P L D 1955 Federal Court 435

(Advisory Jurisdiction)

Present: Muhammad Munir, C. J., A. S. M. Akram,

A. R. Cornelius Muhammad Sharif, and S. A. Rahman, JJ

REFERENCE BY HIS EXCELLENCY THE GOVERNOR-GENERAL

(under section 213 of the Government of India Act, 1935)

Special Reference No. 1 of 1955, answered on 16th May, 1955.

(a) Governor-General's assent—Not obtained to certain con­stitutional Acts of Constituent Assembly—Governor-General's powers to temporarily validate, retrospectively, such invalid Acts--Common Law of civil or state necessity—Government of India Act, 1935, S. 213.

Assent of the Governor-General had not been obtained to certain constitutional Acts of the Constituent Assembly. The Federal Court having held in Maulvi Tamizuddin Khan's case (P, L D 1955 F C 240) that assent of the Governor-General was necessary to all laws passed by the Constituent Assembly, the Governor-General sought to validate such Acts by indicating, his assent, with retrospective operation, by means of an Ordinance (Emergency Powers Ordinance, IX of 1955) issued under section 42 of the Government of India Act, 1935. The Federal Court in Usif Patel's case (P L D 1955 F C 387), however declared that the Acts mentioned in the schedule to that Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor could retrospective effect be given to them. A noteworthy fact was that the Constituent Assembly had ceased to function, having been already dissolved by the Governor-General by a Proclamation on 24th October, 1954, and no Legislature competent to validate these Acts being in existence, the Governor-General made a Reference to the Federal Court under section 213, Government of India Act, 1935 asking for the Court's opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor, General could by order or otherwise declare that all orders made, decisions taken, and other acts done under those laws should be valid and enforceable and those laws which could not without danger to the State be removed from the existing legal system should be treated as part of the law of the land until the question of their validation was determined by a new Constituent Convention?

Answer returned to the Reference was: (By majority of Court Muhammad Munir, C. J., A. S. M. Akarm, and S. A. Rahman, JJ,., Cornelius, J. and Muhammad Sharif J. (Contra).—In the situation presented by the Reference the Governor-General has during the interim period the power under two common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly are during the aforesaid period valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

Per Muhammad Munir, C. J.-(Dealing with the principle of civil or state necessity): The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law and the maxim cited by, Bracton that necessity makes lawful which otherwise is not lawful. Since the address expressly refers to the right of a private person to act in necessity, in the case of Head of the State justification to act must a fortiori be clearer and more imperative.

This being the position regarding individual acts, the next question is whether the Head of the State can, in the .circum­stances postulated, legislate for the society. This Court has held in Usif Patel's case (P L D 1955 F C 387) that the Governor-General has no power to make such laws as are mentioned in subsection (1) of section 8 of the Indian Independence Act, 1947, but that decision was expressly limited to the Governor-General's powers under section 42 of the Government of India Act, 1935, no other source for the power to pass such laws having been claimed for him in that case. If it once be conceded that the power to act in ah emergency of the nature just indicated exists, the conclusion is inescapable that the act may be done by a general order, which, as admitted by Mr. Pritt, would amount to legislation. If, the law as stated by Chitty that the .Crown is the only branch of Legislature that is capable of performing any act at a time when Parliament is not in being is correct, legislative powers of the Crown in an emergency are a necessary corollary from that statement, and' the same result flows from Dicey's statement that the free exercise of a discretionary or preroga­tive power at a critical juncture is essential to the executive Government of every civilised country, the indispensable condition being that the exercise of that power is always subject to the legislative authority of Parliament, to be exercised ex post facto. The manner in which such power is exercised, whether in individual cases or by positive directions or restraint orders of a general character, is essentially a question of method and detail, not affecting the main principle. The emergency legislative power, however, cannot extend to matters which are not the product of the necessity, as for instance, changes in the constitution which are not directly referable to the emergency.

Per Cornelius, J. (Contra)—(a) There is no provision in the Constitution and no rule of law applicable to the situation, by which the Governor-General can, in the light of this Court's decision in the case of Usif Patel, by proclamation or otherwise, validate the laws enumerated in the Schedule to the Emergency Powers Ordinance, 1955, whether tempora­rily or permanently.

(b) The expression "laws which cannot without danger to the State be removed from the existing legal system" is altogether vague, and therefore no answer can be offered to the second part of the question.

The legislative powers of the Governor-General under the existing Constitution are confined within the terms of section 42, Government of India Act, 1935. Those powers are sufficient to enable the Governor-General to stay all proceedings in Courts other than the Federal Court, in which the legal provisions referred to are called in question, pending such action as the proposed Constituent Convention (Con­stitutional Assembly) may see fit to take in respect thereof."

It has been argued that the action thus taken is one taken in an extreme emergency, to save the State from dissolution, and is relatable to powers derived from the maxim salus populi supremo lex.

The scope and content of this maxim were fully canvassed before the Court in the earlier case of Maulvi Tamizuddin Khan, by the Senior Counsel for the Federation of Pakistan. It was possible for the Advocate-General of Pakistan, who attended the proceedings in Maulvi Tamizuddin Khan's case throughout, to have relied upon the powers derived from this maxim, when he was asked in Usif Patel's case to refer the Court to the specific sources from which the Governor-General derived power to make constitutional law with retrospective effect. (For the validation of such law with retrospective effect undoubtedly is tantamount to making such law). No reliance was placed by the Advocate-General of Pakistan at that stage upon the maxim salus populi suprema lex, but the argument, based upon this maxim, that the Governor-General possessed powers over and above those contained in the constitutional instruments in force which he was competent to exercise in an emergency, was fully present to the mind of the Court. This appears clearly from several passages in the extracts from the judgment in Usif patel's case, which I have reproduced above. It was said for instance that the Advocate-General of Pakistan was repudiating a position previously supported by Mr. diplock, and "on the ground of emergency every kind of Power is being claimed for the Head of the State". The effect of that judgment is in my opinion, to make it clear that in relation to the very situation which the Proclamation of the 16th April, 1955 is intended to remedy, this Court was emphatically of the view that the Governor-General could not invoke any powers except such as were available to him under the constitutional instruments in force. To that opinion, I steadfastly adhere, and 'nothing which has been said in the arguments in the Reference affords in my view, sufficient justification for varying that finding, which constitutes law declared by this Court under section 212, Government of India Act, 1935.

Per Muhammad Sharif, J. (Contra)—On constitutional matters the Governor-General is not competent to legislate and cannot, therefore, by his own act make valid laws which he himself could not enact. Realising this difficulty, the learned counsel for the Government had recourse to the dicta like "salus populi est supremo lex" or "necessity makes lawful what is otherwise unlawful". These have been sometimes invoked in times of war or other national disaster to infringe private rights or commandeer private property, but we have not been referred to any authority or reported case where, under the stress of circumstances created by some interpreta­tion of law, these were extended to embrace changes in con­stitutional law. It might on occasions lead to dangerous consequences if in any real or supposed emergency of which the Head of the State alone must be the judge, the constitutional structure itself could be tampered with. It has a sanctity of its own Which is not to be violated. My answer, therefore, to Question No. 2 is that it is beyond the authority of the Governor-General, both under the Constitutional and the general law, to do even for a short period what the Constituent Assembly alone could do.

(b) Constituent Assembly—Dissolved by Governor-General's Proclamation—Whether dissolution was right-Indian Indepen­dence Act, 1947, S. 5—Whether Constituent Convention proposed to be set up by Governor-General was competent to exercise powers conferred by S. 8 (1), Indian Independence Act, 1947, on the Constituent Assembly—Governer-General's Reference to Federal Court under S. 213, Government of India Act, 1935.

Provisions for a constitution for the country not having been made by the Constituent Assembly of Pakistan that body was dissolved by, a Proclamation of the Governor-General on 24th October, 1954, the, ground of dissolution stated in the Proclamation being that the Assembly had lost the confidence of the people and could no longer function. The Proclamation also contained a promise of early elections to enable the people through their representatives to decide all issues including constitutional issues. The dissolution was challenged by Mr Tamizuddin Khan, President of the Constituent Assembly, by a petition for writs of mandamus and quo warranto in the Chief Court of Sindh which issued the writs prayed for against the Federation of Pakistan etc.—the opposite party to the petition. On appeal by the latter, the Federal Court held that section 223-A which conferred the power to issue writs was invalid having been enacted by an Act of the Constituent Assembly which 1had not received the assent of the Governor-General. The writs in question were therefore cancelled. The question of dissolution of the Constituent Assembly, however, was not decided. But the federal Court's finding that assent of the Governor-General was necessary to all legislation of the Constituent Assembly rendered invalid a large number of Acts of that body of a constitutional nature passed in the course of about seven years, which Acts, in accordance with a Rule of procedure of the Constituent Assembly had been enacted without obtaining the Governor-General's assent. The Governor-General, there-fore, proceeded to validate those Acts by signifying his assent with retrospective effect by, means of an Ordinance (Emergency powers Ordinance, IX of 1955) issued under section 42, Government of India Act. The Federal Court, however, held in Usif Patel's case, that the Governor-General could not validate these Acts by an Ordinance. As the question of validation was of great urgency, the Governor-General while summoning a Constituent Convention for the purpose of making provision as to the constitution of Pakistan also issued a Proclamation validating the Acts which he had formerly sought to validate' by an Ordinance, referring at the same time the question of validating the Acts for the opinion of the Federal Court under section 213, Government of India Act, 1935. On this Reference coming up for a preliminary hearing the Court's order suggested that the following questions might also be included in the Reference :

Whether the Constituent Assembly was rightly dissolved by the Governor-General ?

Whether the Constituent Convention proposed to be set up by the Governor-General will be competent to exercise the powers conferred by subsection (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?

Accordingly, the Governor-General referred- the above questions for the opinion of the Court.

Answer returned to the Reference was : (By majority of the Court, Muhammad Munir, C. J. delivering the leading, Judgment, with which A. S. M. Akram and S. A. Rahman, D. agreed, Cornelius, J. differing in reasons for, and details of the answer) :

On the question whether the Constituent Assembly was rightly dissloved.—That on the facts stated in the Reference, namely, (1)' that the Constituent Assembly, though it functioned for more than 7 years, was unable to carry out the duty to, frame a constitution for Pakistan to replace the transitional constitution provided by the Indian Independence Act, 1947 (2) that in view of the repeated representations from and resolutions. passed by representative bodies through-out the country the Constituent Assembly, in the opinion of the Governor-General, became in course of time wholly unre­presentative of the people of Pakistan and ceased to be responsible to them ; . (3) that for all practical purposes, the constituent Assembly assumed the form of a perpetual Legislature; and (4) that throughout the period of its existence the Constituent Assembly asserted that the provisions made by it for the constitution of the Dominion under sub section (I) of section 8 of the Indian Independence Act were valid laws without the consent of the Governor-General the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly.

On the question whether the Constituent Convention was, competent to exercise the powers of the Constituent Assembly under section 8 (1), Indian Independence Act 1947:

Subject to this:

(1) that the correct name of the Constituent Convention is Constituent Assembly:

(2) that the Governor-General's right to dissolve the Assembly can only be derived from the Indian Independence Act;

(3) that the arrangements for representation of States and Tribal Areas can, under the proviso to subsection (3) of section 19 of the Indian Independence Act, be made only by the Constituent Assembly and not by the Governor-General ; and

(4) that the Governor-General's duty being to bring into existence a representative legislative institution he can only nominate the electorate and not members to the Constituent Assembly.

The new Assembly, constituted under the Constituent Convention Order, 1955, as amended to date, would be com­petent to exercise all the powers conferred by the Indian Independence Act, 1947, on the Constituent Assembly includ­ing those under section of that Act.

Per Muhammad Munir C. J.— "It seems to me to be perfectly clear from this scheme of the Indian Independence Act, 1947, and the adapted Government of India Act, 1935, that the absolute and unqualified prerogative right of the Crown and of the Governor-General as representative of the Crown to dissolve the Assembly was taken away. If the intention had been to transfer to the. Governor-General, as representative of the Crown, the prerogative right of summon­ing, proroguing and dissolving the Constituent Assembly, the elaborate constitutional structure that was built upon the Indian Independence Act, 1947, and the adapted Government of Indian Act, 1935, could have been pulled down by the' Governor-General, with or without the advice of the Prime Minister, on the very day he assumed his office and before the Constituent Assembly had even commenced to function:

"This possibility was certainly excluded by and ,is clear - inconsistent with the intention of the Indian Independence Act,, 1947, particularly subsection (1) of section 8 according to which the powers of the Legislature of the Dominion Wert to be exercised in the first instance by the Constituent Assembly and proviso (e) to subsection (2) of that section which similarly declared that the powers of the Federal Legislature under the adapted Government of India Act, 1935,- were to be exercisable in the first instance by the same Assembly."

"The whole scheme of that Act (Indian Independence Act, 1947) appears to me to suggest that the Constituent Assembly was to make a constitution under subsection (1) of section 8 of the Act as well as to exercise the powers of the Federal Legislature under the adapted Government of India Act, because the words ‘in the first instance’ on which considerable emphasis was laid by Mr. Diplock in another connection and which occur both in subsection (1) and clause (e) of the provision to subsection (2) of that section are unmistakably indicative of the intention that the Constituent Assembly, if it functioned according to the true intent of the Constitution Acts, was in neither capacity to be dissolved. A dissolution is no more than an appeal to the electorate, and it is admitted that neither under the Indian Independence Act, 1947, nor under the adapted Government of India Act, 1935, there exists any provision relating to fresh elections to the Legis­lature of the Dominion or the Federal Legislature. This, in my opinion, being the correct interpretation of the Indian Independence Act, 1947, no unqualified delegation of the prerogative of dissolution can be read in section 5 of the Indian Independence Act, 1947, or in the warrant of Governor-General's appointment."

"If we look at the language of subsection (1) of section 8 of the Indian Independence Act it becomes perfectly clear that because the power of making provision as to the con­stitution of the Dominion had been given to the Constituent Assembly, the prerogative to dissolve that Assembly was taken away if that Assembly did exercise its powers to make provision as to the constitution of this country. It is, how-ever, equally clear that the provisional constitution granted to Pakistan by the Indian Independence Act, 1947, and the adapted Government of India Act, 1935, was until its nature was altered by a law made by the Constituent Assembly, a democratic constitution, and it cannot possibly be contended that the Constituent Assembly had been given the power to function as long as it liked and assume the form of a perpetual or indissoluble Legislature. The only reasonable construction of subsection (1) of section 8 of the Indian Independence Act, 1947, is that that subsection gave to the Constituent Assembly an opportunity to frame a working or functioning constitu­tion for the country within a reasonable time and not the right to go on with constitution making indefinitely. The prerogative to dissolve, therefore, must be taken to have been taken away by the Act only if the Constituent Assembly performed the duty assigned to it by the Act, and if the Act did not intend to install that Assembly as a perpetual Legislature, the prerogative of dissolution which was in abeyance must be held to have revived when it became apparent to the Governor-General that the Constituent Assembly was unable or had failed to provide a constitution for the country.

It could certainly not be the intention of the Indian Independence Act that in the guise of a constitution making body the Constituent Assembly could function as the Legislature of the Dominion indefinitely until it became necessary to remove it by a revolution. And if that was not the intention of the Act, it must follow that the common law prerogative to dissolve was not taken away by the Act in that contingency The words "in the first instance" in subsection (t) of section 8 of the Indian Independence Act, 1947, appear to me to indicate quite clearly that an indefinite life for the Assembly was not intended and that the prerogative right to dissolve it was excluded only, if the Assembly performed the duty assigned to it, within a reasonable time. Therefore if the Assembly was unable or refused to perform the function assigned to it, and on the contrary: assumed the form of a perpetual Legislature, the right in that event to dissolve it was not taken away by the Act."

"If there was a clear assumption in the Indian Independence Act that the constituent Assembly would frame a constitu­tion for the country and then dissolve itself and the whole structure of that Act was built upon that assumption, then it is obvious that-for more man seven years the Assembly having made no constitution for the country and on the contrary having assumed the form of a Legislature for an indefinite period, its dissolution was in furtherance and not ' in contraven­tion of the intention of the Act."

The Court's opinion was expressed on assumption of facts as set out in the Reference.

In the Court's opinion the prerogative power of dissolution revived because :

(1) The Assembly was not performing its function.

(2) It had become unrepresentative in character.

(3) It had violated the requirement of the Governor-General's assent to all laws passed by it.

Per Muhammad Munir, C. J.—(On the powers of the proposed Constituent Convention) :

"In a democratic constitution of the British type such as is envisaged by the Indian Independence Act, 1947 and the adapted Government of India Act, 1935, the power to dissolve a representative legislative institution implies the right to convene another, the power exercised in both cases being a prerogative power."

"Under the Indian Independence Act, 1947, there is no provision relating to the convention or composition of a fresh Constituent Assembly. It follows therefore that the Governor-General must, as representative of the Crown, exercise the same powers as were exercised by the Governor-General in 1947, on behalf of the Crown, the only difference between the two cases being that whereas in 1947 the Governor-General exercising the powers was responsible to His Majesty's, Government in the United Kingdom, the present Governor-General having been appointed to represent the King for the purposes of the Government of the Dominion, is not responsible to any agency outside the Dominion, though in law the source of the authority in both cages is the Crown. The dissolved Constituent Assembly was set up by an executive order and not under any law and the new Constituent Assembly also can be set up by a similar order."

"The only legal requirement in setting up a new Assembly is that it should be a representative body, but in attaining that object time, practicability, and agreement between various political leaders are as much relevant factors as they were in the Cabinet Mission's Plan of 16th May and His Majesty's Government's announcement of 3rd June, l941. I am there-fore of the view that under the Indian, Independence Act, 1947, the Governor-General had the authority to issue the Constituent Convention Order, 1955."

Federation of Pakistan v. Maulvi: Tamizuddin Khan P L D 1955 F C 240, Attorney General v. De Keyser's Royal Hotel,. (1920) A C 508 and Sammut v. Strickland (1938) A C 678, ref.

Per Cornelius, J.-(Differing in reasons for, and details of the answer): ". . . . the power of dissolution of the Constituent Assembly arises from the circumstance that it is, as- held in Maulvi Tamizuddin Khan's case (P L D 1955 F C 240), the Legislature of the Dominion, and that the' Governor-General of the Dominion possesses all prerogatives, of His Majesty, among which must necessarily be included the power of dissolving the principal Legislature of the Dominion."

".... there is a strong presumption that the prerogative, of dissolution of the Legislature of the Dominion vests in the Governor-General and if this presumption is to be dislodged, there must be either express provision to that effect, or the relevant instruments must, by necessary intendment, produce the same result."

"Since the exercise of a prerogative power is not a justiciable matter, whether it is rightly or wrongly exercised is not a matter of law, and therefore not a suitable subject for expression of opinion by this Court."

"All that I need add for the complete elucidation of my answer to this question is that since it was conceded that the Governor-General could not dissolve the Constituent Assembly unless he had the power to re-convene it, the continued life of the Constituent Assembly until it had accomplished its task of providing a working Constitution for the country which could operate after the abolition of the Constituent Assembly, was assured. Therefore, it cannot be urged that since by section 8 of the Indian Independence Act, 1947, certain powers are said to be exercisable "in the first instance" by the Constituent Assembly, there is any duty upon the Governor-General not ' to exercise his power of dissolution for any period. So long as the Constituent Assembly does not provide for the setting up of a "Legislature of the Dominion" its necessity for the operation of the existing Constitution remains. But, once it has set up a Legislature of the Dominion, which will by expression have the power of making provisions as to the Constitution of Pakistan, the Constituent Assembly can, without detriment to the country, eliminate itself as soon as the new Legislature of the Dominion is complete. Until that time, it seems to me that the Governor-General cannot be said, in law, not to possess the power of dissolving the Constituent Assembly. I do not concern myself with the consideration of particular circumstance in which he may or may not dissolve the Constituent Assembly, in the proper exercise of his powers. That is a matter within the Governor-General's discretion, and is subject to recognised conventions. But it is no part of the duty of this Court to advise upon matters of convention."

On the question of basis for the election of the proposed Constituent Convention : —"It was urged with great force that the Plans of the 16th May, 1946 and the 3rd June, 1947 are not law, and therefore do not provide an electoral law binding upon the Governor-General in relation to the recon­vening of the Constituent Assembly. The view which I prefer to take is this. The original Constituent Assembly was elected upon the basis of these two instruments, and I there-fore look to these two instruments for the electoral law which governed the constitution of that Constituent Assembly. No, other electoral law having been passed in the meantime and it being now necessary to reconvene the Constituent Assembly in the absence of any enactment by the Constituent Assembly providing for its own reconstitution I can see no alternative for a constitutional head like the Governor-General, but to repeat as nearly as may be, with the minimum of adaptation necessary to provide for the changed circum­stances the process by which the first Constituent Assembly was constituted by the then Governor-General, expressly in pursuance of the Plans mentioned above.

Federation of Pakistan v. Maulvi Tamizuddin Khan P L D 1955 C 240 ; Musgrave v. Pulido, (1879) 5 App, as. 102 and Is if Patel v. Crown P L D 1955 F C 387 ref

(c) Government of India Act, 1935, S. 213—Court may decline to answer a question which is of a too general character.

Faiyaz Ali, Advocate-General of Pakistan, Kenneth Diplock, Q. C. (R. L. McEwen, Barrister-at-Law, with them) instructed by Iftikharuddin Ahmad, Attorney.

Under O. XLV, rule 1, Federal 'Court Rules, 1950.--(1) A. R. Changez, Advocate-General of the Punjab, instructed by Ijaz All, Attorney.

(2) Sikandar Beg S. Mirza, Advocate-General of Sind.

(3) Muhammad Ali, Advocate-General of North-West Frontier Province, instructed by Iftikharuddin Ahmad, Attorney, for the Governor-General of Pakistan.

