

# Chapter 1

## Introduction

The present system of law making by an organ of the state specifically empowered to do so is of relatively recent vintage. Laws were made, promulgated and enforced in societies of which there are historical evidence and record, for at least 2500 years. However, the beginning of law making by a specialised organ which was not simultaneously the executive organ as well, is an arrangement of little more than, roughly, 300 years. Earlier laws were promulgated by Emperors and Kings or religious heads and the laws derived their normative character from the powers of those who declared these laws.

In addition to the Emperors and Kings, certain 'councils of elders or wisemen' gradually became involved in the law making process in the early middle ages. For Islamic law, the model of 'council of wisemen' and theoreticians of law in the 8<sup>th</sup> to 11<sup>th</sup> centuries were the primary law makers, although ostensibly as interpreters of the Quran and the Sunnah.

In Mughal India, the Emperors promulgated laws as 'Farmans', though from the 16<sup>th</sup> century, prominent judges, i.e., head Kazi's of the provinces, became important interpreters of laws and made rules which, using our present categories, were akin to precedents or judge-made laws. There are several compilations of such judge-made laws of the 16<sup>th</sup> and 17<sup>th</sup> centuries in not only the Mughal India but other centers of Muslim Empires of the Middle East and Central Asia.

The forms, categories and nuances of law making in various societies and epochs need not detain us here, as the purpose of this Compendium is to list the laws, their location and contents. Also, almost all the laws in force in Bangladesh were made and promulgated by specialised legislative bodies and not Emperors and Kings. We start by outlining these legislative bodies below. It, however, needs to be pointed out that in addition to the

'Legislative Laws' we have a large body of 'Personnel Laws' of Muslims, Hindus, Christians and Buddhists which are primarily religious and customary, though certain procedural aspects of these personal laws have also been 'legislated'. In the following paragraphs the history of law making authorities are outlined.

## 1. History of Law Making Authorities

The history of law making *authorities are discussed below sequentially, in three periods* i.e., Company and Colonial period, Pakistan period and Bangladesh period.

### 1.1 Law Making under East India Company and Colonial Rule (1600 - 1947)

The history of law making by a formal authority specifically empowered to promulgate laws in this subcontinent dates back to the early days of East India Company regime. As one may recall, the early Charters of the East India Company granted the Company the power of making laws and enforcing them. It was of course, as one author put it "modeled on the powers of making by-laws commonly exercised by ordinary municipal and commercial corporations".<sup>1</sup> The powers of legislation granted by these early Charters<sup>2</sup> were rudimentary and restricted, and would have been quite forgotten had the East India Company remained a mere trading company. However, history sometimes is stranger than fiction - a trading company rose to be the 'Company Government'; and the ordinary privileges of the Company now wear the halo of historical grandeur as the origin of the Anglo-Indian Codes.<sup>3</sup>

Queen Elizabeth's Charter of 1600, which set up the East India Company authorised the Company to:

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<sup>1</sup> Dharker, C.D., *Lord Macaulay's Legislative Minutes*, Oxford University Press, London 1946, p.3.

<sup>2</sup> Elizabeth's Charter of 1600; James I's Charter of 1609; Charles II's of 1669; George I's Charter of 1726 and George II's Charter of 1753.

<sup>3</sup> See above, note 1, p.3.

“ . . . make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances, for good government of the said company, and of all masters, mariners, and officers, employed or to be employed in any of their voyages, . . . and their pleasure to revoke or alter the same or any of them, as occasion may require; . . . the said laws, orders, constitutions, ordinances, imprisonments, fines, and americiaments be reasonable and not contrary or repugnant to the laws, statutes, or customs of this our realm”.<sup>4</sup>

The above legislative powers granted to the Company by Elizabeth’s Charter of 1600, and similar powers conferred on it by James I’s Charter of 1609 and 1661, were intended to be used “for good government of the said Company and of all factors, masters, mariners and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of their trade and traffic”.<sup>5</sup> Till 1726, there was hardly any change in the Company’s legislative powers. By George II’s Charter of 1726 the Governors and Councils of the three Presidencies i.e., Madras, Bombay and Bengal, were empowered to:

“ . . . make, constitute, and ordain by-laws, rules and ordinances for the good government and regulations of several corporations created, and of *the inhabitants of the several towns, places and factories*<sup>6</sup> aforesaid respectively, and to impose reasonable pains and penalties upon all persons offending against the same or any of them”.<sup>7</sup>

Such laws and penalties were to be reasonable and not contrary to the laws of England, and they were not to have any force or effect until confirmed by the Court of Directors.<sup>8</sup> The language of the Charter of George II, granted in the Year 1753 in this connection, was similar.<sup>9</sup>

<sup>4</sup> See, *Queen Elizabeth’s Charter 1600 dated 31 December, 1600*, reproduced in, *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, pp. 8-9.

<sup>5</sup> Ibid, p. 8.

<sup>6</sup> Italics for emphasis.

<sup>7</sup> Quoted from Acharyya, B.K., *Codification in British India*, Calcutta, 1914, p. 46.

<sup>8</sup> Id.

By the Charter of 1726, the Crown recognized the Company as a ruling power in respect of the several towns, places and factories that were already under its control. The Crown had no legal authority to grant such recognition because it had no sovereignty over the territories concerned, with the sole exception of Bombay. However, no Indian rulers resisted the power assumed by the Company under this Charter. The Charter of 1726 has some distinguished features. First, the legislative power granted in 1726 was applicable to the inhabitation, including Indians of the places concerned; it was not limited, as it was under the previous Charters, to the Company and its servants. Secondly, under the previous Charter, the law making power was to be exercised in England by the Court of Directors; but under the Charter of 1726 it was to be exercised in India by the Governors and Council of the three Presidencies.<sup>10</sup> The Crown thus, established in India itself a subordinate power of law making that was destined to supersede the authority in this regard vested in the Company itself.<sup>11</sup>

However, apprehensive of financial instability of the Company and certain of its gross mismanagement in Bengal, the British Parliament decided to mend matters through direct interference<sup>12</sup> by passing the East India Company Act, 1772 popularly known as the Regulating Act 1773. Section 36 of the Act enabled the Governor-General and Council of Bengal to make Rules and Regulations for the good order and civil government of the territories in their charge, but the same were not to be valid until registered in the Supreme Court with consent and approbation of that Court.<sup>13</sup> Accordingly, as far as Bengal was concerned, it was a continuation and extension of the system adopted in the Charters of 1726 and 1753 with an important change i.e., the participation of the Supreme Court in law-making through the system of registration.

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<sup>9</sup> Banerjee, A.C., *English Law in India*, New Delhi, 1984, p. 93.

<sup>10</sup> *Ibid*, pp. 93-94.

<sup>11</sup> Keith A.B., *A Constitutional History of India*, London, 1935, p. 18.

<sup>12</sup> Agrawal, R.K., "History of Courts and Legislature" in *The Indian Legal System*, Minattur, J. (ed.), New York, 1978, p. 118.

<sup>13</sup> For text of the law, see, *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, pp. 44-45.

The Regulating Act appears to have studiously avoided making any recognition of the grant of the *Dewani* to the Company, in 1765, as being a separate source of the authority of the Company to frame laws for the people of India. In exercise of the latter authority, however, Regulations had been made for the administration of justice before the passing of the Regulating Act and the Company continued to make Regulations without submitting them to the Supreme Court for approbation.<sup>14</sup>

It needs to be mentioned, first, that similar to many other 'Provinces' of Mughal India, the late eighteenth century Bengal was also 'governed' by representatives of the Mughal Empire – Nawabs of Bengal – who formally owed allegiance to the Mughal Emperor at Delhi and collected and paid taxes to the central exchequer. A number of important officials in the 'Provincial Administration' were appointed from Delhi, but the Nawab retained considerable powers in the matters of administration of criminal and civil justice. The Nawab could and did delegate judicial and administrative authorities to Zamindars in various localities. By the 'Grant of Dewani' of Bengal in 1765 to the Company, the Nawab delegated the task of collecting revenues to the Company. Under the Mughal system of decentralised governance this arrangement was not unheard of, though the scale, i.e., collecting revenues from a huge territory was. In technical administrative terms of the day, the Company became a 'Zamindar' under the Nawab. Such 'Zamindari', however, was wrested through battles and not negotiations. Further, the legislative powers granted by several Charters to the Company were, as was the practice for Chartered Companies under the British Law, primarily meant for regulating and organising the internal matters and affairs of the Chartered Companies. After the Company became the Dewan, i.e., civil – revenue administrator of Bengal, the affairs of Bengal became the affairs of the Company and as such its legislative power was deemed to extend to administration of Bengal along with that of the internal management of the Company.

