

## THE IMPOSITION OF MARTIAL LAW IN BANGLADESH, 1975: A LEGAL STUDY.

DR. M. ERSHADUL BARI

### 1. Introduction

The term 'Martial Law' in its proper sense<sup>1</sup> means 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. Therefore, it is an emergency measure and is the great law of social defence. In Constitutional Law, Martial Law finds its justification in the common law doctrine of necessity for its promulgation and continuance; all measures taken in exercise of the power of Martial

1. The expression 'Martial Law' has also been used in three other senses by various authors at different times. Firstly, in earlier times '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 a common historical origin in the law that had been administered in medieval England in the Court of the Constable and the Marshal. Secondly, the expression '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 government agencies. In this sense, Martial Law is quite outside the scope of municipal or constitutional law; it is a part not of municipal but of international law. Thirdly, 'Martial Law' is used to mean 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 with out the proclamation of Martial Law. 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. This right of the executive cannot be properly called Martial Law. 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"

Law must be justified by requirements of necessity alone, the necessity to restore law and order. Thus it can be declared in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for 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 case 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 disorders 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.

However, for the first time in the history of sovereign and independent Bangladesh, Martial Law was declared throughout the country on 15 August 1975. The purpose of this paper is to examine the legal aspect and impact of this imposition of Martial Law.

## **II. The Coup d'Etat and the Proclamation of Martial Law**

The fundamental character of the 1972 Constitution of Bangladesh, which was passed by the Constituent Assembly on 4 November and put into effect on 16 December, was changed by the Constitution (Fourth Amendment) Act, 1975, passed on 25 January 1975, during the civilian regime of the Awami League. This Fourth Amendment 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 withholding assent to 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 24 January 1980.

It may be mentioned that 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 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, 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."<sup>2</sup>

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 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

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2. Quoted in Lifschultz, Lawrence, "The Army's Blueprint for a Takeover", *Far Eastern Economic Review*, 5 Sept. 1975, p. 16 ;

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<sup>3</sup> with the 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 the 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.<sup>4</sup>

Whatever his involvement in the coup, Moshtaque in his broadcast<sup>5</sup> 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

3. The interview with Khandaker Moshtaque took place on 10 October 1984.

4. The Asian Recorder, 10-16 Dec. 1975.

5. The Bangladesh Times, Dhaka, 16 Aug. 1975.

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 it 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 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 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",<sup>6</sup>

### III. 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

6. Ibid.

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 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*<sup>7</sup> 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."<sup>8</sup>

A similar view was expressed by Justice Hamoodur Rahman in *Asma Jilani V. Government of the Panjab and another* :<sup>9</sup>

"...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

7. PLD 1959 SC 387

8. Ibid. at 439

9. PLD 1972 SC 139

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.”<sup>10</sup>

However, it seems that Martial Law was declared in Bangladesh on 15 August 1975 to meet any disturbances which might arise as a consequence 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'etat* 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*<sup>11</sup> 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'etat* . . . is outside the scope of constitutional law . . . What had happened on the 7th of October 1958, was in fact, a revolution and *coup d'etat* 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.”<sup>12</sup>

10. *Ibid.*, at 187

11. PLD 1963 Dhaka, 377

12. *Ibid.*, at 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 paper.) 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 properly described as a 'revolution' in Kelsenian terms.<sup>13</sup> In fact, it seems that the military takeover in Bangladesh was in the nature of a constitutional deviation rather than '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".

#### IV. 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

13. According to Prof. Hans Kelsen of the (Analytical) Positivist School of Jurisprudence, "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" Quoted in PLD 1958 SC 539

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 of the 1956 Constitution and Article 223-A of the 1962 Constitution of Pakistan, the Articles which enacted provision 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<sup>14</sup> 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.

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*<sup>15</sup> and *Asma Jilani*<sup>16</sup> (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.

14. Art. 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."

15. PLD 1958 SC 533

16. See *Supra* footnote 9

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*<sup>17</sup> are worth quoting :

“It may be a vain hope that the judgment of 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”<sup>18</sup>

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

#### V. 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* (office & 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

17. ( 1968 ) 2 SALR 284

18. Ibid. at 430

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.

Eventually, Khandaker Moshtaque Ahmed issued a Proclamation 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 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<sup>19</sup> and 55<sup>20</sup> and modified the provisions of Article 148<sup>21</sup> and Form I<sup>22</sup> of the Third Schedule of the 1972 Constitution to the effect that oath 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.

## VI. 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 Con-

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19. Art. 48 of the 1972 constitution relates to the election of the President of the country.
  20. Art. 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.
  21. Art. 148 provides for taking the oath of office before entering upon the office of President.
  22. Form I of the Third Schedule of the Constitution required the President to take the oath administered by the Speaker.

stitution 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.

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".<sup>23</sup> Moreover, it was stated that the First Proclamation and the Martial Law Regulations and Orders should have effect, notwithstanding anything contained in the 1972 Constitution or in any law for the time being in force.<sup>24</sup>

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*<sup>25</sup> 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 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

23. Clause ( e ) of the First Proclamation

24. Clause ( d ) of the First Proclamation

25. DLR 1978 SC 207

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 inconsistent 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."<sup>26</sup>

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 Proclamation (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 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.

## VII. 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

26. Ibid at 218

legal instruments in force on the morning of the 15th August 1975, shall continue to remain in force until repealed, revoked or amended".<sup>27</sup>

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.

### VIII. Conclusion

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. 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 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. Martial Law promulgated 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),

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27. Clause (f) of the First Proclamation.

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 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 on 15 August 1975 had any legal basis.

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, properly 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".

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.