D. N. Pritt, Q. C., I. I. Chundrigar, Senior Advocate, Federal Court, (Sharifuddin Pirzada, Advocate, Federal Court, Manzar-e-Alam, Advocate, Federal Court, and M. Nashn, Advocate, Chief Court of Sind under O. IV, rule 7, Federal Court Rules, 1950, with them), instructed by M. Siddiq, Attorney, for Maulvi Tamizuddin Khan.

Hamidul Haq Choudhry, Senior Advocate, Federal Court, (Abu Muhammad Abdullah, Advocate, Federal Court, with him), instructed by M. Siddiq, Attorney, for the- United Front Parliamentary Party of Ea 't Bengal Legislative Assembly represented by its leader A. K. Fazlul Haq and Congress Party and Scheduled Castes Federation.

Dates of hearing : April 25, 27, 28, 29 and May 2, 3, 4, 5, 6, 9 and 10, 1955.

OPINION

MUHAMMAD MUNIR, C. J.--The situation presented by this Reference by His Excellency the Governor-General under section 213 of the Government of India Act, 1935, is that after experimenting for more than seven years with a con­stitution which was imposed on this Country, with the consent of its leaders, by a statute of the Parliament of the United. Kingdom, called the Indian Independence Act, 1947; we have come to the brink of a chasm with only three alternatives before us:

(1) to turn back the way we came by

(2) to cross the gap by a legal bridge;

(3) to hurtle into the chasm beyond any hope of rescue.

It is not a long story to tell how we have come to this pass. Pakistan came into existence as an independent Dominion member of the British Commonwealth of Nations on the 15th August, 1947, with a provisional constitution of the federal pattern, under the Indian Independence Act, 1947. By that Act, until a new constitution was framed, the Gorvernment of Pakistan was to be carried on in accordance with the Government of India Act, 1935, with certain consequential adaptations and modifications. A Governor-General was to represent the Crown and the functions of the Legislature of the Dominion, including the making of a Constitution, were to be performed by a Constituent Assembly which had also to function as the Federal Legislature. The Assembly had not made any constitution when on the 24th October, 1954, it was dissolved by a Proclamation of the Governor-General, the ground of dissolution stated in the Proclamation being that the Assembly had lost the confidence of the people and could no longer function: The Proclamation also contained a promise of early elections to enable the people through their representatives to decide all issues in eluding constitutional issues.

On the 7th November, 1954, Mr. Tamizuddin Khan, the President of the Constituent Assembly, preferred a petition on the Extraodinary Special Jurisdiction side of the Chief Court of Sind, calling in question the Governor-General's power to dissolve the Assembly and praying for writs of mandamus and quo warranto. The jurisdiction to issue what in England are called prerogative writs had been conferred on the High Courts in Pakistan by section 223A, which was inserted in the Government of Indian Act, 1935, by an Act called the Government of India (Amendment) 'Act, 1954, passed by the Constituent Assembly on the 16th July, 1954. This Amendment Act, however, was never presented for assent to the Governor-General. The respondents to the petition were the Federation of Pakistan and certain Ministers of the Central Government including the Prime Minister. In their reply to the petition the respondents objected to the jurisdiction of the Sind Chief Court to issue the writs, on the ground that the Governor-General's assent to the Amendment Act, 1954, was indispensable and that since no such assent had been given to that Act the Chief Court had no jurisdic­tion to issue the writs. The Chief Court held that the Governor-General's assent to Acts passed by the Constituent Assembly, when it functioned as the Legislature of the Dominion under subsection (1) of section 8 of the Indian Independence Act, 1947, was not necessary and that the Governor-General had no power to dissolve the Assembly. Accordingly the writs prayed for were issued.

The Federation and the Ministers appealed to this Court after obtaining a certificate under section 205 of the Govern­ment of India Act, 1935, from the Chief Court of Sind. It was contended on their •behalf that the assent of the Governor-General to all legislation passed by the Constituent Assembly, whether as the Federal Legislature or as the Legislature of the Dominion, was necessary and that since the Amendment Act had not received such assent, section 223A of the Government of India Act, 1935, which conferred on the High Courts the jurisdiction to issue prerogative writs, was not a part of the law and that, therefore, the Chief Court had no jurisdiction to issue the writs.. The dissolution of the Assembly by the Governor-General was sought to be defended on the ground that the power to dissolve was implicit in the wide terms of section 5 of the Indian Independence Act, 1947, which provides that the Governor-General shall represent His Majesty for the purposes of the government of the Dominion.

After hearing full arguments on the question of assent the majority of us came to the conclusion that all laws passed by the Constituent Assembly required the Governor-General's assent, and we determined the appeal on that issue alone. Our judgment, in Mr. Tamizuddin Khan's case (1) was delivered on the 21st March, 1955, but reasons for it were given later on the 3rd April 1955.

It is mistake to suppose that we were not aware of the far-reaching consequences of the decision in Mr. Tamizuddin Khan's case (PLD 1955 FC 240). I referred to this aspect of the matter at pp. 69 to 74 of my judgment and concluded with the following observations:

"I am quite clear in my mind that we are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legis­lation by the, Legislature of the Dominion under sub-section (I) of section 8 needed the assent of the Governor‑General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable Legislature to what straits it has brought the country. Unless any rule of estoppel require us to pronounce merely purported legislation as complete and valid legislation; we have no option but to pronounce it to be void and to leave it to the relevant authorities under the Constitution or to the country to set right the position in any way it may be open to them. The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule of estoppel stands .in the way of a clear pronouncement."

On the 27th March, 1955, the Governor-General purport­ing to act under section 42 of the Government of India Act, 1935, and professing to exercise "all other powers enabling him in that behalf" promulgated the Emergency Powers Ordinance, IX of 1955,'by which he sought to validate and to give retrospective effect to 35 Constitutional Acts which had been, passed by the Constituent Assembly in exercise of its powers as the Legislature of the Dominion under sub-section (1) of section 8 of the Indian 'Independence Act 1947, and which under the judgment of this Court in Mr. Tamizud­din Khan's case (I) had become invalid. By that Ordinance the Governor-General not only claimed the power of making by order such provisions as appeared to him to be necessary or expedient for the Constitution of Pakistan but he also repealed or amended certain provisions of the existing constitu­tion relating to the Federal Legislature, the Annual Financial Statements, the Supplementary Statements of Expenditure, the Provinces and States and the High Courts and added a Proviso to section 176 of the Government of India Act, 193s, forbidding the bringing of suits or other proceedings against the Government or any Minister or Officer of the Government in respect of or arising out of anything done or omitted to be done by the Governor-General or by the Government or by any person under or in consequence of the Governor.. General's Proclamation under section 102 of the Government of India Act, 1935, which had been issued simultaneously with the Ordinance. The question of the validity of section 2 of that Ordinance came up before us within a few days of our judgment in Mr. Tamizuddin Khan's case (P L D 1955 F C 240), in Usif Patel's appeal (P L D 1955 F C 387). In that appeal the learned Counsel for the Crown relied on Ordinance IX of 1955 as having validated some of the Constitutional law which in consequence of our judgment in Mr. Tamizuddin Khan's case had been supposed to have been declared invalid. We unhesitatingly repelled that contention and held that validation of constitutional legislation being itself legislation could only be effected by the Constituent. Assembly under subsection (1) of section 8 of the Indian Independence Act, 1947, and not by means of an Ordinance by the Governor-General promulgated under section 42 of the Government of India Act, 1935: In coming to that conclusion we did no more than repeat the finding of the Court in Mr. Tamizuddin Khan's case.

Though it was recited in that Ordinance that the Cons­tituent Assembly had been dissolved, that the Federal Court had declared all constitutional legislation by the Constituent Assembly to be invalid and that therefore the constitutional machinery had broken down, the powers professed to be exercised under the Ordinance were claimed under section 42 of the Government of India Act, 1935, and from some other sources not specified. In the arguments before us, however, none of the matters mentioned in the Preamble was referred to and reliance was solely placed by the learned Advocate-General on the Governor-General's powers of promulgating Ordinances under section 42 of the Government of India Act. We repelled that contention on the short ground that that section did not enable the Governor-General to make by Ordinance any provision as to the constitution of the country. Since we had not so far recorded any finding that the constitutional machinery had broken down or -that the Constituent Assembly had been rightly dissolved, and no legislative body to replace the Constituent Assembly as pro­mised in the Proclamation of the 24th October, 1954, had yet been set up, the learned Advocate-General rightly did not rely on the inherent powers of the Governor-General to legislate in an emergency outside the purview of section 42 of the Government of India Act, 1935, and lost the Crown case simply on the ground that under the Constitution Acts the Governor-General could not exercise the powers claimed by him in the Ordinance.

On the 15th April, 1955, the Governor-General summoned a Constituent Convention for the 10th May, 1955, for the purpose of making provision as to the constitution of Pakistan, and on the following day issued a Proclamation assuming to himself until other provision was made by the Constituent Convention such powers as were necessary to validate and enforce the laws that were needed to avoid a breakdown in the constitutional and administrative machinery of the country or to preserve the State and maintain the Government of the country in its existing condition, and. in exercise of those powers retrospectively validated and declared enforceable the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955. These powers were exercised by the Governor-General subject to the opinion of this Court on certain questions which had in the meantime been referred to it under section 213 of the Government of India Act, 1935. The Proclamation was accompanied by two Ordinances, No. XlII of 1955,, to validate Acts enacted by the Governors of the Provinces of East Bengal, Punjab and Sind, and No. X1V of 1955, precluding the Courts from questioning the validity of any Act passed by the Provincial Legislatures or of any order made, decision taken or other acts done in pur­suance of any such Act, on the ground that any law passed by the Constituent Assembly had not received the assent of the Governor-General. The questions originally referred were :

(1) What are the powers and responsibilities, of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation ?

(2) The Federal Court having held in Usif Patel's case that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the constitution or any rule of law applicable to the situation by which the Governor-General can by order or otherwise declare that' all orders made, decisions taken and other acts done under those laws shall be valid and enforceable and, those laws which cannot without danger to the State be removed from the existing legal system shall be treated as part of the law of the land until the question of their valida­tion is determined by the new Constituent Convention?

Subsequently as suggested in the course of this Court's order, dated the 18th April 1955, the following further questions were also referred for opinion :

(3) Whether the Constituent Assembly was rightly dissolved by the Governor-General ?

(4) Whether the Constituent Convention proposed to be; set up by the Governor-General will be competent to exercise the powers conferred by subsection (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly ?

Question No. 4 was later modified and in the form in which it has now to be answered is :

Whether the Constituent Convention proposed to be set up by the Governor-General will be competent to exercise the powers conferred by section 8 of the Indian Independence Act, 1947, on the Constituent Assembly.

DISSOLUTION

(a) POWER TO DISSOLVE NOT ABSOLUTE

The fundamental question in the Reference is whether the action of the Governor-General in dissolving the Assembly was legal. The Proclamation of the 24th October,: 1954, which is relied upon as the order dissolving the Assembly, stated that the constitutional machinery had broken down ; that a state of emergency had been declared throughout Pakistan ; that the Constituent Assembly, as then constituted, having lost the confidence of the people, could no longer function; and that the Prime Minister had accepted the invitation to reform the Cabinet with a view to giving the country a vigorous and stable administration. The question whether in acting in the manner that he did, the Governor-General acted in his discretion, does not arise because the acceptance of the in­vitation by the Prime Minister must," on the strength of several constitutional precedents in the Commonwealth, be taken as assumption by him of the responsibility for dissolution. This, however, does not solve the issue because whether the Governor-General was acting with the advice of the Prime Minister or without his advice, some authority, express or implied, must be found in the Constitution Acts to make the action of the Governor-General legal ; though if the power to dissolve be found to exist, the Court will not enquire into the propriety or impropriety of the exercise of that power, nor go into the question whether the action was or was not backed by ministerial advice. Such action by the constitutional Head of the State always gives rise to two issues, one of which is purely legal and the other, political. or constitutional, by the word constitutional being meant whether the action was consistent with the practice and usages of the constitu­tion., The first issue is for the Courts to determine and if the Court finds that the power claimed existed in law, it is not concerned, with the question whether the power was exercised in accordance with the questions or unwritten traditions of the constitution. This position is recognised by subsection (4) of section 10 .of the Government of India Act, 1935, which prohibits , a Court from inquiring into the question "whether any and, if so, what advice was rendered by Ministers -to the Governor-General". Therefore the word `rightly' in the question whether the Constituent Assembly was rightly dissolved by the Governor-General can only mean `lawfully' or `legally' because the political propriety or impropriety of a dissolution is not a question of law that can be referred by the Governor-General or answered by this Court under section 213 of the Government of India Act, 1935.

It was the case of Mr. Faiyaz Ali, the learned Advocate-General of Pakistan, and of Mr. Diplock in Mr.Tamizuddin khan's case that the Governor-General had an unqualified legal right to dissolve the Constituent Assembly at any time he liked and that the act of dissolution was not justiciable issue in Courts of law. This power was claimed in that case for the Governor-General and is still being claimed for him by Mr. Faiyaz Ali, though Mr. Diplock, as well be mentioned later, has slightly altered his position, on the following grounds :‑

(1) that the power to dissolve was as much a prerogative of the Crown as the power to prorogue and summon ; and that it was vested in the Governor-General to be used unreservedly by him as representative of the Crown, under section 5 of the Indian Independence Act, 1947.;

(2) that the setting up of the Constituent Assembly being an executive act, it could be performed by the Governor-General, in super session of the earlier act, under sub-section (3.) of section 19 of the Indian Independence Act, 1947, read with, subsections (1) and (2) of section 32 of the Interpretation Act, 1889, the argument t being that the power to set up a new Assembly necessarily implies the power to dissolve an existing Assembly.

Having given anxious thought to these grounds I find myself unable to find the Governor-General as the repository of the wide and unqualified powers which are claimed for him.

In Mr. Tamizuddin Khan's. case I had the occasion to explain at length the profound constitutional changes that were brought about by the Indian 'Independence Act, 1947. The changes that are relevant to the present Reference were :-

(1) that a Governor-General wag to represent His Majesty, for the purposes of the Government of the Dominion section 5 :-

(2) That the Legislature of the Dominion was given full and unqualified powers to make laws, of whatever kind; for the Dominion, the exercise of those powers being• subject to the Governor-General's assent—section 6 ;

(3) that the Assembly set up or about to be set up at the date of the passing of the Act under the authority of the Governor-General, was to be the Constituent Assembly for Pakistan—section 19, subsection (3) (b) ;

(4) that the powers of the Legislature of the Dominion conferred on that Legislature by section 6 were, in so far as they related to the making of provision for the consti­tution of the Dominion, "exercisable in the first instance" by the Constituent Assembly and

(5) that the powers of the Federal Legislature under the adapted Government of India Act, 1935, were also to "be exercisable" "in the first instance" a by the Constituent Assembly.

The Act contained no express provision for the dissolu­tion of the Constituent Assembly, nor did it prescrible any time limit within which it was to frame the Constitution or to function as the Federal Legislature. As dissolution of the Assembly, if it performed the duty assigned to it, was not contemplated the Act made no provision for the election of a new Constituent Assembly: Similarly as the Constituent Assembly. was to function as the first Federal Legislature, the provisions, relating to the oath of members, vacation of seats, disqualification for membership, which occurred in sections 24 to 27 of the Government of India Act, 1935, and the provisions in the first Schedule to that Act relating to the composition of the Federal Legislature were omitted: It seems to me to be perfectly clear from this scheme of the Indian Independence Act, 1947, and the adapted Government of India Act, 1935, that the absolute and unqualified preroga­tive right of the Crown and of the Governor-General as representative of the Crown to dissolve the Assembly was taken away. If the intention had been to transfer to the Governor-General, As representative of the Crown, the prero­gative right of summoning, proroguing and dissolving the Constituent Assembly, the elaborate constitutional structure that was built upon the Independence Act, 1947, and the adapted Government of India Act, 1935, could have been pulled down by the Governor-General, with or without then advice of the Prime Minister, on the very day he assumed his office and before the Constituent Assembly had even com­menced to function.

This possibility was certainly excluded by and is clearly inconsistent with the intention, of the Indian Independence Act. 1947, particularly subsection (1) of section 8 according to which the powers of the Legislature of the Dominion were to be exercised in the first instance by the Constituent Assem­bly and proviso (e) to subsection (2) of that section which similarly declared that the powers of the Federal Legislature, under the adapted Government of India Act, ls35, were to be exercisable in the first instance by the same Assembly. If this be the correct interpretation of the Indian Indepen­dence Act, 1947, then two of the principles which were developed by Mr. Diplock in a full day argument in Mr. Tamizuddin Khan's case would be applicable but would produce a result entirely contrary to what is contended by him. The operation of the principle that the prerogatives of the Crown in an overseas Dominion can be taken away by a statute, whether of the United Kingdom or of the Dominion itself, by express words or necessary intendment, would negative an unqualified power on the part of the Governor-General to dissolve the Assembly because the Indian Independence Act, 1947, by providing that the powers of the Legislature of the Dominion for the purpose of making Constitution and of the Federal Legislature under the adapted Government of India. Act, 1935, were to be exercised in, the first instance by the Constituent Assembly would take away the unqualified prerogative of the Crown to dissolve the Assembly, and the principle that the Crown may delegate its prerogative in whole or in part to the Governor-General of an overseas Dominion and that it is a question of construction of the 'relevant statue or instrument to determine the extent to which the prerogative has been delegated would produce the result that on this interpretation of the Indian Indepen­dence Act the prerogative to dissolve, though delegated by the Crown, was not intended to be exercised by the Governor-General so long as the Constituent Assembly continued to function within the intention of the Indian Independence Act, 1947. Mr. Diplock has not questioned the correctness of the House of Lords' decision in Attorney General v. De Keyser's Royal Hotel (1) on which the learned Judges of the Sind Chief Court had relied in support of the proposition that where a prerogative matter has been legislated upon, the prerogative as to that matter must be deemed to have been merged in the statute to the extent that it has been legislated upon. In that case in May, 1916, the Crown purporting to act under the Defence of the Realm Regulations took possession of a hotel for the purpose of housing the headquarters personnel of the, Royal Flying Corps and denied the legal right of the owners to compensation. The owners yielded up possession under protest and without prejudice to their rights, but by a petition of right asked for a declaration that they were entitled to compensation under the Defence Act, 1842. It was held by the House of Lords that Regulation 2 of the Defence of the Realm Regulations issued under the Defence of the Realm Consolidation Act, 1914, when read with subsection (2) of section 1 of the Act, conferred no new powers of acquiring land but authorised the taking possession of land ;under the Defence Act, 1842, while impliedly suspending the restriction imposed by that Act upon acquisition and user of land; that Crown had no power to take possession of the suppliants' premises in right of its prerogative simpliciter; and that the suppliants were entitled to compensation in the manner provided by the Act of 1842. While considering the question to what extent prerogative can be considered to have been taken away by statute, Lord Dunedin said at p. 526 of the Report:— .

"None the less it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: what use would there be imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?'

The prerogative is defined by a learned constitutional writer as `the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown. Inasmuch as the Crown is a party to every Act of Parliament, it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that 'Act, to the prerogative being curtailed".

To a similar effect were the observations made by Lord Atkinson, who said at p. 539:—

"It is quite obvious that it would be useless and meaning less for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the crown of the powers conferred by statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statute empowered it to do. One cannot in the construction of a statute" attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word merged is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, 1 think, the same—namely, that after the statute has been passed and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been."

And another noble lord Lord Sumner, remarked at

"The Legislature, by a appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a modus operandi for recurring the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by, statute with the same subject-matter as is already dealt with by prerogative, unless it be either to limit or at least to vary its exercise, or to provide an addi­tional mode of attaining the same object.

The principle so clearly enunciated, though in different words, by each of the noble lords speaking on this case is that where restrictions or limitations are imposed by statute on a prerogative muter, the prerogative is abridged or taken away to the extent of the restriction or limitation. Applying that principle to the present case it must be held that sub-section (1) of section 8 of the Indian Independence Act, 1947, took away from the Crown by necessary implication the pre­rogative of dissolutions to this extent that the Crown was bound to give to the Constituent Assembly a reasonable opportunity to frame the Constitution.

The instances of the power to dissolve, .unqualified in law but strictly restricted by conventions, which vests in the Governor-General of the other Dominions are not relevant for the purpose of inferring a similar power for the Governor-General of Pakistan, because that power is expressly recognis­ed by the Constitutions of those Dominions. Thus under the British North America Act, 1867, section 50, the House of Com­mons is to continue for five years (subject to be sooner dissolved by the Governor-General) and no longer. Similarly under section 28 of the Commonwealth of Australia Constitution Act; 1900, the House of Representatives continues for three years but may be sooner dissolved by the Governor-General. Under the South Africa Act, 1929, section 20, the Governor-General could dissolve the Senate and the House of Assembly simultaneously or the House of Assembly alone. Section 15 of the Ceylon (Constitution) Order-in-Council, 1956, which continues by virtue of the Ceylon Independence Act, 1947, and Ceylon Independence (Commencement) Order-in-Council 1947, provides that the Governor-General may by proclamation summon, prorogue or dissolve Parliament. In the New Zealand Constitution Act, 1852, the relevant provision is section 44 which empowers the Governor-General at his pleasure to prorogue or dissolve the General Assembly. Similar power is given to the Governors of the Colonies by the instruments appointing them or by the Constitutions of those Colonies. In the case of Pakistan, the Indian Indepen­dence Act, 1947, contains no express provision empowering the Governor-General to dissolve the Assembly ; nor any express reference to this power is to be found in the warrant of his appointment though one of the prerogatives, namely, that of granting pardon and reprieves, etc., to persons con­victed has been specifically mentioned because by reason of section 259 of the Government of India Act, 1935, this prerogative had expressly to be delegated to the Governor-General to be exercised on His Majesty's behalf. Of course the warrant refers to the Indian Independence Act, 1947, and to the powers and duties of the Governor-General under that Act as well to the powers, rights, privileges and advantages belonging or appertaining to the office of Governor-General.

