and whose name appeared in the list of *détenus* directed to be released on 7 November 1976 on the solemn occasion of the first anniversary of the National and Revolution and

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34. *Ibid.*, p.927.
35. *Ibid.*, pp.930-931.

Solidarity Day of 7 November, continued to be held in detention.[36] Neither were the reasons for this action given.

The facts of the case briefly are as follows: after the coup of 7 November 1975, the government sent Captain Abdul Majed to Libya along with some other army officials connected with the August coup of 1975. While in Libya, the Captain applied to the Government of Bangladesh for his repatriation, but permission was refused. Later, Captain Majed flew into Bangladesh on receiving the news of the serious illness of his mother, and, on his arrival at Chittagong Airport, was arrested on 26 June 1976. He was taken to Chittagong Prison where an order of detention under the Emergency Powers Rules, 1975, was served on him. Later, his sister filed a writ petition in the High Court challenging the legality of his continued detention after general amnesty without a further order of detention. The High Court found that Captain Majed's detention was unlawful and ordered his release accordingly.

V. Some Examples of Writ Petitions and Supreme Court Orders

It should be pointed out that, during the Martial Law period, writ petitions were filed in the High Court Division of the Supreme Court in the first instance challenging the validity of the detention orders in some cases. Altogether 139 such petitions were either discharged or summarily rejected.[37] On the other hand, 178 writ petitions, as mentioned earlier, were successful and the Court ordered the release of the *détenus* concerned.[38] Here some of the decisions of the Court ordering the release of *détenus* may be mentioned which will show, *inter alia*, the manner in which sometimes the power of preventive detention was exercised.

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36. The Bangladesh Times, Dhaka, 20 September 1977.
37. This figure is prepared on the basis of information collected from the Writ Registers of 1978-1978 of the Supreme Court.
38. *Ibid*.

In Amresh Chandra Chakrabarty v. Bangladesh and others,[39] where the detention order, issued by the Martial Law government, merely mentioned that the détenu was required to be detained to prevent him from doing prejudicial acts as described in Rules 2(e)/5(1) of the Emergency Powers Rules, Chief Justice Kemaluddin Hossain observed that:

> "The [detention] order merely refers to Rule 2(e) of the Emergency Powers Rules and then invokes the power under Rule 5(1)(a) in passing the order of detention against the détenu. It is to be noticed that Rule 2(e) defines prejudicial acts wherein there are included sixteen different species of activities which come within a generic expression 'prejudicial act', but Rule 5(1) includes only some of the activities which could be a ground for passing the detention order. Unfortunately in this particular case excepting making a casual and careless reference to the numbers of two clauses nothing has been mentioned in the detention order which could at all be said to be an order passed under Rule 5(1) of the Emergency Powers Rules...no ground whatsoever has been mentioned excepting repeating the number of two clauses and on this ground alone apart from anything else the order of detention must be struck down as invalid as the very manner of articulation shows a total lack of application of the mind of the detaining authority. It is declared that the order of detention is without lawful authority and the détenu is being held in unlawful custody. It is directed that the détenu be released forthwith".[40]

It is noteworthy that, since the Emergency Powers Rules did not originally provide for communicating the grounds of detention to the détenu and the order of detention was made before its amendment of 18 August 1977, the question of such a communication did not arise. It is interesting to note that when the order of detention was challenged in a writ petition, the government in the affidavit-in-opposition alleged that the détenu was attached to the Awami League, which ruled the country before the imposition of Martial Law in 1975, obtained a licence for a dealership in government rations at Khulna, and also became a visa agent of the Indian

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39. Bangladesh Supreme Court Reports, 1978, p.429.
40. Ibid., pp.430-431.

High Commission at Dhaka and thereby established close liaison with the Indian High Commission Office. His aforesaid associations were alleged as acts of indulgence in prejudicial activities.

It is evident that the charges were made in the most general terms. The mere association with the Indian High Commission for purposes of commercial gains cannot be termed as a prejudicial activity.

In Saleha Begum v. the Government of Bangladesh,[41] the détenu was arrested on 27 June 1976 without any warrant and no reason was given. Later, a bail petition was moved and the Additional Sessions Judge, Faridpur, granted bail to the détenu. While the bail matter was being processed, an order of detention was served upon the détenu under Rules 5(1)(a) of the Emergency Powers Rules, 1975, perhaps with the ulterior motive of frustrating and negativing the order of bail. When the legality of the order of detention was challenged in a writ petition. the government filed an affidavit. In the affidavit, it was stated that some miscreants were arrested from the house of the détenu one day before his arrest, on 26 June 1976, with prejudicial documents; and that the détenu used to harbour the underground armed cadre of the so-called "Biplobi Gano Bahini" (Revolutionary People's Army) for carrying on sabotage, subversive and prejudicial activities. It was further stated that although the détenu was not present at the time of arrest of some miscreants, it was a fact that "his house was a den of miscreants". However, it is apparent that the affidavit mentioned some vague accusations without referring to any specific activities that would constitute prejudicial acts. Nevertheless, the petitioner's advocate submitted that "the order of detention is vague, indefinite and that it does not indicate that the order was passed on proper application of mind and on

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41. Dhaka Law Reports, Vol.XXIX, 1977, p.59.

satisfaction as contemplated under Rule 5(1)(a) of the Emergency Powers Rules, 1975". He also submitted that while on the night of 26 June 1976, the local boys and neighbours were watching the television show of the boxing between Muhammad Ali and Inoki, held in Tokyo, in the 'out-house' of the dêtenu in his absence, a contingent of the police force surrounded the house and arrested about 100 boys of different ages on the allegation that some prejudicial leaflets were found in the possession of some of them. But ultimately all the boys with the exception of a few were released. The advocate for the petitioner argued that in the manner these boys were arrested from the house of the dêtenu it could not be said that he gave shelter to them as alleged in the affidavit. Justice Ruhul Islam accepted the reasoning of the advocate for the petitioner when he observed:

> "From the order of detention it appears that the Additional District Magistrate passed the order merely at the instance of the police report, because, excepting the police report no other materials were placed before him. If the grounds as mentioned in the impugned order are considered vis-à-vis the police reports and the instances of prejudicial activities as enumerated in the affidavit in opposition, it becomes clear that the order of detention cannot be said to have been passed in conformity with the law. Even if it is accepted that the dêtenu entertained some young boys alleged to be members of the so-called armed cadre of Jatiya Samajtantrick Dal with food etc., that by itself, in the absence of any specific activity ascribed to the dêtenu, is not sufficient to bring the case within the scope of 'prejudicial act' as enumerated in Rule 2(e) and as such he cannot be described as a 'miscreant' endangering the public security, far less, injuring the interest of the People's Republic of Bangladesh. Mere recovery even of some prejudicial printed materials from his house does not bring the case within the scope of Rule 5(1)(a) of the Emergency Powers Rules, 1975. Categorical statement made by the petitioner that the police rounded up some boys when they were enjoying the television show at night along with many others, has not been controverted in the affidavit in opposition does not justify the impugned action of treating the dêtenu as a miscreant... In our opinion the extra-ordinary power of preventive detention provided under Rule 5(1)(a) was not properly

