Martial Law and the Defence of Constitutional Order in India

V. D. Sebastian*

As events in India, Pakistan and many other areas of the world show, definite ideas about the subtle points covering the execution of martial law under the common law doctrine and its possible refinements by a statutory regime are urgently necessary. The doctrine of martial law is, like those of the act of state and the inherent powers of the executive, a specially smooth patch on the slippery-slopes of constitutional law. Many who attempted to find paths in this oft-travelled area have slipped and even some veterans have fallen, as Mr. Sebastian shows in this article—Ed.

The constitutional order of a state may be destroyed by external aggression or by serious internal disorder. In federal states, the duty of defending the constitution from external aggression is generally entrusted to the federal government. Thus the defence power or war power is entrusted to the national government in the U. S. A, Australia and India. The defence of the constitution against internal disorder raises primarily a question of public order. This responsibility in federal states is generally given to the state or regional governments. But, when the disorder is too grave for the resources of the state government, the federal government can either *suo motu*, or more decorously, on request by state government or even by any other appropriate civil authority, according to the circumstances of the case, assume responsibility for its suppression and the restoration of order. Thus Art. 355* of the constitution of India casts a duty upon the government of India to protect every state not only from external aggression but also from internal disorder.

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1. Art. 355: "It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of this constitution."
Protection of Public Order by State Governments in India:

The constitution of India has included public order within the powers of the state governments in the federal division of powers. It is significant that the use of the armed forces of the union in aid of civil power for the suppression of public disorder is excluded from the power of the state governments. However, the Criminal Procedure Code, which comes under Entry 2 in the concurrent list, contains certain provisions for the use of the armed forces in aid of the civil power for the suppression of disorder. The fundamental rights to freedom of speech and expression, to assemble peaceably and without arms, and to form association or unions, guaranteed in Art. 19 of the constitution of India, could be subjected to reasonable restrictions in the interest, inter alia, of public order. Hence various provisions in the statute law of India to achieve this purpose are constitutional.

Cases of Grave Disorder:

The provisions of the ordinary law would be inadequate to meet very serious cases of disorder arising from internal disturbances or external aggression. To deal with such situations two institutions are generally employed, the martial law rule and the state of seige. Martial law is the answer of the common law to situations of grave disorder. It is based on the proposition that when the civil power in an area becomes incapable of maintaining law and order, it is lawful for all loyal citizens, including the military and the executive par excellence to use necessary force for the restoration of order. The state of siege, which is a concept of French Public Law, has been introduced in the constitutional systems of many 'civil law' countries. Its chief feature is the provision in the fundamental law or its consequential documents for the suspen-

2. Entry I, List II (State List), in the Seventh Schedule to the Constitution of India: "Public order (but not including the use of naval, military or air force or any other armed forces of the Union in aid of civil power)."

3. S. 129 of the Criminal Procedure Code empowers magistrates to disperse unlawful assemblies by the use of armed forces. S. 130 casts a duty on officers commanding troops to disperse unlawful assemblies when required by magistrates. S. 131 empowers commissioned military officers to disperse such assemblies on their own authority when public security is manifestly in danger and when a magistrate cannot be communicated with. S. 132 prohibits the institution of criminal proceedings without the sanction of the state government against magistrates, police and armed personnel and other persons taking part in good faith in the dispersal of unlawful assemblies.
sion of the fundamental rights and the powers for the setting up of special tribunals to cope up with emergencies. It is a ready made statutory code to face emergencies of disorder. The effective government passes from the hands of the civil authorities to those of the armed forces. It is necessary to clearly understand that the entire scheme is statutory in character in as much as the provisions for the proclamation of a state of seige and safeguards against the abuse of the assumed emergency powers are contained in the constitution itself.4

Article 352 of the constitution of India (in Part XVIII Emergency Provisions) provides for the President of India to make a proclamation of emergency when the security of India or any part of the territory thereof is threatened by war or external aggression or internal disturbance. While a proclamation of emergency is in operation, according to Art. 358, the limitations on state action imposed by the seven freedoms guaranteed by Art. 19 are removed. With regard to the other fundamental rights conferred by Part III of the constitution, the President of India may by order under Art. 359 suspend the right to move any court for the enforcement of those rights. These provisions are comparable to the regime known as the state of siege in civil law countries.

Though there is no express mention anywhere in the constitution about the execution of martial law, it is not advisable to proceed on the assumption that the framers of the indian constitution were unaware of the concept of martial law which had been invoked many times during the British rule of India. However, we are not left in any such doubt, for, Art. 34 of the constitution (in Part III-Fundamental Rights) empowers the Union Parliament to pass an Act of Indemnity after martial law was in force notwithstanding the Fundamental Rights.5

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5. Art. 34: “Restriction of rights conferred by this Part while Martial law is in force in any area — Notwithstanding anything in the foregoing provisions of this part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.”
Thus the constitution of India draws on the French and British experience for the suppression of grave disorder.

