P L D 1969 Supreme Court 485

Present: Hamoodur Rahman, C. J., Muhammad Yaqub Ali, Sajjad Ahmad, Abdus Sattar and M. R. Khan, JJ

THE SUPERINTENDENT, LAND CUSTOMS TORKHAM (KHYBER AGENCY)-Appellant

versus

ZEWAR KHAN AND 2 OTHERS-Respondents

Civil Appeal No. 57 of 1968, decided on 25th August 1969.

(On appeal from the judgment and order of the High Court of West Pakistan, Peshawar. Bench, dated the 9th October 1968, in Writ Petition No. 29 of 1967).

(a) Constitution of Pakistan (1962),

Arts. 223 & 242 and Constitution of Pakistan (1956), Arts. I(2) & 104-"Tribal areas" Analysis of various constitutional provisions relating to Tribal Areas and history, both administrative and legislative, of Tribal Areas Constitutional position of Tribal Areas and applicability of laws, prevailing in other parts of Pakistan. to such territories--Tribal Areas legally parts of territories of Pakistan-Sea Customs Act, 1878, Land Customs Act, 1924 and Tariff Act, 1934 applicable to Tribal Areas-Sea Customs Act (VIII of 1878), S. 167 (81)-Land Customs Act (XIX of 1924), S. 5 (1)-Sales Tax Act (III of 1951), S. 3 (5)-Tariff Act (XXXII of 1934), S, 5.

A truck carrying foreign textile goods crossed the Pak Afghan border at Torkham and instead of stopping at the Land Customs Station at Torkham for checking and customs duties it sped on towards Landi Kotal in the Tribal Areas. It was inter cepted by the Commandant Khyber Rifles at Landi Kotal and the truck along with its contents was handed over to the Customs staff who seized the truck and the articles in it and the truck and the seized articles were removed to Customs Ware House at Peshawar. Z claiming to be owner of the truck and its contents thereupon filed a writ petition in the High Court. In the hearing of that petition the question of law relating; to the applicability of the Sea Customs Act, Laid Customs Act and the Tariff Act to the Tribal Areas was mooted for adjudication. The petition was heard at length and ultimately the High Court declared the seizure as illegal, holding that the Land Customs Act the Tariff Act and all laws made applicable to the Tribal Area before 18th July 1947 had lapsed as from that date as a con sequence of the lapse of all treaties and agreements in relation to the Tribal Areas under the Indian Independence Act, 1947. According to the High Court, since the Tribal Areas never formed part of British India and the Indian Independence Act, 1947 made no provision for the accession to either of the two domi nions, the Tribal Areas were not part of the territories of Pakistan and as such from the coming into force of the Indian Independence Act, 1947 these areas were left without any laws whatsoever. The Governor-General's Orders Nos. 5 and 6 of 1949 were held to be ultra vires. The High Court also took the view that even if it be assumed that Land Customs Act, Sea Customs Act and the Tariff Act had been made applicable to the Tribal Areas, they could not legalize the seizure made by the Authorities for there was no notification under section 3 of the Imports and Exports (Control) Act, 1950 or under section 5 of the Tariff Act declaring the Khyber Agency to be a foreign territory:

Held, the examination of the provisions of the Foreign Juris diction Act, 1890, sections 4 and 5; Indian (Foreign Jurisdiction) Order in Council 1902; Government of India Act, 1935, sections 8, 123, 311, 313 (2) (c) and Indian Foreign Jurisdiction Order, 1937, sections 3 and 4 reveals that although the tribal areas were not a part of British

India, they were to be ruled by Orders in Council as if they were parts of the dominions of the Crown in England and the Governor-General of India as the representative of the Crown in India could extend any law prevailing in British India to the tribal areas with such adaptations, modifications or excep tions as he thought fit or necessary for the Governance of these areas. In exercise of the powers given to him by these provisions the Governor-General on the 24th January 1938, by Notification No. 19-F extended section 5 of the Tariff Act, 1934 and the Land Customs Act, 1924 to the Khyber Agency and again on the 29th January 1938, by Notification No. 49-Cus. established a Land Customs Station at Torkham in the Khyber Agency under section 4 of the Land Customs Act, 1924. This Notification also prescribed a route, namely, Torkham-Khyber-Peshawar via Land Customs Office, Torkham as the only route by which duti able goods would be allowed to pass by land from the territory of Afghanistan into the said Agency. Again on the 10th January 1939, another Notification No. 24-T (1)/37 was issued under section 5 of the Tariff Act of 1934 as applied to the Khyber Agency declaring Afghanistan to be a foreign territory for the purposes of the said section and directing that "a duty of customs at the rate prescribed by or under the said Act as in force in British India (now Pakistan) shall be leviable" on, inter alia, "fabrics containing silk, artificial silk, cotton or gold or silver thread" as defined in item 48 of the First Schedule to the Tariff Act. Then on the 29th March 1941, by Notification No. 29-Cus. the importation by land from Afghanistan of goods on which duty of Customs was leviable was prohibited under section 19 of the Customs Act, 1878. Prior to the coming into force of the Indian Independence Act, therefore, it seems, that the Sea Customs Act, the Land Customs Act and section 5 of the Tariff Act had been duly extended to the tribal areas by a competent authority and were being lawfully enforced there. Torkham was declared a Land Customs Station, Afghanistan was declared a foreign territory for the proposes of the Tariff Act as applied to the Khyber Agency and the importation of fabrics from Afghanistan was permissible only on payment of duty at the rates prescribed by the Tariff Act and under section 19 of the Sea Customs Act the importation of dutiable goods from Afghanistan was totally prohibited except under an import licence. There could be no doubt, therefore, that under the Government of India Act, 1935, these laws had been validly extended to the tribal areas and were being enforced there under the Indian Foreign Jurisdiction Order of 1937 even though the Tribal Areas did not form part of British India.

Although the tribal areas did not form part of the territories of the Dominion of Pakistan yet subsection (3) of section 2 and the proviso to section 19 (3) of the Indian Independence Act clearly contemplated that areas not forming part of the territories specified as the territories of the Dominion of Pakistan could be included in it with the consent of the Dominion and arrange ments made with the representatives of the tribal areas. Again although under section 7 (1)(c) of this Act treaties or agreements in force with respect to the tribal areas lapsed, yet agreements relating to customs, transit and communications, posts and tele graphs or other like matters continued to have effect until the provision thereof were denounced either by a person having autho rity in the tribal areas or by the Dominion or a Province or any other part thereof or were superseded by subsequent agreements under the proviso to clause (c) of subsection (l) of section 7. The non-obstante clause therein clearly has the effect of making an exception to the general provision that all such treaties or agreements with tribal areas will lapse from the coming into force of the Indian Independence Act and amongst the matters so excepted were treaties relating to customs. It is difficult to appreciate, therefore, as to how the High Court could have, in the face of these provisions, come to the conclusion that the treaties and agreements relating to customs also lapsed in the tribal areas. There is also nothing to show that these treaties were ever denounced either by any authority in the tribal areas or by the Dominion of Pakistan. On the contrary it appears that the Government of Pakistan was doing all that it possibly could to preserve the status quo in the tribal areas as the successor to His Majesty's Government in respect of those areas. The speeches of Quaid-i-Azam delivered on 31-7-1947 and 17-4-1948 contained abundant indication of the fact that the de facto

accession of the tribal areas to the territories of Pakistan had taken place by the agreement of the tribal Jirgas but in order to give this de facto position a de jure constitutional status, the Governor-General on the 31st March 1949, issued two Orders called "The Extra-Pro vincial Jurisdiction Order, 1949" (G. G. O. 5 of 1949) and "the Pakistan Provisional Constitution (Amendment) Order, 1949" (G. G. O. 6 of 1949). The Governor-General's Order No. 5 extended to all the territories in Pakistan outside the Provinces which may be declared by the Governor-General of Pakistan to be the territories in which jurisdiction is being exercised by him. This came into force with retrospective effect from the 15th day of August 1947, and in effect re-enacted the provisions of the Indian (Foreign Jurisdiction) Order in Council of 1902 as well as sections 3 and 4 of the Foreign Jurisdiction Act of 1890.