> exercised by the detaining authority, and as such detention...[of the dētenu] is wholly illegal and without lawful authority".[42]

In Abdul Latif Mirza v. Bangladesh,[43] the main ground of detention was that the dētenu belonged to the Jatiya Samajtantrik Dal, whose declared object was to overthrow the Awami League government which preceded the imposition of Martial Law in August 1975. It was alleged that he started lawless activities at different places in furtherance of the programme of the Party, although the nature of such activities was not particularised, nor was the time or place of those activities specified. However, in spite of the fact that the Awami League government was overthrown in August 1975 by a coup d'état, the dētenu, who was taken into custody on 22 April 1974, continued to be held in preventive custody. The Martial Law government failed to realise the truth that, with the overthrowing of the Awami League administration, the basis of the grounds of detaining the dētenu also disappeared. As Justice Kemaluddin Hossain observed whilst declaring the order of detention illegal and directing that the dētenu be released forthwith,

> "...the principal ground [of detention] was that the dētenu belonged to a political party whose object was to overthrow the government established by law. This was in 1974 when the composition of the government was different. The then government has been overthrown and a new government installed. There have been some changes in the Constitution as well. Judicial notice of these facts can be taken. The dētenu, we find, is in continuous detention from 22 April 1974 till today [i.e., till 2 September 1977, the day on which the judgment was delivered] and this change has taken place during the period of his continued detention. The moot question is, whether the basis of the ground that was existent in 1974, is still existing....The ground clearly stated that the aim of the party was directed against the political government of the day, but it has now been overthrown....The main basis of the grounds of detention has, in the present context of facts, become non-existent, and

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42. Ibid., pp.61-62.
43. Dhaka Law Reports, Appellate Division, Vol.XXXI, 1979, p.1.

> therefore the principal ground has lost its cogency and has become irrelevant. It is to be remembered that this ground was the foundation of all other grounds, and the rest are but superstructures. The foundation having gone, the supersturctures must collapse".[44]

VI. The Defiance of the Spirit of the High Court Order in Respect of Release of Détenus

In some cases, political prisoners who were released in accordance with the orders of the High Court were immediately re-arrested at the prison gate under a different law. At an interview with the author in October 1985, the Special Law Officer of the Ministry of Home Affairs stated that such a course of action was adopted "in a number of cases". Here one such case may be considered.

One Khaliquzzaman, a political and labour leader of Comilla District and President of the Jatiya Samajtantrik Dal, Chandpur, Comilla, was arrested on 18 March 1974 by the Awami League government. Later, on 27 March 1974, an order of detention was passed under the Special Powers Act. It stated that it was necessary to detain him for reasons of (i) security, (ii) public safety, and (iii) maintenance of law and order. At first he was detained in Comilla Central Prison, and later he was transferred to Dhaka Central Jail. The detention was challenged in Writ Petition No.1493 of 1974, which was allowed and finally disposed of on 20 January 1977. The High Court by its order of 20 January 1977 made the Rule absolute and the detention was declared illegal. In accordance with the direction of the High Court, the détenu was released from Dhaka Central Prison on 28 January 1977. Yet whilst he was about to come out of the prison, another order of detention was served on him at the prison gate under the Emergency Powers Rules, 1975, and he was taken back to the prison. The order of detention was issued by the Additional District

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44. Ibid., pp.11-12.

Magistrate, Dhaka, in exercise of powers under Rule 30(1) of the Emergency Powers Rules, 1975. It stated that complaint was made before the Additional Magistrate that Khalequzzaman was 'acting' in a manner prejudicial to the security or interest of Bangladesh, and to the public safety and the maintenance of law and order. On consideration of the 'charges', the Additional District Magistrate was satisfied that the détenu should be detained in Dhaks Central Prison until 10 March 1977. Subsequently, on 9 March 1977, this order was extended up to 10 April 1977. After 10 April, the détenu was not released as another order of detention, issued by the government on 12 April 1977, was served on him. It is to be noted that although the Additional Magistrate was empowered under Rule 30(1) of the Emergency Powers Rules to detain a person for a period of fifteen days, in this case he held the person in question in detention for about two-and-a-half months, from 28 January 1977 to 10 April 1977.

It is interesting to note that whilst the Additional District Magistrate passed the order of detention because the person concerned was acting in a manner prejudicial to the security or interest of Bangladesh and to the public safety and the maintenance of law and order, the order of detention issued by the government on 11 April 1977 stated that detention was necessary for preventing the détenu from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community and also from prejudicing the economic and financial interest of the state. Later, on 21 July 1977, it was discovered that the government's order of detention was passed in a 'wrong form' 'due to oversight' and, as such, on the same day a fresh order was issued which was served on the détenu in the prison. The new order stated that with a view to preventing the détenu "from acting in a manner prejudicial to the security, or interest of Bangladesh or the

public safety or the maintenance of law and order, it is necessary to detain him". Thus ultimately the grounds of detention were brought into conformity with those contained in the order of detention passed by the Additional District Magistrate.

However, it is noteworthy that whilst the Additional District Magistrate in his order of detention alleged that the dêtenu was 'acting' in a prejudicial manner, the order of detention issued by the government stated that it was intended to prevent him from acting in a prejudicial manner.

It should be stressed here that the detention order of 28 January 1977, which was served on the dêtenu, immediately after his release from about three years captivity, at the prison gate, was a clear instance of an arbitrary exercise of power. As the dêtenu was virtually in preventive custody at the time of serving on him the said order, it could not be rationally postulated that if he was not detained he would act in a prejudicial manner. The conduct of the dêtenu could not have any rational connection with the conclusion that his detention was necessary, because he had, in effect, no freedom of action at the relevant time. Thus the satisfaction that is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is the basis of the order of detention, and this basis was clearly absent in the case of this dêtenu. Moreover, it is evident that the Martial Law authorities obeyed the order, passed by the High Court for the release of the dêtenu, in form only, and proceeded to get round it, and defied the spirit of the court order by re-arresting him at the prison gate under a different law.

Mrs. Shamsun Nahar, sister of the dêtenu, Khalequzzaman, filed a writ petition in the High Court challenging the first order of detention made on 28 January 1977 under the Emergency Powers Rules. The lawyer for the

petitioner argued that as the détenu was in custody since 1974, he was incapable of acting prejudicially to the interest of the state. Moreover, as a result of the High Court order, passed on 20 January 1977, to release him, the détenu was not actually released, because he was re-arrested at the prison gate under the Emergency Powers Rules. He further argued that the detention order contained the expression 'acting', but as the détenu himself was in prison as a result of a previous detention order which was found illegal by the High Court, "how then was he acting in a prejudicial manner?" It was also asserted that the respondents had acted arbitrarily in respect of the détenu. Against this background, as the petitioner's lawyer claimed, it was easy to see that the order dated 28 January 1977 demonstrated the 'mala fide' of of the respndents who had acted cynically and in utter disregard of the liberty of the citizen and had detained the détenu only for 'collateral purposes'. He also affirmed that the respondents could make use of the Prisons Act if the détenu acted in breach of the discipline of the prison, but they were not entitled to take recourse to the Emergency Powers Rules.