The reference in the marginal note of Art. 34 to restrictions on fundamental rights with no specific provision in the constitution empowering any specific authority for the proclamation of martial law has raised some interesting questions. Before examining some of these issues, it is necessary to understand the position in the common law as expounded by the courts in England, as martial law was imported into India during the British rule.

**Martial Law in England:**

From a survey of the various reviews on the subject, the position of martial law in England may be briefly stated as follows:

Martial law denotes the system of legal relations which arise between the military and the civilian subjects of the king in time of insurrection or civil war. The military authorities may in such a case, with the assistance of the civil population, do all that are necessary, including the use of force, to restore order. During the warlike operations for the suppression of disorder, the courts of law will not interfere with the actions of the military authorities. But once peaceful conditions are re-established, the existence of disorder as a question of fact, and the justification based on reasonable necessity for the measures adopted to suppress the disorder, could be enquired into in judicial proceedings. It is, however, usual to pass an Act of Indemnity to validate all things done in good faith to prevent a detailed judicial enquiry into the justification for each act, and to protect the persons concerned from liability under the ordinary law. An Act of Indemnity might also sometimes provide for ex-gratia compensation to innocent victims who suffered injury.

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what state of facts the judiciary will decide that a state of civil
disorder justifying the introduction of martial law existed.
That the civil courts are sitting in some areas or for some
purpose is not conclusive that such a state of disorder did not
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It is also possible that martial law may be brought
into operation in places outside the area of actual conflict.
"There may be a state of war at any place where aid and com-
fort can be given effectually to the enemy having regard to the
modern conditions of warfare and means of communication."
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Since the justification for martial law is the need to defend
the legal order, logic would seem to suggest that an imminent
emergency would also justify the resort to martial law. But
there seems to have been no such case. In any case the grant
of statutory powers to meet threatened emergencies makes it
perhaps needless to consider this point further.

A proclamation of martial law is neither an authority for,
nor a justification of, the measures adopted by the armed
forces. Nor is it a necessary condition for the legality of a
martial law regime. A proclamation is only a convenient notice of
assumption of absolute power. It does not add to the powers
of the authorities in the suppression of disorder. Martial law
may be introduced if the state of affairs so warrant it, even
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if a proclamation, and not a state of emergency, is the only
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the disrupters of peace before firing or other direct action is
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It is important to note that the scope of martial law extends
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Though there is no express mention anywhere in the constitution about the execution of martial law, it is not advisable to proceed on the assumption that the framers of the Indian constitution were unaware of the concept of martial law which had been invoked many times during the British rule of India. However, we are not left in any such doubt, for, Art. 34 of the constitution (in Part III-Fundamental Rights) empowers the Union Parliament to pass an Act of Indemnity after martial law was in force notwithstanding the Fundamental Rights.5

4. For a brief comparative study see "Martial Law and the State of Siege" by Joseph Minattur; (1969) II S. C. J. 43.

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writers on the subject that the courts-martial or the tribunals by
which martial law is administered are not courts of law in
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able to the jurisdiction of the ordinary courts. It has been stated that:

“They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War. On the other hand, if they do so proceed, they are not protected by them as members of a real court martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War.”

There is a difference of opinion as to the true basis of martial law in England. One view is that it is based on the royal prerogative. To this it is objected that the Petition of Right, 1628, has denied the prerogative of executing martial law within the realm. But as Stephen has pointed out, the practice forbidden by the Petition of Right seems to be that of “resort to martial law as a mode of punishing rebellion”, but not its employment as a means of facing and suppressing rebellion. The other view is that martial law is based on an independent rule of the common law. Its basis is the inherent right of self-preservation available to a community as in the case of an individual. Pollock has supported this view. However, according to Keir and Lawson one aspect of martial law may still be best based on the royal prerogative. This is the right not to be interfered with durantebello which according to them belongs exclusively to the regularly constituted military forces. It would not according to them avail any purely private organisation assembled for the purpose of suppressing disorder. As pointed out by Markose, the king has as part of his prerogative in the

9. Clifford and O'Sullivan (1921) 2 A. C. 570.
11. Ib. at 210
12. 18 L. Q. R. 152 at 156.
13. Keir & Lawson, op. cit., pp 231-32 The unspoken object of this rendering of the matter by the learned Oxford professors, it is presumed, is to withhold legitimacy to any ad hoc private army that might operate in the guise of executing martial law without accepting the leadership of the established army.
original sense of that term, the first right to suppress a disorder and, if his efforts are successful, the subjects will help him best by obeying the behests of his commander. This also stands to common sense, as in the absence of unity of command, the efforts at suppressing disorder may result in greater confusion. Hence, even if the second view as to the basis of martial law is adopted, at least the primacy of the armed forces may still be traced on the royal prerogative. But this approach, it has to be observed, does not make any change in the substance of the doctrine of martial law as individual self-defence writ-large. Under the common law when martial law has to be executed, if the armed forces of the government established by law are available, they shall take charge of the operations; but still, they also will be subjected to the common law liability of proving that the force they used was reasonably necessary to repel the force that came against them, unless an Act of Indemnity was passed. It is also to be clearly understood that it is assumed here that the civil disorder spoken of is an ordinary disorder brought under control by the legitimate government or the public with or without army leadership. If a civil war or major rebellion, on principle, erupts, the army and the government might also be imagined to be playing the tyrant. In such cases the only test of ultimate legitimacy is ultimate victory. But we are not at that question here.