Prior to 1793 there was no general Code of laws and Regulations in British India. Regulations were usually drawn without any particular form. Some of

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<sup>14</sup> Eggar, A., *The Government of India: Being a Portion of a Treatise on the Laws of India*, Rangoon, 1924, pp. 123-124.

them existed only in form of manuscript.<sup>15</sup> According to Harington, those printed were, for the most part, on detached papers without any prescribed form or order; and consequently not easily referred to, even by the officers of government, much less by the people at large, who had no means of procuring them in a collective state.<sup>16</sup> Lord Cornwallis therefore, made provisions by Regulation XLI to effect some reforms in the legislative methods and forms.<sup>17</sup> These were: (a) each Regulation was to have a title expressing its subject as closely as possible; (b) a Regulation was to contain a Preamble reciting the reasons for its enactment; (c) every Regulation was to be divided into Sections and where necessary, was to be divided into Clauses. The Sections and Clauses were to be numbered; (d) the subject of each Section and Clause was to be inserted opposite to it in the margin, as concisely as possible; (e) all Regulations enacted in a year were to be recorded in the judicial department and then numbered, printed and published.<sup>18</sup> Regulation XLI of 1793 started the process of compilation of a code of Regulations and thus the era of Regulation law came into being.<sup>19</sup> Till 1834 three independent sets of Regulations were developed in the three Presidencies. Each Presidency made its own laws and there was no system of coordination and harmonisation.

The period of legislating by Regulations came to an end in 1834 when the Government of India Act, 1833, came into force.<sup>20</sup> The said statute vested the whole of the government of India in the central authority of the Governor-General of India in Council. Section 43 gave power to that body to legislate for India generally, for all persons, courts, places and things within the British territories of India, and all servants of the Company within the Dominions of Princes and States in alliance with the Company. By Section 44 all laws were to be subject to disallowance by the Court of Directors. According to Section 45 all such laws were to have the force of

<sup>15</sup> Hamid, A., *A Chronicle of British Indian Legal History*, Jaipur, 1991, p.102.

<sup>16</sup> Harington, J.H., *An Elementary Analysis of the Laws and Regulations enacted by the Governor- General and Council of Fort Williams*, London, 1821, p.2.

<sup>17</sup> See above, note 15, p.102.

<sup>18</sup> Id, p.102. See, also, Banerjee, A.C., *English Law in India*, New Delhi, 1984, p. 93.

<sup>19</sup> See above, note 15, p.103.

<sup>20</sup> See above, note 14, p. 124.

Acts of Parliament, and the term 'Act' came to be used in reference thereto.<sup>21</sup> The Government of India Act, 1833, had centralised legislative authority in the of the Governor-General in Council depriving the minor Presidency governments of their law making powers except in cases of emergency. It had repealed the condition imposed by the Regulating Act for registration of laws in the Supreme Court.

By the Government of India Act, 1858, the governing powers of the East India Company were transferred to the Crown and were to be exercised on behalf of the Crown. In India generally speaking the powers were to be exercised through the same authorities as before, but in England, through the Secretary of State for India aided by a Council. During the period from 1858 to 1918, four statutes were passed<sup>22</sup> which had enlarged the Councils, extended their functions, and introduced new principles in their composition. The first of these, namely, the Indian Councils Act, 1861, made numerous changes in the Council machinery both at the Centre and in the Provinces.

The system of legislation from a central source exclusively, continued in force until the passing of the Indian Councils Act, 1861, which established local legislatures for the provinces of Madras and Bombay, and gave power to the Governor-General in Council to extend the provisions of the Act to Bengal and to establish similar local legislatures in other provinces. Section 23 of the Indian Councils Act, 1861, authorised the Governor General to make and promulgate Ordinances in times of emergencies, from time to time, for the peace and good governance. Such Ordinances were to have the force of laws for a time not more than six months from the date of promulgation, unless the disallowance of such Ordinance by Her Majesty was earlier signified to the Governor General by the Secretary of State for India in Council, or unless it was controlled or superseded by some law or

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<sup>21</sup> For text of the Sections 43, 44 and 45 of the *Government of India Act, 1833*, see, *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, pp. 270-271.

<sup>22</sup> The *Indian Councils Act, 1861*; The *Indian Councils Act, 1892*; The *Indian Councils Act, 1909* and the *Government of India Act, 1912*.

regulation made by the Governor General in Council under the said Act.<sup>23</sup> Thus, the term 'Ordinance' came to be used in reference thereto.

The Government of India Act, 1915 was passed with a view to consolidating the numerous Acts of Parliament relating to the Government of India. It replaced, with a few omissions, the unrepealed provisions of 47 Statutes beginning with an Act of 1770 and consolidated the law into a single statute of 135 Sections with 5 schedules. Part VI of the Act was devoted to law making under the title head 'Indian Legislation'.<sup>24</sup> Section 63 elaborated about the composition/constitution of the Indian Legislative Council while Section 65 conferred legislative powers to the Governor-General.

Thus, Section 65(1) of the Act empowered the Governor-General in Legislative Council to make laws for:<sup>25</sup>

(a) all persons, for all courts, and for all places and things within British India; (b) all subjects of His Majesty and servants of the of the Crown within other parts of India; (c) all native Indian subjects of His Majesty, without and beyond as well as within British India; (d) the government of officers, soldiers and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act; (e) all persons employed or serving in or belonging to the Royal Indian Marine Services; and (f) repealing or altering any laws for which the time being are in force in any part of British India or apply to persons for whom the Governor-General in Legislative Council has power to make laws.<sup>26</sup>

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<sup>23</sup> For text of the *Indian Councils Act, 1861*, see, *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, pp. 366-390.

<sup>24</sup> See, *Government of India Act, 1915*, sections 63-84, reproduced in *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, pp. 453-468.

<sup>25</sup> For text of the law, see, *Government of India Act, 1915*, reproduced in *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, p.455.

<sup>26</sup> The above legislative power of the Governor-General in Council was of course subject to Clauses 2 and 3 of the same Section.



Laws promulgated by the Governor-General in Council under section 65, as mentioned above, was to be known as Act and was subject to the approval of assent of the Governor-General.<sup>27</sup> Section 68 further specified that an Act<sup>28</sup> passed<sup>29</sup> by the Governor-General in Legislative Council was not valid until the Governor-general had declared his assent. He could, however, withhold assent and refer the matter to the Crown. The Crown at that juncture could give his assent or disallow the passage of the Act through the Secretary of State in Council.<sup>30</sup>

The Governor-general; under section 72 was empowered to make and promulgate Ordinances in cases of emergency in the following circumstances and manner:

The Governor-general may, in cases of emergency, make and promulgate ordinance for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council; but the power of making ordinances under this section is subject to the like restrictions as the power of Governor-General in Legislative Council to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Governor-General in Legislative Council, and may be controlled by any such Act.<sup>31</sup>

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<sup>27</sup> See, Section 68 of the Government of India Act, 1915, reproduced in *Constitutional Documents (Pakistan)*, Volume I, Ministry of Law and Parliamentary Affairs, Karachi, 1964, p.458.

<sup>28</sup> The word 'Act' was substituted for the word 'Bill' by the Part II of Schedule II of the Government of India Act, 1919. It may be emphasised that in the history of law making the word 'Bill' came to be used in reference thereto.

<sup>29</sup> The above amendment appears to make distinction between a proposed law i.e. Bill and a law duly passed (Act).

<sup>30</sup> See, Section 69 of the *Government of India Act, 1915*, pp. 458-59.

<sup>31</sup> For text of the law, see, *Government of India Act, 1915*, pp. 459- 460.

It needs to be emphasised that the power of making Ordinance was subject to similar restrictions as the power of the Governor-General in Legislative Council to make laws; and any Ordinance under this Section was subject to similar disallowance as an Act passed by the Governor-General in Legislative Council, and could be controlled or superseded by any such Act.

The Local Legislature of any province, under Section 79 of the Government of India Act, 1915 was authorised to make laws for peace and good government of the territories for the time being constituting that province. Such law making power was not absolute but subject to such limitations as specified in the proviso to Section 79.