On the other hand, the Deputy Advocate-General, appearing for the respondents contended that the détenu had acted prejudicially inside the prison and had started maintaining clandestine liaison with other members of his party who were at large and organising the cadres of his party by giving direction, etc., with the help of some corrupt jail officials, and accordingly the detaining authority was satisfied that it was necessary to re-arrest and keep him in preventive detention. He also proceeded to justify the detention order on the ground that when the impugned order of detention was passed, the détenu was a free man.

Justice Badrul Haider Chowdhury, who delivered the judgment of the Court, in fact accepted the arguments of the petitioner's lawyer when he observed that:

> "The argument of the respondents is devoid of any substance and there is considerable force in the argument of Mr. Halder [the lawyer for the petitioner] that the respondents could in such a contingency take recourse to the Prisons Act if the détenu was really acting a manner which was contrary to the discipline of the prison. The Prison Act deals with the management, administration, discipline, conduct and all other affairs regulating the life of the prisoners who happen to be lodged therein.... For violation of any of the rules of the Prisons Act penalty is provided vide Section 42, for communicating with his fellow-prisoner without any authority.... Therefore, the stand that was taken by the respondents that a fresh order of detention was passed on 'fresh grounds and prejudicial activities committed by him while in jail-custody' may be considered....The desperate argument that was advanced on behalf of the respondents that he was maintaining liaison in clandestine manner with his party cadre through the agency of a jail warder is not appreciated. Such things could be stopped by resort to the provisions of the Prisons Act which sufficiently deals with such contingency. But to say that security or interest of Bangladesh or public safety and maintenance of law and order is being threatened by the action of a prisoner who is detained in jail is to bring the proposition to an absurdity and such proposition should not be allowed to be argued...certainly the provisions of the Emergency Powers Act are not available to respondents for detaining such a person who is already in jail".[45]

With regard to the contention of the Deputy Advocate-General that when the impugned order of detention was passed on 28 January 1977 the détenu was a free man, Justice Badrul Haider Chowdhury observed that it

> "is not tenable because the whole affair was an idle ceremony. While the Court said his detention is illegal, the government obeyed by bringing him up to the jail gate; then allowing the détenu to have a glimpse of the outside world, promptly another order was served and this was under the Emergency Powers Act (sic). How can it be said that when the order of detention was served he was a free man? To say the least it is mere words and since the words only

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45. In Shamsun Nahar Begum v. Bangladesh, Dhaka Law Reports, Vol.XXX, 1978, pp. 36, 38, 39 and 40.

> mean to convey ideas, the least that can be said is that the detaining authority paid little regard to the declaration that was made by the Court in Writ Petition No.1493 of 1974".[46]

With regard to the discrepancy of the ground of detention between the order passed by the Additional Magistrate on 28 January 1977, and that of the government passed on 11 April 1977, the learned Justice held:

> "Liberty of a citizen...can only be circumscribed by arriving at a decision that it is so necessary to preventing him from acting prejudicially. The degree of consideration, the degree of care, the degree of duty that is cast on the respondents is of highest order and slightest deviation from such care, from such consideration, from such duty will render the act as not a good one....We conclude by saying that the respondents have displayed utter carelessness and deviated from their duties and the degree of carelessness renders the action as colourable exercise of power".[47]

Consequently, the learned Justice Badrul Haider Chowdhury expressed his opinion that "the detention of Khalequzzaman is illegal and without lawful authority. In the result...it is directed that the respondents should set Khalequzzaman at liberty forthwith if not wanted in any other connection".[48]

Conclusion

The foregoing discussion reveals that the Martial Law government, immediately after coming into power, declared its intention, after proper review, to release those political prisoners who had been detained for holding political views different from those of the government in power. It seems that most of the political prisoners were a legacy from the Awami League administration and were held in

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46. Ibid., pp.37-38.
47. Ibid., p.40.
48. Ibid.

preventive detention under the provisions of the Special Powers Act, 1974, and the Emergency Powers Rules, 1975. However, in order to fulfil its commitment to release dêtenus in suitable cases, the Martial Law government had to keep the cases of persons detained in preventive custody under constant review. Consequently, the government announced several general amnesties during the Martial Law period (August 1975 to April 1979) which involved the release of 10,756 political dêtenus. The amnesties were generally declared to mark solemn occasions, such as Independence Day, National Revolution and Solidarity Day, Victory Day, and certain other religious festivals.

Although the Martial Law regime released a large number of dêtenus, it was not free from resorting to the politics of repression as, in spite of the various general amnesties, new arrests took place under the Special Powers Act and the Emergency Powers Rules. Sometimes the persons arrested for criminal offences and held in custody were served the orders of detention in the course of their trial. Similarly, on a few occasions, persons acquitted after trial were not released and detention orders were served on them. In some cases, dêtenus who were released in accordance with the orders of the High Court, were re-arrested immediately at the prison gate, in general under the Emergency Powers Rules. Moreover, in a few cases, dêtenus whose release was announced in the press were, in fact, continued to be held in custody. However, the Martial Law administration preferred the exercise of the power of preventive detention under the Emergency Powers Rules to that of the Special Powers Act. This preference seems to emanate from the fact that the Emergency Powers Rules, 1975, did not originally provide either for the communication of grounds to the dêtenu, or for his right to make a representation against the order of detention. Further, it did not provide for the constitution of an Advisory Board to review such orders of detention until the Emergency Powers Rules were amended on 18 August 1977.

It is to be noted that, on many occasions, the Superior Courts of Bangladesh stood between the dētenu and the encroachment on his liberty by the Executive. They issued the order of release in respect of 178 dētenus in consequence of writ petitions challenging their orders of detention. The decisions of the courts also show that, in some cases, the orders of detention were passed in a casual or cavalier manner without due process of thought and consideration. The grounds themselves were vague and in the most general terms. However, the wide, frequent and arbitrary use of preventive detention in Bangladesh in times of peace shows the indifference and insensitivity of the government in power to the serious encroachment on the personal liberty of the individual. It became an instrument of detaining the political adversaries of the party in power for an indefinite period. Thus the government of the day failed to realise that frequent use or misuse of the power of preventive detention makes a mockery of the cherished liberty of the individual in a democratic state.

CHAPTER IX

Conclusion

I. What is Martial Law?

We have already seen in Chapter I how the meaning of Martial Law has evolved in the common law over several centuries. Its contemporary usage is quite different from its former meanings.

(i) The Historical Evolution of the Term Martial Law

The term 'Martial Law' has been used in various senses by different authors at different times.

Firstly, in earlier times, the expression 'Martial Law' was used to mean what we now call military law, the law for the discipline and government of the armed forces. It had this connotation up to the latter part of the eighteenth century. Prior to that period, no distinction was made between the military law and the Martial Law of the present day as they had had a common historical origin in the law that had been administered in medieval England in the Court of the Constable and the Marshal.