**Martial law in India before the Constitution**

The early charters issued to the East India Company for India during the British period contained provisions for executing martial law. But the scope of such martial law was limited, it seems, to the maintenance of discipline among the armed forces permitted to be maintained by the company. After the company established itself as a territorial power in India and after the British Parliament passed statutes to regulate the Company’s government of Indian territories, one finds the power to establish martial law given by regulations framed under statutory powers. Thus the famous Bengal State Offences Regulation, 1804, (X of 1804) (commonly referred to as the Martial Law Regulation) and the Madras Regulation VII of 1808 empowered the establishment of martial law “while the British

Government in India shall be engaged in war with any Native or other power, as well as during the existence of open rebellion against the authority of the government.” These regulations also authorised the trial by courts-martial of persons taken in rebellion. In a circular issued on 11th April 1805 by the then Governor General of India (the Marquis of Wellesley) explaining the scope of Regulation X of 1804, it was directed that “if any person or persons, charged with any of the overt acts of rebellion specified in Regulation 10 of 1804, shall be apprehended by any military officer, when not in the actual commission of offences of that description, they are to be delivered over by the military to the civil power” for bringing them to trial according to the ordinary procedure of criminal law. When courts-martial were held in Cuttack during 1817-18 for the trial of certain persons, Spankie, the Advocate-General of Bengal, gave his opinion that the intention of Regulation X was that only persons taken in the actual commission of an overt act of rebellion or taken in the act of openly aiding or abetting the enemies of the state or taken in open hostility should be tried by courts-martial. The object of martial law was thus explained in para 38 of his opinion:

“The object of material law in the trial of offenders under it, is justly stated in the Regulation X of 1804, to be immediate punishment, for the safety of the British possessions and for the security of the lives and property of the inhabitants thereof.

It is, in fact, the law of social defence superseding under the pressure, and therefore under the jurisdiction of an extreme necessity, the ordinary forms of justice Courts-martial under the martial law, are invested with the power of administering that prompt and speedy justice in cases presumed to be clearly and indisputably of the highest guilt. The object is self-preservation by the terror and example of speedy justice; but courts-martial which condemn to imprisonment and hard labour belie the necessity under which alone the jurisdiction of courts-martial can lawfully exist in civil society.”

16. Notes on Bengal State Offences Regulation, 1804, pages 24 & 25 in “Laws Affecting the Rights and Liberties of Indian people”, compiled and annotated by Akshaya K. Ghose, published by Mohun Brothers, Calcutta, 1921. For an interesting collection of material on martial law in general, and on various instances of martial law in India up to 1919 in particular, refer to pp. 13-74 of this compilation.

17. Ib. at 34.

18. This sentence, it is suggested, is a beautiful definition of the common law martial law.
While dealing with martial law in England it was pointed out that according to the common law concept of martial law, punishment for crimes was never within its scope and the so called punishments by courts martial was only part of the scheme of suppressing disorder by the use of force. Why the above opinion refers to martial law for the immediate punishment of clear cases of guilt is because the Regulation of 1804 authorised such trial and punishment modifying to that extent the common law concept of martial law. Throughout the British period it was the "statutory martial law" of the above type that was employed in India except in Sind in 1942 (which is considered below) and in Sholapur before the "statutory" variety was established.

Before the assumption of the government of India by the British Crown in 1858 there were many other instances of martial law in India. Thus martial law was proclaimed in Cuttack (1817-18), in Vizagapatanam and Palkonda in 1832, in Kimedi in 1833, in Gumsur in 1835, in Savantawadi in 1844 and in various other places in 1857 following the Mutiny.19

After the Government of India Act, 1858 was passed and the British Crown assumed direct responsibility for the Government of India, the Indian Councils Act, 1861 authorised the Governor-General to promulgate ordinances having the force of law in cases of emergency.20 The ordinance-making power was continued by the various Government of India Acts.21 It was by exercising the ordinance-making power that martial law was established in the Punjab in 1919, in Malabar in 1921 and in Sholapur in 1930. The martial Law Ordinances modified the common law concept of martial law by authorising punishment of offenders by commissions or special tribunals.22

Common law martial law in India

While statutory martial law, which had the advantage of modifying the traditional concept of martial law to suit the needs of particular situations, seems to have been the rule during the British administration in India, common law martial law was