In Mr.Tamizuddin Khan's case (PLD 1955 FC 240) the learned Judges of the Sind Chief Court inferred from the adaptation of sub-sections 18 and 19 of the Government of India Act, 1935, that the power to dissolve that Federal Legislature was impliedly taken away from the Governor-General because while his power to summon and prorogue was kept intact, that to dissolve the Federal Legislature was omitted in the adaptations. In its original form section 18 of Government of India Act, 1935, had provided that the Federal Legislature was to consist of His Majesty, represented by the Governor-General and two Chambers to be known respectively a the Council, of State and the House of Assembly which was referred to in the Act as the Federal Assembly. The Council of State was to be a permanent body not subject to dissolution while the Federal Assembly, unless sooner dissolved, was to continue for five years. By the Provisional Constitution Order this section was substituted by the following provision :

"The powers of the Federal Legislature under this Act shall, until other provision is made by or in accordance with a law made by the Constituent Assembly under subsection (1) of section 8 of the Indian Independence Act, 1947, be exercisable by that Assembly, and accordingly references in this Act to the Federal Legislature shall be construed as references to the Constituent Assembly."

The substituted section was bodily, taken from clause (e) of the Proviso to subsection (2) of section 8 of the Indian Independence Act, 1947, with only this exception that the words ‘in the first instance’ were omitted and the words ‘and accordingly references in this Act to the Federal Legislature shall be construed as references to the Constituent Assembly’ added. Section 19 in 'its original form dealt with the summon­ing of the Chambers, or either Chambers, prorogation of the Chambers and dissolution of the Federal Assembly, and gave to the Governor-General, in his discretion, the power to do any of these acts. The Provisional Constitution Order omitted the words ‘in his discretion’ and substituted ‘Federal Legislature’ for the words ‘Chambers or Chamber’ and while retain­ing the Governor-General's power to summon or prorogue the Federal Legislature omitted clause (e) of subsection (2) of the section which had given to the Governor-General the power to dissolve the Federal Assembly. On the basis of these adaptations it is argued by Mr. Chundrigar and Mr. Pritt that the omission of the power to dissolve the Federal Assembly and not making any provision for the dissolution of the Federal Legislature must be taken to imply the taking away of the power of dissolution of that Legislature from the Governor-General while preserving his power to summon and prorogue. It is, however, contended before us both by Mr. Faiyaz Ali and Mr. Diplock that there are two obvious explanations for removal of the provision relating to the dissolution of the Federal Assembly and not substituting for it any provision as regards the dissolution of the Federal Legisla­ture. Firstly, since the Federal Assembly disappeared under the adapted Constitution, all provisions relating to it including, clause (c) of subsection (2) of section 19 of the Government of India Act, 1935, had necessarily to be omitted. Secondly, the provisions relating to dissolution could, under that Act, only relate to dissolution of the Federal Legislature and not of the Legislature of the Dominion if by Legislature of the Dominion was meant the Constituent Assembly in its capacity of the body charged with the duty of making provision' as td the constitution of the Dominion. The power to dissolve the Constituent Assembly, it is contended, having been included in the delegation of the King's prerogatives to Governor-General under section 5 of the Indian Independence Act, it did not require any specific delegation. The argument is good so far as it goes but does not repel the implications that arise from the omission of the provision relating to the dissolution of the Federal Legislature. If a provision relating to the dissolution of the Federal Legislature had been enacted as it could quite properly have been enacted in the Provisional Constitution Order, the result would have been that the Governor-General would in that case have acquired an un­qualified power to dissolve the Federal Legislature which would have been inconsistent with clause (e) of the Proviso to subsection (2) of section 8 of the Indian Independence Act, 1947, which had provided that the powers of the Federal Legislature shall, in the first instance, be exercisable by the Constituent Assembly. Since, therefore, the intention was that not only the duty of making a Constitution but the func­tions of the Federal Legislature were in the first instance to be performed by the Constituent Assembly, no provision relating to the dissolution of the Federal Legislature was inserted in the adapted section 19. This conclusion is strengthened by the fact that in the adaptations the First Schedule to the Government of India Act, 1935, which dealt with the Com­position of the Federal Legislature was completely omitted. If the possibility of the dissolution of the Federal Legislature at all times and of new members being chosen to it had been contemplated, some provision relating to elections should certainly have found place in the adaptations. The fact therefore that the First Schedule was omitted and no provision relating to dissolution of the Federal Legislature was enacted and the only provision relating to dissolution of the Federal Assembly was omitted, show quite clearly that the expert who adapted the Government of India Act, 1935, by an order under section 9 of the Indian Independence Act, 1947, thought that within a reasonable time the Constituent Assembly would complete the work assigned to it and dissolve itself when the new Constitution came into force. I accept Mr. Diplock's contention that nothing that was done by an order under the Indian Independence Act, 1947, is relevent to a true interpretation of that Act, because the adaptations merely represent the personal view of the adapter and the implica­tions that arise from them are not conclusive of a particular construction ; but the whole scheme of that Act appears to me to suggest that the Constituent Assembly was to make a constitution under subsection (I) of section 8 of the Act as well as to exercise the powers of the Federal Legislature under the adapted, Government of India Act, because the words ‘in the first instance’ on which considerable emphasis was laid by Mr. Diplock in another connection and which occur both in subsection (1) and clause (e) of the Proviso to subsec­tion (2) of that section are unmistakably indicative of the E intention that the Constituent Assembly, if it functioned according to the true intent of the Constitution Acts, was in neither capacity to be dissolved. A dissolution is no more than an appeal to the electorate, and it is admitted that neither under the Indian Independence Act, 1947, nor under the adapted Government of India Act, 1935, there exists any provision relating to fresh elections to the Legislature of the Dominion or the Federal Legislature. This, in my opinion being the correct interpretation of the Indian Independence Act, 1947, no unqualified delegation of the prerogative of dissolution can be read in section 5 of the Indian Independence Act, 1947, or in the warrant of Governor-General's appointment.

Mr. Faiyaz Ali and Mr. Diplock also attempted to justify the dissolution under clause (a) of subsection (1) and clause (b) of subsection (3) of section 19 of the Indian Independence Act, 1947, read with subsection (2) of sec­tion 32 of the Interpretation Act, 1889. Clause (a) of subsection (I) provides that references in the Act to the Gover­nor-General shall in relation to any order to be made or other act done on or after .the appointed day, be. construed, where the order or other act concerns only one of -the new Dominions, as references to the Governor-General of that Dominion ; while clause (b) of subsection (3) declares that in relation to Pakistan references in the Act to the Constitu­ent Assembly are to be read as references to the Assembly set up or about to be set up at the date of the passing of the Act under the authority of the Governor-General, as the Constituent Assembly for Pakistan. Subsection (2) of the Interpretation Act says that where an Act passed after the commencement of ,that Act confers a power or im­poses a duty, on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office. The Indian Independence Act, 1947, was passed on the 18th July, 1947, but on that day no Constituent Assembly had in fact been set up. The personal of the Constituent Assembly was announced by the Governor-General on the 26th July, 1947, that is to say, after the passing of the Act. It is argued that since there was a possibility of the composition of the Constituent Assembly not being completed before the appointed day, i.e., the 15th August; 1947, the act of setting up the Assembly on a sub­sequent date could only be done by the Governor General of Pakistan under clause (a) to subsection (1) of section 19 and that in that case the references in the Act to the Constituent Assembly could only have been meant as references to the Constituent Assembly to be set up by the Governor-General of Pakistan. The whole argument is based on the words ‘about to be set up’ at the date of the passing of this Act under the authority of the Governor-General and we know that the .Governor-General on the date of the passing of the Indian Independence Act, 1947, was Lord Louis Mountbatten who had practically taken all necessary steps for the setting up of the Constituent Assembly. The intention to set up a Constituent Assembly had been announced in paragraphs 5-7 of the Statement of His Majesty's Govern­ment of June 3rd, 1947. Paragraph 14 of that statement had also detailed the manner in which the members of the Con­stituent Assembly were to be chosen, and paragraph 1 7 had provided that the representatives of the various Provinces which were divided for the purposes of election were, in accordance with the mandate given to them, to decide whether they were to join the existing Con­stituent Assembly or form a new Constituent Assembly. On 10th June, 1947, the Governor-General, in pursuance of paragraph 21 of that statement, had issued an order directing a certain procedure to be followed for the pur­pose of giving effect to paragraph 5 to 8 of the statement. 1 By this announcement the constituencies whose representatives 1 were to form part of the Legislative Assemblies of those provinces for the purpose of taking the decision referred to in paragraphs 6 to 8 of the statement were specified. The pro­cedure relating to the District of Sylhet was announced in the statement of 16th June, 1947, while the announcement, dated the 21st June, 1947, detailed the procedure for holding fresh elections in Bengal and a referendum in Sylhet. The proce­dure for fresh elections in the Punjab was announced on the 23rd June, '1947, that for holding a referendum in N.-W. F. P. on the 23rd June, 1947, and that for ascertaining the wishes of the British Baluchistan on the 24th June, 1947. The announcement of cessation of membership of Sind members came on the 27th June, 1947, that of membership of represen­tative of British Baluchistan on the 30th June, 1947, and that of cessation of membership of the representatives of N.-W. F. P. on the 21st July, 1947. Fresh elections in Assam and East Bengal were announced on the 22nd July, 1947. The final composition of the Constituent Assembly of Pakistan, with the exception of the representatives of Sylhet District whose name were announced a few days later (4th August 1947), was announced on the 26th July, 1947. The Indian Independence Act, 1947, received the Royal assent on the 18th July, 1947. It is, therefore, clear that references to the Constituent Assembly of Pakistan in the Indian Independence Act, 1947, could only have been meant as references to the Constituent Assembly whose composition was finally comp­leted on the 14th August, 1947, and not to any other Consti­tuent Assembly to be set up by the Governor-General of Pakistan after .the 15th August, 1947. If Mr. Diplock's argument be accepted, it would mean that the words in clause (b) of subsection (3) of section 19 of the Indian Independence Act, 1947, Assembly set up or about to be set up at the date of the passing of this Act (18th July, 1947) are comprehensive enough to include an Assembly set up at any time after the 15th August 1947—even today. I cannot accept this result as reasonably possible or agree to any such construction of section 19 of the Indian Independence Act, which was drafted by the best legal brains in the United Kingdom, as would 'lead to a conclusion so ludicrous. I am, therefore, of the view that the statutory provisions relied on are not an authority for the Governor-General of Pakistan to set up a new Constituent Assembly in, supersession of the original Constituent Assembly and that if any such authority exists it lies elsewhere in the Act.

Mr. Diplock in the early stages of the arguments in this Reference seemed materially to qualify the position taken by him in Mr. Tamizuddin Khan's case (PLD FC 1955 240) by conceding that Until the Constitutional Assembly had a reasonable opportu­nity to frame a constitution, the Governor-General had no power to dissolve it. But while, attempting to construe sub-section (1) and proviso (e) to subsection (2) of section 8 of the Indian Independence Act, 1947, so as to mean that the Governor-General can create another Constituent Assembly i.e finally took up the position that the Governor-General' right to dissolve the Assembly was excluded only as long as the Constituent Assembly did not make any provision as to the Constitution of the Dominion and that as soon as that Assembly exercised the right of making any such provision the Governor-General's right to dissolve reasserted itself. On this argument the moment the Constituent Assembly passed its first constitutional Act, namely, the Indian Independence (Amendment) Act, 1948, the condition laid down in subsec­tion (1) of section 8 of the Indian Independence Acct, 1947, of making provision as to the constitution of the Dominion, in the first instance, was fulfilled and immediately thereafter the Governor-General acquired the legal right to dissolve the Assembly. I find it impossible to accept this construction of subsection (I) and having considered the argument in all its implications and the words of the Statute on which it is based I am perfectly clear that the contention has unhesitatingly to be rejected. In my opinion the words in that subsection and Proviso (e) say no more than that the Constituent Assembly was the first Legislature of the Dominion to exercise the powers, in so far as those powers related to the making of provision as to the Constitution of the Dominion, conferred on it by section 6, as' well as the first Federal Legislature compe­tent to exercise the powers of that Legislature under the adapt­ed Government of India Act, 1935. Neither of these provisions is capable of the interpretation that the moment the Consti­tuent Assembly exercised either of these powers, in however inchoate or imperfect a form, the Governor-General's right to dissolve it in the capacity in which it exercised those powers was revived. The only reasonable meaning that can be given to subsection (1) of section 8 of the Indian Independence Act 1947, is that the powers of the Legislature of the Dominion in making provision as to the constitution of the Dominion were to be exercisable in the first instance by the Constituent Assembly, that is to say, the Constituent Assembly was invested with the right of making such provision as to the constitu­tion of the Dominion as would bring into existence another Legislature of the Dominion, whether that Legislature had the form of a representative Legislature of a single person Legisla­ture responsible to nobody being immaterial so that the new Legislature could take the place of the Constituent Assembly. The words are certainly not capable of the construction that if the Constituent Assembly made even a single law in the consti­tutional sphere, it discharged its function and became liable to dissolution by the Governor-General.

(b) POWER TO DISSOLVE CONDITIONAL

I now proceed to reply to the two basic questions in the Reference which are allied and mixed up with each other, namely, whether in the circumstances stated in the Reference the Governor-General had the legal authority to dissolve the Constituent Assembly and to constitute another Constituent Assembly. But before doing that it is necessary to make a preliminary observation and that is that the answers have to be given in the context in which and on the assumptions on which the questions have been formulated. The Reference states :-

(1) that though the Constituent Assembly functioned for more than seven years, it was unable to carry out the duty of providing a constitution, and for all practical purposes assumed the form of a perpetual Legislature;

(2) that the Constituent Assembly was dissolved by the Governor General because .by reason of repeated representa­tions from and resolutions passed by representative public bodies throughout the country, he formed the opinion that, the Assembly had become wholly unrepresentative of the people, and

(3) that the Constituent Assembly, from the very beginning asserted the claim that the laws passed by it under subsection (1) of section 8 of the Indian Independence Act, 1947, did not require the assent of the Governor-General. Thus the assumptions of fact on the basis of which this Court's opinion is asked are :

(1) the Constituent Assembly's inability to provide a constitution and its assumption of the powers of a perpetual Legislature;

(2) its wholly unrepresentative character which it had gradually acquired during the seven years of its existence ; and

(3) its claim that it was itself competent to make provisions as to the constitution of the Dominion without obtaining to those provisions the assent of the Governor-General.

It is here necessary to dispose of some objections which have been taken by Mr. Pritt to the manner in which the Reference has been made. I have already mentioned that the word ‘rightly’ in question No. 3 must be taken to mean ‘lawfully’ or ‘legally’ because the question whether, if the Governor-General had the authority to dissolve the Constituent Assembly, it was properly dissolved, is not a legal but a political issue which cannot be referred to this Court .for opinion Mr. Pritt, however, contends that the question must be answered in the form in which it has been framed and that the Court should go into the facts on which the propriety or impropriety of the dissolu­tion may depend. He has, therefore, referred to the affidavits which were filed on behalf of the Government and the counter-affidavits that were put in by Mr. Tamizuddin Khan, in an endeavour to show that the dissolution was not justified on the facts and that it was ordered with some ulterior motives. We cannot, on this Reference, undertake this enquiry or record .any findings on the disputed questions of facts because any such course would covert us into a fact finding tribunal which is not the function of this Court when its advice is asked on certain questions of law. The answer to a legal question always depends on facts found or assumed and since we cannot try issues of fact the Reference has to be answered on the assumption of fact on which it has been made. The Privy Council also has, under section 4 of the Act of 1833 (3 and 4 Will. Ch. 41), similar advisory jurisdiction but no precedent from that Board or from the Federal Court has been shown to us where a reference Was ever made to ascertain a legal position after a trial of facts by the advisory Court. We consider that there is nothing improper or peculiar about the manner in which the Reference has been made. The Governor-General has taken the responsibility of asserting certain facts and has merely asked us to report to him what the legal position is if those facts are true.

Mr. Pritt also appeared to complain that in the Reference there are certain facts which were not mentioned in the Procla­mation of the 24th October, 1954, by which the Constituent Assembly was dissolved. But the Proclamation cannot be treated to have been a plaint or a written statement in a suit in which all facts which led the Governor-General to dissolve the Assembly should have been exhaustively mentioned. Even if some facts or some legal position was not present to the mind of the Governor-General when he dissolved the Assembly, there is nothing to preclude him from asking this Court whether the dissolution could be defended on the addi­tional facts and the subsequently discovered legal position. The question relating to the necessity of assent to legislations by the Constituent Assembly under subsection (1) of section 8 of the Indian Independence Act, 1947, was not mentioned in the Proclamation as a ground for the dissolution of the Assembly but this was probably due to the fact that the legal position as to this was still uncertain. The point, however, was prominently mentioned in the Chief Court of Sind and since this Court in Mr. Tamizuddin Khan's case (PLD 1955 FC 240) upheld the objection, I think the Governor-General is justified in asking whether the Constituent Assembly by asserting the claim that its constitutional laws did not require the Governor-General's assent, had not begun to function as an unconstitutional body which could have been dissolved. I am, therefore, of the view that for the purposes of this Reference we shall , have to assume the facts mentioned therein and to give our opinion on that assumption.

Thus the precise issue to be determined in relation to the question of dissolution is whether, if the facts be as postulated in the Reference, the Common Law right of the Crown to dissolve a Dominion Legislature can be said to have been excluded by the Indian Independence Act, 1947. It cannot be doubted that the power to summon, prorogue and dissolve is a prerogative of the Crown, well recognised by the Common Law. It is equally plain, and not disputed by anyone, that a prerogative of the King may be created, abridged or completely taken away by an Act of Parliament or of an Independent Dominion. The true question in the case, therefore, is whether the Indian Independence Act took away the King's prorogative right to dissolve the Constituent Assembly, and if so, was this taking away absolute or qualified? If that right had been taken away by the Indian Independence Act for ever, it could not be delegated to the Governor-General, and the Governor-General, being merely a representative of the King, could not exercise it. On the other hand, if that right was taken away only for a specific purpose and that purpose was not fulfilled the right would still vest in the Governor-General, having been delegated to him by the King under section 5 of the Indian Independence Act, 1947.

This position was indicated by me in my opinion in Mr. Tamizuddin Khan's case (i) Dealing with the prerogatives of the King in a colony I said at p. 16

"Thus in every question which arises between the King and his colonies respecting the prerogative, the first con­sideration is the Charter granted to the inhabitants. If that be silent on the subject, it cannot be doubted that the King's prerogatives in the colony are precisely those prerogatives which he may exercise in the mother country. Where the colony charter affords no criterion or rule of construction the common law of England with respect to the rule of prerogatives is the common law of the country.

Thus the real question that has to be determined in the present case is whether the King's prerogative right to dissolve the Constituent Assembly was taken away for ever or only on the condition that the Assembly was to function for a certain purpose and in a particular manner. If the legal position be that the taking away was not absolute but only qualified, the reply to the question referred would depend upon whether in the circumstances presented by the reference the case fell outside the qualifying conditions. The matter may also be looked at in the light of principles 2 and 3, stated by Mr. Diplock in Mr. Tamizuddin Khan's case the correctness of which was admitted by Mr. Pritt, principle 2 being that the prerogative of the Crown in an overseas Dominipn can be taken away by a statute, whether of the United Kingdom or of the Dominion, by express words or necessary intendment,, and principle 3 that ,the Crown may delegate its prerogative, in whole or in part to the Governor-General of a Dominion and that the extent of the delegation is a matter of construction of the statute or instrument of delegation. It is not disputed, and is otherwise plain, that under the common law the Crown has the right to dissolve a representative legislative assembly. This right is exercised by him in the United Kingdom when under ministerial advice he dissolves the House of, Commons before the expiry of its term. In the overseas Dominions that right is exercised by the Governor-General, as. representative of the King, under the Constitution Acts of those Dominions' or the Commission of his appointment. "Of the legal power of the Crown", says Farsey at p. 3 of "The Royal Power of Dissolu­tion of Parliament in the British Commonwealth," in this matter there is of course no question. Throughout the Commonwealth (except in Eire, where there is no longer any representative of the Crown), the King or his representative (1) P L D 1955 F C 240 may in law grant, refuse or force 'dissolution of the Lower House of the Legislature. In the Commonwealth of Australia the Union of South Africa, Southern Rhodesia, Victoria and South Australia, he may, in defined circumstances, dissolve both Houses. In legal theory the, discretion` of the Crown is absolute (though of course any action requires the consent of some Minister), but the actual exercise of the power is every where regulated by conventions". And Maitland at p. 42 of his book, Constitutional History of England, 1950 Ed observes :--.

"The King's power of summoning, proroguing and dis­solving Parliament is very large."

At pp. 271-272 of Vol. I of Chalmer's "Opinions of Emi­nent Lawyers" is stated the opinion of Ryder and Murray that the King has the prerogative right of dissolving a popular Legislative Assembly in a Colony.

Now if it be once found that the prerogative to dissolve is a common law right of the King or his fully accredited repre­sentative in an overseas Dominion, the short, question on which the legality or otherwise of dissolution of the Constituent Assembly will depend is whether the Statute namely the Indian Independence Act, 1'947, expressly or by necessary intendment excludes the exercise of that prerogative in the circumstances stated in the Reference. Ever since common law began Jo come in competition with statute law, the rule of decision has always been that where a statute makes provision for a particular situation, it excludes the common law; but of the situation be entirely outside the contemplation of the, statute, it is governed by the common law. Stated more con­cisely, the principle is casus provisos (case provided), the statute rules ; and casus omissus (case omitted), the common law retains the field. The issue, therefore, is whether the common law right to dissolve has in the circumstances stated in the Reference been ousted by the Indian Independence Act 1947.