> The "Law of the Marshal which then ruled the prerogative of the Crown during war or insurrection, included both the law necessary for the government of the army [raised for the occasion], and also for the government of the [people of the] occupied territory or disturbed district while the ordinary law was in abeyance".[1]

Secondly, the term 'Martial Law' was commonly used in the sense of 'military government in occupied foreign territory' and meant the law administered by a military commander in occupied foreign territory in time of war. Martial Law in the sense of 'military government' took the place of a suspended or destroyed sovereignty and replaced the previous governmental agencies. In this sense, Martial Law is quite outside the scope of municipal or constitutional

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1. Tovey, Hamilton, Martial Law and the Custom of War, London, 1886, p.66.

law; it is a part not of municipal but of international law. It is recognised in international law as a part of the jus belli and is incidental to the state of war.[2]

Thirdly, and finally,

> "Martial Law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England"[3]

In this sense, Martial Law is a part of the English Constitutional Law and is called Martial Law in the English sense. Martial Law, in this form, may amount to no more than the deployment of troops, in aid of, and under the direction of, the civil authorities to suppress riot, insurrection or other disorders in the land without the proclamation of Martial Law. During such a deployment, the military does not supersede the civil authority and the question of setting up of military courts to govern the country does not arise. It is to be noted that the right to enlist the support of the military forces by the civil authority in its effort to restore order is common to the law of every civilised country. In Bangladesh, in times of disorder, a magistrate can, under Section 129 of the Criminal Procedure Code, call in the military to suppress a riot, and, under Section 130 of the same Code, in the absence of a magistrate, a commissioned military officer may disperse an unlawful assembly by force and nothing done in good faith by such an officer is an offence. These rights of the Executive and military forces cannot properly be called Martial Law. Justice Muhammad Munir observed in Muhammad Umar Khan v. The Crown.[4]

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2. Opinions of the Attorney-Generals, Vol.VIII, Washington, 1868, p.369.
3. Dicey, A.V., Introduction to the Study of the Law of the Constitution, 8th edition, 1915, p.284.
4. Pakistan Law Reports, Lahore, Vol.VI, 1953, p.825.

> "It is, however, a misuse of the term to describe these rights and duties (of citizens, including servants of the Crown and the Military in suppressing riots and restoring law and order) as martial law; they are no more than a part of the civil law of the land".[5]

It seems that, for the lack of an alternative name, the expression 'Martial Law' is used to mean the use of military forces in the aid of the civil authorities in suppressing riots and other public disorders.

ii) The Modern Meaning of Martial Law

The term Martial Law is used in modern times in a restricted sense. It is that law which is brought into operation in the territory of a country in a state of insurrection or war when the civil government becomes inoperative or powerless by the insurrectionary or enemy forces, and the military assumes the function of the government in order to preserve law and order and rises superior to the civil authorities. In its restricted or proper sense, Martial Law can, therefore, be defined as that kind of law which is generally promulgated and administered by and through military authorities in an effort to maintain public order in times of insurrection, riot or war when the civil government is unable to function or is inadequate to the preservation of peace, tranquillity and enforcement of law and by which the civil authority is either partially or wholly suspended or subjected to the military power. "Martial Law, in the proper sense of that term", says A.V. Dicey

> "in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France the 'Declaration of the State of Siege', under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army".[6]

Thus Martial Law in its proper or narrow sense is equivalent to the 'state

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5. Ibid., p.835.
6. Dicey, A.V., op.cit., pp.283-284.

of siege' which is so commonly called in the civil law countries of continental Europe and Latin America. The 'state of siege' is the civil law counterpart of Martial Law which obtains in common law countries.[7] It is sometimes called 'Martial Law in the continental sense' as opposed to 'Martial Law in the English sense'.

(iii) The Bangladeshi Version of Martial Law

Martial Law promulgated for the first time in Bangladesh on 15 August 1975 represents a radical change from both its traditional and modern meanings. Although Martial Law had been applied in Pakistan in 1953, and 1969 (before the birth of Bangladesh), Martial Law as declared in Bangladesh represents a significant departure even from the Pakistani precedents; for unlike Pakistan, Martial Law was proclaimed in Bangladesh as a means to implement a coup d'état. The aim was not to restore law and order but to obviate any public opposition which might be provoked as a result of the assassination of President Sheikh Mujib and the seizure of power by the army. Although the country had already been in a state of emergency imposed on 28 December 1974, the leaders of the coup d'état felt that they needed further powers to strengthen their hold on the country. Thus it would appear that Martial Law declared in Bangladesh on 15 August 1975 was sui generis - fundamentally different from the common usage of its meaning.

II. How is the Proclamation of Martial Law Justified?

The doctrine of 'necessity' renders lawful that which otherwise is unlawful - id quod alias non est licitum, necessitas licitum facit. In constitutional law, Martial Law finds its justification in this doctrine -

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7. Rossiter, C.L., Constitutional Dictatorship, 1948, p.9.

for its promulgation and continuance; all measures taken in exercise of the power of Martial Law must be justified by requirements of necessity alone. In this respect, all the relevant authorities, as we have seen in Chapter I, appear to be unanimous.

Since Martial Law is an emergency measure and is the great law of social self-defence, it can be employed in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for the speedy restoration of peace and tranquillity, public order and safety in which the civil authority may function and flourish. The declaration of Martial Law would, in cases of foreign invasion, mainly serve the purpose of enabling the forces of the country to be better utilized for its defence and in cases of rebellion or other serious internal disorder, would enable the government to arrest persons resisting its authority, summarily try and promptly punish them when the ordinary course of justice is, for its slow and regulated pace, utterly inadequate in an emergency when every moment is critical.

The true test of the right to establish Martial Law is whether the civil authorities are able, by the ordinary legal processes, to preserve order, punish offenders and compel obedience to the laws. In other words, the test is whether the interference by military is necessary when it becomes evident that the civil authorities are unable to function, or that because of impending grave danger it would be unsafe for them to function, in order to perform the duty of repelling force and restoring such condition of things as will enable the civil government to resume charge.

Thus Martial Law is a measure which may be used as a last resort when less drastic measures have failed and when even the support of the military authorities, acting under civil direction, is also found to be inadequate. As A.V. Dicey says:

> "...Martial Law comes into existence in times of invasion or insurrection when, where, and in so far as the King's peace cannot be maintained by ordinary means..."[8]

A similar view was expressed by Attorney-General Sir John Campbell and Solicitor-General Sir R.M. Rolfe:

> "The right of resorting to such an extremity is a right arising from and limited by necessity of the case - quod necessitas cogit, defendit"[9] - what necessity forces, it justifies.