19. Minattur, op. cit., p. 16.
22. For a survey of these ordinances see Minattur, op. cit., pp. 17-39.
enforced in Sind in 1942. In Sholapur, before proclamation could be issued, martial law had to be executed. This was also of the common law variety.\(^{23}\) Why the statutory powers were not exercised in the case of martial law in Sind in 1942 is not clear. Alan Gledhill has referred to the decision of the Madras High Court in \(\textit{re Govindan Nair}\)\(^{24}\) arising from the martial law administration in Malabar in 1921 to the effect that if a summary court sat outside an Administration Area to try offences committed within the area, it had no jurisdiction and stated that “The modern practice has therefore been to proclaim martial law, and enforce it without resort to legislation.”\(^{25}\) Except in two instances above referred to, all other instances of martial law operation in India were under statutory provisions. Therefore it was wrong to say that the “modern practice” was to execute the common law variety of martial law. Further, why statutory martial law could not have achieved the same result and how martial law without resort to legislation would better achieve it, is not made clear. Of course, the execution of martial law under a written law has its own demerits as \(\textit{In re Govindan Nair}\),\(^{26}\) illustrates. Still, a previous well drafted statutory martial law could be made amply flexible. An ordinance\(^{27}\) issued after the termination of martial law in Sind (1942-43), indemnified the servants of the Crown and all persons from liability for all acts done in good faith in pursuance of martial law and confirmed the seizure and destruction of property and all sentences passed, including those passed, for offences committed before the martial law came into operation, by the martial law courts whether such courts sat within or outside the martial law area.

**Martial law after the Constitution of India came into force**

We have seen that during the British Rule both statutory martial law and common law martial law were applied in India

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23. cf., Marpese, \(\textit{op. cit., p. 22}\) and \(\textit{Channappa Chandirappa v. Emperor, A. I. R. 1931 Bom. 57}\). Therefore the statement of Shukla in his \(\textit{Commentaries on the Constitution of India, (5th Ed., 1960)}\) at 175; “In the recent past in India martial law has been several times applied but action has always been authorised by express legislative enactment”, requires reconsideration.

24. I. L. R. 45 Mad 922. (1922)

25. Alan Gledhill, \(\textit{Fundamental Rights in India, Stevens & Sons Ltd., 1955, p. 122}\).


27. The Martial Law (Indemnity) Ordinance, 1943 (XVIII) of 1943.
and that it was the former one that was resorted to in a majority of cases. It is now necessary to find out whether either or both of these two varieties of martial law have continued in force after the constitution of India came into force.

Statutory martial law

Article 372 of the constitution of India continues “all the laws in force” at its commencement and not repugnant to it. Following Gledhill, it has been stated that “Bengal Regulation X of 1804...........was part of the law of the land when the constitution came into force.”

But the Special Laws Repeal Act, 1922 (Act IV of 1922) had repealed Regulation X of 1804.

There seems to have been no other legislation, which empowered government to declare martial law, which could be continued under Art. 372 of the constitution. Therefore there was no enacted provision covering martial law capable of being continued under Art. 372.

But if parliament wants to pass a legislation providing for statutory martial law, what is the power under which it may be done? A view that “if the parliament seeks to proclaim martial law, it may use its residuary power under Entry 97 of List I”, has been objected to in the following words:

“Some writers have surmised that it (the power to proclaim martial law) is included in the residuary powers. They appear to be apparently unconvincing because, the declaration of martial law is essentially an executive act and not a legislative function.”

Here the learned writer is confusing between common law martial law and statutory martial law or more correctly what may be called statutory provision for a ‘state of siege’ as the French would call it. When one is discussing the basis in the Indian constitution for the promulgation of a code for meeting insurrection or rebellion one has necessarily to find out the specific provision on which he can build his law. Further, the above objection does not appear to be valid for the following reasons. It is not correct to say in this context that declaration of martial law is essentially an executive act. If the legislature wants to
regulate the use by the executive of martial law, a question about the source of the legislative power would arise. In such a case it would be necessary to locate the power to legislate with regard to martial law in the provisions of the constitution. Again, as the executive power has been conferred by the constitution by reference to legislative power, the source of the legislative power will have to be determined first before the source of the executive power to declare martial law can be located.

A more pertinent doubt has been raised about the power to proclaim martial law being found in the Union's residuary power. "There is no specific entry in the three Lists relating to this subject (Power to proclaim martial law). If it is held that the matter is covered by the residuary entry 97 of List I, Parliament alone will have the exclusive power to proclaim martial law." The question whether the states in India may proclaim martial law is examined at a later stage in this article.

It is suggested that the correct view is that the power to legislate with regard to martial law falls within Entry I, List I, which provides for the defence of the whole or part of the territory of India. Art. 352 of the constitution also makes it clear that the power to defend the territory of India or a part of it exists not only against external aggression but also against internal disturbance. Art. 355 of the constitution of India also would seem to support the above view.

Common law martial law

While referring to martial law in England it was pointed out that there is a conflict of opinion as to the true basis of martial law, viz., whether it is based on the royal prerogative or an independent rule of the common law, and it was then observed that the latter is the better view. Since India is a Republic, a martial law based on prerogative is out of the question. It is therefore necessary to see how far the common law rule permitting martial law has become part of the law of India.