According to the announcement on ' behalf of His Majesty, both in the House of Lords and the House of Commons at the time of the passing of the Indian Independence Act, 1947, His Majesty had placed his prerogatives and interests at the dis­posal of the Parliament only "so far as concerned the matters dealt with by the Bill". If, therefore, the matter raised by this Reference has been dealt with and the prerogative of dissolu­tion taken away, expressly or by necessary intendment, by the Act, then the prerogative having been utilised by the Parlia­ment it must be deemed to have been surrendered by the King and therefore not to have been delegated by section 5 to the Governor-General. Now if we look at the language of sub-section (1) of section 8 of the Indian Independence Act it becomes perfectly clear that because the power of making provision as to the 'constitution of the Dominion had been given to the Constituent Assembly, the prerogative to dissolve that Assembly was taken away if that Assembly did exercise its powers to make provision as to the constitution of this country. It is, however, equally clear that the provisional constitution granted to Pakistan by the Indian Independence Act, 1947, and the adapted Government of India Act, 1935, was until its nature was altered by a law made by the Consti­tuent Assembly, a, democratic constitution, and it' cannot possibly be contended that the Constituent Assembly had been given the power to function as long as it liked and assume the form of a perpetual or indissoluble Legislature. The only reasonable construction of subsection (1) of section 8 of the Indian Independence Act, 1947, is that that subsection gave to the Constituent Assembly an opportunity to frame a work­ing or functioning constitution for the country within a reasonable time and not the right to go on with constitution making indefinitely. The prerogative to dissolve, therefore, must be taken to have been taken away by the Act only if the Constituent Assembly performed the duty assigned to it by the Act, and if the Act did not intend to install that Assembly as a perpetual Legislature, the prerogative of dissolution which was in abeyance must be held to have revived when it became apparent to the Governor-General that the 'Constituent Assembly was unable or had failed to provide a constitution for the, country. It could certainly not be the intention of the Indian Independence Act that in the guise of a constitution making body the Constituent Assembly could function as the Legislature of the Dominion indefinitely until it became neces­sary to remove it by a revolution. And if that was not the intention of the Act, it must follow that the common law prerogative to dissolve was not taken away by the Mt in that contingency. The words "in the first instance" in subsection (1) of section 8 of the Indian Independence Act, 1947, appear to me to indicate quite clearly that an indefinite; life for the Assembly was not intended .and that the prerogative right to dissolve it was excluded only if the, Assembly performed the duty assigned to it, within a reasonable time. Therefore if the Assembly was unable or refused to perform the function assigned to it, and on the contrary assumed the form of a perpetual Legislature, the right in that event to dissolve it was sot taken away by the Act. Of course, if the Act can be construed, as making the Constituent Assembly a permanent Legislature of the Dominion, then the prerogative right to dissolve must be held to have been taken away from the King's representative for ever, but I am quite clear in my mind that that was' not the intention of the Indian Independence Act. The framers of that Act had before them the experience of other Constituent Assemblies in the world and inserted sub-section (1) of section 8 in the Act in the belief that both the Constituent Assemblies would complete the work assigned to them within approximately the same time as other Constituters Assemblies had done. They never imagined that in this respect the Constituent Assembly for Pakistan would beat the worn record, and for seven long years would not even be able Le introduce the draft constitution for enactment. In the Select Constitutions of the World a book which was prepared for presentation to Dail Eireann, there is some interesting information of the activities of Constituent Assemblies or Constituent Conventions and of the time taken by them in the preparation 4,11d adoption of constitutions. The following abstract from he publication will be found interesting :-

Name of the Constituent Assembly

or Convention

Date of election,or first meeting

Date of completion or adoption of the constitution

Total time taken (not including days)

1

2

3

4

1.

Kingdom of Serbs Croats and Slovenes.

November 1920

28th June 1921

About 7 months.

2.

Polish Republic ...

21st January 1920

17th March 1921

One year and two months.

3.

Republic of Austria

15th February 1919

1st October 1920

1 year and 7 months

4.

The Eathonian Republic

The

7th April 1919

15th June 1920

1 year and 2 month

5.

Czechoslovak Republic

14th November 1918

19th February 1920

1 year and 3 month

.

6.

German Reich

19th January 1919

31st July 1919

6 month

7.

Russian Socialist Federal Soviet

Republic.

18th January 1918

10th July 1918

About 6 months.

8.

United States of Mexico

February 1856

5th February 1857

About 1 year

9.

Kingdom of Denmark

January 1848

5th June 1849

1 year and 5 months

10.

Union of South Africa

12th October 1908

June, 1909

(Costitution enacted by the British Parliament on 20 th September 1909).

About 9 months

11.

Commonwealth of Australia

March 1891

9th April 1891

One Month.

(a). (First Convention called the Sydney Convention).

(On which date it was dissolved).

20th January 1898.

(b) (Second Constituent Convention, called the Adelaide Convention).

23rd March

1897

20th January 1898 (Constitution enacted by the British' Parliament on

9th July 1900).

About 10 months.

12.

French Republic

November, 1873

July 16, 1875

The three constitutional laws passed during this period formed the foundation of the subsequent French Constitution.)

1 year and 7 months.

13.

Swiss Confederation

(a) Constitution of 1842

Less than a year.

(b) Revision of 1842 (Constitution in 1874).

Ditto

14.

The Dominion of Canada

1st September 1864

Convention's resolutions approved by the Canadian Parliament in 1865.

.

Ditto

The Maritime Union

(Became Constituent in October).

British North America Act passed by the British Parliament in March 1867

.

15.

Kingdom of Belgium

10th November 1830

January 1831

3 months

16.

Kingdom of Norway

...

…

Less than a year.

17.

Kingdom of Sweden (Constitution of 1809)

….

…..

Ditto

18.

United States of America

25th May 1787.

4th March 1789 (Ratification by other

States July 26, 1789).

One year and 9 months.

19.

Ireland

6th December 1921

25th October 1922.

(Constitution enacted by

the U. K. Parliament on

5th December 1922.)

One year.

20.

India

15th August 1947 ...

26th November 1949.

Two years and 10 months.

Thus when the Constituent Assembly for Pakistan was set up, the longest time ever taken by any Constituent Assembly had been one year and nine months. Citing the instance of the Constituent Convention of Australia, Mr. Pritt alleged that that Convention took about ten years to complete its work but he is clearly wrong there because the Sydney Convention which he links up with the Adelaide Convention in calculating the period of ten years completed its work in about a month's time and then formally dissolved" itself, and the subsequent Convention, the Adelaide Conven­tion, was called six years later.

If there was a clear assumption in the Indian Independence Act that the Constituent Assembly would frame a constitution for the country and then dissolve itself, and the whole structure of that Act was built upon that assumption, then it( is obvious more that for than seven years the Assembly having made no constitution for the country and on the contrary having assumed the form of a Legislature for an indefinite period, its dissolution was in furtherance and not in contra­vention of the intention of the Act. While explaining the, fundamental principles of a democratic constitution in my opinion in Mr. Tamizuddin Khan's case (PLD 1955 FC 240) I had pointed out that an irremovable Legislature was the worst calamity that could befall a people. I said there :-

"The basic principle is that no representative body can continue indefinitely and that its composition must admit of change from time to time by means of an appeal to the people. An irremovable Legislature is the very antithesis of democracy and no democratic constitution is known in the world where elections are for life or for an indefinitely long time

This is what Sir William Blackstone said in 1765 about a perpetual Legislature :-

"Lastly, a Parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual ; or might last for the life of the Prince who convened them, as formerly; and; were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy ; but when different bodies succeed each other, if the people show cause to disapprove of the present, they may rectify its faults in the next. ,(Commentaries on the Laws of England, Book I, Chapter 2, p. 189) ;

"The requirement of periodic accountability of a representative Assembly to the electors is so basic that in the United Kingdom the Crown, which since long has ceased to exercise its discretion in opposition to the advice of the Ministry, will be considered to be justified in exer­cising its reserve powers of withholding assent or directing dissolution if Parliament ever attempted ' to prolong its own life indefinitely. The reason for it is that in a democratic constitution the ultimate or political sovereignty resides in (1) PLD 1955 FC 240 the people, while the popular assembly, where the consti­tution does not impose any limitation on its powers, exercises legislative sovereignty only during its term. Since sovereignty as applied to States imports the supreme, absolute, uncontrollable power by which a State is governed and demoracy recognises all ultimate power as resting in the people, it is obvious that in the case of a conflict between the ultimate and legal sovereign, the latter must yield. An irremovable Legislature, therefore, is not only a negation of democracy but is the worst calamity that can be fall a nation."

Referring to a self-dissolving Parliament, Blackstone at p. 162 of the First Volume of his Commentaries on the laws of England says:

"If nothing had a right to prorogue or dissolve a Parlia­ment but itself, it might happen to become perpetual, and this would be extremely dangerous if at any time it should attempt to encroach upon the executive power; as was fatally experienced by the unfortunate King Charles I, who, having inadvisably passed an Act to continue the Parliament, then in being, till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power which he himself had consented to give them. It is, therefore, extremely necessary that the Crown should be empowered to regulate the duration of these assemblies under the limitations which the English Constitution has prescribed; so that, on the one hand, they may frequently and regularly come together for the despacth of business and redness of grievances; and may not on the other, even with the consent of the Crown, be continued to an inconvenient or unconstitutional length."

Mr. Pritt maintained that the dissolution of the Assembly could only be brought about by itself by its bowing to the force of public opinion or by revolution. So far as public opinion is concerned, there was abundance of it before the Governor-General in the form of resolutions and represen­tations by' the provincial Legislatures and, other representative bodies which showed thata4he Assembly had become indifferent to the public opinion, and as regard its dissolution by a revolution, it is sufficient to say that revolutions are not, in the contemplation of those who frame constitutions.

In my view it cannot reasonably be contended that the intention of the Indian Independence Act was to foist a perpetual Legislature on this country, and if that was not the intention but the Constituent Assembly did become in fact a perpetual Legislature, the purpose of the Act could only be served by ordering its dissolution. The demand for Pakistan was formulated for the first time in 1940, and by the middle of August 1947, the new State had come into being. The highly complicated legal formalities necessary to establish that State took hardly three months. But though the Constituent Assembly sat for more than seven years it failed to make provision for the future constitution of the State. And seven years is a long period in the history of a people, particularly a new people. If the task of constitution making was proving too formidable and the difficulties in its accomplishment appeared to be insurmountable, the Assembly could have dissolved itself or created the necessary mechanism to bring another Assembly into existence. Its omission to take any such step or to provide a working constitution for the country was, in my opinion, a sufficient ground for the Governor-General to hold that the Assembly had failed to perform the function assigned to it by subsection (1) of section 8 of the Indian Independence Act. And if he came to that conclusion, the prerogative power of dissolution must be held to have been revived.

The second ground for the dissolution stated in the Reference is the unrepresentative character of the Assembly. This ground is not materially distinguishable from the first since the Assembly is alleged to have lost its representative character by lapse of time. Here again if the intention of the Indian Independence Act, 1947, was, as I think it was, to give a representative Assembly to the ,new Dominion, the Assembly if it lost that character could not function as the Assembly intended by the Act, and' could under the prerogative right be lawfully dissolved. It is stated in the Reference that the public, opinion was unanimously in favour of the dissolution of L the Assembly and that repeated representations from and resolutions passed by public bodies were received by the Governor-General against the representative character of the Assembly. Probably the reference here is to the resolutions passed by the various Provincial Legislatures and the Corporation of the City of Karachi, copies of which were filed with affidavits in Mr. Tamizuddin Khan's ease (1955 FC 240). We cannot, however, enter upon a discussion of the truth or otherwise of those affidavits or the counter-affidavits of Mr. Tamizuddin Khan because, as I have already mentioned for the purposes of the present Reference it will have to be, assumed that the Governor-General dissolved the Assembly because in view of repeated representations from and resolutions passed by various representative public bodies throughout the Country he was satisfied that the Assembly had become wholly unrepresentative of the people of Pakistan and ceased to be responsible to them: In my opinion in Mr. Tamizuddin Khan's case (PLD 1955 FC 240) I thus expressed myself, as to the necessity of a popular Assembly retaining its representative character:

"The second and by far the most important requirement of a democratic constitution is the need for periodic accountability of the representatives to their electors. In modern times within a few years political events of great and unanticipated importance may happen in a country and the mental horizon of the whole people may change by sudden international or domestic event, the importance and implications of which may not have been present to the minds of the people when elections were held. It is, therefore, necessary that old representatives should seek re-election either because of their having ceased to reflect in the Legislature the progressive or changing outlook of the people or because of their having ceased to represent the views of, the people on a particular issue. The principle, therefore, is fundamental that in every democratic constitution there must exist a provision for holding election after a few years, so that the House, may continue to be representative of the varying aspirations and, needs of the people."

Therefore dissolution on the ground that the Assembly had become unrepresentative can be held to be illegal only if it be found that the intention of the Indian Independence Act, 1947, was to retain the Assembly as the Legislature of the Dominion, however unrepresentative of the people it became by the influx of time. Since I am unable to read any such intention in the Act, it follows that the prerogative right to dissolve was not excluded by the Act in the circumstances mentioned. And the reason for the dissolution of an representative Constituent Assembly is that since the consti­tution made by it, if it makes one, cannot be acceptable to the people, the Assembly becomes incapable of discharging the duty assigned to it by the Statute. Here again it is obvious that if the Assembly cannot function in furtherance of the intention of the Act, the case is one of cams omissus, in the sense that the prerogative of dissolution cannot be held to have been ousted by the Act.

It should not be overlooked that dissolution does not in any way adversely affect the rights of the members of the Assembly. If their claim that they are in the Assembly by the consent of the people and as their representative and not merely because of a statutory provision is good, they can seek re-election to the new, Constituent Assembly, there being no disqualification attaching to them from being chosen as members of that Assembly. If they receive a fresh electoral mandate, they can return to the Assembly with greater popular acclamation and thus disprove the allegation that they re-present nobody except themselves.

The third ground for the dissolution is that though under the Indian Independence Act, 1947, all legislation passed by the Constituent Assembly required the assent of the Governor-General, the Assembly took up the position that no assent was needed to its legislation under subsection (1) of section 8 ?vi of the Indian Independence Act, 1947": This Court has held in Mr. Tamizuddin Khan's case (PLD 1955 FC 240) that the Governor-General's assent to laws made by the Assembly under subsection (1) of section 8 of the Indian Independence, Act, 1947, is necessary to give them validity, and therefore if the Assembly claimed, that it could give laws to the country without the assent of the Governor-General, it must be held that it -was functioning outside the Constitution and was liable to removal on .the short ground that it was an illegal legislative body. A further illegality that tainted the composition of the Assembly was the addition of six members to its personnel by the Increase and Redistribution of Seats Act, 1949, without obtaining the assent of the Governor-General, to that Act. Thus, on the date that it was dissolved, the Constituent Assembly was not functioning as the Constituent Assembly for Pakistan as defined by section 19 (3) (b) of the Indian Independence Act, but as an illegal Legislature whose removal by the Governor-General was not only legal but the performance of a clear constitutional obligation. The existing legal confusion is solely due to the Assembly's claim to function as the sole constituent of the Legislature, a claim which has brought the whole legal system of the country, on which the State itself depends, literally to ruination. In Sammut v. Strickland (k), the Privy Council has held that the dictum of Lord Mansfield in Pyrn v. Campbell to the effect that the King's prerogative to legislate for a ceded . or conquered territory to which representative legislative institutions have been granted is excluded applies only if such institutions continue to exist. The principle of this Privy Council decision is in my opinion applicable to a situation like the present where a representative Legislature begins to function illegally i.e., in a manner different from the one in which it was intended to function. For this reason alone, it seems to me that the Constituent Assembly never functioned as it was intended by the Indian Independence Act, 1947, to function, with the result that the prerogative to dissolve all along remained with the Governor-General.

CONVENTION

The fourth question, namely, "whether the Constituent Convention proposed to be set up by the Governor-General would be competent to exercise the powers conferred by section 8 of the Indian Independence Act, 1947, on the Constituent Assembly" is not separable from the question relating to the Governor-General's power to dissolve the Assembly because in a democratic constitution of the British type such as is envisaged by the Indian Independence Act, 1947, and the adapted Government of India Act, 1935, the power to dissolve a representative legislative institution implies the right to convene another, the power exercised in both cases being a prerogative power. Here again the matter is governed by the principle that where the prerogative has not been excluded by the statute the common law applies. Casus omissus et oblivioni datus dispositioni Communis juris relinquitur (a case unprovided for in a statute and given to oblivion must be disposed of according to common law). Under the Indian Independence Act, 1947, there is no provision relating to the convention or composition of a fresh Consti­tuent Assembly. It follows therefore that the Governor-General must, as representative of the Crown, exercise the same powers as were exercised by the Governor-General in 6 1947 on behalf of the Crown, the only difference between the two cases being that whereas in 1947 the Governor-Genera exercising the powers was , responsible to His Majesty'

Government in the United Kingdom, the present Governor General having been appointed to represent the King for the purposes of the Government of the Dominion, is not respon­sible to any agency outside the Dominion, though in law the source of the authority in both cases is the Crown. The dissolved Constituent Assembly was set up by an executive order and not under any law and the new Constituent Assembly also can be set up by a similar order.

Before elections were regulated in, England by law, the King exercised his prerogative right under the common law, to convene the Parliament. The number of knights, citizens and burgesses summoned and the counties, cities and boroughs that were to return them were both determined by the King and all election disputes were settled by the King-in-Council. This was the position under the common law though later it began gradually to be regulated by statute. Referring to this right Maitland in the Constitutional History of England, 1950 Edition, says at p. 239:-

"But this was by no means all: the King, we remember, had exercised the power of conferring on boroughs the right to send members. Hitherto this power had not been extensively used for the purpose of packing Parlia­ment and Henry VIII used it but very sparingly: he gave the right to but five boroughs. Under Edward VI the power was lavishly used for political purposes : he thus added forty-eight members, Mary twenty-one, Elizabeth sixty, James , twenty-seven. The number of burgesses in the lower house was thus vastly increased, and with it the power of the Crown. When a new borough was created, and when a new charter was granted to an old borough, care was generally taken to vest the right of election not in the mass of the burgesses, but in a small select governing body—a mayor and council—nominated in the first instance by the Crown, and afterwards self elected."

The learned author reverts to, this subject and goes on to say at p. 289

"The number of the House of Commons have grown. In the first parliament of James there were 467 members. In the Long Parliament (1640) 504. In the parliament of 1661, 507; in 1679, 513. The causes of the increase have been various. In 1672 a statute admitted two

knights for the County Palatine of Durham, and two citizens for the city. Except in this, respect the represent‑action of the counties remains unaltered. We have seen that under Edward VI, Mary, Elizabeth and James, the number of borough members was increased by royal charter thus it was hoped that a House favourable to the Crown might be returned. Charles I added, or restored I think, eighteen borough members. Charles II exercised this prerogative but once, he gave Newark two members. The representation of the two Universities is due to James I. The prerogative of increasing the number of borough members was never taken away—but it was last exercised in favour of Newark in 1677— and after the

Restoration the House of Commons would have resented its exercise: though it is curious to observe that the excellent Whig, John Locke, agreed that if the House would not reform itself, the King might reform. it.

In his opinion reported at pp. 188-189 of "Opinions of Eminent Lawyers" by George Chalmers, Vol. I. Mr. Pane described the King's power of calling an assembly in the colony of New York as "an undoubted right, which the Crown has always, exercised, of caring, and continuing, the assembly of the colony, at such times, and as long, as it was thought necessary for the public service". Similarly, Mr. Raymond, the Attorney-General is reported at pp. 267-269 of the same book to have thought that in the absence of an Act the King had the power, iii point of law, to empower a new county to send representatives to the Colonial representative assembly and to restrain a town which had enjoyed the right of sending representatives to such assembly from sending such representatives. At pp. 271 and 272 of the book are the opinions of two other lawyers, Ryder and Murray, to the effect that where "the right of sending representatives was founded originally on the com­missions and instructions, given by the Crown to the Governors of New Hampshire (Colony), His Majesty lawfully May extend the privilege of sending representatives to such new towns, as His Majesty shall judge to be, in all respects, worthy thereof."

. I have gone so far back in English History merely to illustrate the simple point that in the absence of a statute the representation of the Realm in Parliament was in the discretion of the King though the repetition of similar writs addressed to, the Sheriff of the same County from time to time tended to create in the shires, cities and burgesses of the county expectations which gradually developed into rights in Common Law. The Order of 1947 constituting the Constituent Assembly for Pakistan was merely a surrender of this prerogative right by the Crown which the Parliament utilised in the statute of Independence. That being the legal position, it follows that Pakistan being a Dominion and the Governor-General here representing the King for the purposes of the Government of the Dominion, he is possessed in this matter of the same powers as in the absence of a statute were or are exercise able by the King. Since eight years have expired since the dissolved. Constituent Assembly was set up, it is obvious that in setting up the new Constituent Assembly the Governor-General is not only entitled but is bound to take cog­nizance of the altered conditions, the new issues, the views of the different political parties and the Measure of agreement among them. The dissolved Constituent Assembly was chosen on an issue which has been replaced by more burning issues and it cannot possibly be contended that the executive order constituting the Assembly of 1947 is a part of the law which must determine the composition of the new Assembly. The mode in which representation of the country is to be secured, namely, whether elections should be dire or indirect, whether there should be equal distribution of seats between East Pakistan and West Pakistan, how backward area or areas in which there are no represen­tative Legislatures should be represented are not legal issues but political controversies which should be raised not in courts but elsewhere. The only legal requirement in setting up a new Assembly is that it should be a representative body, but in attaining that object time, .practicability, and agreement between various political leaders are as much relevant factors as they were in the Cabinet Mission's Plan of 16th May and His Majesty's Government's announcement of 3rd June 1947. I am therefore of the view that under the Indian Independence Act, ,1947, the Governor-General had the authority to issue the Constituent Convention Order, 1955, and that subject to the observations in the three succeeding paragraphs, the convention called by that Order will have all the, powers of, the Constituent Assembly.