The contention that the Governor-General's powers under sections 8 and 9 of the Indian Independence Act became exhaust ed by the promulgation of the Pakistan (Provisional Constitution) Order, 1947 (G. G. O. 22 of 1947), on the 14th August 1947, by Lord Mountbatten, because, thereafter changes in the Government of India Act could only be made by the Constituent Assembly as provided in the said Order, is equally untenable. The orders passed in exercise of the powers given under the Indian Indepen dence Act could not curtail those powers which were to be exercisable up to the 31st March 1948 unless earlier determined by a law of the Legislature of that Dominion, i.e. the Constituent Assembly. Subsection (5) of section 19 of the Indian Independence Act, which gave to the Governor-General the power to revoke or vary an Order previously made, would also seem td indicate that the power was not exhausted by the promulgation of the Governor-General Order No. 32 of 1947 by Lord Mountbatten. Indeed in Pakistan the need for the continuance of this power was felt even after the initial period fixed in the Indian Indepen dence Act and the Constituent Assembly of Pakistan on the 19th March 1948, actually extended this period to the 31st March 1949, by passing the Indian Independence (Amendment) Act, 1948. It is not correct to say that the laws which were made applicable to the tribal areas before the 15th August 1947, in exercise of the powers given to the Governor-General under the Indian Foreign Jurisdiction Order of 1937, lapsed with the coming into force of the Indian Independence Act, or that the tribal areas had not become part and parcel of the territories of Pakistan with effect from the 15th August 1947. On general principles too such a result must follow for, the laws of a State or territory do not disappear by a change in its sovereignty. Laws governing or regulating the relations, the rights and obligations of the residents of a ceding or acceding territory do not lapse by a mere change in the sovereignty but continue to remain operative until changed by a competent authority. The laws, as pointed out by Lord Mansfield in the case of Campbell v. Hall 98 E R 1045 of an acquired or ceded territory continue in force until they are altered by the conqueror or the country to which it has been ceded or acceded. Cession of course, is not restricted to cases where the possession is acquired by conquest but it also includes cases of voluntary cession by the general consent of the people. In the case of Vorisimo Vaseuez Vilas v. City of Manila U S S C R 55 Law Edn. 345 it was observed by Lurton, J. while delivering the opinion of the Court that it is a general rule of public law, recognised and acted upon by the United States, that whenever political juris diction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new Government or sovereign. It is patent, therefore, that once it is found that the tribal areas had acceded to Pakistan then the right to legislate for the governance of those areas must necessarily be vested in the authority that was both before the 15th August 1947, and after the 15th August 1947, vested with those powers, namely, the Governor-General until other provision is made in that behalf by a competent Legislature.

Both under the international law as well as the Municipal Law, the tribal territories became part and parcel of Pakistan and were duly recognised as such by the United

Kingdom and the member Nations of the South East Asia Treaty Organisation. The Dominion of Pakistan through its Constitutional Assembly also formally accepted it as such. In the circumstances it was not for the Municipal Courts to hold otherwise. It is important to remember that in such matters of a political nature, namely, accession or cession of territory it is not for the Courts to take a different view. The executive authority of the State has in the exercise of its Sovereign power the right to say as to which territory it has recognised as a part of its State and the Courts are bound to accept this position. Indeed this was the principle that was given statutory effect in section 4 of the Foreign Jurisdiction Act, 1890 and section 6 of the Governor-General's Order No. 5 of 1949. If the Courts felt any doubt with regard to the status of such a territory then it was incumbent upon them to make a reference to the Government and to accept its opinion.

The result, therefore, of the above analysis of the various constitutional provisions relating to the tribal areas is that the tribal areas became legally parts of the territories of Pakistan from 15-8-47, the date mentioned in the Notifications of the 27th June 1950, and all laws which applied to those territories before the 15th August 1947, were continued in force until altered or amended, and from 1955 the tribal areas of the North-West Frontier became parts of the Province of West Pakistan having a representation even in the Legislature of the said Province. There could be no manner of doubt, therefore, that the Sea Customs Act, the Land Customs Act and section 5 of the Tarif Act, which had been made applicable to the tribal areas by the Notifications of the 22nd September 1926 and the 24th January 1938, continued to apply in those areas and never lapsed. Torkham was declared a Land Customs Station by the Notification of the 28th January 1938, and Afghanistan was declared a foreign territory under section 5 of the Tariff Act, 1934 by the Notifica tion of the 10th January 1939, in respect of the tribal areas of the Khyber Agency. Subsequently on the 29th March 1941, another Notification was issued prohibiting under section 19 of the Sea Customs Act the importation of dutiable goods into Pakistan from Afghanistan. By another notification issued on the 12th June 1951, under subsection (1) of section 3 of the Imports and Exports Control Act, the importation of fabrics into Pakistan save under a licence issued for the purpose was prohibit ed and on the 28th July 1959, another Notification No. S. R. O. 349 was issued under section 5 of the Tariff Act, 1934 again declaring Afghanistan to be a foreign territory for the purposes of the said section and directing that a duty of customs at the rate prescribed by or under the Tariff Act shall be leviable on any of the articles mentioned in the Schedule to the said Notification, which included fabrics containing silk, artificial silk, cotton or gold and silver thread, when imported by land from any of the notified foreign territories.

Dwarkadas and another v. The State P L D 1957 S C 72; Chatturam and others v. Commissioner of Income-tax, Bihar A I R 1947 F C 32 and Pakistan and another v. Qazi Ziauddin P L D 1962 S C 440 ref.

Sir Gulab Singh v. District Magistrate, Dehra Dun A I R 1950 All. 11 distinguished.

(b) Interpretation of statutes

Laws of State or territory do not disappear by change in its sovereignty.

Campbell v. Hall 98 E R 1045 ref.

(c) Interpretation of statutes-

Interpretation of laws-Territory declared by a sovereign State itself to be its own part and parcel Municipal Courts not competent to hold otherwise.

Vorisimo Vaseuez Vilas v. City of Manila U S S C R 55 Law Edn. 345 and Halsbury's Laws of England, 3rd Edn., Vol. VII, p. 280 ref.

(d) Constitution of Pakistan (1962),

Arts. 223(5) 8c 98-Smuggled goods along with truck in which they were being carried seized by Customs Authorities in Tri5al Areas but same brought and kept in Ware House at Peshawar-High Court competent to issue writ in respect of such goods.

Jamil Ahmad and another v. The State Criminal Appeal No. 11 of 1968 distinguished.

Sharifuddin Pirzada, Attorney-General for Pakistan (Muhammad Ismail, Senior Advocate and Maqbul Ahmad Sheikh, Advocate Supreme Court with him) instructed by Iftikharuddin Ahmad, Attorney for Appellant.

A. K. Brohi, Senior Advocate Supreme Court (absent on 2-6-69), Zahoorul Hague, Advocate Supreme Court with him) instructed by Fazle-Hussain, Attorney for Respondent No. 1.

Raja Said Akbar Khan, Advocate-General, West Pakistan (absent on 2-6-69) and M. Dilawar Mahmood, Assistant Advocate -General West Pakistan (A. H. Najafi, Advocate Supreme Court with him) instructed by Ijaz Ali, Attorney for Respondent No. 2.

Dates of hearing : 26th, 27th, 28th, 30th May and 2nd June 1969.

JUDGMENT

HAMOODUR RAHMAN, C. J.-This certificated appeal arises out of the judgment of a Division Bench of the High Court of West Pakistan, Peshawar Seat, in a petition under Article 98 of the Constitution of 1962, whereby the seizure of a truck, containing foreign-made cloth, on the highway between Torkham and Landi Kotal, by the Customs Authorities, was declared illegal and the authorities were directed to return the same to the petitioner.

The truck, bearing No. P. R. 8876 was, at the relevant time, registered in the name of one Shahalam Khan of Landi Kotal, Khyber Agency. The said Shahalam Khan had also obtained a permit on the 6th December 1966, in respect of the temporary export of the said truck from Pakistan to Afghanistan. This permit sanctioned the making of multiple journeys between the above-mentioned two countries, provided it was ultimately brought back into Pakistan by the 27th December 1966.

On the 8th December 1966, this truck was entered in the register at Torkham Land Customs Station as having crossed the border into Afghanistan at about 2 p.m. On the same day at about 6-30 p.m. it was again noticed that the said truck bad re-entered Pakistan,- carrying foreign textile goods but instead of stopping at the Land Customs Station at Torkham for checking and payment of Customs duties, it sped on towards Landi Kotal, in spite of the efforts of the Customs Staff to stop it. The Customs Staff thereupon sent a telephonic message to the Commandant, Khyber Rifles at Landi Kotal and the latter personally intercepted it on the main road near Landi Kotal at about 7 p.m. The truck, along with its contents and its three occupants, a driver and two cleaners, was then handed over to the Customs Staff who seized the truck and the articles in it as also arrested its occupants for smuggling. The occupants were subsequently. released on bail by the Political Agent, Khyber Agency but the truck and the articles in it were removed to the Customs Ware House at Peshawar Cantt.