32. Arts. 73 and 162 of the constitution of India.
33. Shukla, op. cit., 142.
As stated earlier, Art. 372 of the constitution continues all the laws in force in the territory of India immediately before its commencement, and not repugnant to it, until altered by competent authority. This provision embraces not only the statutes in force at the date of the constitution but also personal and customary laws and the common law principles applied in India by Indian decisions. Minattur has stated that the common law power of proclaiming martial law as part of the law of India has been recognised by Indian courts. The case cited in support of this view is Channappa v. Emperor, a case which arose out of the martial law in Sholapur in 1930. In this case, though martial law was imposed from 12th May 1930 without any statutory authority, an Ordinance issued on 15th May by the Governor General under S. 72 of the Government of India Act, 1919, while conferring statutory power to enforce martial law, also validated the regulations issued, the orders made, and the sentences passed before the statutory proclamation. From the point of view of defence of the army personnel involved it is possible to include this also as an instance of statutory martial law; but it is more in consonance with the classical theory to hold that Ss. 10 & 11 were only indemnity provisions for the common law martial law that was in fact executed between 12th and 18th of May 1930. But let us suppose that Ss. 10 & 11 of the Sholapur Ordinance engulfed the common law martial law regime of 12-17th of May also. Still it proves that despite the existence of the most fool-proof, pre-fabricated, state of siege statutory code, human situations still require a doctrine of common law martial law.

Common law martial law was proclaimed in Sind in 1942 as stated earlier. There does not appear to be any judicial decision recognising the principle of common law martial law which may be said to have been continued under Art. 372 of the constitution. Of course, when a state practice evidences a rule of law, a judicial decision is not to be demanded.

There is, however, a view that every rule of English common law which includes principles of English Public Law.

37. A. I. R. 1931, Born. 57.
38. Ss. 10 and 11 of the Ordinance quoted in A. I. R., 131 Bom. 657 at 69.
Law not inconsistent with the Indian constitution has become part of the law of India. It has been stated:

"It was to the reception of the common law, under the doctrine of justice, equity and good conscience, that the principles of public law that were enforced by the company's courts owe their origin. It was continued after 1865 by the recognition given to it in clauses 20 and 21 of the 1865 Charter."

If this view is correct there may not be any difficulty in finding a basis for common law martial law in India today. But the decision of the Supreme Court in *Superintendent and Legal Remembrancer v. Corporation of Calcutta* seems to have proceeded on the basis that the common law of England had legal force only in the three Presidency Towns of India. Therefore to base the case for non-statutory martial law in India on the received common law may not be free from difficulty.

**Non-statutory martial law in the absence of the common law rule**

Even if the English common law rule supporting martial law is not available, a non-statutory martial law may be justified on the basis of the need to defend the legal order against forced overthrow. A legal system is in the last resort based on force. Until the final triumph of reason, if ever it is possible, when force can be completely eliminated, a legal order will be supported by a mixture of legal power based on the rule of law and merely dominating or despotic power based on force. The need for resorting to such

40. A.I.R. 1967 S.C. 997 at 1007. The observation is clearly not necessary for the decision of the case. The real ratio of that case should have been that a public health statute carries a necessary implication that it has to be universally obeyed by all, including public authorities.
41. Stone, *Social Dimensions of Law and Justice*. "While the contrast between despotic power and "legal power" of the democratic type is itself clear, it is mistaken to suppose that any concrete society ever manifests only one kind... even in legal systems which are models of the rule of law, tempering power with socio-ethical approval, elements of mere domination remain. The history of state immunities from liability or legal process shows many examples. The law of prerogative, statutory emergency power, the judicial contempt power; martial law and much of the law relating to national security yield many more." pp. 625-26.
Despotic power has been recognised by the courts as one of the fundamental facts for the continued existence and working of the legal system even in the absence of a specifically formulated rule to that effect. There must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent. Martial law may be based on one such ultimate principle. In Hart's concept of law as a system comprised of primary rules of obligation and secondary rules of recognition, adjudication, and change, a provision that martial law may be enforced, when necessary could be accorded the status of a secondary rule. In this view, the executive, primarily responsible for defending the legal order, has, as part of its inherent power, the power to execute martial law. It is however true that, instead of leaving it to be inferred from the fundamental facts about the existence of the legal order, it may be better to have a formulated rule regarding martial law in India.

Can States declare martial law in India?

In the United States of America, martial law may be enforced both by the national and state governments. Thus speaking about "preventive martial law" (as distinct from punitive martial law which is equivalent to military government) Crowin has said: "It may be established whenever the executive organ, state or national, deems it to be necessary for the restoration of good order." Unlike in India, the states in the U.S.A. have got the right to maintain militia though always subordinate to the power of the Congress to raise and support armies.

As stated earlier, the constitution of India has given the defence power to the union. "Public Order" and "Criminal

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42. The most recent and wellknown decision is that of the Supreme Court of Pakistan recognising the constitution promulgated by the first dictator of that country dissolving the Constituent Assembly.