Subsequently, the Government of India Act, 1919 was promulgated to make further provisions with respect to the Government of India which supplemented and amended the Government of India Act, 1915. Section 10 of the Act of 1919 outlined the legislative power of the local legislature, which substituted Section 79 of the Government of India Act, 1915. One important object of this revision was to limit the number of cases in which previous sanction of the Governor-General was required, and at the same time to make the statutory list of such cases complete so as to avoid continuance of the practice whereby bills not included in the list were formerly submitted for previous sanction under executive order. Section 10 of the 1919 Act provided that a provincial legislature might not, without previous sanction of the Governor-General, make or take into consideration any law on the aspects and issues mentioned in clause (a) to (i) of section 10(3).<sup>32</sup> Clause 4 of Section 10 of the 1919 Act<sup>33</sup> provided that the local legislature did not have any power to make any law affecting any Act of Parliament.<sup>34</sup>

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<sup>32</sup> See, the *Government of India Act, 1919*, pp. 524-525.

<sup>33</sup> *Ibid*, p.526.

<sup>34</sup> Parliament here means the British Parliament.

By the Act of 1919 the concept of 'Governor-General in Legislative Council'<sup>35</sup> was substituted by 'Indian Legislature'<sup>36</sup> and consequently, the law making power of the Governor-General in Legislative Council was vested to the Legislative Assembly.<sup>37</sup>

The Government of India Act, 1915 and the Government of India Act, 1919 were repealed by the Government of India Act, 1935<sup>38</sup> which was one of the most important constitutional measures passed by the British Parliament. It marked a change in India from unitary to federal system of government and set up autonomous administration in the provinces. Consequently, the Act provided for the establishment of Federal Legislature<sup>39</sup> and Provincial Legislatures.<sup>40</sup>

Subject to the provisions of the 1935 Act, the Federal Legislature was empowered to make laws for the whole or any part of British India or for any Federated State,<sup>41</sup> and a Provincial Legislature could make laws<sup>42</sup> for the province or any part thereof.<sup>43</sup> Section 100 of the Act made provisions for the subject matter of Federal and Provincial laws by providing 'Federal Legislative List',<sup>44</sup> 'Provincial Legislative List'<sup>45</sup> and 'Concurrent

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<sup>35</sup> These words were substituted by Part II of Schedule II of the *Government of India Act, 1919*.

<sup>36</sup> The Indian Legislature consisted of the Governor-General and two chambers, namely the Council of State and the Legislatively Assembly. See, section 17 of the *Government of India Act, 1919*

<sup>37</sup> For composition of the Legislative Assembly, see, section 19, *Ibid*.

<sup>38</sup> See, section 321 and Tenth Schedule of the *Government of India Act, 1935*.

<sup>39</sup> For constitution of Federal Legislature, see, Section 18, *Ibid*.

<sup>40</sup> For constitution of Provincial Legislatures, see, Section 60 *Ibid*.

<sup>41</sup> For legislative procedure of the Federal Legislature, See, sections 30-41 of the *Government of India Act, 1935*.

<sup>42</sup> For legislative procedure of the Provincial Legislature, see, Sections 73-83, *Ibid*.

<sup>43</sup> See, section 99, *Ibid*.

<sup>44</sup> See, List I of Seventh Schedule of the *Government of India Act, 1935*. The list provided 59 category of issues.

<sup>45</sup> See, List II of Seventh Schedule, *Ibid*. The list provided 54 category of issues.

Legislative List'.<sup>46</sup> The Governor-General, however had the authority, under section 104 to empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule of the Act.

At the Federation level the Governor-General<sup>47</sup> was empowered to exercise legislative powers. He could promulgate Ordinances during recess of the Federal Legislature;<sup>48</sup> and also if he was satisfied that circumstances existed which needed immediate action for the purpose of enabling him satisfactorily to discharge his functions.<sup>49</sup> Section 44 enabled him to enact Acts under certain circumstances. Thus, it appears that apart from the Federal Legislature, the Governor-General, being the executive head of the Federation could promulgate laws under three different circumstances.

Following the same pattern, at the Provincial level, the Governor<sup>50</sup> of a Province was empowered to legislate. He could promulgate Ordinance during recess of Legislature;<sup>51</sup> and under circumstances which rendered immediate action.<sup>52</sup> Like the Governor-General he was also empowered to enact Act(s) under certain circumstances.<sup>53</sup>

Under Section 102 of the Act, in the event of 'Proclamation of Emergency' by the Governor-General, the Federal Legislature had the power to legislate for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List. During the continuance of

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<sup>46</sup> See, List III of Seventh Schedule, Ibid. The list provided 36 category of issues.

<sup>47</sup> The Governor-General exercised the executive authority of the Federation on behalf of His Majesty. See, Section 7.

<sup>48</sup> See, Section 42 of the *Government of India Act, 1935*.

<sup>49</sup> See, Section 43, Ibid.

<sup>50</sup> The executive authority of the Province was exercised on behalf of His Majesty by the Governor. See, Section 49.

<sup>51</sup> See, Section 88 of the *Government of India Act, 1935*.

<sup>52</sup> See, Section 89, Ibid.

<sup>53</sup> See, Section 90, Ibid.

emergency the power of law making by the Provincial Legislature was not restricted.

Section 103 of the Act empowered the Federal Legislature to legislate for any province, if the province so desired by a resolution. Section 103 reads as follows:

If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

Apart from the specific procedures of law making as mentioned above, the Governor-General under section 104 possessed residual power to empower either the Federal Legislature or the Provincial Legislature to enact laws.

Leaving the contents, goals and impacts of the laws enacted during the colonial period aside, it can surely be suggested that this colonial law making process, particularly in consequences of the Acts of 1915, 1919 and 1935, introduced and consolidated formalism and procedural specialisation into the law making process.

### **1.2 Law Making Authority during Pakistan Period (1947-1971)**

Until 1947, India continued to be under British colonial rule. The Indian Independence Act, 1947 passed by the British Parliament on 12 July 1947 provided that from the fifteenth day of August 1947 two independent Dominions were to be set up in India to be known as India and Pakistan.<sup>54</sup> The Act indicated that the “new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935”.<sup>55</sup> Section 6 of the Act provided that the

<sup>54</sup> See, Section 1 of the *Indian Independence Act, 1947*.

<sup>55</sup> See, Section 8(2), *Ibid*.

Legislature of the new dominions will have full powers to make laws for that dominion. Section 8 of the Act envisaged that in the case of each of the new Dominions, the powers of the legislature for the purpose of making provision as to the constitution of the Dominion were to be exercised by the Constituent Assembly and reference in the Act to the Legislature of the Dominion was construed accordingly. The Constituent Assembly apart from engaging itself to Constitution making, was empowered with all the powers of the Federal Legislature as envisaged in the Government of India Act, 1935.<sup>56</sup> This meant, until the adoption of Constitution for the new Dominion, it was upon the Constituent Assembly to promulgate laws as prescribed by the Government of India Act, 1935.

Section 18 of the Indian Independence Act, 1947 laid down provisions as to existing laws. Clause 3 read as follows:

Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, as far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

In furtherance to the above, the Governor-General of Pakistan on the 14<sup>th</sup> August, 1947 promulgated the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947. Section 2 of the Order confirmed as laws of Pakistan the Act, Ordinance, Regulation, Rule (the whole or any part of the order or bye-law) which immediately before the fifteenth day of August 1947 had the force of law in the whole or any part of the territories of the Dominion of Pakistan.

On the 15<sup>th</sup> of April 1955 the Governor-General of Pakistan promulgated the Constituent Convention Order, 1955. Section 4 of the Order laws laid down the powers of the Convention.<sup>57</sup> It stated “the powers of the Legislature of

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<sup>56</sup> See, Proviso (e) of Section 8, Ibid.

<sup>57</sup> According to section 2(a) “The Convention” means the Constituent Assembly to be known as Constituent Convention of Pakistan.

the Dominion under the Independence Act shall be, for all purposes of making provision as to the Constitution of Pakistan, be exercisable by the Convention". The above Order was repealed on the 28<sup>th</sup> of May 1955 by the Constituent Assembly Order, 1955.<sup>58</sup> The Constituent Assembly, so formed under the said Order, promulgated a Constitution for Pakistan on the 29<sup>th</sup> of February 1956 to be known as the Constitution of the Islamic Republic of Pakistan which inter alia laid down the law making procedures and repealed the Government of India Act, 1935, and the Indian Independence Act, 1947.<sup>59</sup> The new Constitution, in Article 224, clearly indicated that "notwithstanding the repeal of the above mentioned enactment, and save as otherwise provided in the Constitution, all laws including Ordinances, Orders-in Council, Orders, rules, bye-laws, regulations, notifications, and other legal instruments in force in Pakistan or any part thereof, immediately before the Constitution Day, shall, so far as applicable and with the necessary adaptations, continue in force until altered, repealed or amended by the appropriate legislature or competent authority".