Whereas as A.V. Dicey referred to 'immediate necessity'[10] and Sir Frederick Pollock wrote of 'apparent necessity'[11] regarding the degree of necessity that will be sufficient for the declaration of Martial Law, it may be suggested that reasonable necessity should now be preferred as the most appropriate phrase for this purpose. As J.I.C. Hare said:

> "Nothing short of a necessity can justify a recourse to martial law; but such a necessity may exist before the blow actually falls....All that can be said with certainty is that there must be reasonable and probable cause for believing in the imminency of a peril that suspends the ordinary rules..."[12]

It is said that the role of the doctrine of necessity in promulgating Martial Law "cannot be separated from the concept of open court".[13] This concept of 'open court' may be traced from early English history through the Theobold Wolf Tone[14] case, its transfer to America and its adoption as law in Ex parte Milligan[15] where the majority held that, "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their

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8. Dicey, A.V., op.cit., p.539.
9. Forsyth, William, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence, London, 1869, p.198.
10. Dicey, A.V., op.cit., pp.549, 552.
11. Pollock, Frederick, "What is Martial Law?", Law Quarterly Review, Vol.XVIII, 1902, pp.155-156.
12. Hare, J.I.C., American Constitutional Law, Vol.II, Boston, 1889, pp.964-965.
13. Justice M. Afzal Zullah in Zia-ur Rahman v. the State, All Pakistan Legal Decisions, Lahore, Vol.XXIV, 1972, p.397.
14. Howell, T.B., State Trials, English, Vol.XXVII, 1798, p.613.
15. Wallace, United States, Vol.IV, 1866, p.2.

jurisdiction".[16] This view does not receive unqualified support. Westel W. Willoughby criticised this decision when he said:

> "...it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly pointed out, there may be urgent necessity for martial rule even when the courts are open....Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption".[17]

It is worthy of note that even in the eighteenth century, the framers of the Irish Act, 1799, realized the fact that there could be the necessity of promulgating Martial Law even when the civil courts were open. As it was declared:

> "that Martial Law should prevail, and be put in force whether the ordinary courts of common or criminal law were or were not open".[18]

However, in the twentieth century, the doctrine, that where the courts are open, Martial Law cannot prevail, has been abandoned by the Judicial Committee of the Privy Council in Ex parte D.F. Marais.[19] As it was held that the fact that some courts were exercising uninterrupted jurisdiction was not conclusive that war was not raging.[20]

Since modern scientific knowledge and technological developments have revolutionized the very concept of warfare, it is possible for the civil courts to be open and functioning and yet be in the actual fighting zone, as, for example, in December 1941, Martial Law was declared in Hawaii following the Japanese bombing on 7 December 1941 when "the federal court in Hawaii was open...and was capable of exercising criminal jurisdiction".[21]

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16. Ibid., p.127.
17. Willoughby, Westel Woodbury, The Constitutional Law of the United States, 2nd edition, 1910, Vol.III, p.1602.
18. Clode, Charles M., The Military Forces of the Crown: Their Administration and Government, Vol.II, London, 1869, p.171.
19. The Law Reports, Appeal Cases, London, 1902, p.109.
20. Ibid., p.114.
21. United States Supreme Court Reports, Vol.327 [CCCXXVII], 1945, p.332.

Therefore, it can be said that the concept of open court should be considered as one of many factors (e.g., failure of the civil authorities to preserve law and order) in determining the necessity to promulgate Martial Law. "The necessity for Martial Law arises rather from the proximity of a danger than from the fact that the courts continue or do not continue to sit."[22]

Since Martial Law owes its existence to necessity, it is to be continued only as long as the necessity giving rise to its declaration prevails. Martial Law, therefore, ceases as soon as the civil authorities are able to resume the unobstructed exercise of their ordinary functions.

In view of the fact that the promulgation of Martial Law depends on necessity, the justification of all measures adopted during the period of Martial Law should also be based on necessity. Necessity alone justifies the taking of those measures which are necessary for the suppression of rebellion, insurrection or riot and the establishment of civil authority.

The role of 'necessity' in the proclamation, and continuation of Martial Law and in the justification of all measures taken during the period of Martial Law, can be summed up in the words of Sir James Mackintosh, one of the most accomplished jurists Britain has ever produced. Speaking in the House of Commons on 1 June 1824 in support of Lord Brougham's motion condemning the use of Martial Law in Demerara, he made the following observations which would seem timeless in their wisdom and validity:

> "The only principle on which the law of England tolerates what is called Martial [law] is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence....While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society."[23]

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22. Richard, H. Earle, "Martial Law", The Law Quarterly Review, Vol.XVIII, April 1902, p.141.
23. Hansard, T.C., Parliamentary Debates, New Series, Vol.XI, March-June 1824, London, p.1046.

III. Was the Proclamation of Martial Law in Bangladesh in 1975 Justified?

Since Martial Law was proclaimed in Bangladesh in peace-time and there was no question of suppressing riot, rebellion or insurrection, the proclamation of Martial Law on 15 August 1975 did not satisfy the test of the doctrine of necessity and, as such, was unjustified. It was not realized that Martial Law is an extreme measure used in the last resort and can only find its justification in the necessity to restore law and order. Evidently, the tradition established by the British government in India in respect of the declaration of Martial Law was not followed. Although on some occasions controversies arose as to the justification of the imposition of Martial Law by the British government in India (e.g., proclamation of Martial Law in the Panjab in 1919, in Sholapur and in Peshawar in 1930), it should be stressed here that it declared Martial Law only for the purpose of preserving, safeguarding or restoring law and order.

IV. How is Martial Law Established?

In the subcontinent, under different types of governments, Martial Law has been introduced in a variety of ways. For example, the British government in India, as we have seen in Chapter I, declared Martial Law in the subcontinent in the following three ways: firstly, by the Executive, in pursuance of the authority previously conferred by the Bengal State Offences Regulation, 1804, as in the five districts of the province of the Panjab in 1919; secondly, by ordinance, issued by the Governor-General (under Section 23 of the India Councils Act, 1861, which empowered him "in cases of emergency, to make and promulgate, from time to time, ordinances for the peace and good government"), as in Malabar in 1921, in Sholapur in 1930, and in Peshawar in 1930; thirdly, and finally, by instruction from the civil authorities to the armed forces in reliance upon the common law rule which justifies the repelling of force by force, as in Sind in 1942.

However, in this respect also, Bangladesh presents an exceptional experience, for Martial Law was declared in none of the ways mentioned above.

V. What Other Principal Conclusions Can be Drawn from the Experience of Martial Law in Bangladesh?

(i) Was the Declaration of Martial Law in 1975 Legal?

The declaration of Martial Law in Bangladesh in 1975 has to be seen as an extra-constitutional act since throughout the text of the 1972 Constitution no reference whatsoever has been made to Martial Law. As the Constitution is the supreme law of the land and does not contain the term Martial Law, it seems that it excludes the common law rule as a basis for Martial Law for the purpose of restoring law and order. Thus it is not possible to maintain that the proclamation of Martial Law in Bangladesh in 15 August 1975 had any legal basis.

(ii) Did the Military Takeover in 1975 Constitute a Revolution?

Martial Law was declared in Bangladesh, as mentioned earlier, after a coup d'état in order to forestall any public opposition. This kind of Martial Law is in a class by itself and "has nothing to do with constitutional Martial Law". The military takeover in Bangladesh could not be called a revolution, from a juristic point of view, as the basic norm or the total legal order of the country, the 1972 Constitution of Bangladesh, was neither abrogated nor suspended. The Constitution remained the fundamental law of the country and, in fact, co-existed with Proclamations, Martial Law Regulations or Orders. Therefore, it seems that the military takeover in Bangladesh constituted a constitutional deviation rather than a 'total new dispensation'.