The respondent No. 1, Zewar Khan, who was neither present at the time of the seizure of the truck nor was the owner of the truck or of the cloth being carried in it, however, on the 9th February 1967, filed a petition under Article 98 of the Constitution of 1962, before the Peshawar Bench of the High Court of West Pakistan, alleging that the truck

in question had been illegally seized from within the compound of the Serai at the Landi Kotal Bazar, on the 7th December 1966. In this petition, as originally filed, it was not stated as to what interest, if any, the said Zewar Khan had in the truck but it was simply alleged that the goods being carried in it were his and it was conceded that the goods seized from the truck were of foreign origin. It was, however, maintained that business in foreign-made goods was being openly carried out in the Serai at Landi Kotal and neither the Customs authorities nor the Khyber Rifles had ever taken any action against any one else for bringing such foreign goods for sale at the Landi Kotal Bazar. The petitioner also alleged that the truck was taken into custody under some misapprehension for the number of the truck communicated to the Commandant was different.

The Superintendent of Land Customs in answering the report called for by the High Court, raised on the 6th March 1967, a preliminary objection regarding the locus standi of the said Zewar Khan, respondent No. 1 herein, to maintain the application and expressly challenged his right to do so on the ground that he was neither the owner of the truck nor of the goods seized from it. According to the Superintendent of Land Customs the transit invoices in respect of the said goods showed that they belonged to Messrs Said Mohammad & Sons of Kabul and the forwarding agents thereof were Messrs Haji Yaqub Ali Hassan Ali of Chowk Yadgar, Peshawar. The Land Customs Superintendent also maintained that the goods had been brought into Pakistan through the Torkham Customs Station unlawfully, without making any declaration, in clear contravention of subsection (i) of section 5 of the Land Customs Act, 1924, section 167(8), (36) and (81) of the Sea Customs Act, 1878, and section 3(5) of the Sales Tax Act, 1951, on the 8th December 1966.

The Customs Authorities further alleged that the same truck bad -earlier, on the 8th December 1966 (and not the 7th of December 1966, as falsely alleged by the respondent No. 1), at about 2-p.m. crossed over to Afghan territory from Pakistan but returned again at about 6-30 p.m. with dutiable foreign goods which Could not be imported except under a licence and on payment ,)f duty. It., was also denied-that the truck was seized from the 1.6mpound of the Serai in Landi Kotal Bazar, for, according to the respondents the truck was seized on the highway between Loradi Kotal and Torkham.

The Land Customs Superintendent desired to have the question -of the locus stand! of respondent No. 1 determined as a preliminary issue.

The respondent No. 1 filed a rejoinder on the 28th March 1967, wherein for the first time he stated that the truck was sold by Shahalam Khan to one Abdul Rahman, a resident of Jamrud and the latter had, on the 15th August 1966, resold it to the respondent No. 1 for Rs. 55,000. The petitioner claimed that he `had documents to support the assertion but no documents were ever filed. As regards the goods he also claimed that he had even before the authorities asserted his title to the goods in categorical terms and that no one else had ever claimed the said goods.

Subsequently, on the 18th July 1967, the said Zewar Khan also applied for amending his writ petition by introducing therein two sub-paragraphs to the following effect:

"(h) That the petitioner Zewar Khan son of Habil Khan is the owner of the Truck No. PR-5876 and the Japanese-made cloth seized in the same truck by the Customs Authorities.

(j) That the petitioner is ready to produce the documentary and oral evidence in support of the title of the truck and the contents therein, i.e. foreign-made cloth if ordered by the Honourable Court."

The Motor Registering Authority, however, on the 6th March 1967, reported that even till then the truck stood registered in the name of Shahalam Khan son of Haji Janat Gul but on the 23rd April 1968, one Abdur Rahman Khan son of Mansoor Khan, Tesident of Jamrud, filed an affidavit saying that he had purchased the truck from Shahalam Khan and subsequently on the 15th of August 1966, sold it to Zewar Khan, but again no documents were filed in the High Court in support of this claim.

On the 9th February 1967, the truck as directed by the High Court to be released to the respondent No. 1, on his furnishing security in the sum of Rs. 30,000 to the satisfaction of the Superintendent Land Customs. The preliminary objection was also rejected on the 13th April 1967 and the amendment of the petition was allowed on the 18th July 1967.

On the 30th April 1968, the respondents in the writ petition, applied to have the Government of Pakistan impleaded as a party so that the questions of law relating to the applicability of the sea Customs Act, Land Customs Act and the Tariff Act to the tribal areas may be effectively and completely adjudicated upon but the High Court rejected this prayer holding that the Govern ment of Pakistan was not a necessary party and the prayer was, in any event, a belated one as the hearing of the writ petition had already commenced on the 18th July 1967.

The petition was thereafter heard for another 9 days and judg ment was ultimately announced on the 9th October 1968, declaring the seizure illegal, because, the Land Customs Act, the Tariff Act of 1934 and all laws made applicable to the tribal areas before the 18th July 1947, had lapsed as from that date as a consequence .of the lapse of all treaties and agreements in relation to tribal areas under the Indian Independence Act, 1947. The High Court, even doubted as to whether laws made applicable to tribal areas. before, 1947 could be described as laws in the strict juristic sense.

According to the High Court since tribal territories never formed part of British India and the Indian Independence Act, 1947, made no provision for their accession to either of the two new Dominions proposed to be set up thereunder, the tribal areas were not a part of the territories of Pakistan and, as such, as from the coming into force of the Indian Independence Act,, the result was that these areas were left without any laws whatsoever. The attempts made to incorporate the tribal areas into Pakistan by the Governor-General's Extra-Provincial Jurisdic tion Order, 1949 (G. G. O. No. 5) and the Pakistan Provisional Constitution (Amendment) Order, 1949 (G. G. O. No. 6) were futile, because, these were themselves ultra vires the powers of the Governor-General. Even after the enactment of the Establish ment of West Pakistan Act, 1955, no Act of the Federal Legislature or of a Provincial Legislature could apply to a tribal area (therein described as a special area or any part thereof, unless the Governor, with the previous approval of the Governor-General, had so directed or with such previous approval made regulations in regard to such special areas.

Since no such regulation had been made nor any notification issued extending any such law to the special area of the Khyber Agency the High Court opined that "the legal position in regard to the tribal territory remains the same on the enforcement of the Constitution of the Islamic Republic of Pakistan, 1956." Even under the Constitution of 1956 there was, according to the High Court, no power to apply or extend any existing law which was not already applicable in the tribal areas to such an area. The Constitution of 1962 had also made no material difference to the position, for, again thereunder no law of Pakistan could apply to a tribal area or to any part thereof unless the President or the Governor of the Province in which the tribal area is situated had with the approval of the President, so directed and no such direction had ever been made in respect of the Khyber Agency.

The High Court was also inclined to the view that the laws applicable to the tribal areas before 1947 were not "existing laws" within the meaning of the Constitutional

provisions made in Pakistan for the continuance in force of the existing laws applicable to Pakistan.

Finally the High Court also took the view that even if it be assumed that the Land Customs Act, Sea Customs Act and the Tariff Act had been made applicable to the tribal territories they could not legalize the seizure made by the authorities, for, there was no Notification made either under section 3 of the Imports and Exports (Control) Act, 1950, or under section 5 of the Tariff Act declaring the Khyber Agency to be a foreign territory. In the absence of such a Notification the Imports and Export (Control) Act had, in any event, never been made applicable to the tribal territories and, therefore, the application of the Sea Customs Act, Land Customs Act and the Tariff Act was wholly ineffective.

These conclusions of the High Court raise very important questions as to the Constitutional position of the tribal territories and the applicability of laws prevailing in other parts of Pakistan to such territories. It is contended by the learned Attorney General, appearing on behalf of the appellant, that the High Court has entirely misconceived the true Constitutional position of the tribal areas and misconstrued the relevant Constitutional documents made for the purpose of incorporating such territories within Pakistan. Its conclusions were, therefore, wholly erroneous and untenable. This necessitates an examination of a number of Constitutional documents relating to the history, both administrative and legislative, of the tribal areas and we propose to do so now.

It is true that the tribal territories were never a part of British India as such. Nevertheless the Crown in the United Kingdom had acquired jurisdiction therein by grants, usages, sufferances and other lawful means and with regard to such territories over which the Crown had acquired such jurisdiction, although they were territories outside the dominions of the Crown, a Foreign Jurisdiction Act was passed by the British Parliament in 1890 which empowered the Crown in England to hold, exercise and enjoy any jurisdiction which it then had or may at any time thereafter have within a foreign country, "in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

Section 5(1) of this Act also gave power to the Crown by Order in Council to direct that "all or any of the enactments described in the First Schedule to this Act or any enactments for the time being in force, amending or substituted for the same, shall extend with or without any exceptions, adaptations, or modifications in the Order mentioned to any foreign country in which for the time being Her Majesty has jurisdiction." Sub section (2) of this section further provided that upon such extension being made by Order in Council "those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession and as if Her Majesty in Council were the Legislature of that possession."