44. Hart, The Concept of Law, Ch., V and Passim.


46. Ib. at 73.

47. Entry I, List I of the Seventh Schedule to the Constitution of India.
Law” are respectively in the state and concurrent lists. But from these heads of power the use of naval, military, or air force, or any other armed forces of the union in aid of civil power, is specifically excluded. Further, Art.35 of the constitution has denied to the legislature of a state the power to pass an Act of Indemnity under Art.34 after martial law has been in force in any area. From these provisions it may be stated that the constitution of India does not envisage legislation on martial law by a state. But it has to be remembered that the concept of martial law in the common law is that it is nothing but the individual right of self-defence enlarged. Every citizen has a duty, nay a right, to defend his country against civil disorder. A district collector will certainly be guilty of grave dereliction of duty if he stands with folded hands when, within his territorial jurisdiction, public order has wholly broken down entailing loss of life and property. A state may no doubt seek the assistance of the union to put down the disorder. But much damage may be done before the union comes to the rescue of a state in the performance of its duty under Art. 355 to protect states from internal disorder. Therefore the better view is to state that every public authority, including a constituent unit of the union of India, namely, a state, has the right to execute martial law when the conditions precedent are fulfilled. In a federal system, especially in India with the splinter party system, the power of passing an Act of Indemnity cannot be given to a state. The need for uniformity in the possible limitation on fundamental rights in the interest of the operation of martial law would also point to the reservation in the hands of the union authorities of the power to pass an Act of Indemnity. Parliament will stand behind a bonafide execution of martial law by state authorities. And what if the parliament in any partisan view refuses to pass an Act of Indemnity? The courts will certainly not forsake a state or its instrumentality which suppressed a disorder. Except in very obvious cases of excess the courts will not find a use of force beyond the need of the occasion to attract any liability.

The armed constabulary available in the state can be legitimately mobilised for the execution of martial law under the auspices of the state. The existing provisions of the Criminal Procedure Code providing for the aid by the armed forces for the suppression of disorder are to be examined to see whether

48. Entry I of List II, and Entry I of List III.
they require enlargement so as to create a statutory martial law (i.e., the state of siege variety) regime for the states also. Or in the alternative, the union parliament may pass a martial law statute in exercise of its legislative power, and delegate to the states, with adequate conditions and safeguards, the power to operate martial law. Art. 258 of the constitution provides for the conferring of powers on the state authorities by a law made by parliament in exercise of its legislative authority. It is needless to point out that such a state-martial law code could always be subordinate to, and liable to be controlled by, the union government.

Martial Law and the Proclamation of Emergency

Is it necessary that a proclamation of emergency under Art. 352 should first be issued before martial law is enforced? It is stated:

“For an effective scheme to enforce martial law, the necessary steps would, therefore, appear to be: (1) Proclamation of emergency under Article 352; (2) suspension of Art. 19 under Art. 358; and (3) suspension under Art. 359 of the right to move the courts to enforce a fundamental right.”

Another writer has suggested that a proclamation of emergency under Art. 352 should be interpreted as a proclamation of martial law and that the tribunals sitting under the Defence of India Act should be treated as those sitting under martial law as, otherwise, the parliament will have no power to pass an Indemnity Act after a proclamation of emergency has been in force.

As has been stated earlier, a proclamation of emergency and suspension of fundamental rights are akin to the French “State of Siege.” This is different from martial law, the common law’s answer to an emergency. There is no reason why for the coming into operation of one the other also should be invoked. There may be occasions when both will have to be pressed into service for the protection of the legal order. But if the disorder is confined to a particular place, there is no reason why a proclamation of emergency should first be made before resorting to martial rule for its suppression. Seervai has stated:

“If a rebellion or revolt in a place can be put down by the use of the Forces without issuing a proclamation of emergency under Art. 352, it is submitted that there is nothing in the Constitution which requires such a proclamation to be issued. One of the reasons for this submission is that before the machinery of issuing such a proclamation can be set in motion, grave and irreparable damage may be done if in a sudden emergency prompt action is not immediately taken to meet force with force.”

It is suggested that this is the correct view and the source of power is the common law martial law implicitly incorporated in Art. 34.

There seems to be no need to construe a proclamation of emergency as a declaration of martial law. It has been submitted elsewhere that even without any such strained construction, the parliament in India has got the power to indemnify the action taken under the (supposedly) invalid provisions of the Defence of India Act, 1962, although the Indian constitution contains a Bill of Rights and proclamation of emergency has not been mentioned in Art. 34.

Martial Law and Act of Indemnity

What is the function of an Act of Indemnity which has been passed as a general rule after martial law has been in operation? For the successful operation of martial law many drastic steps which might abridge the ordinary rights of persons are called for. When an Act of Indemnity prevents a court of law from entertaining suits of persons aggrieved by the execution of martial law an impression is created that the function of the Act of Indemnity is to legalise illegalities. While discussing the relation between rule of law and the sovereignty of parliament, Dicey observes:

“There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must then break the law and trust for protection to an Act of Indemnity.”

If this remark is read ignoring the context in which it is made and ignoring what Dicey has said elsewhere on the

scope of martial law in England, one may be led to conclude that Dicey held the view that an Act of Indemnity primarily legalises illegalities. In fact in the chapter on martial law Dicey states:

“If by martial law be meant the power of the government or of loyal citizens to maintain public order at whatever cost of blood or property may be necessary martial law is assuredly part of the law of England.”