(iii) Was the 1972 Constitution of Bangladesh to Remain the Supreme Law of the Land?

It should, however, be stressed here that although the 1972 Constitution of Bangladesh continued in force during the period of Martial (1975 to 1979), it ceased to exist as the Supreme Law of the country as it was made subject to the First Proclamation, Martial Law Regulations or Orders. Hence, it assumed a subordinate status.

(iv) What was the Nature of Martial Law Offences?

The 1975 Martial Law administration of Bangladesh created a large number of offences under Martial Law Regulations. Most of these offences had already been offences under the ordinary law and were mainly related to anti-social activities. The Martial Law government, in general, only provided for more severe punishments for these offences. Thus it failed to realize that the creation of offences under Martial Law Regulations during the period of Martial Law is limited to the necessity for the restoration of law and order.

(v) What was the Impact of the Establishment and Operation of Martial Law Courts on the Ordinary Criminal Courts?

Although Martial Law was declared in Bangladesh in peace-time and the ordinary criminal courts were allowed to continue to exercise their functions, Martial Law Courts were established as an almost inevitable incident of the resort to Martial Law, declared under the doctrine of necessity to restore law and order. The Martial Law Courts, which were established parallel to the existing civilian courts, tried not only offences under Martial Law Regulations, but also offences under the ordinary law. But it is ironical that the criminal courts were not given concurrent jurisdiction to try Martial Law offences which constituted a clear-cut departure from the tradition established by various Martial Law governments

at different times in the subcontinent. However, cases were transferred from the criminal courts and special tribunals to Martial Law Courts in an arbitrary manner without following any set guidelines. These arbitrary transfers not only violated the right of equality before the law, but also deprived the person charged with the ordinary offences of the benefits (e.g., the right of appeal; the right of legal representation, if tried by a Summary Martial Law Court) of a civil trial. In many cases, the same group of cases were transferred from the ordinary courts to both Summary Martial Law Courts and Special Martial Law Courts without any set standards or criteria which also resulted in different treatments of the same type of cases or accused. In fact, most of the cases tried by Martial Law Courts were cases under the ordinary law transferred to them for trial. Thus the establishment and operation of the Martial Law Courts, withdrew the powers and jurisdiction from the ordinary criminal courts, functioning under well-established legal procedures.

(vi) Did the Procedure of Martial Law Courts Ensure a Fair Trial?

Most of the Special Martial Law Courts comprised the majority of members from the armed forces and the single member-Summary Martial Law Court sometimes consisted of army majors, who had no legal training, qualification or experience whatsoever in the administration of criminal justice and were, therefore, not fully equipped to exercise a 'fair legal judgment'. Moreover, the holding of trial under summary procedures, the denial of the minimum safeguards of the right of appeal, the deprivation of the right of defence by a lawyer in a trial before the Summary Martial Law Court, the obligation to obtain consent from the prosecution for granting bail - all these eroded the constitutional and legal safeguards to ensure a fair trial and, indeed, allowed for the miscarriage of justice.

(vii) Was the Procedure of Martial Law Courts Abused?

Sometimes certain existing Martial Law Regulations, especially those concerning the procedure of Martial Law Courts, were amended in a calculated way to serve the ulterior motives of the military junta; trials were initiated mala fide and the only relief of review against the judgment of Martial Law Courts was not carried out in a proper manner.[24]

(viii) Were the Accused in the Conspiracy Case Fairly Dealt With?

The Special Martial Law Tribunal which comprised the majority of members from the armed forces and was given wide jurisdiction to try offences under the Military Laws and certain offences under Martial Law Regulations and the Penal Code, mainly followed the procedures of Special Martial Law Courts. It tried a very important and significant case, the conspiracy case of the State v. Major Jalil and others. The trial was held in camera within the confines of the prison which formed a new development in Bangladesh. In this trial, the requisites of a fair trial were not observed. Moreover, there was an unseemly and unprecedented speed in carrying out the review of the sentences passed against the accused and confirming the sentences of death and life imprisonment. This suggests that the Martial Law administration had a political motive in bringing the conspiracy case to a hasty conclusion. Moreover, only three days after the confirmation of the death sentence, one of the convicts, Abu Taher, was hanged on 21 July 1976 in clear violation of the stipulations of the Jail Code. Thus the accused in the conspiracy case were unfairly dealt with and unjustly condemned and the trial in camera, in their cases, proved an "effective instrument of oppression".

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24. See supra, Chapter IV, p. 229-246.

(ix) Were the Martial Law Tribunals Just and Fair?

Although the Martial Law Tribunals were given the same jurisdiction as had been granted to the Special Martial Law Tribunal, they were composed entirely of members of the defence services. These tribunals did not differ with the Special Martial Law courts and the Special Martial Law Tribunal in respect of their procedures except in a few particulars. However, the Martial Law Tribunals restricted themselves to the trial of the members of the army and air force who had been involved in two abortive coups of 1977. They held the trials in camera and, in most cases, gave their judgments on insufficient evidence. Therefore, it seems that the tribunals were more interested in meting out severe punishment to serve as a deterrent rather than dispensing justice.

(x) What was the Effect of Martial on the Fundamental Rights and the Independence of the Judiciary?

The Martial Law administration restored the independence of the Judiciary which had been severely curbed by the civilian regime of Sheikh Mujib through the Constitution (Fourth Amendment) Act, 1975. It also provided better remuneration and privileges for the judges of the Supreme Court which strengthened their freedom, improved their financial position and reduced their likely temptation to resort to corruption. It further re-established the right of the citizen to move the High Court Division of the Supreme Court and the power of the High Court Division to issue necessary directions or orders, for the enforcement of the fundamental rights which had been taken away by the government of Sheikh Mujib in 1975 under the Constitution (Fourth Amendment) Act. Even during the continuance of Martial Law, in December 1978, the Martial Law government lifted the prohibition in respect of the enforcement of most of the fundamental rights that had been imposed by the Presidential Order issued as a consequence of the Proclamation of

Emergency on 28 December 1974 by the civilian regime which had preceded it. In spite of adopting all these healthy measures, it imposed severe restrictions on the powers and jurisdiction of the Judiciary under various Proclamations and Martial Law Regulations which caused a hindrance to the proper discharge of their duties of administering justice and protecting the innocent from injury and injustice.

(xi) What was the Impact of Martial Law on Preventive Detention?

The laws relating to preventive detention, the Special Powers Act, 1974, and the Emergency Powers Rules, 1975, enacted during the civilian rule of Sheikh Mujib, remained in force under Martial Law. The Emergency Powers Rules did not originally contain procedural safeguards against the improper and arbitrary exercise of the power of detention as required by the 1972 Constitution of Bangladesh. It was the Martial Law government which, in August 1977, introduced certain amendments into the Emergency Powers Rules that fulfilled the constitutional safeguards in respect of preventive detention. Immediately after coming into power, the Martial Law administration declared its intention, after proper review, to release those political prisoners who had been held in preventive custody for holding political views different from those of the government in power. In fact, in order to fulfil this commitment, the Martial Law regime announced several general amnesties during the currency of Martial Law which involved the release of 10,756 political détenus, most of whom were admittedly a legacy from the civilian administration that had preceded it. Although the Martial Law government released a large number of détenus, it was not free from resorting to the politics of repression.