Following the Government of India Act, 1935, the 1956 Constitution established Federal Government and Provincial Government to be headed by the President<sup>60</sup> at the Federation and Governor<sup>61</sup> at the Provincial level. Consequently, two categories of legislatures were formed i.e., Federal and Provincial to be known as National Assembly<sup>62</sup> and Provincial Assembly<sup>63</sup> respectively, vested with the powers of making laws.<sup>64</sup> The new Constitution like its former counter part i.e., Government of India Act, 1935 outlined the legislative powers of Federal and Provincial Legislatures.<sup>65</sup> The President and the Governor of each Province could

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<sup>58</sup> See, Section 16 of the Constituent Assembly Order, 1955.

<sup>59</sup> For repeal of the said Acts, see, Article 221 of the Constitution of the Islamic Republic of Pakistan, 1956.

<sup>60</sup> Article 32, Ibid.

<sup>61</sup> Article 70, Ibid.

<sup>62</sup> Article 43, Ibid.

<sup>63</sup> Article 76, Ibid.

<sup>64</sup> See, Articles 50-68, and 83-100 respectively, Ibid.

<sup>65</sup> See, Articles 105-111, Ibid.

promulgate Ordinance when the respective Assemblies were not in session.<sup>66</sup> Further, the President had the powers to make laws for the provinces under two situations, i.e., in the event of Proclamation of Emergency under Article 191 and Proclamation of assumption of power by the Federation in case of failure of constitutional machinery in Provinces, under Article 193.

In the preceding paragraph it has been mentioned that the Constitution provided for the composition of National Assembly and Provincial Assembly for the provinces. Settings up of these Assemblies required course of action and time as well. Accordingly, so far as the law making was concerned, the Constitution took care of the situation by providing transitional provisions. Thus, Article 223 of the Constitution provided that until the first meeting of the National Assembly constituted in accordance with the provisions of the Constitution, the body functioning as the Constituent Assembly of Pakistan, immediately before the Constitution Day, shall, from that day, be the National Assembly of Pakistan. Further, Article 225 provided that until a Provincial Assembly for the Province of East Pakistan has been duly constituted under the provisions of the Constitution, the Provincial Legislative Assembly for the Province of East Bengal functioning immediately before the Constitution Day shall exercise the powers conferred, and perform the duties imposed upon the Provincial Assembly of East Pakistan by or under the provisions of the Constitution.

Within a short span of the adoption of the Constitution, on the 7<sup>th</sup> of October, by a Proclamation, the President of Pakistan General Iskander Mirza abrogated the Constitution of 23<sup>rd</sup> March, 1956; dissolved the National and Provincial Assemblies and declared the country to be under Martial Law, appointing General Muhammad Ayub Khan as the Chief Martial Law Administration. In pursuance of the Proclamation, the President on the 10<sup>th</sup> of October, 1958 promulgated Laws (Continuance in Force) Order, 1958<sup>67</sup>, which was given effect from the 7<sup>th</sup> of October.<sup>68</sup> The Order in article 2 envisaged that the “country shall be governed as nearly as may be by the abrogated Constitution” which it termed as ‘late

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<sup>66</sup> See, Article 69 and 102 respectively, *Ibid.*

<sup>67</sup> President's Order (Post-Proclamation) No. I of 1958.

<sup>68</sup> See, Article 1(2), *Ibid.*



Constitution'. The said Order, vested the power of making laws simultaneously in the President and the Chief Administrator of Martial Law giving effect to all pre-existing laws.<sup>69</sup> The Laws (Continuance in Force) Order, 1958 was followed by promulgation of the Legislative Powers Order, 1959 which further elaborated the law making authority of the President.<sup>70</sup>

On the 1<sup>st</sup> day of March, 1962, Field Marshall Ayub Khan in exercise of mandate given to him on the 14 February, 1960, enacted the Constitution of the Republic of Pakistan, 1962,<sup>71</sup> repealing the Laws (Continuance in Force Order), 1958 and the Legislative Powers Orders, 1959.<sup>72</sup> In the history of law-making, Article 242 of the Constitution, *inter alia*, defined the term 'legislature' for the first time in the following manner:

“legislature means the Central Legislature, each Provincial Legislature and any other authority or person empowered by or under this Constitution to make laws or to issue instruments having the force of law”.

The Constitution further defined Central law as meaning, “a law made by or under the authority of the Central Legislature, and includes a law made by the President”,<sup>73</sup> while Provincial law was defined as “a law made by and under the authority of Provincial Legislature, and includes a law made by the Governor of Province”.<sup>74</sup>

The 1962 Constitution, accordingly, made provisions for the composition of Central Legislature which was to consist of the President and one House to be known as the National Assembly<sup>75</sup> and Provincial Legislature for each

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<sup>69</sup> See, Article 4, Ibid.

<sup>70</sup> See, Article 4 of the Legislative Powers Order.

<sup>71</sup> The Preamble of the Constitution reads as follows: “. . . I FIELD MARSHALL MOHAMMED AYUB KHAN, . . . do hereby enact this Constitution”.

<sup>72</sup> See, Article 225 of the Constitution of the Republic of Pakistan, 1962.

<sup>73</sup> See, Article 242, Ibid.

<sup>74</sup> See, Article 242, Ibid.

<sup>75</sup> See, Article 19, Ibid.

Province which was to consist of the Governor of the Province and one House, to be known as the Assembly of the Province.<sup>76</sup>

The Central Legislature enjoyed exclusive power to make laws for the whole or any part of Pakistan with respect to any matter enumerated in the Third Schedule of the Constitution, which included as many as 49 items;<sup>77</sup> while the Provincial Legislature possessed residual power i.e., pass laws on subjects not included in the Third Schedule.<sup>78</sup> The Central Legislature also had the authority to make laws for the whole or any part of Pakistan with respect to any matter not enumerated in the Third Schedule of the Constitution. Such power was to be exercised where the national interest of Pakistan in relation to: (a) the security of Pakistan, including the economic and financial stability of Pakistan; (b) planning and co-ordination; or (c) the achievement of uniformity in respect of any matter in different parts of Pakistan, so required.<sup>79</sup> Further, if the Provincial Legislature resolved that a matter even though not included in the Third Schedule should be regulated in the Province by an Act of Central Legislature, in such a situation the Central Legislature was competent to pass law on the subject so authorised. Any law so made by the Central Legislature, could be amended or repealed by an Act of the Provincial Legislature.<sup>80</sup>

Apart from the law making authority of the Central Legislature and the Provincial Legislature as discussed above, under Article 29, the President possessed legislative powers of issuing Ordinance when the National Assembly stood dissolved or was not in session. The Governor of a Province possessed similar authority when the Provincial Assembly was dissolved or not in session.<sup>81</sup> Further, the President, who under Section 30(1) of the Constitution had the power to issue a Proclamation of Emergency, could make and promulgate Ordinance during the continuance of emergency under Article 30(4). Article 30(4) read as follows:

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<sup>76</sup> See, Article 70, Ibid.

<sup>77</sup> See, Article 131(1), Ibid.

<sup>78</sup> See, Article 132, Ibid.

<sup>79</sup> See, Article 131(2), Ibid.

<sup>80</sup> See, Article 131(3), Ibid.

<sup>81</sup> See, Article 79, Ibid.

If, at a time when a Proclamation of Emergency is in force (whether or not the National Assembly stands dissolved or is in session at that time), the president is satisfied that immediate legislation is necessary to assist in meeting the emergency that gave rise to the issue of the Proclamation, he may, subject to this Article, make and promulgate such Ordinances as appear to him to be necessary to meet the emergency, and any such Ordinance shall, subject to this Article, have the same force of law as an Act of Central Legislature.

Clause 8 of Article 30, however, emphasised that the power of the President to make laws by the making and promulgation of Ordinances under the said article extended only to the making of laws within the legislative competence of the Central Legislature.

Law making under the Constitution of 1962 continued till the Proclamation of Martial Law<sup>82</sup> on the 25<sup>th</sup> of March 1969 by General Yahaya Khan.<sup>83</sup> The Proclamation, *inter alia*, abrogated the Constitution of 1962<sup>84</sup> and dissolved the National and Provincial Assemblies.<sup>85</sup> According to Clause 5(a) of the Proclamation, all Laws and Bye-laws continued to remain in force, needless to say, subject to the Regulations and Orders made by the Chief Martial Law Administrator.