Section 4 of the said Act prescribed that if any question arose in any proceedings, civil or criminal, as to the existence or extent of the jurisdiction of Her Majesty in any foreign country, the question was to be submitted to the Secretary of State for his decision and his decision was to be final for the purposes of the proceedings.

In exercise of the power given by this Act an Order in Council was made in 1902, called the Indian (Foreign Jurisdic tion) Order in Council, 1902, which delegated the power of the British Crown to the Governor-General of India-in-Council to make such rules and orders as may seem expedient, in particular, "for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise." The territories to which this Order was to apply were the territories of India outside British India, which included the Tribal territories.

In exercise of the powers delegated to him by this Order the Governor-General-in-Council in his turn on the 22nd September 1926 by Notification No. 443-F applied to all the Political Agencies of the North-Western Frontier Province certain provisions of laws then prevailing in British India including the Sea Customs Act, 1878. The sections of the Sea Customs Act thus applied included amongst others sections 19 and 167 (8).

It will thus be observed that the laws extended to such tribal areas under these powers were to operate as if they were territories in the possession of the Crown and in effect it amounted to this that the Governor-General was exercising his powers as a competent Legislature in respect of these areas.

The next development came with the passing of the Govern ment of India Act, 1935. Section 8 of this Act gave powers to the executive authority of the Federation to exercise all such rights, authority and jurisdiction as are exercised by His Majesty by treaties, grants, usages or sufferance s in or in relation to the tribal areas."

The powers formerly delegated to the Governor-General under the Indian (Foreign Jurisdiction) Order in Council, 1902, now came to be vested by a Constitutional document in the executive authority of the Federation, i.e., the Governor-General of India and section 123 thereof empowered the Governor-General to direct a Governor of a Province to discharge as his agent, generally or in any particular case, his functions in or in relation to the tribal areas as may be specified in the direction. Section 311 defined a tribal area as an area "along the frontiers of India or in Baluchistan which are not part of British .India or of Burma or of any Indian State or of any foreign State." Then section 313(2) (c) provided that until the establishment of the Federation the Governor-General-in-Council was to be the exe cutive authority for this period-subject to the provisions of the said Act and was "to exercise all such rights, authority and jurisdiction as were exercisable by His Majesty by grant, treaty, usage, sufferance or otherwise in and in relation to the tribal areas".

Since the powers of the Crown in England which were under the Foreign Jurisdiction Act of 1890 delegated to the Governor General by the Indian (Foreign Jurisdiction) Order in Council, 1902 had now come to be, vested by the above mentioned provisions in the Governor-General of India in Council the Indian Foreign Jurisdiction Order, 1937 was passed on the 18th March 1937. Section 3 of this Order provided that the Indian (Foreign Jurisdiction) Order in Council of 1902 shall cease to have effect as respects the tribal areas in India and Burma, without prejudice to the validity of anything previously done thereunder and provided further that any rules, orders, dele gations, appointments or other instruments made or issued under the Order in Council of 1902 shall" "continue in force except so far as revoked or varied by the authority competent for the purpose under the Government of India Act, 1935." Section 4' of this Order of 1937 reiterated that the powers conferred by the Order in Council of 1902 on the Governor-General-in-Council shall continue to be exercisable by the Governor-General-in-Council until the establishment of the Federation of India and shall thereupon become exer cisable on behalf of his Majesty by the Governor-General of India.

This order does not, therefore, make any change but merely regularises the position resulting from the enactment of the Government of India Act, 1935.

Thus the position that emerges from an examination of these provisions is that although the tribal areas were not part of British India, they were to be ruled by orders in Council as if they were parts of the dominions of the Crown in England and the Governor-General of India as the repre sentative of the Crown in India could extend any law prevailing in British India to the tribal areas with such adaptations, modifications or exceptions as he thought fit or necessary for the governance of these areas. In exercise of the powers given to him by those provisions the Governor-General

on the 24th January 1938, by Notification No. 19-F extended section 5 of the Tariff Act, 1934 and the Land Customs Act, 1924 to the Khyber Agency and again on the 29th January 1938, by Notification No. 49-Cus. established a Land Custom Station at Torkham in the Khyber Agency under section .4 of the Land Customs Act, 1924. This Notification also pres cribed a route ; namely, Torkham-Khyber-Peshawar via Land Customs Office, Torkham as the only route by which dutiable goods would be allowed to pass by land from the territory of Afghanistan into the said Agency. Again on the 10th January 1939, another Notification No. 24-T(1)/37 was issued under section 5 of the Tariff Act of 1934 as applied to the Khyber Agency declaring Afghanistan to be a foreign territory for the purposes of the said section and directing that "a duty of customs at the rate prescribed by or under the said Act as in force in British India (now Pakistan) shall be leviable" on, inter alia. "fabrics containing silk, artificial silk, cotton or gold or silver thread" as defined in item 48 of the First Schedule to the Tariff Act. Then on the 29th March 1941, by Notification No. 29-Cus. the importation by landfrom Afghanistan of goods on which duty of Customs was leviable was prohibited under section 19 of the Sea Customs Act, 1878.

Prior to the coming into force of the Indian Independence Act, therefore, it seems, that the Sea Customs Act, the Land Customs Act and section 5 of the Tariff Act had been duly extended to the tribal areas by a competent authority and were being lawfully enforced there Torkham was declared a Land Customs Station, Afghanistan was declared a foreign territory for the purposes of the Tariff Act as applied to the Khyber Agency and the importation of fabrics from Afghanistan was permissible only on payment of duty at the rates prescribed by the Tariff Act and under section 19 of the Sea Customs Act the importation of dutiable goods from Afghanistan was totally prohibited except under an import licence.

There could be no doubt, therefore, that under the Government of India Act, 1935, these laws had been validly extended to the tribal areas and were being enforced there under the Indian Foreign Jurisdiction Order of 1937 even though the Tribal areas did not form part of British India. This is indeed not challenged but what is challenged is the operation of these laws in those areas after the coming into force of the Indian Independence Act of 1947.

The question, therefore, now that arises for consideration is whether the position was subsequently changed. The High Court has taken the view that after the enactment of the Indian Independence Act of 1947, the agreements etc. with the Tribal areas lapsed and the first document on which reliance is placed for this purpose is the statement issued on the 3rd June 1947, by His Majesty's Government wherein by paragraph 17 it was declared that "agreements with tribes of India will have to be negotiated by the appropriate successor authority." This was, of course, followed by the enactment of the Indian Independence Act on the 18th July 1947.

Subsection (2) of section 2 of this Act, which concerned Pakistan, provided as follows

"Subject to the provisions of subsections (3) and (4) of this section, the territories of Pakistan shall be :-

(a) the territories which, on the appointed day, are included in the Provinces of East Bengal and West Punjab, as constituted under the two following sections ;

(b) the territories which, at the date of the passing of this Act, are included in the Province of Sind and the Chief Commissioner's Province of British Baluchistan ; and

(c) if, whether before or after the passing of this Act but before the appointed day, the Governor-General declares that the majority of the valid votes cast in the referendum which, at the date of the passing of this Act, is being or has recently been held in that behalf under his authority in the North-West Frontier Province are under in favour of

representatives of that Province taking part in the Constituent Assembly of Pakistan, the territories which, at the date of the passing of this Act, are included in that Province.

Subsection (3), however, expressly contemplated that there might be changes subsequently in this respect and, therefore, provided that nothing in this section shall prevent any area being at any time included in or excluded from either of the new Dominions, so however, that

(a) no area not forming part of the territories specified in subsection (1) or, as the case may be, subsection (2), of this section shall be included in either Dominion without the consent of that Dominion ;"

Clause (c) of subsection (1) of section 7 then stated that as from the appointed day -----

(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant usage, sufferance or otherwise:

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements."

The proviso to subsection (3) of section 19 of this Act also contemplated the inclusion of the tribal areas on the borders of a Dominion in that Dominion for it provided as follows

"Provided that nothing in this subsection shall be construed as preventing the participation in either of the said Assemblies, in accordance with such arrangements as may be made in that behalf, of representatives of the tribal areas on the borders of the Dominion for which that Assembly sits."