VI. What Assessment can be made of the 1975 Martial Law Administration in Bangladesh?

To sum up, the unnecessary interference with the powers and jurisdiction

of the civilian courts to try ordinary offences under well-established legal procedures, the arbitrary transfer of cases from the criminal courts to the Martial Law Courts, the conspicuous absence of legal safeguards to ensure a fair trial before the Martial Law Courts or Tribunals and to protect the accused from possible miscarriage of justice, the occasional abuse and manipulation of the procedures of these courts or tribunals, the misuse at times of the power of preventive detention - all showed that the Martial Law administration was far from upholding the rule of law. But if the liberal steps taken by the Martial Law regime, contrary to general expectations, were to be considered, it would give a different impression. Thus the restoration of judicial power to enforce fundamental rights, the lifting of prohibition with regard to the enforcement of most of the fundamental rights, the re-establishment of the independence of the Judiciary, the incorporation into the Emergency Powers Rules of the constitutional safeguards (including the reference to the advisory committee) in respect of preventive detention, the release of a large number of political détenus through various general amnesties - all these steps taken by the Martial Law government constituted a distinct improvement on the record of the civilian administration which had preceded it. It also compared favourably with the Martial Law administrations of 1958 and 1969 of Pakistan which had abrogated the 1956 and 1962 Constitutions, abolished fundamental rights and mullified the effect of the provisions "in law providing for the reference of a detention order to an advisory board".[25]

VII. What Recommendations may be offered for Constitutional and Legal Changes to limit possible Abuse of Power under Martial Law Regimes in Future?

From the Bangladesh experience of Martial Law already discussed,

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25. Article 7 of the Laws (Continuance in Force) Order, 1958, and Article 7(2) of the Provisional Constitution Order, 1969.

various proposals can be put forward which would contribute to the prevention or limitation of abuses of power if Martial Law is proclaimed again in future.

(i) Is There a Need for Constitutional Provisions in Respect of Martial Law?

Although the summary power conferred by Martial Law 'is occasionally essential for the safety of the community at large, and the only means of averting wholesale outrage and rapine', it is, no doubt, a 'great evil'. It is a somewhat dangerous measure to use as its declaration usually affects the ordinary rights of citizens. In this respect, the observations of Chief Justice Innes of the Union of South Africa in Krohn v. Minister for Defence[26] are of direct relevance:

> "In no respect can Martial Law be regarded as a good thing; it is at the best a lamentable necessity. It imposes a great responsibility upon the executive Government; it operates with inevitable harshness in certain cases, and it saps the political fibre of the people".[27]

Therefore, it appears that there is the possibility or risk that Martial Law might degenerate into the uncontrolled and arbitrary will of the commander. It is an evil which can become worse if it is introduced regularly. If there are constitutional and legislative provisions concerning the promulgation and administration of Martial Law, this would reduce the scope of the abuse of power by the Executive. It is worthy of note that, in France, in order to check the abuse of the power of declaring a 'state of siege' by the Executive when there is a threatened or actual invasion by a foreign army or when there is an insurrection of considerable magnitude in any part of the country, it (the 'state of siege') has been made a constitutional and legal institution, and brought under some measure of

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26. South African Law Reports, Appellate Division, 1915, p.191.
27. Ibid., p.202.

legislative control, at least in the provisions that Parliament may authorize its extension beyond twelve days. But in the Commonwealth countries, including Bangladesh, and in the United States of America, there are no statutory provisions for a crisis government of the type envisaged under Martial Law. As Charles Fairman wrote:

> "In France the declaration of a 'state of siege' and particularly the legal results consequent thereto are regulated by Statute. The 'state of siege' is a definite legal status. Quite different is the situation in the United States (and, for that matter, in Anglo-Saxon countries generally), where the law governing an exercise of martial rule is largely customary and judge-made".[28]

Like Pakistan, in Bangladesh Martial Law has become a deep-rooted cancer, for after the withdrawal of the 1975 Martial Law in April 1979, Martial Law was again proclaimed in March 1982 to implement a coup d'état which is still (in 1985) in force. In view of the fact that Martial Law has become a periodic feature of Bangladesh, it may be suggested that, following the example of France, the 1972 Constitution of Bangladesh should be amended to incorporate into it the provisions relating to the proclamation and administration of Martial Law. These provisions should attempt to eliminate the possibility of the abuse of power by the Executive officials through recourse to Martial Law. This may be done by widening the scope of judicial review, with regard to the proclamation as well as the administration of the Martial Law, both during the currency of Martial Law and after its withdrawal. It would also seem desirable to empower Parliament to determine the period during which Martial Law should remain in force.

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28. Fairman, Charles, "Martial Rule and the Suppression of Insurrection" Illinois Law Review, Vol.XXIII, 1929, p.776.

(ii) Is it necessary to establish Martial Law Courts? What should be the Jurisdiction of Martial Law Courts?

Martial Law Courts are almost an inevitable concomitant of the promulgation of Martial Law to try those offences promptly and speedily which the Martial Law Administrator has found it necessary to formulate for the purpose of restoring law and order. The jurisdiction of Martial Law Courts is, therefore, restricted to the trial of offences of causing, aiding and abetting riot, rebellion or invasion. The question of trying civil offences by the Martial Law Courts can arise only when the ordinary courts have ceased to function and, as such, civil offences cannot be tried normally. When the ordinary courts are allowed by the Martial Law regime to continue to exercise their functions, Martial Law Courts should not, in general, be given jurisdiction to try offences under the ordinary law. The greatest care should be taken to limit the jurisdiction of Martial Law Courts to the narrowest limits practical to attain the declared object of restoring law and order. In fact, a kind of practical modus vivendi should be adopted. The ordinary courts would continue to function unimpeded as far as possible and the Martial Law authorities would not interfere with their jurisdiction except for military reasons. As it was held by the law officers of the Crown, Attorney-General and Solicitor-General, Sir John Campbell and Sir R.M. Rolfe, who were called upon to give an opinion as to the legality of adopting punitive measures against the Canadian insurgents in the rebellion of 1837 to 1838:

> "It is hardly necessary for us to add that, in our view of the case, Martial Law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compels its adoption".[29]

A similar view was expressed by Robert M. King:

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29. Forsyth, William, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence, London, 1869, p.199.

> "It is, however, the duty of those enforcing Martial Law not to interfere unnecessarily with the exercise by the ordinary courts of their civil and criminal functions, in matters not affecting the conduct of the war".[30]

However, it may be suggested that in order to administer Martial Law declared for the purpose of restoring law and order, mixed courts should be set up as had sometimes been done by the British Martial Law administration in India. For example, in Malabar in 1921, during the continuance of Martial Law, three types of courts, namely summary courts[31] (consisting of magistrates), special tribunals[32] (consisting of one High Court Judge and two Sessions Judges) and military courts[33] were set up for the effective administration of Martial Law. Similarly, the Peshawar Martial Law Ordinance No.VIII of 1930 provided for the constitution of five classes of special courts - special tribunal, special judge, special magistrate, summary court and military court - to deal with the offences declared by it. It is worthy of note that although this Ordinance provided for the constitution of five types of special courts, no such court was established by the Peshawar Martial Law administration.