General Yahaya Khan soon usurped the office of the President along with the post of Chief Martial Law Administrator, with a view to performing all functions assigned to the President of Pakistan under the Constitution of 1962 or any other law.<sup>86</sup> Clause 3(1) of the Provisional Constitution Order 1969 provided “notwithstanding the abrogation of the Constitution . . . the State of Pakistan shall . . . be governed as nearly as may be in accordance

<sup>82</sup> For the *Proclamation of Martial Law*, See, *Dhaka Gazette* dated 25 March, 1969.

<sup>83</sup> The Preamble of the Proclamation read as follows: “. . . I, General AGHA MUHAMMAD YAHYA KHAN, . . . do hereby declare that the whole of PAKISTAN shall be under Martial Law with immediate effect and assume the powers of the Chief Martial Law Administrator . . .”.

<sup>84</sup> See, Clause 4(1) of the Proclamation dated 25 March 1969.

<sup>85</sup> See, Clause 4(3), *Idid*.

<sup>86</sup> See, Clause 3(2) of the *Provisional Constitution Order, 1969* dated 4 April 1969.

with the Constitution". Clause 4(1) further envisaged that an Ordinance "promulgated by the President or by the Governor of a Province shall not be subject to the limitation as to its duration prescribed in . . . the Constitution". Further, the President possessed power to make such provisions, by means of Order, including constitutional provisions, as deemed appropriate by him for the administration of the affairs of the state.<sup>87</sup>

Law making by an elected representative body hardly took off during the Pakistan period. Provisions for National and Provincial Assemblies were made and their legislative functions were elaborately defined and demarcated. However, rule by Martial Law thwarted any meaningful and sustained functioning of these bodies and, practically, a large number of laws during the Pakistan period was promulgated by the Martial Administrator and not representative legislative bodies.

### 1.3 Law Making Authority since Independence in 1971

The Eastern Province of Pakistan, known as East Pakistan declared itself to be an independent and sovereign state by a Proclamation of Independence dated 10<sup>th</sup> of April 1971 with effect from the 26<sup>th</sup> of March 1971.<sup>88</sup> The Proclamation of Independence vested in the President all powers of law making in the following terms: ". . . the President shall . . . exercise all the Executive and Legislative powers of the Republic . . .".<sup>89</sup> The Proclamation, *inter alia*, provided that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers due to any reason whatsoever, the Vice-President shall have and exercise all the powers, duties and responsibilities of the President.<sup>90</sup>

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<sup>87</sup> See, Clause 8, *Ibid*.

<sup>88</sup> For the Text of the *Proclamation of Independence*, see, 24 DLR (BS), 1972, pp. 1-2.

<sup>89</sup> See, *Proclamation of Independence*, dated 10<sup>th</sup> of April, 1971. For the text see, *Ibid*, pp. 1-3.

<sup>90</sup> *Ibid*.

In furtherance of the Proclamation of Independence, the then Acting President, Mr. Nazrul Islam, on the 10<sup>th</sup> of April 1971, issued the Laws Continuance Enforcement Order, 1971, which came into effect from the 26<sup>th</sup> of March 1971.<sup>91</sup> The Order provided that all laws that were in force in Bangladesh on the 25<sup>th</sup> of March 1971 shall, subject to the Proclamation of Independence, continue to be so in force with such consequential changes as may be necessary on account of the creation of the Sovereign Independent State of Bangladesh.<sup>92</sup> This was followed by promulgation on the 11<sup>th</sup> of January 1972, of the Provisional Constitution of Bangladesh Order by President Sheikh Mujibur Rahman.<sup>93</sup>

The Constitution of the People's Republic of Bangladesh was adopted on the 4<sup>th</sup> of November 1972 and came into force on the 16<sup>th</sup> of December 1972<sup>94</sup> which repealed the Laws Continuance Enforcement Order 1971 and the Provisional Constitution of Bangladesh Order, 1972.<sup>95</sup> At the same time Clause 3(1) of the Fourth Schedule of the Constitution provided that "all laws made or purported to have been made in the period between the 26<sup>th</sup> day of March, 1971 and the commencement of this Constitution, . . . are hereby ratified and confirmed and declared to have been made, exercised and done according to law".

Adoption of the Constitution inevitably resulted in vesting the law making authority to the Parliament<sup>96</sup> and to the President by means of Ordinance

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<sup>91</sup> For the Text of the *Laws Continuance Enforcement Order*, see, 24 DLR (BS), 1972, pp. 2-3.

<sup>92</sup> See, *Laws Continuance Enforcement Order*, dated 10<sup>th</sup> of April, 1971.

<sup>93</sup> For the text of the *Provisional Constitution of Bangladesh Order*, dated 11 January 1972.

<sup>94</sup> See, Article 153 of the *Constitution of the People's Republic of Bangladesh, 1972*.

<sup>95</sup> See, Article 151, *Ibid*.

<sup>96</sup> Article 65 of the Constitution reads as follows: "There shall be a Parliament of Bangladesh (to be known as the House of Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic".

when the parliament is dissolved or not in session.<sup>97</sup> Clause 3(2) of the Fourth Schedule of the Constitution, however, made it clear that:

“ . . . until the day upon which Parliament first meets pursuant to the provisions of this Constitution, the executive and legislative powers of the Republic (including the power of the President, on the advice of the Prime Minister, to legislate by order) shall, notwithstanding the repeal of the Provisional Constitution of Bangladesh, Order, 1972, be exercised in all respects in the manner in which, immediately before the commencement of this Constitution, they have been exercised”.

Clause 3(3) of the Fourth Schedule further specified that “any provision of this Constitution enabling or requiring Parliament to legislate shall, until the day upon which Parliament first meets as aforesaid, be construed as enabling the President to legislate by order, and any order made under this paragraph shall have effect as if the provisions thereof had been enacted by Parliament”.<sup>98</sup>

Law making authority took a different turn from and on the 15<sup>th</sup> of August 1975. By a Proclamation issued on the 20<sup>th</sup> of August 1975, Khandaker Mostaque Ahmed “. . . assumed and entered upon the office of the President of Bangladesh with effect from the morning of the 15<sup>th</sup> August, 1975”;<sup>99</sup> and “. . . placed, . . . the whole of Bangladesh under Martial Law . . .”.<sup>100</sup> Clause (b) of the Proclamation authorised him to “. . . make, from time to time Martial Law Regulations and Orders”. Clause (d) of the Proclamation provided that Martial Law Regulations and Orders shall have

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<sup>97</sup> See, Article 93 of the Constitution. Article 93 reads as follows: “At all time when the Parliament stands dissolved or not in session, if the president is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances (as the circumstances) appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an act of Parliament . . .”

<sup>98</sup> The number of Orders passed under the authority of these provisions are: 161 in 1972 and 37 in 1973.

<sup>99</sup> See, Clause (a) of the Proclamation dated 20<sup>th</sup> August, 1975. It may be noted that he did not declare himself to be the Chief Martial Law Administrator neither did he appoint any one.

<sup>100</sup> See, Preamble of the Proclamation dated 20<sup>th</sup> August, 1975.

effect notwithstanding anything contained in the Constitution or in any law for the time being in force. While Clause (f) 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.

The Proclamation of 20<sup>th</sup> August 1975 even though placed the whole country under Martial Law, it did not abrogate or suspend the Constitution<sup>101</sup> nor did it dissolve the Parliament. Thus, theoretically the Parliament, according to Article 65 of the Constitution had the authority to make laws along with Martial Law Regulations and Orders, which were to be declared by the President who entered the office on the 15<sup>th</sup> of August 1975. Similarly, the Ordinance making power of the President under Article 93 of the Constitution was also in place.

Law making in the above manner continued until the 8<sup>th</sup> of November 1975 when Khandaker Moshtaque Ahmed handed over the office of the President to Justice Abusadat Mohammad Sayem who also assumed the powers of the Chief Martial Law Administrator.<sup>102</sup> Unlike the Proclamation of 20th August of 1975 which provided that the Martial Law Proclamations were to be issued by the President, the Proclamation of 8<sup>th</sup> November Provided that the Martial Law Proclamations were to be issued by the Chief Martial Law Administrator. Clause (b) of the Proclamation reads as follows:

All Martial Law Regulations and Orders in force shall be deemed to have been made by the Chief Martial Law Administrator and shall continue to remain in force until amended and repealed by the Chief Martial Law Administrator.