In law the new Assembly can only be a Constituent Assembly, the term Convention being misleading and not known to the Indian Independence Act. Since the Governor-General cannot assume to himself powers which are not ,expressly or ,by necessary implication given to him by the Indian Independence Act, 1947, it follows that he cannot derive the powers to dissolve the new Assembly from the Constituent Convention Order which is his own creation. That power must still depend on the Indian Independence Act, 1947, unless by a properly assented Act the new Assembly makes some other: provision as to it. The same observations apply to the power; to summon and prorogue after the Assembly; has commenced to function.

As regards the right of the Governor-General to nomi­nate, particular persons to the new Assembly, it is admitted by Mr. Diplock that the duty of the Governor-General being to, bring into existence a representative Assembly, he has no right to nominate members, though consistently with the all-important principle of representation of the people and areas on as wide a basis as possible he may determine the manner in which members are to be chosen.

With respect to the representation of States and tribal areas, the matter is governed by the Indian Independence Act itself. Under the proviso to subsection, (3). of section 19 of that Act, arrangements for the ,representation of these territories have to ,be made by the Constituent Assembly and not by the Governor-General.

EMERGENCY POWERS.

VALIDATION

In approaching questions 1 and 2 the circumstances in which they dame to be referred must bet borne in mind. The reference thus states these circumstances :

"In. the Federation of Pakistan v. Moulvi Tamizuddin khan (1) the Federal Court decided that the legislation referred to in paragraph 5 (legislation under subsection (1) of section 8 of the Indian Independence Act, 1947) did require the Governor-General's assent.

"It was found that 44 Acts passed by the Constituent Assembly had not received the assent of the Governor-General and that under them hundreds of orders had been issued and judicial decisions taken. Thus the consequences which seemed to follow were:-

(1) All actions taken under orders made after the 31st March 1948, under section 9 of the Indian Independence Act, 1947, .as amended by the Indian Independence (Amend­ment) Act, 1948, were invalid, In particular, section 92-A of the Government of India Act, 1935, and hundreds of Acts made by the Governors of East Bengal, the Punjab (which in law should be called `West Punjab'), and Sind were not and never had been part of the law, Further, the criminal law and procedure of Pakistan had never been applied to those parts of Baluchistan which had not been part of British India.

(2) The executive and judicial Government of Karachi had apparently no legal foundation.

(3) All laws passed after 1950 by the Constituent Assembly functioning as Federal Legislature under sub-section (2) of section 8 of the Indian Independence Act, 1947, were, probably invalid because the Assembly had purported to change its composition by law which had not received the Governor-General's assent.

(4) All laws passed by the Provincial Legislatures since the last general elections were presumably invalid because the Assembly had purported to amend the fifth and sixth schedules to the Government of India Act, 1935, under which the Provincial Assemblies were elected and consti­tuted.

(5) All laws passed by the Provincial Legislature of East Bengal after the 14th March, 1953, were invalid because the Provincial Assembly had no legal existence after that day.

(6) Other branches of the Civil, Criminal and Revenue law were in large part invalid because they had been enacted by the Constituent Assembly either under sub section (1) of section 8 of the Indian Independence Act, 1947, or under subsection (2) of that section in accordance with amendments to the Government of India Act, 1935, made under subsection (1) of the section.

"By the Emergency Powers Ordinance, 1955, the Gover­nor-General sought to validate ab initio 35, of the laws passed by the Constituent Assembly under subsection (l) of section 8 of the Indian Independence Act, 1947, but in Usif Patel's case the Federal Court held that the 'Governor-General could not validate those laws by an Ordinance promulgated under section 42 of the Government of India Act, 1935.

"On the 15th April, 1955, the Governor-General issued a Proclamation and Order for the meeting of new con­stituent Assembly, designated Constituent Convention, to exercise the powers of the , Legislature of the Dominion for the purpose of making provision as to the Constitution of Pakistan• The members representing the Governors' provinces will be 'elected by `the persons .elected to the provincial\_ Assemblies. The members representing the other Parts of Pakistan will be nominated by the Governor-General. This Convention is required to meet on the 10th May, 1955, and it: is hoped that it will take the ' earliest opportunity of validating invalid or questioned laws.

"Until the situation could be regularised by the Conven­tion, it became necessary for the Governor-General in order to avoid a possible breakdown in the constitutional and administrative machinery of the country to assume to himself all such powers as may be requisite to validate certain of the invalid laws needed to preserve the State and to main­tain the status quo The Governor-General therefore issued a Proclamation, dated the 16th April, 1955, vesting such powers in himself, and validating (subject to the report of the Federal Court on the basis of this Reference) the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, and all acts done and carders made under those laws. This Proclamation would, of course, cease to operate as soon as the appropriate legislation has been enacted by the Constituent Convention." -

The questions formulated are:

(1) What are the powers and responsibilities of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation?

(2) The Federal Court having held in Usif Patel's case (1) that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India 'Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General can by order or otherwise declare that all orders made, decisions taken and other acts done tinder those laws shall be valid and enforceable and those laws which cannot without danger to the State be removed from the existing legal system shall be treated as part of the law of the land until the question of their validation is determined by the new Constituent Convention?

In order to appreciate the urgency and importance of these questions the following facts have to be remembered :-

(1) that if the Governor-General had not validated the law after assuming to himself the powers to validate them the constitutional and administrative machinery of the country would have broken down;

(2) that the power to validate the laws has been assumed in order to preserve the State and to maintain the status quo;

(3) that a new Constituent Assembly has been called and the validation is merely an emergency measure which would last till the new Constituent Assembly decides the question of validation.

There is, therefore, this fundamental difference between the situation as existed at the time of this Court's decision in Usif Patel's case and the situation' that exists now that whereas the Ordinance the validity of which was considered in Usif Patel's case made no reference to a new Constituent Assembly and claims for the Governor-General the power not only of permanently validating invalid constitutional legislations, bat also the right of framing a constitution for Pakistan, the valida­tion by the present Proclamation of Emergency is only temporary and the power has been exercised with a view to preventing the State from dissolution and the constitutional and admini­strative machinery from breaking down before the question of validation of these laws has been decided upon by the new Constituent Assembly. Thus the issue raised refers to the extraordinary powers of the Governor-General during the emergency period and not to powers which vest in the Gover­nor-General during normal times when the vital organ of the Constitution, namely, the Legislature is functioning, and the question that we 'have to consider is whether there is any provision in the Constitution governing such a situation or any other legal principle within, outside or above the Constitution Act which entitles the Governor-General to act in case of necessity of such a nature,

LAW OF NECESSITY

The point that arises, and I am not aware if it has ever arisen before in this acute form is whether in an emergency of the character described in the Reference there is any 'law by which the Head of the State may, when the Legislature is not in existence, temporarily assume to himself legislative powers with a view to preventing the State and society from dissolu­tion. In seeking an answer to this question resort must necessarily be had to analogies and first principles because the law books and reported precedents furnish no direct answer to the precise question which today confronts the judiciary of Pakistan. The Governor-General claims in the Proclamation that he has acted in the performance of a duty which devolves on him as Head of the State to prevent the State from disruption and the preliminary question that has to be considered is whether when we speak of rights and duties in the matter of preservation of States or their creation, foundation and dissolu­tion (we are still in the field of law or in a region out of bounds to lawyers and courts. Having anxiously reflected over this problem I have come to the conclusion that the situation presented by the Reference is governed by rules which are part of the common law of all civilized States and which every written Constitution of a civilized people takes for granted. This branch of the law is, in the words of Lord Mansfield, the law of civil or State necessity.

The law of natural necessity is a part of the statute law of our country, but the law of civil of State necessity is as much a part of the unwritten law as the law' of military necessity, instances of which are adjudged cases and authorities. On this part of the case Mr. Diplock has addressed us an eager and anxious argument claiming for the Governor-General, as representative of the King or as Head of the State, certain powers which entitle him in the interests of the Sate temporarily to act outside the limits of the written constitution. He has relied in this connection on the maxim cited by Bracton at folios 93-E and 247-A of his Treatise, "DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE" (Of the laws and Customs of England), "ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT" (that which otherwise is not lawful, necessity makes lawful), and the maxims salus populi supremo lex (Safety of the people is the supreme law) and salusrepubllcae est suprema lex (Safety of the State is the supreme law) and certain authorities, where one or more of these maxims or the principle underlying them was treated as part, of the law. The best statement of the reason underlying the law of necessity is to be found in Cromwell's- famous utterance. "If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law." Broom at p.I of the 10th Edition of his legal maxims says that the phrase salus populi suprema lex is based on the implied agreement of every member of society that his, own individual welfare shall, in cases of necessity, yield to that of the commu­nity, and that his property, liberty, and life shall under certain circumstances, be placed in jeopardy or even sacrificed for the public good. In re. An Arbitration between Shipton, Anderson & Co. and Harrison Brothers & Co. (1) Darling J. described the Maxim alus populi suprema lex as not Wily a good maxim but essential law'. In that else, by a contract in writing,' made in September, 1914, the owner of a specific parcel of wheat in a warehouse in Liverpool sold it upon the terms "payment cash within seven days against transfer order. Before delivery and before the property passed to the buyer the wheat was requisitioned by and delivered to His Majesty's Government under the powers of an Act passed before the date of the contract. It was held by the Court of the King's Bench Division that delivery of the wheat by the seller to the buyer having been rendered impossible by the lawful requisition of the Government, the seller was excused from the performance of the contract. The act of requisition was described both by Lord Reading C. J. and Lush J. as `an act of state'. Referring to that act Darling J. said:

"It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by State acting for the general, good. Salus populi suprema lex is a good maxim and the enforcement of that essential law gives no right of action to whom­ so ever may be injured by it."

In Attorney-General v. De Keyser's Royal Hotel (I) Lord Moulton dealing with the Crown's prerogative in taking posses­sion of land for the defence of the Realm observed:

"To decide this question one must consider the nature and extent of the so-called Royal Prerogative in the matter of taking or occupying land for the better defence of the realm. I have no doubt that in early days, that war was carried on in a simple fashion and on a smaller scale than is the case in modern times, the Crown, to whom the defence of the realm was entrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose. But such necessity would be in general an actual and immediate necessity arising in face of the enemy and, in circumstances where the rule salus populi suprema lex was clearly applicable.

"Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have any claim against the Crown for compensation in respect of the damage they had thus suffered…..

There are some interesting observations on the Crown's right to take the subjects' property in an emergency at pp. 176 to 180 in the 6th Edition of Chalmers and Hood Phillip's Constitutional Law: The purport oft the precedents cited there including the Saltpeter case (2) and the Ship Money Case, R. v. Hampdon (3), is that in times of war the King; acting out of military necessity, may take the subjects' property and that this rule is a rule of common law. Referring to the right of the executive to act in contravention of the law in an emergency Dicey says at pp. 412-413 of the 9th Edition of his Law of the Constitution:—

"There ate 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 break the law and trust for protection to an Act of Indemnity. A statute of this kind is (as already pointed out) the last and supreme exercise of Parliamentary sovereignty. It legalises illegality; it affords the practical solution of the problem which perplexed the statesmanship of the sixteenth and seventeenth centuries, how to combine the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must at critical junctures be wielded by the executive' government of every civilised country. .

Commenting on this passage, Chalmers and Hood Philips at p. ° 177 of their book cited above remark "What Dicey calls Convention, Darling J, appears in one case (Shipton Anderson and Co. v. Harrison Brothers and Company to treat as Law:

(1) (1920) A C 508 (2) 1606, XII Cox. Rep 12

(3) (1636) 3 St. Tr. 825

`Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it. The unbiased opinion of Darling J. appears to tally with the so called corrupt judgment in Bate's Case (1) : The power of the King is both ordinary and absolute. Ordinary power, which exists for the purpose of civil justice, is unalterable save by consent of Parliament. Absolute power, existing for the nation' safety, varies with the royal wisdom'." It is true that most of the cases mentioned above relate to the acquisition of the subjects' property for the defence of the realm in times of war, but it seems to me that the same principle must be applicable, and as I shall presently show, has been applied where the State is in danger of a collapse due to other factors.

Chitty in the 1820 Edition of his book, Prerogatives of the Crown,' states at p. 68, "that the King is the first person in the nation being superior to both Houses in dignity and the only branch of Legislature that has a separate exis­tence, and is capable of performing any act at a time when the Parliament is not in being". At the same page referring to two memorable instances in which Parliament had assembled in an illegal manner, i.e., without the authority of the King, the reference being to the Parliament which restored Charles II and the Parliament of l688 which disposed of the British Crown to William III, that learned author says, "that in both, these instances the necessity of the case rendered it necessary for the Parliament to meet as they did, there being no King to call them together and necessity supersedes all law" Maitland at pp. 283 to 286 of the 1950 Edition of his Cons­titutional History of England' makes some interesting observations as to the legality of what happened when William, Prince of Orange, became the King of England and as to the validity of legislation after James dissolved the Parliament and fled from London on the 11th December, 1688, dropping the Great Seal into the 'Thames. The Prince, who was then not King, invited an Assembly which advised him to summon a Convention of the States of the Realm. In accordance with this advice he invited Lords to come and the counts and boroughs to send representatives to a Convention which met on the 22nd January, 689. On the 25th January the Commons re-solved that King. James had abdicated the government and' that William and Mary should be proclaimed King and Queen. The Crown was accepted and thereupon the Convention passed an Act declaring itself to be the Parliament of England notwith­standing the want of a proper writ of summons. This Parliament, known as the Convention Parliament, passed many important Acts, including the Bill of Rights and was dissolved early in 1690. A new Parliament which was duly, summoned by writs of the King and Queen met on the 22nd March, 1690, and it proceeded to declare by statute that the King and the Queen were King and Queen and that the statutes made by the Convention "were and are laws and statutes" of the Kingdom.

Commenting, on this episode in English history Maitland says

"Now certainly it was very difficult for any lawyer to argue that there had not,' been a revolution. Those who conducted the revolution sought, and we may well say were wise in seeking, to make the revolution look as small as possible, to make it as like a legal proceeding, as by any stretch of ingenuity it could be made. But to make it out to be a perfectly legal act seems impossible. Had it failed, those who attempted it would have suffered as traitors, and I do not think that any lawyer can maintain that their execution would have been unlawful. The convention hit upon the word abdicated as expressing James's action, and, according to the established legal reckoning, he abdicated on the 11th December, 1688, the day on which he dropped the great seal into the Thames. From that day until the day when William and Mary accepted the Crown, 13th February, 1789, there was no King of England. Possibly the con­vention would better have expressed the truth if, like the parliament of Scotland, it had boldly said that James had forfeited the Crown. But put it either way, it is difficult for a lawyer to regard the Convention Parliament as a lawfully constituted assembly. By whom it was summoned? Not by a King of England, but by a Prince of Orange. Even if we go back three centuries we find no precedent. The parliaments of 1327 and 1399 were summoned by wits in the King's name under the great seal. Grant that parliament may depose a King, James was not deposed by parliament; grant that parliament may elect a King, William and Mary were not elected by parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament. The act which declares it to be a parliament depends for its validity on the assent of William and Mary. The validity of that assent depends on their being king and queen; but how do they come to be king and queen?".

As a, matter of strict law the Convention Parliament not having been summoned by the King was not a lawful Parlia­ment, with the result that William was not a king and that being so, the Act of Settlement which regulated the succession to the throne was not a valid piece of legislation and none of the sovereigns who succeeded to the throne under the Act of Settlement was a legal sovereign, and none of the laws to which' they gave assent was a valid, law. The only ground on which all that was illegal can be held to have been legal was, as Chitty observes, the necessity of the situation.

In "Opinions of Eminent Lawyers" by George Chalmers several opinions are quoted where what was apparently illegal was supposed in case of necessity to have been legal. At pp. 29 and 30 is, cited the, opinion of Lord Chief Justice Holt on, the forfeiture of Lord Baltimore's charter of Maryland and the grant of it to another Governor. The question In that case was whether, before Lord Baltimore's forfeiture of his charter was adjudged, Maryland could be granted to another Governor. Giving his opinion the Lord Chief Justice said "I think it had been better, if an inquisition had been 11 taken, and the forfeiture committed, by the Lord Baltimore, had been therein found, before any grant be made to a new governor; yet, since there is none and it being in a case of necessity, f think the king may by his commission constitute a governor, whose authority will be legal, though he must be responsible to Lord Baltimore for the profits". The opinion of the Attorney and Solicitor General, Northey and Harcourt, at pp. 30-32 that the Queen may resume a government granted under a royal charter that has been abused proceeded on the same ground. They both agreed that by an extraordinary exigency happening through the default or neglect by a proprietor or of those appointed by him, or their inability to protect or defend the Province under their Government and the inhabitants there of in times of war, or imminent danger. Your Majesty may constitute a Governor of such province, or colony, as well for the civil as military part of government, and for the protection and preservation thereof and of your Majesty's subjects there". The opinion of the Attorney and Solicitor General, Ryder and Murray, which appears at pp. 186 to 188 was asked on the King's right to establish a government in Georgia upon the surrender of the 4 trustees and it was to the effect that "if the surrender of the charter by the trustees cannot be postponed, and the present government there kept up, till a new method of administer­ing the new government can be settled, the proper way, for authorising the present magistrates and officers, to continue in the exercise of their respective offices, in the meantime, will be, for His Majesty to issue a proclamation for that purpose, under the great seal of Great Britain to be published in Georgia". There is one feature which was common to all the instances I have mentioned above—immediate necessity—and that circumstance was supposed to have rendered legal what otherwise appeared to be illegal.

The powers and responsibilities of the Head of a State in preserving the State and Society during an extraordinary emergency and preventing from disruption the constitution and government of the country are analogous to the powers which an Army Commander has during the Martial Law. That is so because the law, of civil necessity and that of military necessity are both founded on a common principle. The nature and extent of the power of an Army Commander were fully discussed by me in the full bench of Muhammad Ummar Khan v. The Crown (1) where referring to the dicta of Willies J. in Phillip v. Eyre (2).. "there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled, unless he shrinks from the discharge of paramount duty, to exercise de facto powers which the Legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the State will be ratified by an Act of indemnity and 'oblivion" I held on the authority of that case and the observations in Tilirko v. Attorney-General of Natal (1) that where civil authority is paralysed by tumult, all acts done by the military which were dictated by necessity and done in good faith will be protected even if there be no bill of indemnity. Of course the duty of an Army Commander arises where there is a revolt, insurrection or disturbance of the public order, but the principle which permits, and occasionally demands, the exercise of emergency powers is not limited to those cases and equally governs a situation where the Head of the State is required to act in a case of necessity when the Legislature is not in being. This result follows from the address of Lord Mansfield in the Proceedings against George Stratton and others (21 Howard's St. Tr. 1046) which had started against them on an informa­tion, filed by His Majesty's Attorney-General for a mis­demeanour in arresting, imprisoning and deposing Lord Pigot, Commander-in-Chief of the Forces in Fort St. George and President and Governor of the Settlement of Madras in East Indies. The defence to the information was that Lord Pigot had violated the constitution of the government of Madras with regard to the Governor and Council in whom the whole power was vested by the East India Company and that the defendants had acted under necessity in order to preserve the constitution. In this address to the Jury, Lord Mansfield thus dealt with the law of civil necessity, as distinguished from the law of natural necessity:-

"I cannot be warranted to put you any case of civil necessity that justified illegal acts, because the case not existing, nor being supposed to exist, there is no authority in the law, books nor any adjudged case upon it. Imagination may suggest, you may suggest so extraordinary a case as would justify a man by a force overturning a magis­trate and beginning a pew government, all by force, I mean in India, where there is no superior nigh them to apply to ; in England it cannot happen ; but in India you may suppose a possible case, but in that case, it must be imminent, extreme, necessity ; there must be no other remedy to apply to for redress ; it must be very imminent, it must be very extreme, and , in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves, with a view of preserving the whole . . . . Then you must see, the Company's settlement are Preserved by it. For if there is a struggle of a faction, it will be upon an illegal act. If the governor does twenty illegal acts, that will not be a justification of it; it must tend to the dissolution of society and the intervention must tend to the preservation of it.

"But the only question for you to consider is this—whether there was that necessity for the preservation of the society and the inhabitants of the place as authorises private men (for when they are out of the Council till a Council is called they are private men) to take possession of the government ; and to take possession of the government to be sure it was necessary to do it immediately.

"If you can find that there was that imminent necessity for the preservation of' the whole, you will acquit the defendants."

In another version of the same case Lord Mansfield is reported to have said :-~

….. to amount to a justification, there must .appear imminent danger to the government and individuals ; the mischief must ,be extreme, and such as would not admit a possibility of waiting for a legal remedy. That the safety of the government must well warrant the experiment……….The necessity will not justify going further than necessity obliges : for though compulsion takes away the criminality of the acts, which would otherwise be treason, yet it will not justify a man in acting farther than such necessity obliges him or continuing to act after the compulsion is removed."

The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful. Since the address expressly refers to the right of a 'private person to act in necessity, in the case of Head of the State justification to act must a fortiori be clearer and more imperative.

This being the position regarding individual acts, the next question is whether the Head of the State can, in the circum­stances postulated, legislate for the society. This Court has held in Usif Patel's case (1) that the Governor-General has no power to make such laws as are mentioned in subsection (1) of section 8 of the Indian Independence Act, 1947, but that decision was expressly limited to the Governor-General's powers under section 42 of the Government of India Act, 1935, no other source for the power to pass such laws having been claimed for him in that- case. If it once be conceded that the power to act in an emergency of' the nature just indicated exists, the conclusion is inescapable that the act may be done by a general order, which, as admitted by Mr. Pritt, would amount to legislation. If the law as stated by Chitty that the Crown is the only branch of Legislature that is capable of performing any act at a time when Parliament is not in being is correct, legislative powers of the Crown in an emergency are a necessary corollary from that statement, and the same result flows from Dicey's statement that the free exercise of a discretionary or prerogative power at a crictical juncture is essential to the executive Government of every civilised country, the indispensable condition being that the exercise of that power is always subject to the legislative authority of parliament, to be exercised ex post facto The manner , in which such power is exercised, whether in individual cases or by positive directions or restraint order of a general character, is essentially a question of method and detail, not affecting the main principle. The emergency legisla­tive power, however, cannot extend to matters which are not the product of the necessity, as for instance, changes in the constitution which are not directly referable to the emergency,

The disaster that stared the Governor-General in the face, consequent on the illegal manner in which the 'Constituent Assembly exercised its legislative authority, is apparent from the results described in the Reference as having followed from this Court's decision in Mr. Tamizuddin Khan's case (1) and the subsequent case of Usif Patel (2). The Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the State and society from dissolution. His proclamation of 26th April, 1955, declaring that the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall be retrospectively enforceable is accordingly valid during the interim peiod, i.e., until the validity of these laws is decided upon by the new Constituent Assembly. Needless to say that since the validity of these laws during the interim perid is founded on necessity, there should be no delay in calling the Constituent Assembly.