When Martial Law is declared in peace-time and the ordinary courts are allowed to continue their functions, the setting up of Martial Law Courts to try offenders should not arise at all although, in practice, unfortunately enough, it has come to be, in some countries, such as Pakistan and Bangladesh, an almost inevitable incident of the resort to Martial Law. It seems more appropriate that, even when Martial Law is declared with a view to restoring law and order, the existing criminal courts, instead of establishing Martial Law Courts or special courts, should be given exclusive jurisdiction to

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30. King, Robert M., "Martial Law", The Cape Law Journal, Vol.XVII, 1900, p.136.
31. The Malabar Martial Law Ordinance No.II of 1921.
32. The Malabar Martial Law (Supplementary) Ordinance No.III of 1921.
33. The Malabar Martial Law (Military Courts) Ordinance, 1921.

deal with Martial Law offences as had been done by the British Martial Law administration in India in Sholapur[34] in 1930. The Peshawar Martial Law Ordinance No.VIII of 1930 also granted to the ordinary criminal courts the limited power to try offences against a Martial Law Regulation or a Martial Law Order with the exception of those which were to be tried by the special courts created by the Ordinance. In this context, the joint opinion given by the Attorney-General and Solicitor-General, Sir John Campbell and Sir R.M. Rolfe, in January 1838 in respect of the trial of Canadian rebels by Martial Law Courts while the civil courts were open, are worthy of note:

> "...we are of opinion that the prerogative (of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors) does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the Irish rebellions of 1798 and 1803, and also of the Irish Coercion Act of 1833".[35]

A similar view was expressed by Justice Muhammad Afzal Zullah in the case of Zia-ur Rahman v. the State:[36]

> "When the Courts are open and functioning effectively under the normal law, there is no justification for establishing Special Military Courts for trial of civilians".[37]

(iii) What Procedure should Martial Law Courts adopt?

The procedure of Martial Law Courts should ensure a fair trial; it should be conducive to discovering guilt or innocence and not causing grave

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34. See Section 7 of the Sholapur Martial Law Ordinance No.IV of 1930.
35. Forsyth, William, op.cit., pp.198-199.
36. All Pakistan Legal Decisions, Lahore, Vol.XXIV, 1972, p.382.
37. Ibid., p.397.

injustices. There must be a definite charge against the accused; the accused should be given a reasonable notice of the charge; the charge must be proved by sufficient evidence especially in those cases where the sentences are capital. The accused should be given an opportunity of cross-examining and calling witnesses for the defence. The accused should not only be given the opportunity to be defended by a lawyer but every reasonable facility should be provided for the preparation of a proper defence. In this respect, the views expressed by W.F. Finlason are directly relevant:

> "There must be a fair hearing, and a reasonable opportunity for answer and defence; if these substantial rules are observed, the non-observance of the more formal or technical rules of procedure, which cannot be applicable to such exceptional tribunals (i.e., Martial Law Courts) with such an irregular procedure, can work no substantial injury or injustice to the accused".[38]

However, the proceedings of the Martial Law Courts should be reviewed by a higher authority, preferably by a court of law, before the sentence is carried into effect. The right of appeal to the High Court should be provided for, at least against the sentences of death and life imprisonment passed by the Martial Law Courts as had been allowed in Malabar in 1921 and in Peshawar in 1930[39] by the British Martial Law administration in India.

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38. Finlason, W.F., Commentaries upon Martial Law, London, 1867, p.237.
39. The Malabar Martial Law (Supplementary) Ordinance, 1921 (No.III of 1921) and the Peshawar Martial Law Ordinance, 1930 (No.VIII of 1930), which made provisions for the constitution of Special Tribunals to try any offence connected with the events which necessitated the enforcement and continuance of Martial Law, provided that in case of a sentence of death, transportation for life or for imprisonment for ten years or more, an appeal would lie to the High Court.

APPENDIX

Government of the People's Republic of Bangladesh

President's Secretariat

Proclamation

The 20th August, 1975

WHEREAS I, Khandaker Moshtaque Ahmed, with the help and mercy of the Almighty Allah and relying upon the blessings of the people have take over all the full powers of the Government of the People's Republic of Bangladesh with effect from the morning of the 15th August, 1975;

AND WHEREAS I placed, on the morning of the 15th August, 1975, the whole of Bangladesh under Martial Law by a declaration broadcast from all stations of Radio Bangladesh;

AND WHEREAS, with effect from the morning of the 15th August, 1975, I have suspended the provisions of article 48, in so far as it relates to election of the President of Bangladesh, and article 55 of the Constitution of the People's Republic of Bangladesh, and modified the provisions of article 148 thereof and form I of the Third Schedule thereto to the effect that the oath of office of the President of Bangladesh shall be administered by the Chief Justice of Bangladesh and that the President may enter upon office before he takes the oath;

NOW, THEREFORE, I, Khandaker Moshtaque Ahmed, in exercise of all powers enabling me in this behalf, do hereby declare that -

(a) I have assumed and entered upon the office of the President of Bangladesh with effect from the morning of the 15th August, 1975;

(b) I may make, from time to time, Martial Law Regulations and Orders -

(i) providing for setting up Special Courts or Tribunals for the trial and punishment of any offence under such Regulations or Orders or for contravention thereof, and of offences under any other law;

(ii) prescribing penalties for offences under such Regulations or Orders or for contravention thereof and special penalties for offences under any other law;

(iii) empowering any Court or Tribunal to try and punish any offence under such Regulation or Order or the contravention thereof;

(iv) barring the jurisdiction of any Court or Tribunal from trying any offence specified in such Regulations or Orders;

(c) I may rescind the declaration of Martial Law made on the morning of the 15th August, 1975, at any time, either in respect of the whole of Bangladesh or any part thereof, and may again place the whole of Bangladesh or any part thereof under Martial Law by a fresh declaration;

(d) this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof shall have effect notwithstanding anything contained in the Constitution of the People's Republic of Bangladesh or in any law for the time being in force;

(e) the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof, continue to remain in force;

(f) all Acts, Ordinances, Presidents' Orders and other Orders, Proclamations, rules, regulations, bye-laws, notifications and other legal instruments in force on the morning of the 15th August, 1975, shall continue to remain in force until repealed, revoked or amended;

(g) no Court, including the Supreme Court, or tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order made by me in pursuance thereof, or any declaration made by or under this Proclamation, or mentioned in this Proclamation to have been made, or anything done or any action taken by or under this Proclamation, or mentioned in this Proclamation to have been done or taken or anything done or any action taken by or under any Martial Law Regulation or Order made by me in pursuance of this Proclamation;

(h) I may, by order notified in the official Gazette, amend this Proclamation.

KHANDAKER MOSHTAQUE AHMED
President.

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