Under Clause (c) of the Proclamation, the Parliament stood dissolved and Clause (e) provided that an Ordinance promulgated by the President shall

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<sup>101</sup> Clause (e) of the proclamation read as follows: "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, shall continue to remain in force". The Preamble of the Proclamation suspended Article 48 of the Constitution so far as it related to the election of the President.

<sup>102</sup> See, Preamble of the Proclamation dated 8 November 1975.

not be subject to the limitation as to its duration prescribed in the Constitution. Needless to say, the Constitution was not suspended. Thus, subject to Clause (e) of the Proclamation, President Justice Abusadat Mohammad Sayem continued to possess the power of making Ordinances under Article 93 of the Constitution.

On the 21<sup>st</sup> of April 1977, Justice Sayem resigned from the office of President after appointing Major General Ziaur Rahman as the President<sup>103</sup> who then assumed the power of making Ordinance under the Constitution. During the continuance of Martial Law, on 3<sup>rd</sup> June 1978, presidential election took place according to Article 48 of the Constitution. Similarly, during the continuance of Martial Law, election for the members of Parliament took place on 18<sup>th</sup> February 1979. Session of the Parliament began on 2<sup>nd</sup> April 1979 but the Martial Law was not withdrawn until the Proclamation withdrawing Martial Law was passed on the 7<sup>th</sup> of November 1979.<sup>104</sup> The Constitution (Fifth Amendment) Act, 1979 (Act No.1 of 1979) passed on the 6<sup>th</sup> of November, ratified and confirmed law making and other actions of the Martial Law authorities in the following manner:

All Proclamations, Proclamation Orders, Martial law Orders and other laws made during the period between the 15<sup>th</sup> August, 1975, and the 9<sup>th</sup> April, 1979 (both days inclusive), all amendments, additions, modifications, substitutions and omissions made in this Constitution during the said period by any such Proclamations, all orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken, by any person or authority during the said period . . . are hereby ratified and confirmed and are declared to have been validly made, done or taken and shall not be

<sup>103</sup> Under his order, the election Commission conducted a referendum of Yes-No votes on the 30<sup>th</sup> of May 1977.

<sup>104</sup> The proclamation *inter alia* read as follows: “. . . I, Lieutenant General Ziaur Rahman, B.U. President of Bangladesh and chief martial law Administrator, do hereby declare and direct as follows:

(a) at 8 p.m. on the 6<sup>th</sup> day of April, 1979, hereinafter referred to as the commencing day, Martial Law declared on the 15<sup>th</sup> August, 1975, shall stand withdrawn . . .”.



called in question in or before any court, tribunal or authority on any ground whatsoever.<sup>105</sup>

With the withdrawal of Martial Law and the Parliament coming into session, the law making functions, according to Constitution, vested to the Parliament and the President in the manner described earlier. However, this was short-lived as on the 24<sup>th</sup> of March, 1982, the country was again placed under Martial Law by Lieutenant General Hossain Muhammad Ershad who assumed and entered upon the office of the Chief Martial Law Administrator<sup>106</sup> and President,<sup>107</sup> suspending the Constitution.<sup>108</sup> According to Clause (g) of the Proclamation all Acts, Ordinances, President's Orders, Proclamations, Rules, Regulations, By-laws, Notifications and other legal instruments in force on the morning of the 24<sup>th</sup> of March 1982 continued to remain in force. The legislative powers of the Republic, according to the Proclamation (First Amendment) Order 1982,<sup>109</sup> vested in the Chief Martial Law Administrator.<sup>110</sup> Further, Clause (5) of the Schedule of the Proclamation read "the Chief Martial Law Administrator may make and promulgate Ordinance on any matter of which legislation is necessary, and any such Ordinance shall have the same force of law as an Act of Parliament". In addition, Clause (6) provided "the Chief Martial Law Administrator may make Regulations, Orders or Rules on any matter in respect of which the President could make such laws before this Proclamation".

Thus, Lieutenant General Hossain Muhammad Ershad usurped all the powers of law making through extra-constitutional means. He, *inter alia*, had the powers to revive the Constitution,<sup>111</sup> and the Constitution

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<sup>105</sup> See, Paragraph 18 of the Fourth Schedule of the Constitution of the People's Republic of Bangladesh.

<sup>106</sup> See, Proclamation of Martial Law dated 24 March 1982.

<sup>107</sup> See, Proclamation Order No. III of 1983 dated 11 December 1983.

<sup>108</sup> See, clause (f) of the Proclamation of Martial Law dated 24<sup>th</sup> of March 1982.

<sup>109</sup> Dated 11 April 1982.

<sup>110</sup> Clause (4) of the Schedule of the Proclamation.

<sup>111</sup> Clause (ff) of the Proclamation dated 24<sup>th</sup> of March 1982 provided "the Chief Martial Law Administrator may, at any time by Order notified in the official Gazette, revive the Constitution of the People's Republic of Bangladesh, either in

accordingly was revived in parts by means of various Martial Law Orders.<sup>112</sup> Consequently, under the constitutional provisions, during the continuance of Martial Law, Parliamentary and Presidential elections were held.<sup>113</sup> Even though the Parliament had its first session between 10<sup>th</sup> July 1986 to 22<sup>nd</sup> July 1986, Martial Law was not lifted until the 10<sup>th</sup> November 1986<sup>114</sup> which, coincided with the promulgation by the Parliament, the Constitution (Seventh Amendment) Act, 1986 (Act No. 1 of 1986). Section 3 of the Act read, *inter alia*, as follows:

The Proclamation of the 24<sup>th</sup> March, 1982, hereinafter referred to as the said Proclamation, and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders and Martial Law Instructions, Ordinances and all other laws made during the between the 24<sup>th</sup> March, 1982 and the date of commencement of the Constitution (Seventh Amendment) Act, 1986 (Act I of 1986) (both days inclusive), hereinafter in this Paragraph referred to as the said period, are hereby ratified and

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full or in part . . .". This Clause was inserted by Proclamation Order No. III of 1983.

<sup>112</sup> The Constitution (Partial Revival) Order, 1984 (Order No. I of 1984) dated 3 March 1984; The Constitution (Partial Revival) (Amendment) Order, 1984 (Order No. II of 1984) dated 9 July 1984; The Constitution (Partial Revival) (Second) Order, 1985 (Order No. I of 1985) dated 15 January 1985; The Constitution (Partial Revival) (Third) Order, 1985 (Order No. II of 1985) dated 5 December 1985; The Constitution (Partial Revival) (Amendment) Order, 1986 (Order No. I of 1986) dated 15 March 1986; The Constitution (Partial Revival) (Second Amendment) Order, 1986 (Order No. II of 1986) dated 17 June 1986; The Constitution (Partial Revival) (Fourth) Order, 1986 (Order No. III of 1986) dated 17 June 1986; The Constitution (Partial Revival) (Fifth) Order, 1986 (Order No. IV of 1986) dated 8 July 1986; The Constitution (Partial Revival) (Third Amendment) Order, 1986 (Order No. V of 1986) dated 8 July 1986; The Constitution (Partial Revival) (Sixth) Order, 1986 (Order No. VI of 1986) dated 3 October 1986; The Constitution (Partial Revival) (Seventh) Order, 1986 (Order No. VII of 1986) dated 9 November 1986; The Constitution (Final Revival) Order, 1986 (Order No. VIII of 1986) dated 10 November 1986.

<sup>113</sup> The Parliamentary election took place on 7 May 1986 and the Presidential election on 15 October 1986. Lieutenant General Hossain Muhammad Ershad was elected as the President. He however, assumed the office of the President on the 11<sup>th</sup> of December 1983 by Martial Proclamation No. III of 1983.

<sup>114</sup> See, Proclamation of Withdrawal of Martial Law dated 10<sup>th</sup> of November 1986.

confirmed and declared to have been validly made and shall not be called to be in question in or any court, tribunal or authority on any ground whatsoever.<sup>115</sup>

The constitutional amendment thus ratified all the legislative initiatives of the Martial Law regime. The revival of the constitutional regime inevitably resulted in vesting the law making authority to the Parliament and the President. The law making function in the usual manner under the Constitution continued until 6<sup>th</sup> December 1990. Following a mass upsurge in November 1990 President Hossain Muhammad Ershad had to resign on the 6<sup>th</sup> of December 1990. Upon his resignation the then Vice-President Moudud Ahmed became the acting President who immediately i.e., on the 6<sup>th</sup> of December 1990 resigned after appointing the then Chief Justice Shahabuddin Ahmed as the Vice-President.<sup>116</sup> Consequently, Chief Justice Shahabuddin Ahmed became the Acting President, assuming all the powers to legislate by means of Ordinance as the Parliament stood dissolved. The Parliamentary election took place on the 27<sup>th</sup> of February 1991 and the first Session of the 5<sup>th</sup> Parliament began on the 5<sup>th</sup> of April 1991.