I would, therefore, reply to the questions referred as follows :

Question No. 3.—Whether the Constituent Assembly was rightly dissolved by the Governor-General?

Opinion.—That on the facts, stated in the Reference, namely (1) that the Constituent Assembly, though it func­tioned for more than 7 years, was unable to carry out the duty to frame a constitution for Pakistan to replace the transitional constitution provided by the Indian Indepen­dence Act, 1947 ; (2) that in view of the repeated represen­tations from and resolutions passed by representative bodies throughout the country, the Constituent Assembly, in the opinion of the Governor-General, became in course of time wholly unrepresentative of the people of Pakistan and ceased to be responsible to them ; (3)' that for all practical purposes the Constituent Assembly assumed the form of a perpetual Legislature ; and (4) that throughout the period of its existence the Constituent Assembly asserted that the provisions made by it for the constitution of the Dominion under subsection (1) of section 8 of the \Indian Independence, Act, 1947, were valid laws without the assent of the Gover­nor-General, the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly.

Question' No 4.—Whether the Constituent Convention proposed to be set up by the Governor-General will be competent to exercise the powers conferred by subsec­tion (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly ?

Opinion—That subject to this—

(1) that the correct name of the Constituent Convention is Constituent Assembly

(2) that the Governor-General's right to dissolve the Assembly can only be derived from the Indian Independence Act ;

(3) that the arrangements for representation of States and Tribal Areas can, under the privisio to subsection (3) of section 19 of the Indian Independence Act, be made only by the Constituent Assembly and not by the Governor-General ; and

(4) that the Governor-General's duty being to bring into existence a representative Constituent Assembly he " can only nominate the electorate and not members to the Constituent Assembly,

The new Assembly, constituted under the Constituent Convention Order, 1955, as amended to date, would be competent to exercise all the powers conferred by the Indian Independence Act, 1947, on the Constituent Assembly including the powers under section 8'of that Act.

Question No. 1.—What are 'the powers and responsibilities of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation?

Opinion---That this question is too general and need not be answered.

Question No. 2.--The Federal Court having held in Usif Patel's case that the Jaws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retros­pective effect given to them, and no, Legislature competent to validate such laws being in existence, is there any pro-vision in the Constitution or any rule of law applicable to the situation by which the Governor-General can by order or otherwise declare that all orders made, decisions taken, and other acts done under those laws shall be valid and enforceable and those laws which cannot without danger to the State' be removed from the existing legal system shall he treated as part of the law of the land until the question if their validation, is determined by the new Constituent Convention ?

Opinion.---That in the situation presented by the Reference the Governor- General has, during the interim period, the power under the common law of civil or state necessity of-retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all, those laws, until the question of their validation is decided upon by the Constituent Assembly are, during the aforesaid period, valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

Before I conclude, I should like to dispel the impression, which this opinion may produce on the mind of a layman that while seeking in Common Law the origin of a jurisdiction exercisable in Pakistan, I have assigned to the Governor-General of this country a position analogous to that of English Kings in the middle ages. Nothing that I have said here in any way affects the independence of Pakistan or is inconsistent with the constitutional position of the Governor-General des­cribed at length by me at pp. 23-26 and 77-79 of my opinion in Mr. Tamizuddin Khan's case (1). The words "Crown", "King'', "Queen", "His Majesty", "His Majesty", "Prerogative", etc., are mere legal abstractions and do not in any manner imply the subordination of Pakistan to any outside power. Thus, to explain my point, when after winning independence for Pakistan the Qaid-i-Azam, while taking the oath of office as the first Governor-General of Pakistan, promised to be "faithful' to His Majesty' King George the Sixth, His Heirs, and Successors, in the office of Governor-General of Pakistan" no one could suppose, and none can suppose now, that he was swearing allegiance to the laws of another country or to a subordinate and dependent position for Pakistan or was acknowledging the right bf the, British Crown to governor or interfere with the affairs of this country. Though appointed by the Crown, the Governor-General is in fact a representative of this country and not of any outside power, and the authority that he exercises flows from the laws of this country.

AKRAM, J.—For the reasons given by the learned Chief Justice I agree in the opinions expressed by him in the Special Reference No. 1 of 1955.

CORNELIUS, J.--In this note, I proceed , to state the reasons underlying the opinions on the referred questions which I delivered in open Court on the 10th May, 1955.

Each of the four questions referred to this Court rests basically upon the fundamental question of vires in the Governor-General of Pakistan, in relation to acts performed or proposed to be performed by him. Therefore, a proper answer to the questions requires an examination of the follow­ing fundamental questions, viz,--

(1) What is the status of the State of Pakistan ?

(2) What is the status of the Constituent Assembly referred to in the Indian Independence Act, 1947 ?

(3) What is the status of the Governor-General of Pakistan under the existing constitutional instruments, and what are as powers which he can exercise, in the relevant respects?

Each of these questions has been examined and pronounced upon in greater or less detail in the judgments delivered by this Court on the 3rd April, 1955 in the case of Moulvi Tamiz­pddin Khan (1). The sole question which was decided in that case was whether constitutional laws passed by the Consti­tuent Assembly of Pakistan required the assent of the Gover­nor-General in order to be effective in law, I had the mis­fortune of adhering to a -point of view which varied greatly from that which found favour with my Lord the Chief Justice and the other learned Judges. Proceeding on what I thought was the true construction of the constitutional instruments, I came to the conclusion that Pakistan was an indepedent Dominion, and in that status, it enjoyed a sufficient degree of autonomy to justify the three great limbs of State namely, the Constituent Assembly, the Executive (i.e., the Governor‑General acting with his Ministers), and the judiciary (i.e., the superior Courts) in holding unanimously for a period of seven years, that constitutional laws passed by, the Constituent Assembly became laws in accordance with a rule made in that respect by the Constituent Assembly, viz., upon the Bill as passed being authenticated by the signature of the President, 'and thereafter being published in the Government Gazette under the authority of the President. I expressed the opinion that to say that the State of Pakistan as operating through the three great organs mentioned above was wrong in adopting this mode of passing constitutional laws, was in effect to deny the autonomy of Pakistan.

Having been overruled in this respect, however, it is my duty loyally to accept the view expressed by the majority of the Full Bench, and I proceed to reproduce below extracts from the other judgments delivered in the case, which set out with clarity ' what ,must now be regarded as the law of the land in this particular- respect.. In the leading judgment of my- Lord the Chief Justice, the expression "Independent Dominion" applied by section 1 of the Indian Independence Act was elaborately analysed and the principal features were set out, in the following words :— ,

"Thus Pakistan became independent because.

(1) in law, on the mid-night of the 14th August 1947, if the Constituent Assembly made a law and the Governor-General assented to it, it could secede from the Commons wealth and become a completely independent State, its citizens owing no allegiance to the Crown and not being British subjects ; and

(2) it was not subject, as Canada and Australia were, to any disability to change its constitution. It could have any constitution or -form of government she liked, having no connection with` the Commonwealth ' or the Crown or the Governor-General as the representative of the Crown.

But so long as it did not secede from the Commonwealth, it was 'a Dominion because

(a) it was linked with the Commonwealth by allegiance to a common Crown ; .

(b) its citizens were internationally British subjects ; (I) P L D 1955 F C 240

(c) its laws needed the assent of His Majesty or his representative, the Governor-General

(d) the King's prerogative existed here except to the extent that it was utilized by Parliament in the Indian Inde­pendence Act because the King had placed his prerogatives and interests at the disposal of Parliament only " so far as concerned the matters dealt with by the bill " ; and

(3) it could make any law it liked, constitutional or otherwise, and no law of the dominant country was to extend to it:"

In a discussion of the meaning of the expression " Domi­nion -" under the sub-heading "Allegiance to the Crown " the following observations occur :‑

But though independent in the sense just explained, Pakistan is a Dominion and therefore certain incidents attach to it by reason of that status. The first feature that is common to the Dominions which are members of the British Commonwealth of 'Nations is common allegiance to the Crown."

" But so long as either of them remains a Dominion, assent to its legislation is necessary both under the common law doctrine and the statutory provision in subsection (3) of section 6. So strict is this rule that even if a Dominion intended to secede from the Commonwealth and repudi­ate allegiance to the Crown, it could do so only by an extra-legal act. But if it intended to proceed constitu­tionally such secession would itself require the assent of the Queen or her representative, or legislation by the Parliament of the United Kingdom. Such assent was given when Burma became independent under the Burma Independence Act, 1947. And though in the case of India no such assent seems to have been requested or given, the connection between India and the United Kingdom had to be recognised by a statute of the British Parliament India (Consequential Provisions) Act, 1949, to retain India as a member of the Commonwealth."

Earlier in the judgment, in a discussion of the requirement of assent in respect of laws passed under the Government of, India Act, 1935, .my Lord the Chief Justice observed as follows :

"The restrictions are, therefore, illustrative of the constitutional position that assent to the Dominion legisla­tion by the Crown or its representative is indispensable and has in no instance ever been dispensed with by the Crown."

My brother Muhammad Sharif expressed his full con­currence with the views contained in the judgment of my Lord the Chief Justice.

In the separate judgment of my brother Akram, reference is made to the fact that His Majesty's Government by' their declaration of the 3rd June, 1947, announced their decision "to introduce legislation during the current session for the) transfer of power this year on a Dominion Status basis to one or two successor authorities according to the decisions taken as a result of this announcement". After reproducing the description of the Dominions contained in the declaration of the Imperial Conference held in " London in 1926, Akram J. proceeded to observe as follows:

"Thus the effect of conferring a Dominion Status was that "certain rights and liabilities as between the Dominion and the United Kingdom came into existence, for instance, if the Dominion by its legislation negated allegiance to the Crown or severed connection with it, such a legislation perhaps could not be considered as legally valid or justified. The expression "Independent Dominion" has, therefore, been purposely used in the Independence Act in order to give to the Dominion a freedom of choice either to remain or to refuse to remain within the British Com‑ monwealth of Nations It is clear that by the Indepen‑

dence Act the .intention: was to give a constitutional form of Gorvernment modelled on the pattern of the British Government pending the setting up of a final constitution by the Dominion itself. According to English Constitutional theories, the sovereign, who is the Executive Head of the State, is always a constituent part of the supreme legislative power and as such has the legal right not only of giving assent but also of refusing assent in case he considers a provision to be inexpedient or injurious Such being the English constitutional theories, it would be a strange supposition to make that the British Parliament, while framing an interim Constitutional Act 'for Pakistan, acted in a manner contrary to its own principles and traditions and deprived the Executive Head of the Dominion of power to give or to withhold assent as respects constitutional laws."

I understand my learned brother to be saying in the passages reproduced above that by the Indian Independence Act a constitution modelled on the British pattern was provid­ed as an interim measure for Pakistan, and the incidents of constitutional laws as applicable to His Majesty's Government in the United Kingdom apply also in relation to the State of Pakistan. In a number of passages cited from authoritative sources, my learned brother has referred to the prerogative powers of the King in relatin to legislation, in particular the prerogative of assent and one of these passages contains reference also to the power of the King to dissolve Parliament.

From the separate judgment of my brother S. A. Rahman, I extract the following passages:

Assent to legislation is one of the most important pre­rogatives of the Crown in England. There is also ample authority for the proposition that the prerogative of the Crown extends to the Colonies and Dominions of His Majesty beyond the Seas....Only express words on neces­sary intendment of a statute can take away a prerogative and the presumption would be against such a result.

I can discover nothing in the Indian Independence Act which could support the plea of express or implied abrogation of the prerogative of assent in the case of laws enacted by the Constituent Assembly sitting as the Legislature of the Dominion to frame the Constitution. On the other hand, a reading of sections 5 and 6 together, would lead to, the inference that henceforth the prerogative of the Crown as respects assent, would, in the case "' of each new Dominion, be exercised by the Governor-General, as representing His Majesty. Allegiance to the Crown, however tenuous the bond may in practice turn out to be, is an essential incident of Dominion Status... .This position would continue to hold good in Pakistan as long as it is a Dominion, albeit an "Inde­pendent Dominion", unless of course it is altered by a proper constitutional provision. From the expression "Inde­pendent Dominion", merely constitutional autonomy and not full political sovereignty in the legal sense, can be spelt out, though the latter status would be potentially within the Dominion Legislature's. grasp."

The observations reproduced above from the judgments of my Lord the Chief Justice and my brothers Akram and Rahman are, addressed to the existence or otherwise of the prerogative of assent, but they are based upon a view of the status of Pakistan which, I say so with all respect, is expressed in sufficiently general terms to found an inference regarding the cognate prerogative of dissolution as well. That dissolu­tion falls within the Royal prerogative in the United Kingdom admits of no doubt. I reproduce here, merely for convenience of statement, the following passages from the monograph on the subject of Parliamant in Volume 24 of Halsbury's Laws of England, Second Edition :

"295. The two Houses of Parliament are summoned, prorogued, and dissolved by the Sovereign by the exercise of his Royal Prerogative, and his assent must be given to any Bill passed by the fords and Commons" before it can have the force of law. `

490. A new Parliament can be called together for the transaction of business only by the Crown. It is summoned by means of-the King's writ, issued by the, direction of the Lord Chancellor from the office of the Clerk of the Crown in Chancery with the advice of the Privy Council and in pursuance of a Royal proclamation.

513. A session of Parliament can only be brought to an end by the exercise of the Royal Prerogative. Parliament is prorogued at the end of a session either by the Sovereign in person or by a commission appointed for the purpose by letters patent under the Great Seal.

513. Parliament can be dissolved at any time by the Crown by the exercise of the Royal Prerogative, but its duration is limited by' statute to a period of five years, from the day on which by the writ of summons it was appointed to meet."

It is clear on general principle as well as authority that the prerogatives of the Crown extend to all British possessions and Dominions overseas and that they are exercisable subject to certain qualifications based upon the relevant statute or instrument of appointment by the Governor or Governor-General, in each sunlit possession or Dominion. The point has been placed beyond doubt in the leading judgment in the case of Maulvi Tamizuddin Khan (1) in the paragraph reproduced below:

"The Governor-General of Pakistan is appointed by the King or Queen and represents him or her for the purposes of the Government of the Dominion (section 5 of the Indian: Independence Act)., The authority of the representative of the King extends to the exercise of the " Royal prerogative in so far as it is applicable to the internal affairs of the Member State; or Province, even without express delegation, subject to any contrary statutory or constitutional provisions."

The primary question in the present case is whether the Governor-General had power to dissolve the Constituent Assembly, and the decision of thin question must, in the light of the conclusions reached in Maulvi `Tamizuddin Khan's case (1) by my Lord the Chief Justice and my learned brothers, turn upon the question' whether there is anything in the statutes or other relevant instruments which operates either expressly or by necessary intendment to curtail the prerogative of dis­solution in this respect.

The second question which I have, posed above, admits of an answer after the same fashion as the first. With reference to the relevant provision in the Indian Independence Act, 1947, the view which I held in Maulvi Tamizuddin Khan's case (1) was that the Constituent Assembly was not at any time from its establishment onwards, capable of being regarded as the Legislature of the Dominion. It was given a capacity, by express provisions, to exercise certain powers which were stated to be powers of the Legislature of the Dominion, as well as to exercise the powers of the Federal Legislature under the Government of India Act, 1935. In the view which I took, the "Legislature of the Dominion" was and is still to be set up, in accordance with a law made by the Constituent Assembly, and the provisions mentioned above relating to the powers of two other Legislatures being exercisable by the Constituent Assembly did not appear to me to have the effect of making 'the Constituent Assembly iden­tical with the Legislature of the Dominion ,,(or, for that matter, with the Federal ,Legislature).

In this respect also, mine was a minority view, as my Lord the Chief Justice and two of my learned brothers were clearly of the opinion that as from the date on which Pakistan became a separate State, the Constituent Assembly of Pakistan was the Legislature of the Dominion. The following extract from the leading judgment contains the views of my lord the Chief Justice and my brother Muhammad Sharif on this point:

"Under the temporary constitution provided by section a Federal Legislature had to come into existence and some one from the appointed day had to exercise its functions under, that constitution. Proviso (c), to subsection (2) of section 8 therefore declares that the powers of the Federal Legislature or the Indian Legislature Under the Government of India Act, 1935, as in force in relation to each of the Dominions, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of that section. Thus the Constituent Assembly became on the 15th August, 1947, not only the Legislature of the Dominion for the purposes of section 6, fully competent to make provision as to the constitution of the Dominion but also the first Federal Legislature under the scheme outlined in the Government of India Act, 1935; which with necessary adaptation came into force on the same date. Accordingly the position of the Constituent Assembly is that it is the Legislature of the Dominion when it makes laws for the constitution of the Dominion and the Federal Legislature when it functions under the limitations imposed upon it by the Government of India Act, 1935."

The views of my brother S. A. Rahman appear from the following extract:-

"The argument was raised that though subsection (1) of section 8 made the constitution-making powers included in subsection (t) of section 6, exercisable in the first instance (the phrase "in the first instance" needs to be specifically emphasised in this connection) by the Constituent Assembly, the latter body was not identifiable with the "Legislature of the Dominion" within the meaning of subsection (3) of section 6. A similar formula contained in proviso (e) to subsection (2) of section 8, makes the powers of the Federal Legislature or Indian Legislature exercisable in the first instance by the same Constituent Assembly, After a comparison of sections 6 and 8, the inference seems to be irresistible that during the interregnum prior to the promulgation of .a fresh constitution, the Constituent Assembly in fact functions as the Legislature .of the Dominion." '

The point was not specifically pronounced upon in the separate judgment of any brother Akram who was content to observe that "the Constituent Assembly which in the first instance is to make provision for, the constitution of the Dominion is to exercise the power of the Legislature of the Dominion for that purpose." Since, however, the majority of the Full Bench were clearly of the opinion that the Constituent Assembly was in fact the Legislature of the Dominion in the period prior to the promulgation of a new Constitution, I must accept that view as being the law of the land. It serves to determine the status of the Constituent Assembly as well as to place. it in a well-defined position in relation to the Governor-General of the Dominion having regard to the conception of Dominion Status as accepted by the majority of the Full Bench.

Three members of the Full Bench including my Lord the, Chief Justice were indeed of the opinion that the Governor-General was to be regarded as a part of the Legislature of the Dominion. The following extracts from the leading judgment are relevant "The power to make all laws was given to the Legislature of the Dominion while the power to give assent, to those Iaws given to the Governor-General, who thus became a constituent part of the Legislature ands was to occupy the same position as the Sovereign in the United Kingdom in respect of the prerogative of giving or withholding assent."

"The Crown is a constituent part of Parliament in the United Kingdom and of all Dominion Legislatures either because it is expressly so stated in the constitutional statutes or because the Crown appoints the Governor-General who is empowered to give or withhold assent to the legislation of the Dominion."

"Similarly the provisions in the Government of India Act which give to the Governor-General the right to withhold assent from legislation do not confer on, or create a new right the Crown; on the contrary they implicitly recognise such right and regulate the manner in which it is to be exercised, It is for this reason that the fiction of making the Crown a constituent of the legislature is resorted to, because neither the King nor his representative, the Governor-General, is a member of the Legislature like other members. The King or the Governor-General is a part of legislature only in the sense that all bills passed by the legislature are presented to him, so that he may exercise his right of giving or withholding assent. Thus subsection (3) of section 6 produces the same result by giving to the Governor-General full power to assent in His Majesty's name to any law of the Legislature of the Dominion. It makes the Governor-General a constituent part of the Legislature inasmuch as the right to give assent necessarily includes in it the right to withhold assent.

"It (I.e., the Constituent Assembly) had, of course, legis­lative sovereignty as the legislature of the Dominion but then the Governor-General was a constituent part of the Legislature."

In the judgment of my brother Akram, there is direct reference to the English constitutional theory under which the Sovereignty "who is the Executive head of the State is always a constituent part of the supreme legislative power" and in arriving at the conclusion that the Governor-General had the power of giving or withholding assent as respects constitu­tional laws, the judgment refers to him as the "Executive Head of the Dominion", in a passage already quoted.

The exact position of the Governor-General of the Dominion, under the existing constitutional instruments did not receive the same attention in the judgment in Maulvi Tamizuddin Khan's case (1) which it is necessary to apply to the matter in the present Reference. In the leading judgment, the following observations occur which are helpful in the present context :

"From the fact that the Governor-General is the head of the State, it must not be inferred that in matters of legislation his position is either that of, a nodding automation or that of an autocrat. He is appointed by the King and represents the King for the purposes of the Government of the Dominion, but that does not mean that he is an unrestrained autocrat, and purporting to act on behalf of the King, can in normal times take an active part in the actual administration of the country. Since the Imperial Conference of 1926 he has generally been a "man of the Dominion and a representative of that, Dominion just as the Prime Minister is As a constitutional functionary, it is his duty to give his assent to all reasonable and necessary legislation by the legis­lature."