It will be observed from the above that although the tribal areas did not form part of the territories of the Dominion of Pakistan yet subsection (3) of section 2 and the proviso to section 19 (3) of the aforementioned Act clearly contemplated that areas not forming part of the territories specified as the territories of the Dominion of Pakistan could be included in it with the consent of the Dominion and arrangements made with the representatives of the tribal areas. Again although under section 7(1)(c) treaties or agreements in force with respect to the tribal areas lapsed, yet agreements relating to customs, transit and communications, posts and telegraphs or other like matters continued to have effect until the provisions thereof were e denounced either by a person having authority in the tribal areas or by the Dominion or a Province or any other part thereof or were superseded by subsequent agreements under the proviso to clause (c) of subsection (1) of section 7. The non-obstante clause therein clearly has the effect of making an exception to the general provision that all such treaties or agreements with tribal areas will lapse from the coming into force of the Indian Independence Act and amongst the matters so excepted were treaties relating to customs. It is difficult to appreciate therefore, as to how the High Court could have, in the face of these provisions, come to the conclusion that the treaties and agreements relating to customs also lapsed in the tribal areas.

The contention that the above-mentioned proviso related only to agreements and not to laws extended to these areas does not take into account the fact that the relevant laws were extended in pursuance to the jurisdiction acquired under the agreements. Therefore the proviso had the effect of continuing not only the agreements but also the laws extended in pursuance thereof. The contrary view was clearly opposed to the clear intention of the proviso appended to clauses (b) and (c) of subsection (1) of section 7 of the Indian Independence Act, 1947. There is also nothing to show that these treaties were ever denounced either by any authority in the tribal area or by the Dominion of Pakistan. On the contrary it appears that the Government of Pakistan was doing all that it possibly could to preserve tie status quo in the tribal areas as the successor to His Majesty's Government in respect of those areas. On the 31st July i, the Quaid-i-Azam as the Governor-General designate of Pakistan issued a statement which was published in the Dawn newspaper, appealing "to all the different elements in the Frontier Province and in the tribal areas to forget past disputes and differences and join hands with the Government of Pakistan in setting up a truly democratic Islamic State," and assuring the tribesmen "that Pakistan would like to continue all treaties, agreements and-, allowances until new arrangements are negotiated."

Then on the 17th April 1948, when the Quaid-i-Azam visited the Frontier Province as the first Governor-General of Pakistan a historic Jirga of all the tribes of the North-West Frontier Province waited upon him at the Government House of Peshawar and the tribesmen, including those of the Khyber Agency, pledged: their loyalty to Pakistan and desired that they should be placed. "directly under the control of the Central Government." The Quaid-i-Azam in his reply noted with approval that the tribesmen had pledged their loyalty to Pakistan and had promised that they will help Pakistan with all their resources and ability and then asked the tribesmen to realize that : "It is now the duty of every Musalman, your and mine, every Pakistani, to see that the State which we have established is strengthened in every department of life and made prosperous and happy for all, especially those who need most." He also assured them that "Pakistan has no desire to unduly interfere with your internal' freedom on the contrary, Pakistan wants to help you and make you as far as it lies in our power self-reliant and self-sufficient and to help your educational, social and economic uplift, and not to be left, as you are, dependent on annual doles as has been the practice hitherto," and concluded by again thanking the, tribesmen for their "whole-hearted and unstinted declaration"` of their pledge of loyalty and their assurance to support' Pakistan.

These speeches contained abundant indication of the fact; that the de facto accession of the tribal areas to the territories of Pakistan had taken place by the agreement of the tribal Jirgas but in order to give this de facto position a de jure Constitutional status, the Governor-General on the 31st March 1949, issued two Orders called "The Extra-Provincial Jurisdiction, Order, 1949" (G. G. O. No. 5 of 1949) and "the Pakistan Provisional Constitution (Amendment) Order, 1949" (G. G. O. No. 6 of 1949). The Governor-General's Order No. 5 extended to all the territories in Pakistan outside the Provinces which may be declared by the Governor-General of Pakistan to be the territories in which jurisdiction is being exercised by him. This came into force with retrospective effect from the 15th day of August 1947 and in effect re-enacted the provisions of the Indian (Foreign Jurisdiction) Order in Council of 1902 as well as sections 3 and 4 of the Foreign Jurisdiction Act of 1890.

The Notifications issued under this Order are also not without significance. The first is the Notification No. F. 9(170) P/48, published on the 27th June 1950 in the Gazette of Pakistan, Extraordinary. It declared that "Whereas the inhabitants of the areas situated within the external Frontiers of Pakistan which are not included in any of the Provinces or in the Chief Commissioner's Province of Baluchistan or in any of the acceding States or in the Capital of the Federation have, through their accredited representatives, declared their territories to be a part of the Federation of Pakistan as constituted on the 15th day of August 1947.

And whereas the Governor-General has accepted their request and given his consent to those areas being included in the Federation of Pakistan Now therefore in exercise of all the powers enabling him in that behalf the Governor-General is pleased to declare as follows :-

(1) This Notification shall be deemed to have taken effect from the 15th day of August 1947.

(2) The areas aforesaid shall be deemed to have been included in the Federation with the consent of the Federation, as from the 15th day of August 1947."

By the Governor-General's Order No. 6 of 1949, clause (bb) was added to subsection (1) of section 5 of the Government of India Act, 1935, which it will be recalled, provided for the setting up by proclamation of the Federation of India. Originally this was to consist of the Provinces and the Indian States which had acceded to the Federation and the Chief Commissioner's Provinces, but by clause (bb) the following was added:

"Any other areas that may with the consent of the Federation be included in the Federation."

This was done to give power to the Governor-General to formally incorporate the tribal areas into the Federation.

The Governor-General's Order No. 6 also introduced a new section 95-A which is in these terms:

"(1) The executive authority of the Federation extends to the areas included in the Federation under clause (bb) of section 5, but notwithstanding anything in this Act, no existing law, no Act of the Federal Legislature and no notification, rule or other instrument whether made before or after the fifteenth day of August 1947 shall apply to any such area unless the Governor-General by public notification so directs, and the Governor-General in giving such direction with respect to any such law, Act, notification, rule or other instrument may direct that the law, Act, notification, rule or other instrument shall in its application to that area or to any part thereof have effect subject to such exceptions or modifications as he thinks fit.

(2) Any direction given under this section may be given so as to be retrospective to any day not earlier than the fifteenth day of August 1947 and may continue in force on and after that day and subject as aforesaid any such law, notification, rule or other instrument in force immediately before that day."

Subsection (1) of this new section extended the executive authority of the Federation to the areas included under the new clause (bb) of subsection (1) of section 5 and also gave power to the Governor-General by public notification to direct that any existing law, Act, notification, rule or other instrument, whether made before or after the 15th August 1947, shall apply to the area so included subject to such exceptions or modifications as he thinks fit. Subsection (2) of this section is important, for, it gives express power to the Governor-General to issue a direction having retrospective effect from any day not earlier than the 15th August 1947 and to continue in force on. and from that day any law, notification, rule or other instrument in force in the tribal area immediately before that day.

Clause (bb) also by reason of the provisions of subsection (2) of section 1 of this Order was to be deemed to have taken effect from the 15th August 1947. It was in the exercise of the powers given by these Orders that the Governor-General issued the two Notifications of the 27th June 1950, referred to earlier. The Notification No. F. 9

(170)-F/48, dated the 27th June 1950 as also Notification No. F. 9 (170)-F/48-I. By this latter notification which was also to be deemed to have taken effect from the 15th August 1947, all notifications, rules or other instruments made before the 15th day of August 1947, in respect of the aforesaid areas under subsections (1) and (2) of section 313 of the Government of India Act, 1935, were to be deemed to have been continued in force after the 14th day of August 1947, and to have been duly made in exercise of the jurisdiction conferred by the said Order. (Vide paragraph 4 of the Notification).

This was followed by the Government of India (Seventh Amendment) Act, 1950, enacted on the 9th October 1950, by the Constituent Assembly of Pakistan, which re-introduced section 123 into the Government of India Act, 1935. The statement of objects and reasons attached to the said Act declared that section 123 which had been repealed by the Pakistan Provisional Constitution Order, 1947, pending Constitutional integration of the tribal areas with the rest of Pakistan under section 2, subsection (3) of the Indian Independence Act, 1947, was being re-enacted, because, "the Tribal Areas have now been included in the Federation in fulfillment of the formal agreements concluded with the tribes, but as they do not form part of any of the Provinces of Pakistan and are under the Governor-General's administrative control, administrative convenience demands that the Governors of Provinces adjacent to these areas should be empowered to act as the Governor-General's Agent in those areas, as before." This Act was duly validated by the Validation of Laws Act, 1955 and received the assent of the Governor -General.

Ex facie these provisions and the notifications made thereunder would appear to have continued in operation the notifications issued under the Sea Customs Act, Land Customs Act and the Tariff Act, before the- 15th August 1947, but the High Court, notwithstanding the express provisions of paragraph 4 of the Notification No. F. 9(170)-F/48-I, has held them to have lapsed, because, in its view, the Governor-General's Orders Nos. 5 and 6 were themselves ultra vires and gave no power to the Governor-General to issue the notifications.