The holding of office of the Vice-President and subsequently Acting President by the then sitting Chief Justice Shahabuddin Ahmed may be deemed to be extra constitutional as the Constitution did not provide for the Chief Justice to become the executive head of the Government.<sup>117</sup> However, Article 2 of the Constitution (Eleventh Amendment) Act, 1991, passed by the 5<sup>th</sup> Jatiya Sangsad, remedied the defect in the following manner:

The appointment of, and the administration of oath to the Chief Justice of Bangladesh as Vice-President on . . . the 6<sup>th</sup> day of December 1990, and the resignation tendered to him by the then President and all powers exercised, all laws and Ordinances made and all orders made and acts and things done,

<sup>115</sup> See, Paragraph 19 of the Fourth Schedule of the Constitution of the People's Republic of Bangladesh.

<sup>116</sup> The then Chief Justice Shahabuddin Ahmed agreed to be sworn in as Vice-President at the request of all the major political parties and at the demand people in general of the country. He actually acted as the head of the interim government with the prime purpose to hold parliamentary election.

<sup>117</sup> The legality of the appointment was never challenged or questioned before the Court of Law.

and actions taken, or purported to have been made, or done or taken by the said Vice-President acting as President . . . are hereby ratified and confirmed and declared to have been made administered, tendered, exercised, done and taken according to law".<sup>118</sup>

Law making process since the beginning of the first session of 5<sup>th</sup> Parliament<sup>119</sup> and until now has been governed under the provisions of the Constitution as discussed before.

Since the 'return to democracy' and the Parliamentary election of 1991, law making by Parliament has now continued uninterrupted for the longest period since independence. Also, since the late 1990s, law making by the President under the 'Ordinance making power' of Article 93 of the Constitution has hardly been exercised, auguring a sustained period of law making by elective representative legislative bodies.

## 2 Sources Consulted in Preparing the Compendium

In the process of preparing this compendium the authors took all possible efforts to access the text of the laws. In this process many sources were consulted. The first choice was to consult the Gazette Extraordinary, where the government publishes the laws once these are enacted. It would have been logical to begin with the Gazette of India, but it was not so done due to the non-availability of these gazettes and non-accessibility.<sup>120</sup> Thus, the Pakistan Gazette Extraordinary<sup>121</sup> (PG), the East Pakistan Gazette, Extraordinary (EPG) the Dacca Gazette Extraordinary (DG) and the Bangladesh Gazette Extraordinary (BG) were consulted as primary sources of laws.

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<sup>118</sup> See, Paragraph 21 of the Fourth Schedule of the Constitution of the People's Republic of Bangladesh.

<sup>119</sup> The first session of the 5<sup>th</sup> Parliament began on 5 April 1991.

<sup>120</sup> However, occasionally the Gazette of India was consulted. Generally speaking, the references of Gazette of India in this compendium have been drawn from any one or more of the following sources: The Bengal Code, The Unrepealed Central Acts, The East Pakistan Code and the Bangladesh Code.

<sup>121</sup> Also Part I of the Gazette of Pakistan and Dhaka Gazette for some of the Rules. See, Volume III, chapters 6 and 7.

Apart from the above primary sources where the laws are published immediately after enactment, the authors consulted authentic government sources of laws such as the Bengal Code, Unrepealed Central Acts, the East Pakistan Code, the Pakistan Code and the Bangladesh Code. The following paragraphs elaborate on these government publications relied on by the authors apart from the Gazettes referred to above.

The Bengal Code,<sup>122</sup> contain laws applicable to the then East Bengal. The Legislative Department of the Government of Bengal published its fifth edition in five volumes<sup>123</sup> in the year 1939. Any reference of Bengal Code in this Compendium refers to the fifth edition.

The East Pakistan Code (EPC) published under the authority of the Secretary to the Government of East Pakistan, Law (Legislative) Department replaced the Bengal Code.<sup>124</sup> Published in the year 1965, it contains laws between 1793 to 1959 as were in force in the East Pakistan or any part of it. It is the first and the only edition comprised of seven volumes. The first volume contains Regulations of the years 1773 to 1938 and Acts of the years 1836 to 1932.<sup>125</sup> The second and third volumes contain the Bengal Acts of the years 1864 to 1889 and the years 1895 to 1919 respectively.<sup>126</sup> The fourth volume contains Bengal Acts of the years 1929 to

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<sup>122</sup> The Bengal Code referred to in this Compendium refers to the 5<sup>th</sup> edition.

<sup>123</sup> Volume I contains Bengal Regulations between 1793 to 1833 and laws between 1836 to 1938 which includes local Acts of the Governor-General of India in Council, Local Acts of the Indian Legislature and Central Acts as modified in their application to Bengal; Volume II contains Bengal Acts between 1862 to 1889; Volume III contains Bengal Acts between 1890 to 1919; Volume IV contains Bengal Act between 1920 to 1930; and Volume V contains Assam Acts between 1907 to 1912 & Bengal Acts between 1931 to 1938.

<sup>124</sup> Fifth edition published in the year 1939.

<sup>125</sup> The various laws contained in this volume are printed as modified up to the 31 December, 1963; but the amendments effected by the Central Adaptation of Laws order, 1964 (PO 1 of 1964) and the Adaptation of Existing Provincial Laws Order, 1964 have also been taken into account in preparing the text.

<sup>126</sup> The Acts printed in these volumes are amended up to the 31<sup>st</sup> December 1962.

1930 while the fifth volume contains between 1931 to 1938.<sup>127</sup> The sixth volume contains Bengal Acts and Regulations for the period from 1939 to the 14<sup>th</sup> 1947 with the exception of certain enactments, which are spent or obsolete.<sup>128</sup> The seventh volume contains East Bengal and East Pakistan Acts, Regulations and Ordinances of the period from the 15<sup>th</sup> of August, 1947 to the 31<sup>st</sup> of December 1959.<sup>129</sup> The East Pakistan Code has been referred to by the abbreviation EPC in this Compendium.

The Unrepealed Central Acts published, by the government of India, in nine volumes in the year, 1939 and supplemented by 10<sup>th</sup> and 11<sup>th</sup> volumes in 1942 and 1944 was replaced and updated by the Central Government of Pakistan. The Government of Pakistan published Unrepealed Central Acts in twelve volumes between the 1951 to 1955.<sup>130</sup> Needless to say that it contains laws which the government of Pakistan inherited from colonial India. The Unrepealed Central Acts has been referred to by the abbreviation UCA in this Compendium.

The Pakistan Code (PC) replaces and updates the publication entitled 'Unrepealed Central Acts' mentioned above. Published in 1965, by the Ministry of Law and Parliamentary Affairs, it originally consisted of fifteen volumes covering laws in force between 1836 to 1965, to which further

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<sup>127</sup> The Acts printed in these two volumes contain amendments up to 31 December 1962 but the amendments and repeals affected by the East Pakistan Repealing and Amending Ordinance 1962 (EPO XIII of 1962) have also been taken into account.

<sup>128</sup> The laws printed in this volume contains amendments up to 31 December 1959 but the amendments and repeals affected by the East Pakistan Repealing and Amending Ordinance 1960 (EPO XXVIII of 1960) have also been taken into consideration in preparing the text.

<sup>129</sup> The enactments of this volume are printed as modified up to 31 December 1959 but the amendments and repeals affected by the East Pakistan Repealing and Amending Ordinance 1960 (EPO XXVIII of 1960) have also been taken into account.

<sup>130</sup> Volume I contains laws between 1834 to 1871; Volume II: 1872 to 1881; Volume III: 1882 to 1897; Volume IV: 1898 to 1907; Volume V: 1908 to 1910; Volume VI: 1911 to 1919; Volume VII: 1920 to 1923; Volume VIII: 1924 to 1933; Volume IX: 1934 to 1939; Volume X: 1940 to 1847; Volume XI: 1948 to 1951; and Volume XII: 1952 to 1954.

volumes were later added.<sup>131</sup> The Pakistan Code comprises of the Acts and Ordinances “made by the Centre on Central subjects; made by the Centre on Provincial subjects and applicable to both Provinces; and made by the Provinces on what are now Central subjects”.<sup>132</sup> The laws in the Pakistan Code have been chronologically published.<sup>133</sup> The Pakistan Code has been referred to by the abbreviation PC in this Compendium.