Again,

“Officers, magistrates soldiers, policemen and ordinary citizens .... each and all of them are authorised to employ so much force, even to the taking of life as may be necessary for that purpose .......”

Hence whether any one engaged in executing martial law committed any illegality by exceeding the use of necessary force has to be proved in a court of law. The function of an Act of Indemnity is to disarm the courts by preventing enquiry into the justification for the acts done in executing martial law. Dicey’s observation in the chapter on the relation between rule of law and parliamentary sovereignty quoted above can then be justified in the light of the rule regarding the burden of proof, i.e., the point that the riot-quellers need not show that the force they used was justified. It is this vital shifting of position which depends on the availability or otherwise of an Act of Indemnity which Dicey wanted to bring out by his observation quoted earlier.

One particular reason for the view that an Act of Indemnity legalises illegalities is the scope of ‘necessary force’ that may be employed for the operation of martial law. According to one view only the acts of coercion done within the theatre of actual disturbances are permissible. Acts done outside the area of disturbance are in the first instance illegal and have to be legalised by an Act of Indemnity. Dicey has been criticised for holding such a view. Pollock’s criticism of the ‘once favoured doctrine’ that extraordinary but necessary acts in time of war or rebellion, outside military law proper, were all in the first instance illegal and that it might be a political duty to commit unlawful acts and rely on the legislature’s grace for a

54. Ib. at 290.
55. Ib. at 289.
56. See the review of the Sixth edition of Dicey in (1903) 19 L.Q. R. pp. 230-231.
subsequent Act of Indemnity presumably refers to views supposedly held by Dicey. It is submitted that this criticism is without a "sound basis. There is nothing to show that Dicey ever maintained that the test of necessary force could not be a flexible one adapted to the changing conditions of warfare and disorder. Correctly understood, as explained above, Dicey's view of the scope of an Act of Indemnity is the same as that expressed by Pollock:

"An Act of Indemnity is a measure of prudence and grace. Its office is not to justify unlawful acts ex post facto but to quiet doubts, to prevent vexatious and fruitless litigation......." 58

C. K. Allen's remark that Acts of Indemnity to validate measures for public safety in time of emergency do not add anything to common law rules concerning martial law 59 is also similar to Dicey's views correctly understood.

When an Act of Indemnity (which generally protects only measures taken in good faith) draws a legislative curtain over martial law activities, there is no need to justify the things done under the doctrine of necessity. Some acts so protected might be in excess of strict necessity but nevertheless done in good faith. But these acts are at worst potentially illegal, and until a judicial finding that they are so in law, which an Act of Indemnity prevents the courts from making, it cannot be said in fact that, there has been any illegality. In England since the parliament is sovereign there is no obstacle to the passing of such an Act of Indemnity. The position in India may seem to present difficulties in view of the fundamental rights in the constitution which are limitations on legislative power.

Act of Indemnity under the Indian Constitution

As stated earlier, Art.34 of the constitution empowers the union parliament to pass an Act of Indemnity after martial law has been in force. This Article was not in the draft constitution. 60 From the debates of the Constituent Assembly it is seen that Ambedkar thought that, in the absence of a provision as in Art.34, the operation of martial law would be

57. Pollock op. cit. 156
58 Pollock, op. cit. 157.
59. Allen, Law in the Making (7th Ed. paper back 1964) at 486.
60 Vide page 1 of the tabular statement showing Articles of the constitution of India with corresponding clauses in the draft constitution P. L. No. 6.
difficult in view of the fundamental rights guaranteed in Arts. 20 (1)\(^6\) and 21\(^6\) of the constitution. Some writers have also expressed the view that the express power conferred by Art. 34 to indemnify and validate acts is necessary, for otherwise any Act of Indemnity following the termination of martial law would be void under Art.13 as violating fundamental rights.\(^6\) The true scope of an Act of Indemnity particularly vis a vis the fundamental rights therefore requires attention.

The provision in Art.34 of the constitution enabling the parliament to pass an Act of Indemnity seems to have been made on the view referred to above that it is an act of repose and grace to save the concerned persons from the hazards of litigation. Since an Act of Indemnity might protect also acts in excess of strict necessity, the specific provision in Art.34 might have been thought to be necessary ex abundanti cautela in view of the limitations on the legislative power of the Indian parliament imposed by fundamental rights. Still, can it be said, as Ambedkar said that Arts.20 (1) and 21 of the constitution would stand in the way of parliament regularising them in the absence of an express provision as in Art.34? For this one has to think of an Act of Indemnity under the Indian constitution in the absence of Art.34.

It is well known that Art.20 (1) of the constitution prohibits punishment for an offence under ex post facto law, and that an offence means any act or omission made punishable by any law for the time being in force. When a military commander punishes a person for violation of a martial law regulation, he is not inflicting any punishment for an offence in the above sense. At worst, the military commander has done an illegal act. When the legislature validates the act, it is not making an ex-post facto law within the prohibition of Art.20(1), but only passing a retrospective law. The observation of Chase J. of the

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61. Art. 20(1): "No person shall be convicted of an offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

62. Art. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

63. Constituent Assembly Debates, Vol. 11, pp. 577-78.

64. Seervai, op. cit. 751.
American Supreme Court in *Calder v. Bull* are apposite here:

"(T)here are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement as statutes of oblivion or of pardon. They are certainly retrospective and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition that nullifies the rigour of the criminal law, but only those that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction .......