We have now to examine if the High Court was right in taking this view. These Orders purport to have been made in exercise of the powers given by the Indian Independence Act, 1947. Section 8, subsection (2) of this Act provides that the new Dominions to be created under the Scheme of the said Act are to be governed as nearly as may be in accordance with the Government of India Act, 1935 and the Orders in Council, rules and other instruments made thereunder in so far as they may be applicable but subject to any express provisions to the contrary in the Indian Independence Act itself and also subject to- "such omissions, additions, adaptations and modifications as may be specified in Orders made by the Governor-General."

Section 9 gives power to the Governor-General to make such orders as may appear to him to be necessary or expedient-

(a) for bringing the provisions of this Act into effective operation ;

(b) for dividing between the new Dominions and between the new Provinces to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in-Council or, of the relevant Provinces ;

(c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions; and

(d) for removing difficulties arising in connection with the transition to the provisions of this Act ; and for enabling agreements to be entered into and other acts done, on behalf either of the new Dominions before the appointed day.

But this power was to be exercisable by the Governor-General initially only up to the 31st day of March 1948. An order under this section could, however, be made so as to take effect retrospectively from any date not earlier than the 3rd day of June 1947. Subsequently this period was extended by another year by the Indian Independence (Amendment) Act, 1948, passed by the Constituent Assembly itself on the 19th March 1948.

Then subsection (3) of section 18 of the Indian Independence Act provided for the continuance of the existing laws of British India with appropriate adaptations.

The power of making adaptations given by section 18 was thus totally different from the power given by sections 8 and 9 to make additions to, omissions from, modifications in and adaptations of the Government of India Act, 1935 itself by Orders passed under section 9 of the said Act. The scope of the latter was patently much wider and was not restricted merely to the making of adaptations of form, as suggested by the High Court, for the Orders, referred to therein, were clearly contemplated to be made for a variety of circumstances which could not possibly have been contemplated by the Government of India Act, 1935, but were likely to arise as a result of an entirely changed situation, namely ; the division of the country into two new Dominions of Pakistan and India. The narrow view taken by the High Court as to the scope of the powers. given to the Governor-General by sections 8 and 9 of the Indian Independence Act cannot be supported either by the language of sections 8 and 9 of the Indian Independence Act or by the purpose for which these powers were given. The narrow and restricted sense given by the High Court to the words of clause (c) of subsection (1) of section 9 of the Indian Independence Act are wholly unwarranted. It is regrettable that to find support for this unsupportable conclusion the learned Judges of the High Court should have travelled to a foreign jurisdiction instead of referring to a decision, directly in point, of this Court itself in the case of Dawarkadas and another v. The State (P L D 1957 S C (Pak.) 72) where Cornelius, J. (as he then was) clearly pointed out that the function of clause (c) of subsection (1) of section 9 of the Indian Independence Act was not "a purely mechanical function of adapting the Government of India Act, 1935." As was also pointed out by him "by the division of the country into two parts, very great and far-reaching changes were effected, which went beyond the mere creation of two national territories where previously there was only one," and it was precisely to bring about such changes in a legalised manner that power had been conferred on the Governor-General by clause (c) of subsection (1) of section 9, to make not only adaptations in but also to make modifications, additions and alterations in the Constitution Act itself. This was a very wide power and it was only limited by the provisions of clauses (a) to (i) thereof. Before declaring that the Governor-General's action in promulgating Orders Nos. 5 and Cs of 1949 was ultra vires the High Court should at least have referred to these provisions and pointed out as to which one of them the orders made by him transgressed or how they went beyond these powers.

One of the purposes of the impugned Orders was clearly to make provision for the incorporation of territories, which did not originally form part of the territories of Pakistan as contemp lated by subsection (3) of section 2 of the Indian Independence Act itself. Clause (bb) was added to section 5 of the Government of India Act to give this power to the Governor-General after the accession of such a territory. Was this beyond the purpose of section 9 of the Independence Act, 1947?

The question would next arise as to how that territory was to be governed. It was for this purpose that section 123 was re-introduced into the Government of India Act and a new section 95-A incorporated by the Governor-General's Order No. 6. How could it, then, be said that the Governor-General had acted beyond the powers given to him by the Indian Independence Act? The Orders promulgated by him were clearly relatable to the objects specified in that section, namely; to make provision for the accession of the new territories not previously included in British India and for the governance thereof.

The decision of the Allahabad High Court in the case of Sir Gulab Singh v. District Magistrate, Dehra Dun (A I R 1950 All. 11) which has been relied upon by the High Court is neither apt nor does it support the proposition sought to be propounded by the learned Judges of the High Court. The question that arose for considera tion in that case was whether the Bengal State Prisoners Regulation (Adaptation) Order, 1947, promulgated on the 26th August 1947, in exercise of the powers conferred on the Governor -General by the Indian Independence Act, 1947, was ultra vires or not. It is interesting to note that even in that case Wali Ullah, Acting Chief Justice, did observe that the powers conferred by section 9 of the Indian Independence Act were "very wide powers" and the consequences of the accession of Indian States to either of the two new Dominions after the paramountcy and suzerainty of the British Emperor had lapsed were clearly contemplated to be purposes falling within the purview of the Indian Independence Act. Indeed he went further and held that the adaptation of the Regulation would have been within the competence of the Governor-General even under section 18, subsection (3) of the Indian Independence Act. He was clearly of the view that the Governor-General in making the impugned adaptations in the Regulation of 1818 had acted "well within his powers."

The observations relied upon by the learned Judges of the Peshawar Bench were made only in connection with the question as to whether the adaptations in the Regulation could come within section 18 and not as to whether even under section 9 of the Indian Independence Act adaptations meant only making formal changes. Every Sapru, J., on whose observations strong reliance has been placed by the High Court, laid emphasis on the word "effectively" occurring in section 9 of the Indian Independence Act and pointed out that this word described the amplitude of the burden which had been cast upon the Governor-General. He had, therefore, "to take into account what was essential for giving life to the independence which Parliament had conceded. It was his job to make the Indian Independence Act a real reality." He was, however, of the view that the power of adaptation given by section 18, subsection (3) of the said Act was of a limited nature as the power to make omissions, additions or modifications was not included therein and it is in this context that he referred to the meaning to be attached to the word "adaptation" which has been quoted by the learned Judges of the High Court. The third learned Judge Bind Basni Prasad, J. agreed with the acting Chief Justice that the alteration made in the regulation was "a matter directly flowing from the altered Constitutional situation" and according to him even the adapta tion of an existing Indian Law so as to bring it into conformity with the modified Government of India Act of 1935 would clearly be an act of bringing the law into effective operation. None of the learned Judges of the Allahabad High Court had taken the view that the power given by section 9 was limited only to making formal changes in the Government of India Act. The learned Judges of the Peshawar Bench were, therefore, clearly wrong in relying upon the observations contained in this decision relating to the meaning of the word "adaptation" in section 18 of the Indian Independence Act.

In the present case we are not concerned with the adaptation of an existing Law. The Governor-General's Orders Nos. 5 and 6 of 1949 were clearly Constitutional provisions which had been made to provide for the accession of the tribal areas to the territories of Pakistan and for the governance thereof. These were well within the competence of the Governor-General under sections 8 and 9 of the Indian Independence Act. The High Court was clearly wrong in holding to the contrary.

The High Court was also, in our view, wrong in holding that the Governor-General's Orders were made beyond the time specified in subsection (5) of section 9 of the Indian Independence Act. The Orders were actually made by the Governor-General on the 31st March 1949, though they were published in the Gazette on the 1st April 1949. The original period was extended by one year by the Indian Independence (Amendment) Act, 1948, passed by the Constituent Assembly on the 19th March 1948, and assented to by the Governor-General under the Validation of Laws Act, 1955. It is

the date of the making of the Order which is the material date and not the date of its publication. Formal Promulgation of such legislative measures is not necessary for making them effective. They come into force on the date they are signed or receive the assent if passed by a Legislature.

The Notifications issued in pursuance thereof were, therefore, also valid, because, they were issued in exercise of the powers given by the Governor-General's Orders Nos. 5 and 6. Sub section (2) of section 95-A clearly gave power to the Governor General to give even a notification a retrospective effect within the 15th of August 1947. In view of this express power given by a Constitutional provision there could be no question of the Notifications being incapable of operating retrospectively.

The Governor-General had, by his Orders Nos. 5 and 6 of 1949, acquired plenary powers of legislation with regard to the tribal areas and, as such, he also clearly had the power to make v laws by reference or to make laws prevailing in Pakistan applicable to the said areas with retrospective effect.