For the purposes of the present Reference, it is necessary to examine the matter at some length. The position of the Governor (or the Governor-General) of a Dominion is one of the highest importance. It is not my purpose here to deal exhaustively with every aspect of his powers and respon­sibilities. That is indeed not necessary' for the purposes of the matter in hand. In. Dr. Berriedale Keith's Responsible Government in the Dominions, Second Edition, 1928, the status, privileges, powers and responsibilities of the Governor are considered in ,six separate Chapters under the heading "The Executive Government". He is described as the Chief Executive Officer and is appointed by the Crown. The following observation in Chapter II is relevant :

"The office of Governor is now normally constituted by letters patent under, the Great Seal of the United Kingdom, and this instrument is accompanied and supplemented by royal instructions under the sign manual and signet. It is important to note that the, act of constituting the office is a prerogative action, resting on the authority of the Crown to exercise executive authority in so far as no other provision is made by legislation."

The extent of a Governor's authority to exercise the royal prerogative must be held to be determined by the pronounce­ment on the subject contained in the leading judgment in Maulvi Tamizuddin Khan's case. (1) for the purposes of the Dominion of Pakistan. It is, however; useful and it may be valuable to reproduce certain observations regarding the Governor's exercise of prerogative power from Dr. Keith's Chapter on the Powers of the Governor, in section 2. The learned writer refers to the judgment of the Privy Council in Musgrave, v. Pulido (1) where the Judicial Committee emphatically asserted that

"The Governor of a colony in ordinary cases cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers- thereby expressly or impliedly entrusted to him."

Commenting on this judgment, the, learned writer observes that there can be no doubt of the doctrine of the Privy Council, and that a Governor has no special privilege like that of the Crown. He is under the necessity of showing in respect of his acts that they are covered by authority in law, and in order to do this, he must show not only that the Crown possesses the power to do the act, but also that he had the authority to do the act. The general conclusion is then reached that

"apart from statutory powers, the Governor has a delegation of so much of the executive power as enables him effectively to conduct the Executive Government of the territory."

At the conclusion of the same section, the learned writer refers to views favouring a larger authority in a Governor expressed by other writers, and cites the following statement from a book by Sir H. Jenkyns:

"There is no doubt that a Governor will be always, held to have had all the power necessary for meeting any emergency which may have required him to take immediate action for the safety of the Colony. If he acts in good faith and having regard to the circumstances reasonably, he will be held harmless".

As regards this dictum Dr. Keith has the following observation to offer

, "This is doubtless unsound doctrine, if it suggests that there is any special privilege in the case of a Governor or that mere reasonable action in good faith will cover any Act. Every member of the executive may violate in case of emergency ordinary laws, but the Governor, like every other officer, runs the risk of finding that a Court of law may conclude that the emergency was not such as to justify his action despite its good faith and apparent, reasonableness".

In the case of Pakistan, the question of satisfying a Court may be thought to be partially excluded by section 306 of the Government of India Act, 1935, but it is to be observed that both in the present proceedings, as well as in the arguments in Maulvi Tamizuddin Khan's case (2) it was conceded by Senior Counsel' appearing for the Federation of Pakistan that the Court had jurisdiction to examine whether the impugned action was justified by the nature of the emergency that was declared by the Governor-General of Pakistan. But as regards the opinion of Dr. Keith on this point, I consider that it is unexceptionable, particularly in the case of a Dominion such as Pakistan which is provided with a most 'elaborate constitution contained in the Indian Independence Act, 1947 and the Government of India Act, 1935. By these instruments, all the powers of Government are distributed in detail among the several authorities of the Centre and the Provinces. This Constitution, which was well adapted to the requirements, of great country with a population of some 350 millions was Operated successfully for ten years before the Partition, some six of these years being covered by the period of the Second World War, in a most successful manner, without resort by the Chief Executive to any powers other than those expressly provided by the British Parliament in the Government of India Act and certain other statutory; instruments of a temporary nature. Prior to the coming into operation of the Government of India Act, 1935, the country had been governed for some twenty-two years under the previous Constitution Act, viz., the Government of India-Act, 1915 whole provisions differed from those of the 1935 Act in two main respects, viz., that powers were mainly concentrated in the hands of the Executive, and legislative institutions were as yet embryonic and were provided with only limited scope yet even in the earlier period, when responsibility for the safety and welfare of the State developed so much more heavily upon the Executive heads at the Centre and in the Provinces, it was never found necessary to invoke any powers in relation to British India except such as were derived clearly from express statute. Consequently, it is in my opinion entirely fair to, say, in relation to the Governor-General of Pakistan, what Dr. Keith has said generally with reference to the Governor of a Dominion, that he possesses no special privilege to act in excess of the powers afforded to him by the written constitution, and by his Commission of Appointment, and that he cannot affect to act as Viceroy or to assume that he possesses general sovereign power.

The instruments which govern the matter in the case of the Governor-General of Pakistan are as follows. By section 5 of the Independence Act, the Governor-General is "appointed by His Majesty and shall represent His Majesty for the purposes of the Government of the Dominion". This formula has been I held to attract all the prerogatives of the Crown as exercisable in the United Kingdom, except to the extent that they may have been excluded expressly or by necessary intendment. Then there is the Commission issued 'to the Governor-General upon his appointment by HO Majesty which confers upon him "all the powers, right' privileges and advantages to the said office belonging qt appertaining". The Governor-General is further authorized, empowered .and commanded to exercise and perform powers and duties conferred and imposed upon him by the consti­tutional instruments. He is invested with authority to grant pardons in the exercise of the Royal Prerogative. The remaining provisions contained in the Commission are not relevant for the present purpose, but it is of advantage to, not', that the Oath which the Governor-General takes is one of true faith and allegiance to the Constitution of Pakistan as by law established" and , secondly, to be faithful to the British Sovereign.

There is also conferred upon the Governor-General by section 7 of the Government of India Act, 1935, general authority in the following words :

"Subject to provisions of this Act, the executive authority of the Federation shall be exercised by the Governor-General, either directly or through officers subordinate to him."

One major question which will require answer in the present Reference is, whether the Governor-General can make constitutional law under any conditions. It seems obvious that he cannot affect to do so under, the Government of India Act, 1935. In the context of that Act, he is a statutory authority and plainly it would be contrary to principle and good reason to allow that as statutory authority has power to interfere with the very statute under which it purports to act, and from which it derives its entire power to act. Nothing in the Commission of Appointment or the Oath of Office can be construed so as to confer a power of this kind. On the other hand, the oath of true faith and allegiance to the Constitution of Pakistan and the direct induction by the British Sovereign to carry out the duties and exercise the powers, conferred by the Indian Independence Act, 1947, (which by express reference, imports all the powers and duties dealt with in the Government of India Act, 1935) afford the strongest possible indication of limitation of the Governor-General's powers'. The fact of the Governor-General 'being made the represen­tative of His Majesty by section 5 of the' Indian Independence Act, 1947, has been deemed to invest him with all the available Royal Prerogatives, as exercisable in the, United Kingdom but it is not suggested, and in my view it cannot be suggested that extends to interference with Constitutions granted by the British Parliament. Consequently, it seems entirely correct to say of the Governor-General' what has been said by Dr. Keith concerning a Governor of the Dominion, viz., mani­festly the Governor has not the Royal. Prerogative of con­stitution giving being merely himself a part, of the Constitution."

On this point indeed, the law has been stated as recently as the 12th April 1955, by this Court, sitting in Full' Bench, in the case of Usif Patel (1) in the following terms:-

"This Court held in Mr. Tamizuddin Khan's case that the Constituent Assembly was not a sovereign body. But that did not mean that if the Assembly was not a sovereign body the, Governor-General was We took pains to explain at lenght in that case that, the position of the Governor-General in Pakistan is that of constitutional Head of the State, namely, a position very similar to that occupied by the King in the United Kingdom.

This is a convenient point at which I should perform the duty of explaining an expression I have employed in my opinion on the fourth question referred to this Court. That question will be reproduced later at its proper place. Here I need only, reproduce the particular expression which is as follows :

"the exercise of any political initiative outside the con­stitutional instruments."

I can best elucidate this phrase by means of illustrations from the proceedings which immediately preceded the passing of the Indian Independence Act, 1947. It is of course, perfectly clear that when the conqueror of a country is pleased to grant representative institution to that country, he exercises what may, in the context of constitutional law as applicable to rep­resentative institutions, be truly said to be sovereign political power. The step which he takes is one which involves a sharing of power between himself, the conqueror, and the people whom he has conquered. Such a step may, in my opinion, be truly described as a political initiative. As the governmental processes are liberalised, and the rule of the people is extended over increasingly large areas included in the governmental field, further instances are afforded of the exercise of political initiative. It is not my purpose to enumerate every such step taken by the British Sovereign in the long term of years which elapsed between the assump­tion of complete sovereignty over India by the British Sovereign, and the grant of Dominion Status coupled with a Constituent Assembly which was expressly empowered, if it thought fit, to withdraw the country from every form of attachment to or association with the British Crown. It will be sufficient to accept the position as it was in May. 1946 when after lengthy negotiations between representatives of His Majesty's Government in the United Kingdom on the one hand, and representatives of the major Indian political parties on the other, a very marked political initiative was taken by His Majesty's Government in the United Kingdom, which was embodied in the Plan of the 16th May, 1946. This document is replete with political initiative as exercisable only by a Sovereign. Remembering that the Constitution of India, by which must be understood that instrument under which the powers of absolute sovereignty over the country vested in the King were distributed among authorities in the United Kingdom and subordinate authorities in India, viz., the Government of India Act, 1935, it is evident that any new scheme for transfer of responsibility from the United Kingdom to India was not competent, at any rate on the very great scale appearing in the Plan of the 16th May, 1946, under that Constitution. In other words, the Plan was, in relation to the law in force in India, a supra-legal constitutional initiative taken by the absolute political Sovereign of India, .,namely, His Majesty's Government in the United Kingdom, I select for mention a few instances of the exercise of such political initiative embodied in that Plan. There was first a declaration that the function of providing Constitution for India was not to be discharged by the British Parliament any loner, but His Majesty's Government as the political sovereign had determined "to set in motion machinery whereby a constitution can be settled by Indians for Indians" The objective was one entirely outside the Government of India Act, 1935. It was a conception which far transcended the scope of the Constitution provided by the latter Act. To give shape to this conception, the Plan furnished details of the Constitution making machinery which was proposed to be set up. This was to be on what has been described as the three tier basis. The Provinces of India were divided into three groups whose representatives were to meet separately and settle their own provincial constitutions, including the question whether any group constitution should be set up for those Provinces. For settling the Union Constitution, representatives of Provinces and States were to assemble together at a later stage.

In paragraph 18 : His Majesty's Government in the United Kingdom set out with great clarity the basic principles upon which representatives were to be returned to the Union Constituent Assembly from the Provinces of British India. Declaring that for the purpose of deciding a new constitutional structure, the first problem was "to obtain as broad based and accurate a representation of the whole population as is possible" they regretted that the optimum method, namely, election based on adult franchise would involve' "wholly unacceptable delay" and consequently that it is necessary to accept the only practicable alternative, viz., "to utilize the recently elected Provincial Legislative Assemblies as elective bodies". It was then pointed, out that to grant representa­tion to the Provinces in proportion to the numerical strength of their respective Legislative Assemblies would, owing to the existing conditions, not secure accurate representation of the whole population. The strengths of the Legislative Assemblies bore no uniform proportion to the population, and "gather source of difficulty lay in the fact that weightage had been given to minorities on account of what is described as the "Communal Award". (This was a further political initiative taken at a much earlier stage, prior to the passing of the Government of India Act, 1935, by means of which a compromise was worked out by His Majesty's Government in the United Kingdom, between strongly conflicting views held in India regarding the representation of the various communities in the Legislatures. In order to secure uniform representa­tion of the whole population, which was, declared by the Plan to be a requisite of "any Assembly to decide a new constitutional structure" it was found necessary by the then political Sovereign to ignore the political compromise represented by the Communal Award). To overcome these difficulties, the following decision was taken which ob­viously represents a political initiative of the utmost importance:

"After a most careful consideration of the various methods by which these points might be corrected, we have come to the conclusion that the fairest and most practicable plan would be

(a) to allot to each Province a total number of seats proportional to its population, roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage;

(b) to divide this provincial allocation of seats between the main communities in each Province in proportion to their population ;

(c) to provide that the representatives allotted to each community in a Province shall be elected by the' members of that community in its Legislative Assembly.

We think that for these purposes it is, sufficient to recognize only three main communities in India: General, Muslim, and Sikh, the "General" community including all persons who are not Muslims or Sikhs. As the smaller minorities would, upon the population basis, have little or no representation since they would lose the weightage which assures them seats in the Provincial Legislatures, we have made the arrangements set out in paragraph 29 below to give them a full representation upon all matters of special interest to minorities."

As regards representation of the smaller minorities, the decision taken by the political sovereign was that at a pre­liminary meeting of the Constituent Assembly proposed to be set up in pursuance of the Plan, an Advisory Committee on the rights of citizens, minorities and tribal and excluded areas should be set up. Then, in paragraph 20 of the same Plan the following provision was made:

"The Advisory 'Committee on the rights of citizens, minorities, and tribal and excluded areas should contain due representation of the interests affected, and their functions will be to report to the Union Constituent Assembly upon the list of Fundamental Rights, clauses for protecting minorities, and a scheme for the administration of the tribal and excluded areas, and to advise whether these rights should be incorporated in the Provincial, Group, or, Union constitutions,"

With reference to the administration of the country while, constitution-making was in progress, the Plan declared that a Government having popular support was necessary and that the Viceroy hoped "to form an interim Government in which all the portfolios, including that of War Member, will be held by Indian leaders having the full confidence of the people". Nothing being said to indicate that there was to be change in the status of the country or in the mode of Government under the Government of India Act, 1935, which' was then in force, it seems clear that the interim Government was to operate under the Government of India Act, I V5. The statement containing the Plan closed with an appeal to the Indian people to implement the Plan which was intended "to enable you to attain your independence in the shortest possible time and with the least danger of internal dis­turbances, and conflict". The hope was, however, expressed that the new independent India might choose to remain a member of the British Commonwealth. In pursuance of this plan, a Constituent Assembly was set up in December, 1946, but the refusal of the Muslim League Party to join this Constituent Assembly obliged His Majesty's Government in the United Kingdom to reconsider the situation, and eventually, a new Plan was announced on the 3rd June, 1947 after further lengthy negotiations with the leaders of major political parties. The necessity for the new Plan appears from the following sentence contained in its first para­graph :-‑

" His Majesty's Government had hoped that it would be possible for the major parties to cooperate in the working out of the Cabinet Mission's Plan of May 16, 1046, and evolve for India a constitution acceptable to all concerned. This hope has not been fulfilled."

In other words the political' initiative taken outside the then Constitution by the political sovereign had failed and the circumstances forced the political sovereign to continue its efforts to transfer political sovereignty to the Indian people on an altered basis. Again, it became incumbent upon the political sovereign to exercise political initiative at the highest level. The eventual result was the Partition of India into two countries, namely, India and Pakistan. This document of the 3rd June, I947 furnishes another example of political initiative being taken practically in every sentence. Declaring once again that the intention of the political sovereign was that political power should be transferred in accordance with the wishes of the Indian people themselves, and that/ the framing of the ultimate Constitution for Indians was a matter for the Indians themselves, the Plan expressed the intention of the political sovereign to ascertain the wishes of the people on the question of partition of the country, which would involve the setting up of two separate Constituent Assemblies, through resolution of the Provincial Legislative Assemblies of Bengal, the Punjab and Sind, and by means of referendums in the North-West Frontier Province and in the district of Sylhet in Assam. The expression of views by these Muslim majority areas was declared to be the factor which would determine whether there were to be two countries or only one, two Constituent Assemblies or only one. It was declared that as regards the Indian' States, the decision in the earlier Plan of May 16, 1946 remained unchanged. Finally, a most import-ant announcement was made concerning the administrative arrangements during the period that constitution-making was in progress. It is contained in the following words:--‑

"The major political parties have repeatedly emphasised their desire that there should be the earliest possible transfer of power in India. With this desire His Majesty's Government are in full sympathy, and they are willing to anticipate the date June 1948 for the handing over of power by the setting up of an independent Indian Government or Governments at an even earlier date. Accordingly, as the most expeditious and indeed the only practicable way of meeting this desire. His Majesty's Government propose to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to the deci­sions taken as a result of this announcement. This will be without prejudice to the right of the Indian Constituent Assemblies to decide in due course whether or not the part of India in respect of which they have authority will remain within the British Commonwealth."

This last decision furnishes most forcible illustration of the "exercise of politional initiative outside the constitutional instruments in force." Dominion Status was not conceivable within the constitutional instrument which then was in force in India, namely, the Government of India Act, 1935. To grant Dominion Status it was necessary that the political sovereign should perform an act of the highest political initiative, not in any legal field, but in the unfettered field of sovereign power.

The foregoing expositions of 'the principles which are, in my opinion, the governing principles by which any question regarding powers of the Governor-General under the existing Constitution must necessarily be gauged, enables me now to approach the final task of explaining the answers which I have proposed to the questions referred to this Court. The order in which the questions are placed is chronological but by no means logical. The fundamental question is Question 3 which is in the following terms :

"Whether the Constituent Assembly was rightly dissolved by the Governor-General?"

To this the answer which I have returned is in the follow­ing terms :--‑

"In view of the decision of the majority of the Judges in Maulvi Tamizuddin Khan's case, the Constituent Assembly as mentioned in the Indian Independence Act, 1947, is the "Legislature of the Dominion" for the purposes of that Act, which also provides for the Governor-General to be the representative of Her Majesty for the purposes of the Government of the Dominion. The majority of the Judges have also held that the Governor-General is invested with all the Royal prerogatives, except where barred by express words or necessary intendment. The prerogative of dissolu­tion of the Legislature is recognised to exist in, all representative institution in the British Commonwealth of Nations, and there are no words in relevant instruments, taking away, expressly or by necessary intendment, this' prerogative power in relation to the "Legislature of the Dominion." Consequently, the Governor-General must be held to possess the prerogative to dissolve the Constituent Assembly.

The indications to -the contrary contained in the Govern­ment of India Act, 1935, affect the Federal Legislature, which in the precise context, is not the same body as the "Legislature of the Dominion."

The exercise of a prerogative power is not a justiciable matter. Therefore, the question whether the act of dissolu­tion was "rightly" performed does not arise within this Court's jurisdiction, and the enquiry must be limited to the legality of the action.

In view of the answer to question 4 viz., that after dissolving the Constituent Assembly, the Governor-General has the duty and the corresponding power to convene it afresh, the consideration that the ; Indian Independence Act, 1947, provided' for the Constituent Assembly to perform certain function "in the first instance" imports no restraint upon the exercise of this prerogative power, in point of time."

It is not necessary for me to explain any further the conclusion which I have reached that the power of dissolution of the Constituent Assembly arises from the circumstance that it is, as held ' in Maulvi Tamizuddin Khan's case (P L D 1955 F C 240) the Legislature of, the Dominion, and that the Governor-General Q of the Dominion possesses all prerogatives of His Majesty, among which must necessarily be included' the Tower of dissolving the principal Legislature of the Dominion. It was urged that the Indian Independence Act and the constitutional instruments which preceded it should be understood as laying down that there was to be only one Constituent Assembly, namely that set up by Lord Mountbatten for Pakistan On the 26th July, 1947, and that this Constituent Assembly should continue to exist and function until it has discharged its duty of providing a new Constitution, for the country. Support was sought for this point of view from a speech of the Prime Minister of Pakistan made in the Constituent Assembly on the 20th March, 1954 in which the following passages occur :

"The Members of this Assembly were given a mandate by the Federation to frame a Constitution for Pakistan. They must carry out that mandate …..They must continue as Members of the Constituent Assembly till the duty for which it was set up has been accomplished."

Reference was also made to the fact that a provision for the dissolution of the Federal Legislature contained in the Government of India Act, 1935, had been deliberately omitted at the adaptation of that Act effected in advance of the transfer of power the 14th August, 1947. It was pointed, out also that a very powerful provision intended for employment in

case of breakdown of the constitutional machinery as affecting

the Federal Government namely section 45, Government of India Act had also been omitted from the Act. This provision enabled the Governor General in cases of emergency to suspend the constitution and to govern the country if he so chose, without the aid of the Federal Legislature. By section' 8, subsection' (2) of the Indian Independence Act, it was declared

that the powers of the Federal Legislature should be exerciseable in the first instance by the Constituent Assembly. The inference was sought to be drawn from the omission of the power of dissolution of the Federal Legislature, and the omission of section 45 from the Government of India Act, 1935, that the Governor-General was to have no power of dissolu­tion of the Constituent Assembly, or to interfere in any way with its working. If the position were that during the interim period, the Legislature of the Dominion was not yet in exist­ence, it would in my opinion have been necessary to give serious consideration to this argument but, as it has now been held that from the 14th August, 1947 onwards, the Constituent Assembly was the Legislature of the Dominion, these consider­ations do not carry the same weight. For there is a strong presumption that the prerogative of dissolution of the Legisla­ture of the Dominion vests in' the Governor-General and if this R presumption 'is to be dislodged, there must be either express provision to that effect, or the relevant instruments must, by necessary intendment, produce the same result. The Federal Legislature is not in the context of the existing constitutional instruments identical with the Legislature of the Dominion. Therefore, references in the Government of India Act which save the operation of the Federal Legislature cannot be extended to produce the same result in relation to the Legisla­ture of the Dominion. It is clear that the prerogative of dissolution in relation to the Legislature of the Dominion is not excluded by express words.