There is a great and apparent difference between making an unlawful, act lawful and making an innocent action criminal, and punishing it as a crime." 66

What is therefore involved in the passing of an Act of Indemnity is only a question of retrospective law and not of an *ex post facto* law, and the question that would arise for consideration is the validity of a retrospective law.

Though retrospective laws are not generally favoured, it is accepted that there may be occasions when such laws may be necessary. 67 The constitutional power of a legislature to enact curative measures which will protect public officials against prosecution for acts illegal when committed by them under colour of official authority, and which the legislature might have constitutionally rendered legal is also well established. 68 If the Indian Parliament were to pass a law under its power to legislate

65. 3 Dall 386 (1798); I. L. Ed. 648.
66. p 391; L Ed. et 650
67. In the words of Willes J. in *Philipps v. Eyre* (1870) L R. 6 Q. B. 1 allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and usual exigencies of society for want of provision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong." See Keir & Lawson for the extract of the case at pp. 33-34. Fuller has said that in the context of a system of rules which are generally prospective, retrospective laws may be actually necessary to advance the cause of legality when certain desirable principles which support the morality that makes law possible break down. Lon. L. Fuller, "The Morality of law," 1964, Yale University Press, pp. 53-54.
for the defence of any part of India to regulate the exercise of martial law, such a law can without doubt confer on martial law authorities the power to issue martial law regulations and to punish violations of them. Hence if martial law comes into operation without statutory authority, that is, when common law martial law is enforced, an Act of Indemnity passed later on may not be validly impugned as unconstitutional. The only question that might arise in the face of guaranteed fundamental rights is the reasonableness of the legislation. In the U.S.A. the Supreme Court has consistently held that not all retrospective statutes are unconstitutional but only those which upon a balancing of considerations are felt to be unreasonable.69 In India, there seems to be no doubt that the reasonableness of an Act of Indemnity will be upheld.

It may be readily conceded that a military commander executing martial law is not authorised to make 'law' within the scope of 'the procedure established by law' referred to in Art.21 of the constitution. Martial law regulations when common law martial law is enforced are executive in character. The enforcement of such of those regulations which cannot be justified on the test of necessity are illegal executive acts. Even then it is submitted that parliament may validate such acts as the power of issuing the regulations could have been conferred by previous legislation.

What is the source of the power of the union parliament to pass an Act of Indemnity which is retrospective in character, to validate possibly illegal acts done while enforcing martial law? With regard to the position in the U.S.A one writer has stated: "There is no power of the legislature, under the American Constitution, to pass an Act of Indemnity."70 This statement appears to be incorrect because in Mitchell v. Clark71 the American Supreme Court sustained the validity of an Act passed by the Congress in 1863 for the protection of military personnel against suits for certain acts done by them without authority of law.72 In India too, the parliament would seem to have power to pass an Act of Indemnity even if such power has not been conferred expressly by the legislative entries in the

70. Basu, op. cit 305
71. 110 U. S. 633 (1884)
72. See Willoughby op. cit. 1610.
7th schedule. In *United Provinces v. Atiqua Begum* the validity of a law confirming the illegal remission of rent by executive orders was in question. Upholding the law, Gwyer C.J. for the Federal Court said:

"It is true that "validation of executive orders" or any entry even remotely analogous to it is not to be found in any of the three lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancilliary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued."

Similarly the power of the union parliament to validate action taken under martial law may be held to be subsidiary to the power to legislate on martial law.

If fundamental rights would in the absence of a provision as in Art.34, stand in the way of enforcing martial law for the suppression of disorder and the passing of an Act of Indemnity enabling constitutional provision would seem to be necessary, for the enforcement of the general provisions of criminal law like arrest, detention, search, seizure, etc. But it is clear that there is no such provision in the constitution and that the provisions of the criminal law themselves protect from suits those enforcing it, and the plea of violation of the fundamental rights has never been raised.

It is therefore suggested that Art.34 was included in the constitution by way of abundant caution. Its absence would not negative the competence of parliament to enact an Act of Indemnity. This position is not affected by the existence in the constitution of guaranteed fundamental rights.

73. *A. I. R. 1941 F. C. 16*
74. *ibid, page 26.*
75. see for example Ss. 76, 77 and 78 of the I. P. C. and S. 132 of Cr. P. C.
76. The confusion that may result from a failure to correctly understand its scope may be seen in the fact that the absence of a reference to proclamation of emergency in it was thought to need a constitutional amendment to enable parliament to pass an Act of Indemnity after a proclamation of emergency was in operation. See the 18th Amendment Bill, subsequently withdrawn. For a comment on the then proposed amendment see K. R. Dixit, "The Eighteenth Amendment—Some after thoughts," in *A. I. R. 1964 Journal 90-91.*