In the case of Chatturam and others v. Commissioner of Income-Tax, Bihar (A I R 1947 F C 32) the Federal Court of India also took the same view with regard to the plenary power of legislation of the Governor-General in respect of excluded or partially excluded areas. This is not a case, therefore, of a notification being made applicable retrospectively. This is a case of an existing law being applied retrospectively to an area to which it did not apply before or of a law already applicable being continued in force retrospectively so as to prevent a vacuum or a break in the continuity of its application. Paragraph 4 of Notification No. F. 9 (170)-F/48-1 was clearly a provision designed for con tinuing in force retrospectively existing notifications, rules and other instruments, made before the 15th day of August 1947, in respect of tribal areas, from and after the fourteenth day of August 1947.

The contention that the Governor-General's powers under sections 8 and 9 of the Indian Independence Act became exhausted by the promulgation of the Pakistan (Provisional Constitution):

Order, 1947 (G. G. O. 22 of 1947), on the 14th August 1947, by Lord Mountbatten, because, thereafter changes in the Government of India Act could only be made by the Constituent Assembly as provided in the said Order, is equally untenable., The orders passed in exercise of the powers given under the Indian' Independence Act could not curtail those powers which were to be exercisable up to the 31st March 1948, unless earlier determined by a law of the Legislature of that Dominion, i. e. the Constituent Assembly. Subsection (5) of section 19 of the Indian Independence Act, which gave to the Governor-General the power to revoke or vary an Order previously made, would also seem to indicate that the power was not exhausted by the promulgation off the Governor-General's Order No. 32 of 1947 by Lord Mountbatten. Indeed in Pakistan the need for the continuance of this power was felt even after the initial period fixed in the Indian Independence Act and the Constituent Assembly of Pakistan on the 19th March 1948, actually extended this period to the 31st March 1949 by passing the Indian Independence (Amendment) Act, 1948.

We are unable, in the circumstances, to agree with the High Court that the laws which were made applicable to the tribal areas before the 15th August 1947, in exercise of the powers given to the Governor-General under the Indian Foreign Jurisdic tion Order of 1937, lapsed with the coming into force of the Indian Independence Act, or that the tribal areas had not become part and parcel of the territories of Pakistan with effect from the 15th August 1947.

On general principles too such a result must follow for, the laws of a State or territory do not disappear by a change in its sovereignty. Laws governing or regulating the relations, the rights and obligations of the residents of a ceding or acceding territory do

not lapse by a mere change in the sovereignty brat continue to remain operative until changed by a competent authority. The laws, as pointed out by Lord Mansfield in the case of Campbell v. Hall (98 E R 1045) of an acquired or ceded territory continue in force until they are altered by the conqueror or the country to which it has been ceded or acceded. Cession of course, is not restricted to cases where the possession is acquired by conquest but it also includes cases of voluntary cession by the general consent of the people.

In the case of Vorlsimo Vasouez Vilas v. City of Manila (U S S C R 55 Law Edn. 345) it was observed by Lurton, J. while delivering the opinion of the Court that it is a general rule of public law, recognised and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign.

It is patent, therefore, that once it is found that the tribal areas had acceded to Pakistan then the right to legislate for the governance of those areas must necessarily be vested in the authority that was both before the 15th August 1947, and after tie 15th August 1947, vested with those powers, namely; the Governor-General until other provision is made in that behalf by a competent Legislature.

It now remains to consider whether any further change was made in the Constitutional position of the tribal areas after the Governor-General's Orders Nos. 5 and 6 of 1949.

In International Law too Pakistan was accepted and recognised as a successor Government and the inheritor of his Majesty's Government in the United Kingdom. This was made abundantly clear by the following statement of the then Secretary of State for Commonwealth Relations, made in the British House of Commons on the 30th June 1950:-

"His Majesty's Government in the United Kingdom have seen with regret the disagreements which there have been between the Governments of Pakistan and Afghanistan about the status of the territories on the North-Western Frontier. It is His Majesty's Government's view that Pakistan is in interna tional law the inheritor of the rights and duties of the old Government of India and of His Majesty's Government in the United Kingdom, in these territories and that the Durand Line is the international frontier."

This was followed in 1956 by a statement of Sir Anthony Eden, the then Prime Minister of the United Kingdom to the following effect :-

"In 1947, Pakistan came into existence as a new sovereign independent member of the Commonwealth. The British Government regard her as having, with full consent of the overwhelming majority of the Pushto-speaking peoples con cerned both in the administered and non-administered areas, succeeded to the exercise of the powers formerly exercised by the Crown in the Indian North-West Frontier of the sub continent."

Again the Council of Foreign Ministers of the South-East Asia Treaty Organization who met in Karachi from 6th to 8th March 1956, declared in their communique as follows :-

"The members of the Council severally declared that their Governments recognized that the sovereignty of Pakistan extends up to the Durand Line, the International boundary between Pakistan and Afghanistan and it was consequently affirmed that the Treaty Area referred to in Articles IV and VIII of the Treaty includes the area up to that Line."

Both under the international law as well as the Municipal Law, therefore, the tribal territories became part and parcel of Pakistan and were duly recognised as such by the United Kingdom and the member Nations of the South East Asia Treaty Organisation, The Dominion of Pakistan through its Constitutional Assembly also formally accepted it as such. In the circumstances it was; not for the Municipal Courts to hold otherwise. It is important to remember that in such matters of a political nature, namely; accession or cession of territory it is not for the Courts to take a different view. The executive authority of the State has in the u exercise of its Sovereign power the right to say as to which territory it has recognised as a part of its State and-the Courts are bound to accept this position. Indeed this was the principle that was given statutory effect in section 4 of the Foreign Jurisdiction Act, 1890 and section 6 of the Governor-General's Order No. 5 of 1949. If the Courts felt any doubt with regard to the status of such a territory then it was incumbent upon them to make a reference to the Government and to accept its opinion.

In this view of the matter it is not necessary for us to enter upon any detailed examination of the question as to whether this constituted an "act of State" and whether the Courts could go behind this question. Suffice it to say that this expression has been used not only narrowly to describe the defence available to the Crown against a subject of a foreign State or his property but also in the wider sense to denote those acts of the Crown which are done in the exercise of its prerogative powers in the sphere of foreign affairs, such as, the making of war or peace, the annexation or cession of territory, the recognition of a new State or the new Government of an old State. Acts of the latter kind are `not justiciable in the Municipal Courts. The sanction behind them, as observed in Halsbury's Laws of England, 3rd Edition, Vol. VII, P. 280 "is not that of law, but of sovereign power, and, whatever it be, Municipal Courts must accept, as it is, without question. They do not in the absence of special statutory provision to the contrary, administer treaty obligations, but they will enforce rights acquired by the Crown by virtue of or in connection with an annexation of territory."

It has next to be considered whether any further change took place thereafter. The Establishment of West Pakistan Act, 1955, it appears, actually incorporated the tribal areas of Baluchistan, the Punjab and the North-West Frontier, and the States of Amb, Chitral, Dir and Swat into the Province of West Pakistan by section 2(1) (iv) thereof and section 10, subsection (1) continued to apply all laws in force in West Pakistan immediately before the appointed day. Laws, by the definition given in subsection (2) of this section, included notifications issued by a competent authority. For administrative purposes, therefore, the tribal areas thus became a part and parcel of the Province of West Pakistan and even in the Provincial Assembly seats were provided for members of the Jirgas of the tribal areas including the Khyber Agency.

Under the Constitution of 1956, by sub-Article (2) of Article 1 the tribal areas which in 1955 were incorporated in the territories of the Province of West Pakistan also became territories of Pakistan but the nomenclature was altered and they were to be known henceforward as `special areas'. Under Article 104 of the said Constitution, in respect of these special areas the Governor was given the powers, with the previous approval of the President to make regulations for the peace and good Government thereof.

Special areas were defined in Article 218 as meaning the areas of the Province of West Pakistan which immediately before the commencement of the Establishment of West Pakistan Act, 1955, were-

(a) the tribal areas of Baluchistan, the Punjab and the North-West Frontier, and

(b) the States of Amb, Chitral, Dir and Swat ;

Khyber Agency is in the tribal area of the North-Western Frontier.

Article 224 of the said Constitution continued `in force' all laws, Ordinances, Orders-in-Council, Orders, rules, bye-laws, regulations, notifications, and other legal instruments `in force' in Pakistan or in any part thereof, immediately before the Constitution day and `in force' in this Article meant "having effect as law whether or not the law had been brought into operation."