The Bangladesh Code (BC) published in 1977, by the Ministry of Law Justice and Parliamentary Affairs is the latest of all efforts towards codification of laws. The ‘Preface’ to all the volumes of the Bangladesh Code emphasises that it “seeks to present in handy volumes the amended, adapted and authentic version of *all enacted laws in force*<sup>134</sup> in Bangladesh”. The goal of bringing out “authentic version of all enacted laws in force in Bangladesh” has a long way to go as of 1 June 2002 only Volumes I to XI have been published covering the period 1836 to 1938.

Volumes I, to III of the Bangladesh Code, published on 30 June 1977, contain laws between 1836 to 1871, 1872 to 1880 and 1881 to 1890 respectively.<sup>135</sup> Volume VI<sup>136</sup> includes laws between 1891 to 1898<sup>137</sup> while Volume V and VI published on 30 April 1979, respectively, accommodate laws between 1898 to 1907 and 1908.<sup>138</sup> Volume VII and VIII<sup>139</sup> cover laws

<sup>131</sup> Volume 16 covering the year 1966, volume 17 covering laws between 1967 to 1970 while volume 19 covering laws between 1971 to 1974. So far Bangladesh is concerned, unless subsequently amended or repealed, laws which were in force on 26 March 1971 are to be considered up-to date.

<sup>132</sup> See, ‘Preface’, all the Volumes of Pakistan Code.

<sup>133</sup> Volume I: laws between 1836 to 1871; Volume 2: laws between 1872 to 1881; Volume III: laws between 1882 to 1897; Volume 4: laws between 1898 to 1906; Volume 5: laws between 1908 to 1910; Volume 6: laws between 1911 to 1919; Volume 7: laws between 1920 to 1923; Volume 8: laws between 1924 to 1933; Volume 9: laws between 1934 to 1939; Volume 10: laws between 1940 to 1947; Volume 11: laws between 1947 to 1952; Volume 12: laws between 1953 to 1957;

<sup>134</sup> Italics for emphasis.

<sup>135</sup> The laws contained in these Volumes are modified up to 31 May 1977.

<sup>136</sup> Published on 31 December 1980.

<sup>137</sup> The laws contained in these Volumes are modified up to 31 December 1980.

<sup>138</sup> The laws contained in these Volumes are modified up to 30 April 1979.

between 1909 to 1912 and 1913, respectively.<sup>140</sup> It was not until 30 June 1984 that Volume IX was published<sup>141</sup> followed by Volume X on 31 December 1985.<sup>142</sup> Volume XI was published on 31 December 1988 containing laws between 1926 to 1938.<sup>143</sup> Volume XII followed by subsequent volumes is long over due. The need for authentic codified laws has been rightly acknowledged by the 'Preface' to all the Volumes of the Bangladesh in the following manner:

Scarcity, if not absence, of legal publications to give correct and up to date text of the laws in force in Bangladesh has made it extremely difficult for courts, lawyers and others concerned not only to ascertain the current position of existing laws which have undergone extensive changes but also to keep track of the flow of new laws which are being continuously enacted. The need for a correct version of the statutes currently in force in a convenient form can hardly be over-emphasised. The Bangladesh Code is designed to meet that need.

The Bangladesh Code has been referred to by the abbreviation BC in this Compendium.

The Dhaka Law Report (DLR) has been another source for the authors for the text of the laws. However, all the enactments are not published in the Dhaka Law Report of the corresponding years. Since 1972, the DLR authority<sup>144</sup> publishes one set of report for a particular year, while in the pre 1971 years it used to publish three sets i.e., East Pakistan High Court Decisions, West Pakistan High Court Decisions and the other one containing Supreme Court Decisions and Statues. The DLR page numbers referred to in this compendium refers to the Statute part. The Dhaka Law Report has been referred to the abbreviation DLR in this Compendium.

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<sup>139</sup> Published on 30 June 1979.

<sup>140</sup> The laws contained in these Volumes are modified up to 30 June 1979.

<sup>141</sup> This Volume contains laws between 1914 to 1822 and modified up to 30 June 1984.

<sup>142</sup> This Volume contains laws between 1923 to 1825 and modified up to 31 December 1985.

<sup>143</sup> The laws contained in these Volumes are modified up to 31 December 1988.

<sup>144</sup> It's a private publication.



Apart from the above sources, some secondary materials were consulted only to access Rules and Regulations. This was done once the above sources were exhausted. The access of authors to the above mentioned Gazettes was not enough to get all the Rules and Regulations. This was so because the bound volumes of the Gazettes (year by year) as available in different libraries and personnel are not exhaustive. These bound volumes of the Gazettes were located at different libraries and personal collections as there is no centralised library for these volumes. Publishers and institutions on their own initiatives have put together these volumes and, as such, there is no guarantee that any such yearly volume contains all the enactments of that year. The authors have consulted different volumes published by different publishers, whenever possible, to eliminate to possibility of 'missing' the text of any enactment.

### 3. Organisation of the Compendium

This compendium is published in four volumes containing thirteen chapters in all. The volumes and the chapters have been logically sequenced. Volume I contain Chapters 1 to 3; Volume II contains Chapters 4 and 5; Volume III contains Chapters 6 to 9 and Volume IV contains Chapters 10 to 13.

Volume I begins with introduction needless to say Chapter I. Chapter 2 lays down the laws in operation according to chronological order i.e., year by year, while in Chapter 3 these laws have been presented in alphabetical order. This volume I, thus, contains all the laws that are in operation in Bangladesh.<sup>145</sup>

Volume II is comprised of Chapters 4 and 5. In Chapter 4, parent laws<sup>146</sup> have been placed in alphabetical order. The exclusion of the amendment laws straightway enables the reader to reach the title of the law on a

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<sup>145</sup> The possibility that a few enactments may have escaped the notice of the authors are not entirely excluded.

<sup>146</sup> The term 'parent laws' has been used to mean the laws which were enacted first on any issue or subject, as opposed to subsequent amendment/s of these laws at later periods. For further see, overview of Chapter 4 in Vol. II of this Compendium.

particular issue. Laws categorised according to subject-matter are to be found in Chapter 5. In doing so, both existing and repealed laws have been put under respective subject heads. This will give the reader an opportunity to find both present and past laws on the subject.

Unlike Volumes I and II, Volume III deals with bye-laws. These have been presented in four chapters. To begin with, Chapter 6 outlines the Rules in chronological sequence. Chapter 7, on the other hand, presents the Rules alphabetically. Regulations framed under laws and other type of bye-laws, for example, Orders have been placed in Chapter 8. Chapter 9 contains repealed bye-laws i.e., Rules, Regulations, Orders, etc.

Volume IV contains laws that are no more in force i.e., either have been repealed, expired, spent or declared to be no part of the laws of Bangladesh. This volume comprises of four chapters i.e., Chapters 10 to 13. Chapter 10 contains laws that have been repealed by subsequent laws. Chapter 11 on the other hand deals with laws that have not been repealed but have expired due to statutory period of limitation i.e., laws enacted for a given period or Ordinances passed by the president lapsing due to the fact that these were not subsequently enacted as laws by the Parliament. The laws declared to be no part of the laws of Bangladesh and the then Pakistan have been shown in Chapter 12. The British Statutes that were once in force in this territory but now stands repealed (as per as their application in Bangladesh) have been shown in Chapter 13.

#### **4. Conclusion**

Consolidating and updating laws by incorporating all the amendments into the primary text of the 'parent laws' is surely one the routine but most necessary functions of the government. Particularly, under the Rules of Business, 1996, this is the responsibility of the Ministry of Law Justice and Parliamentary Affairs. The eleven volumes of the Bangladesh Code is one, albeit, partial indication of such undertaking by the government. This Compendium, arguably, could also have been an official endeavor. Unfortunately, successive governments have not been attentive to this task of 'updating' and publishing laws, further compounding the already problematic issue of access to justice. Besides, non-availability of the

updated official texts of the laws can not but make the task of administering and dispensing justice complicated, unless members of the Bar go the extra length of keeping track of legislative activities to update the laws on their own initiatives.

This Compendium, in addition to being useful to the legal community – judges, lawyers, students, activists – may hopefully facilitate the official task of updating of our laws and that expectation was also one of the primary rationals for undertaking this endeavor.