Finally under the Constitution of 1962, the nomenclature "tribal areas" re-appeared in Article 242 but having the same connotation as the special areas in the Constitution of 1956. Article 223 provided that no Central Law shall apply to a Tribal Area or to any part of a Tribal Area unless the President so directs and no Provincial Law shall apply to such Tribal Area unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs. Such direction could be given subject to such exceptions and modifica tions as may be specified in the direction. But again Article 225 continued in force all existing laws, so far as applicable but subject to the provisions of the Constitution and necessary adaptations therein, until altered, repealed or amended by the appropriate Legislature. Under this Article also existing laws included notifications and other legal instruments having the force of law in Pakistan.

Reference is, however, made on behalf of the respondent to the Tribal Areas (Application of Acts) Regulation of 1965, made on the 10th September 1965, under Article 223(2) of the Constitution of 1962 to show that the Sea Customs Act, 1878 was applied to these areas in 1965 presumably because it was not then applicable there. If so, it is said, the other statutes too should have been made applicable by this Regulation and since that was not done the only inference possible is that they did not apply to the Tribal areas. Such an inference does not in our opinion follow because of what we have said earlier and the only object of including the Sea Customs Act in the Regulation of 1965 could possibly have been to make the rules, orders and notifications, issued thereunder in Pakistan since the Notification of 1926 applying it to the tribal areas, also applicable. This does not mean that prior to this Regulation of 1965 these Acts were not at all applicable in the Tribal Areas.

The result, therefore, of the above analysis of the various Constitutional provisions relating to the tribal areas is that the tribal areas became legally parts of the territories of Pakistan from 15-8-47, the date mentioned in the Notifications of the 27th June 1950 and all laws which applied to those territories before the 15th August 1947 were continued in force until altered or amended, and from 1955 the tribal areas of the North-West Frontier became parts of the Province of West Pakistan having a representation even in the Legislature of the said Province. There could be no manner of doubt, therefore, that the Sea Customs Act, the Land Customs Act and section 5 of the Tariff Act, which had been made applicable to the tribal areas by the Notifications of the 22nd September 1926 and the 24th January 1938, continued to apply in those areas and never lapsed. Torkham was declared a Land Customs Station by the Notification of the 28th January 1938 and Afghanistan was declared a foreign territory under section 5 of the Tariff Act, 1934 by the Notification of the 10th H January 1939, in respect of the tribal areas of the Khyber Agency. Subsequently on the 29th March 1941, another Notification was issued prohibiting under section 19 of the Sea Customs Act the importation of dutiable goods into Pakistan from Afghanistan. By another notification issued on the 12th June 1951 under subsection (1) of section 3 of the Imports and Exports Control Act, the importation of fabrics into Pakistan save under a licence issued for the purpose was prohibited and on the 28th July 1959, another Notification No. S. R. O. 349 was issued under section 5 of the Tariff Act, 1934 again declaring Afghanistan to be a foreign territory for the purposes of the said section and directing that a duty of customs at the rate prescribed by or under the Tariff Act shall be leviable on any of the articles mentioned in the Schedule to the said Notification, which included fabrics containing silk, artificial silk, cotton or gold and silver thread, when imported by land from any of the notified foreign territories.

The learned Judges of the High Court have, however, taken the view that even assuming that the Governor-General's Orders Nos. 5 and 6 were valid these notifications did not serve the purpose, for, according to them, there should have been a further notification under section 5 of the Tariff Act declaring the tribal areas of the Khyber Agency as foreign territory. The declaration of Afghanistan as foreign territory made by the Notification of the 10th January 1939 (Notification No. 24-T (1)/37) was considered to be insufficient. In support of this they have referred to a Notification issued on the 3rd June 1939, namely, Notification No. 24-T(2)/39, declaring the Kurram Agency to be foreign territory for the purposes of the said section. But this argument appears to us to be wholly fallacious, for, if Khyber Agency was declared to be a foreign territory then no goods entering into the Khyber Agency from Afghanistan or China could be charged with any duty while still in the Khyber Agency. As a matter of fact what was done by Notification No. 24-T (1)/37 on the 10th January 1939, was quite correct, for, by declaring Afghanistan to be a foreign territory for the purposes of the Tariff Act that Notification made dutiable goods entering the Khyber Agency from Afghanistan chargeable with duty. If there was any doubt with regard to this matter, this was amply removed by the Notification of the 28th July 1959 which was issued in super session of the Notification No. 24-T(l)/37 of the 29th January 1938, declaring Iran, Afghanistan, Chinese Turkistan, Tibet and Nepal to be foreign territories for the purposes of section 5 of the Tariff Act, 1934 and directing that a duty of Customs at the rate prescribed by or under that Act would be chargeable on goods specified in the Schedule appended thereto ,when imported by land from any of the said territories. This clearly removed all doubts, if any, with regard to the liability of fabrics imported into Pakistan from Afghanistan being chargeable with duty.

The argument of the High Court that in any event since no Notification had been issued extending the Imports and Exports (Control) Act to the tribal areas, the dutiable goods entering the Khyber Agency without licence could not be charged with any duty is equally fallacious, for, the effect of subsection (3) of section 3 of the Imports and Exports (Control) Act is that the import of dutiable commodities is also deemed to be restricted under section 19 of the Sea Customs Act and since in the present case there was, in fact, a notification extending section 19 of the Sea Customs Act to the tribal areas, the provisions of section 3, subsection (3) of the Imports and Exports (Control) Act operated even in the tribal areas. . If the learned Judges had referred to the decision of this Court in the case of Pakistan and another v. Qazi Ziauddin (PLD1962SC440) it would have been noticed that it was there too held that even though the Imports and Exports (Control) Act was not applicable to the tribal areas by reason of no notification in respect of this Act having been issued, yet the effect of subsection (3) of section 3 of the Imports and Exports (Control) Act was that the import of the goods in question was deemed to be restricted also under section 19 of the Sea Customs Act and, therefore, could not pass through the Customs barriers at Torkham without a licence from the Chief Controller of Imports and Exports.

In the present case, however, the notification of the 20th July 1959, set the matter at rest, for, under this Notification fabrics could not be imported into the tribal areas of the Khyber Agency from Afghanistan. The High Court has also omitted to notice that on the 12th June 1951, Notification No. 335/260/34 was in fact issued under section 3 of the Imports and Exports (Control) Act, 1950, prohibiting the import by sea, land or air from any country outside Pakistan of any goods of the description specified in the Schedule, which included fabrics. This Notification also made fabrics a prohibited item of import under section 19 of the Sea Customs Act by virtue of the provisions of subsection (3) of section 3 of the Imports and Exports (Control) Act. Since a Notification under section 19 of the Sea Customs Act was already in operation in the-tribal areas of Khyber Agency, it may well have been considered unnecessary to issue another notification under section 3 of the Imports and Exports (Control) Act. We are thus, of the view that on merits too, the High Court appears to us to have been wrong

in taking the view that effective legal cover was not provided for the seizure of the truck in question.

In this view of the matter, we do not consider it necessary to enter upon a discussion of the technical objection relating to the locus stand of the petitioner and the maintainability of the writ petition itself.

As regards the first point it must, however, be pointed out that in the original petition nothing was disclosed apart from a bald asserted that the petitioner had been deprived of his property but nothing was said to show as to how he was a person interested in maintaining the petition. This deficiency was sought to be remedied by amending the writ petition but it appears from the report of the Transport Licencing Authority that even up to the 6th March 1967, the petitioner's name had not been mutated as the owner of the truck nor had the petitioner filed any documents to show that the goods being carried on the truck belonged to him. The only proof in support of his claim to the ownership of the truck is the affidavit affirmed by Abdur Rehman Khan on the 23rd April 1968. There is a great deal of force, therefore, in the contention put forward on behalf of the appellant that petitioner had, in fact, no locus stanch to maintain the writ petition.

The next question is as to whether the writ could at all issue, because, the truck and the articles therein were seized within the tribal area. The Court has already held in the case of Jamil Ahmad and another v. The State (Criminal Appeal No. 11 of 1968) that the High Court has no jurisdiction to issue a writ under Article 98 of the Constitution to the tribal areas. But in this case since the truck and the goods were brought to Peshawar Cantonment, which was within the jurisdiction of the Court, no legitimate objection could be taken to the High Court issuing a writ on the authorities concerned within their jurisdiction to i release the truck from such seizure. Since that order would have had to be carried out within the territorial limits of the jurisdiction of the High Court it could have been lawfully issued. It is only if the order was sought to take effect in a territory outside the limits of the jurisdiction of the High Court that the question of non-maintainability of the writ could arise.

For the reasons given above this appeal must, in our opinion, succeed. The appeal is, accordingly allowed and the writ issued by the High Court is recalled. The Customs authorities will now proceed in the matter in accordance with law.

In view, however, of the fact that difficult questions of law were involved we make no order as to costs.

K. B. A. Appeal accepted.

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