Since the exercise of a prerogative power is not a justiciable matter, whether it is rightly or wrongly exercised is not a matter of law, and therefore not a suitable subject for expression of opinion by this Court. The use, of the word "rightly" in the question was necessitated by the circumstance that it was conceded in the present case and had been conceded in Maulvi Tamizuddin Khan's case as well that if the power of dissolution was available only outside the constitutional instruments, then the maxim "fraus omnis corrumpit" was applicable, and the validity of the action could be challenged on the ground of mala fides. It is, in my opinion, a source of satisfaction that as a result of the decision in the earlier case, the power of dissolution can be found to lie within these strictly legal limits of the prerogative. For otherwise, it would have been necessary to enter into questions of justifica­tion for the Governor-General's action, and in that connection to refer to a number of statements by the Head of the Government, namely the Prime Minister, of which the earliest in point is dated the 1st April, 1954 aid the latest was made on the 23rd October, 1954 about twelve hours before the issue of the Governor-General's Proclamation which declared that the Constituent Assembly could no longer function. Briefly, the statements operate to convey ample justification of the functioning of the Constituent Assembly. In the earliest statement it was said that the Constituent Assembly could not be dissolved nor could its Members resign until its specific task of framing a constitution fist the country was accomplished, and that it would proceed with this task from the 5th of April onwards without interruption. The delay which had already occurred was justified on the ground that the Constituent Assembly had been at pains to secure the willing consent of all the Units of Pakistan to its proposals. Then, in a speech made on the 15th September, 1954 and a broadcast on the 1st October, 1954, reference was made to the 'fact that the Constituent Assembly was proceeding with its work with all possible speed, and that the first and the most important phase of constitution-making had been completed on the 21st September, 1954 when the House adopted the Report of the 'Basic Principles Committee. The final phase, remained namely that of considering and passing the Draft Constitution Bill, and it was hoped that this would be complet­ed by the 25th December, 1954, On the 23rd October, 1954, it was publicly stated that the .constituent Assembly would pass the Constitution by that date.

The finding that the power of dissolution lies within the prerogative relieves the Court of the duty of considering these undoubtedly weighty pronouncements with reference to Ques­tion 3. All that I need add for the complete elucidation of my answer to this question is that since it was conceded that the Governor-General could not dissolve the Constituent Assembly unless he had the power to re-convene it, the continued life of the Constituent Assembly until it has accomplished its task of providing a 'working Constitution'' for the country which could operate after the abolition of the Constituent Assembly, was assured. Therefore, it cannot be urged that-since by section 8 of the Indian Independence Act, 1947, certain powers are said to be exercisable "in the first instance" by the Constituent Assembly, there is any duty upon the Gover­nor-General not to exercise his power of dissolution for any period. So long as the Constituent Assembly does not provide for the setting up of a "Legislature of the Dominion" its necessity for the operation of the existing Constitution remains. But, once it has set up a Legislature of the Dominion, which will by expression have the power of making provisions as to the Constitution of Pakistan, the Constituent Assembly can, without detriment to the country, eliminate itself as soon as the new Legislature of the Dominion is complete. Until that time, it seems to me that Governor-General cannot b said, in law, not to possess the power of dissolving the Cons­tituent Assembly. I do not concern 'myself with the consi­deration of particular circumstances in which he may or may not dissolve the Constituent Assembly, in the proper exercise of his powers. That is a matter within the Governor-General's discretion, and is subject to recognized conventions. But it is no, part of the duty of this Court to advise upon matters of convention.

Question 4 is 'in the following terms;

"Whether the Constituent Convention proposed to be set up by the Governor-General is competent to exercise the powers conferred by subsection (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?"

I have returned the following answer:

"The powers conferred by section 8 of the. Indian Indepen­dence Act, 1947, on the Constituent Assembly, can only be exercised by a successor body, of the same name, summoned by the ,Governor-General, in the discharge of a duty so to do, which arises out of, and is complementary to, his order dissolving the Constituent Assembly. The duty of summoning does not involve, and, cannot include, the exercise of any political initiative outside the constitutional instruments in force. It must be performed in accordance with the basic principles which were expressly followed in the setting up of the Constituent Assembly of 1947. These basic principles are stated with clarity in paragraph 18 of the Statement' of the Cabinet Delegation and His Excellency the Viceroy and Governor-General of India, issued on the 16th May, 1946."

This answer obviously proceeds upon the basis that by the Proclamation of the 24th October, 1954, the Governor-General has acted, not to abolish the Constituent Assembly, but has merely exercised his prerogative of dissolving the Legislature of the Dominion, which for the time being is the Constituent Assembly. It is perfectly clear that for the Governor-General to continue the Federal Government without a Legislature is entirely contrary to the letter and spirit of the existing constitutional instruments by which he is himself governed. Therefore having dissolved the Constituent Assembly, it is his duty to reconvene it. So much was conceded by the Senior Counsel appearing for the Federation of Pakistan. Therefore, it is clear that what is to be convened is the Constituent Assembly, and this is essential for the working of the existing Constitution, viz., the Indian Independence Act, 1947. Conse­quently, the Assembly which the Governor General is proposing to convene must be called the Constituent Assembly, if it is to be that body which alone has been entrusted with legislative powers by the existing constitution. It is immaterial that it may be called by another name or names as well, but it is essential that it should be called the Constituent Assembly.

It is with some regret that I find myself at variance with my Lord the Chief Justice and my learned brother in regard to the manner adopted by the Governor-General for reconvening the Constituent Assembly. I find, however, that I am supported by the majority in relation at least to the validity of the proposal that the Governor-General should nominate a number of members, to the new Constituent Assembly. I base my objection to this proposal upon the comprehensive basis that in adopting this particular mode of securing representation for certain areas, the Governor-General is exceeding the limits of his power as a constitutional head, working within the relevant' constitutional instruments. He is not a political sovereign, and political initiative outside the existing consti­tutional instruments must, in my opinion, be denied to him. It was urged with great force that the plans of the 16th May, 1946 and the 3rd June, 1947, are not law, and therefore do not provide an electoral law binding upon the Governor-General in relation to the reconvening of the Constituent Assembly. The view which I prefer to take is this. The original Consti­tuent Assembly was elected upon the basis of these two, instruments, and I therefore" look to these two instruments for the electoral law which governed the constitution of that Constituent Assembly. No other electoral law having been passed in the meantime and it being now necessary to recon­vene the Constituent Assembly in the absence of any enact merit by the Constituent Assembly providing for its' own reconstitution. I can see no alternative for a constitutional head like the Governor-General, but to repeat as nearly as may be, with the minimum of adaptation necessary to provide for the changed circumstances the process by which the.' first Constituent Assembly was constituted by the then Governor-General, expressly in pursuance of the Plans mentioned above.

In one respect, the Governor-General is clearly exceeding his legal authority, and that is, in making provision for repre­sentation of the States and tribal areas. By the proviso to section 19, subsection (3), Indian Independence Act, 1947, it is clearly made a function of the Constituent Assembly to provide for the representation of the States and the tribal arias. The Governor-General's assumption of power to appoint persons to represent these areas is therefore clearly ultra wires. But in my opinion, it is no. less clearly an excess of his power, if he departs fre4t the basic principles set out in-paragraph 18 of the Plan of the 16th May, 1'947 in convening the Constituent Assembly afresh. The relevant extract from paragraph 18 has already been quoted above, and I need there-fore say no more on this subject.

Question 1 is in the following terms:-

"What are the powers and responsibilities of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation?"

The answer I have returned is as follows:-

"The powers and responsibilities of the Governor-General during the period in question are those defined and delimited by the Indian Independence Act, 1947, as in force on the 24th October, 1954 "

It is obviously impossible to return a detailed answer, enume­rating all the. powers and responsibilities in question. In the view which I take, the Governor-General as a constitutional head is obliged to find his powers in the existing constitutional instruments, and to employ "them for the discharge of his responsibilities under that constitution.

Question 2 is in the following terms : —

"The Federal Court having held in Yusaf Patel's case that the laws listed in Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General can by order or otherwise declare that all orders made, decisions taken, and other acts done under those laws shall be valid and enforceable and those laws which cannot without danger to the State be removed from the existing legal system shall be treated as part of 'the law of the land until the question of their validation is deter-mined by the new Constituent Convention ?

The answer which I have returned is as follows :-‑

"(a) There is no provision in the Constitution and no rule of law applicable to the situation, by which the Governor-General can, in the light of this Court's decision in the case of Usif Patel, by proclamation or otherwise, validate the laws enumerated in the Schedule to the Emergency Powers Ordinance, 1955, whether temporarily or permanently.

(b) The expression "laws which cannot without danger to the State be removed from the existing legal system" is altogether vague, and therefore no answer can be offered to the second part of the question.

"The .legislative powers of the Governor-General under the existing Constitution are confined within the terms of section 42, Government of India Act, 1935. Those powers are sufficient to enable the Governor-General to stay all proceedings in Courts other than the Federal Court, in which the legal provisions referred to are called in question, pending such action as the proposed Constituent Convention (Constitutional Assembly) may see fit to take in respect thereof."

In this answer I have indicated that any embarrassment caused through multiplicity of legal proceedings which have arisen in consequence of the. decision of this Court in' Maulvi Tamizuddin Khan's case (P L D 1955 F C 240) may be avoided by the exercise of certain powers which the Governor-General possesses in relation to the jurisdiction of all Courts other than the Federal Court. (In view of certain existing proclamations under section 102, Government of India Act, it seems plain that the powers of the Governor-General in this respect can be construed as covering all the three legislative lists in the Seventh Schedule to the Government of India Act). This suggestion, it must be admitted, is of a speculative nature and necessarily so on account of the failure to provide in the reference, any indication of the nature of the incon­venience which, the Federal Government was concerned to avoid.

But on the general question; I am in no doubt whatsoever, that the Governor-General is confined by his Commission and the existing constitutional instruments within the powers that he can derive from these documents. As is stated by Dr. Keith in his book Responsible Government in the Dominions at p. 84, "the Governor is charged with the duty of obeying the law himself and of encouraging obedience to it in others". The learned writer speaks of occasions when the Governor in a Dominion may be justified in breaking the law in the exercise of extraordinary powers, but in a lengthy chapter upon this subject, the only occasions which are enumerated by him to illustrate these powers are those upon which it became necessary to declare martial law and certain other occasions where the requirement arose in relation to public order. Such extraordinary powers are generally confined to matters affecting the' property and the persons of individual subjects. The existence of an emergency say a state of war or a large-scale disturbance may justify the executive in making an order commandeering alb private motor vehicles. Similar circumstances may justify entry by officers of the executive upon privately-owned premises which are in the eye of the ordinary law, inviolable. In a more stringent emergency, the services of members of the public may be requisitioned' for the purposes of carrying out works or otherwise offering resistance to check a calamity or other resistance to an enemy.

This is well understood to be the condition in the United Kingdom and in the countries of the British Commonwealth. In the United States of America also, the operation of the maxim "necessity knows no law" is recognised but only in relation to matters falling within the Police powers of the State. In the words of Blackstone, these powers may be defined as including "the due regulation and domestic order of the Kingdom whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and in-offensive in their respective stations".

That is a sufficiently comprehensive statement, but it is clearly very far removed from the power of interference with constitutional instruments. On this subject, it seems to me that it is unnecessary to attempt a fresh exposition of the legal position. That has already been given by a Full Bench of this Court as recently as the 12th April 1955, in the case of Usif Patel (cited above). A few preliminary facts may be stated with advantage before I reproduce the relevant extracts from the judgment. The appellants in that case were held in custody in pursuance of an Act which had been made by the Governor of Sind purporting to act under powers derived from section 92-A, Government of India Act. This section had been' inserted in the said Act by an order made under section 9 of the Indian Independence Act, 1947, by the Governor-General. This power of the Governor-General under section 9 - of the Indian Independence Act, 1947 in its original shape was expressed to expire on the 31st March, 1948, but this date was altered to the 31st March, 1949, by section 2 of the Indian Independence (Amendment) Act, 1948, passed by the Constituent Assembly, to which the assent of the Governor-General had not been obtained. As a result of this Court's decision in Maulvi Tamizuddin' Khan's case (1) the extension of the date by one year became invalid without the Governor-General's assent, and consequently all action taken by the Governor-General under section 9 of the Indian Independence Act, 1947 after the 31st March 1948, and all consequential action by other authorities, became invalid.

A great many other laws and executive action there under were affected in the same way and to meet the difficulty, the Governor-General issued an Ordinance No. IX of 1955 entitled. The Emergency Powers Ordinance, 1955. This Ordinance was expressed to be made "in exercise of the powers conferred by subsection (1) of section 42 of the Government of India Act, 1935 (26 Geo. 5 Ch. 2) and of all other powers enabling him in that behalf ". The following provision was contained in section 2 (1) of this Ordinance :‑

"2. Validity of certain laws, etc. (1) Whereas none of the laws passed by the Constituent Assembly of Pakistan under the provisions of subsection (1) of section 8 of the Indian Independence Act, 1947 (10 and 11 Geo. 6 Ch.' 30), hereafter in this section referred to as the said Act, received the assent of the Governor-General in accordance with subsection 3 of section 6 of the said Act, it is hereby declared and enacted that every law specified in column 1 of the Schedule to this Ordinance shall be deemed to have received the assent of the Governor-General on the date specified in column 2 of that Schedule, being the date on which it was published in the official Gazette, and shall be deemed to have had legal force and effect from that date."

The question was raised that in purporting to give assent to constitutional: legislation by the Constituent Assembly with retrospective effect, the Governor-General was acting beyond his authority. In view of the last words of the subsection quoted above, namely that the laws in question "shall be deemed to have had legal force and effect from that date" it is clear that what the Governor-General purported to do was to legislate in the constitutional field with effect from a date in the past……This Court in the most emphatic terms declared that the' Governor-General had no power to do so. I may state here, having been a member of the Bench which heard that case that the Advocate-General, when questioned on the precise point, declared that the Governor-General had made the Ordinance under section 42, Govern­ment of India Act only and no claim was made regarding the existence of any "other powers enabling him in that behalf".

The relevant observations of this Court, appear in the judgment of my Lord the Chief Justice, with whom each of the other four Judges agreed, and are as follows:

"The rule hardly requires any explanation, much less emphasis, that a Legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates the' principle governing validation being that validation being itself legislation you cannot validate what you cannot legislate upon. Therefore if the Federal Legislature, in the absence of a provision expressly authorising it to do so, was incompetent to amend the Indian Independence Act or the Government of India Act, the Governor-General possessing no larger powers than those of the Federal Legislature , was equally incompetent to amend either of those Acts by an Ordinance. Under the Independence Act the authority competent to legislate on constitutional matters being the Constituent Assembly, it is that Assembly alone which can amend those Acts. The learned Advocate-General alleges that the Constituent Assembly has been dissolved and that therefore validating powers cannot be exercised by, that Assembly. In Mr. Tamizuddin Khan's' Case (P L D 1955 F C 240) we did not consider it necessary to decide the question whether the Constituent Assembly was lawfully dissolved but assuming that it was, the effect of the dissolution can certainly not be the transfer of its powers to the Governor-General. The Governor-General can give or withhold his assent to the legislation of the Constituent Assembly but he himself is not the Constituent Assembly and on its disappearance he can neither claim powers which he never possessed not claim to succeed to the powers of that assembly.,

So that we nay now be understood more clearly, let me repeat that the power of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion could under subsection (1) of section 8 of the Indian Independence Act be exercised only by the Constituent Assembly and that that power could not be exercised by that Assembly when it functioned as the Federal Legislature within the limits imposed upon it by the Government of India Act, 1935. It is, therefore, not right to claim for the Federal Legislature the power of making provision as to the constitution of the Dominion—a claim which is specifically negatived by subsection (1) of section 8 of the Indian Independence Act. If the constitutional position were otherwise, the Governor-General could by an Ordinance repeal the whole of the Indian Independence Act and the Government of India Act and assume to himself all powers of legislation. A more incongruous position in a democratic constitution is difficult to conceive, parti­cularly when the Legislature itself, which can control the Governor-General's action, is alleged to have been dissolved.

"This Court held in -Mr. Tamizuddin Khan's case (P L D 1955 F C 240) that the Constituent Assembly was not a sovereign body. But that did not mean that if' the Assembly was not a sovereign body the Governor-General, was. We took pains to explain at length in that case that the position of the Governor-General in Pakistan is that of a constitutional Head of the State, namely, a position very similar to that occupied by the King in the United Kingdom. Tat position which was supported by Mr. Diplock is now being repudiated by the learned Advocate-General, and on the ground of emergency every kind of power is being claimed for the Head of the State. Let us say clearly if we omitted to say so in the previous case that under the Constitutional Acts the Governor-General, is possessed of no more powers than those that are gives] to him by those-Acts. One of these powers is to promulgate Ordinances in cases of emergency but the limits within which and the checks subject to which he can exercise that power are clearly laid down in section 42 itself . . . . any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General, is. under the Constitution Acts precluded from exercising those powers .. . . If the position created by the Judgment in the present case is that past constitutional legislations cannot be validated by the Governor-General, but only by the Legislature, it is for the Law Department of the Government to ponder over the resultant situation and to advise the Government accordingly."

After the pronouncement of the judgment in Usif Patel's case (1), the Governor-General, issued a Proclamation on the 16th April 1955, which, after a series of preliminary recitals contained the following operative provisions :

"(1) The Governor-General, assumes to himself until other provision is made by the Constituent' Convention such powers as are necessary to validate and enforce laws needed to avoid a possible breakdown in the constitutional and administrative machinery of the country and to preserve the State and maintain the government of the country in its existing condition.

(2) For the purposes aforesaid it is hereby declared that the law mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall, subject to any report from the Federal Court of Pakistan, be regard as having been valid and enforceable from the dates specified in that Schedule."

Comparison of, the provision in paragraph 2 above with that contained in section 2, subsection (1) of the Emergency powers Ordinance, 1955, will show that the Governor-General, has purported to do once again but on this occasion, "subject to any report from the Federal Court of Pakistan" what had been held in Usif Patel's case to be in excess of his powers. On this occasion, no reference has been made to any powers conferred by any statute which the Governor-General, is purporting to exercise. It has been argued that the action thus taken is one taken in an extreme emergency, to save the State from dissolution, and is relatable to powers derived from the maxim salus populi suprema lex.

The scope and content of this maxim were fully canvasse before the Court in the earlier case of Maulvi Tamizuddin Khan, by the Senior Counsel for the Federation of Pakistan. It was possible for the Advocate-General of Pakistan, who attended the proceedings in Maulvi Tamizuddin Khan's case throughout, to have relied upon the powers derived from this maxim, when he was asked in Usif Patel's case to refer the Court to the specific sources from which the Governor-General derived power to make constitutional law with retrospective effect (For the validation of such law with retrospective effect 'undoubtedly is tantamount to making such law). No reliance was placed by the Advocate-General of Pakistan at that stage upon the maxim salus populi suprema lex, but the argument, based upon this maxim, that the Governor-General possessed powers over and above those contained in the constitutional instruments in force which he was competent to exercise in an emergency, was fully present to the mind of the Court. This appears clearly from several passages in the extracts from the judgment in Usif Patel's case (PLD FC 1955 387) which I have reproduced above. It was said for instance that the Advocate-General of Pakistan was repudiating a position previously supported by Mr. Diplock, and "on the ground of emergency every kind of power is being claimed for the Head of the State". The effect of that judgment is in my opinion, to make it clear that in relation to the very situation which the Proclamation of the 16th April 1955, is intended to remedy, this Court was emphatically of the view that the Governor-General could not invoke any powers except such as were available to him under the constitutional instruments in force. To that opinion I steadfastly adhere, and nothing which has been said in the arguments in the Reference affords in my view, sufficient justification for varying that finding, which constitutes law declared by this Court uncle section 212, Government of India Act, 1935.

The case might have been different if the Governor-General were not, as must be held on the authorities, a mere constitutional head. If he were a political sovereign, he might have claimed such powers as, for instance, the King of England was advised that he could exercise :

(i) in 1723, in relation to the colony of New Jersey in America, to determine the electoral right by prescribing the qualifications of electors, and varying constituencies; in the absence of a local electoral law ;

(ii) in 1747, in relation to the colony of New Hampshire in America, to increase the number of constituencies ;

(iii) in 1690, by appointment of a Governor for Maryland, in America. in respect of which Lord Baltimore had incurred forfeiture of the charter held by him, in advance of the forfeiture being enforced ; or

(iv)in 1752, in relation to the colony of Georgia in America, upon surrender of the charter, to authorise magistrates and other public officers by proclamation under the Great Seal, in advance of the establishment of a new system of administration.

As I am clearly of the opinion that similar special powers are not available to the Governor-General, I will not further length then this opinion by discussing the value of these opinions which have been made available from Chalmers "Opinions of Eminent Lawyers", whether categorically or intrinsically. Nor is it of advantage, from the view-point which seems to me to be the only correct view-point, to discuss the applicability of the Ship-Money case These affairs belong to periods when, and to territories where, the power of the King was, in fact, supreme and undisputed. The records of these affairs are hardly the kind of scripture which one could reasonably expect to be quoted is a proceeding which is essentially one in the enforcement and maintenance of representative institutions. For they can bring but cold comfort to any protagonist of the autocratic principle against the now universal rule that the will of the people’s, sovereign. In the case of North America, the territory was lost eventually to the British Crown through the maintenance of just such reactionary opinions, as those which Senior Counsel for the Federation of Pakistan has been pleased to advance for acceptance by the Court. And in the English case, the fate of the King, and the Judges who delivered the opinion favouring absolute power in the King, stands for all time as a warning against absolutism, and as a landmark in the struggle for the freedom and eventual sovereignty of the people.

It is perfectly clear, in my opinion that in respect of the exercise of political initiative outside the constitutional instruments in force, the position since the Partition has been exactly the same as in regard to variation of the existing constitutional instruments, viz., that the power vests exclu­sively in the Constituent Assembly, and that the Governor-General can claim no share .in the positive exercise of that

power.

MUHAMMAD SHARIF, J.—At the time of her start as an independent Dominion on 15th of August 1947, Pakistan was to be governed under the Indian Independence Act, 1947 and in occordance with subsection (2) of section 8' of this Act. It is as follows :

"(2) Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly , of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of the Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly."

The omissions, additions, etc., were made by the Governor--General of the united India by virtue of the authority given to him under section of the Indian Independence Act. As a result, the Government of India Act, 1935, was brought into conformity with the letter and spirit of the Indian Independence Act and the Act so adapted was to be con­sidered the Government of Indian Act, 1935, from 15th of August 1947 onwards. It established a Federal form of Government. The above Constitution Act could only he changed or amended by the Constituent Assembly exercising the powers of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion (vide subsection (1) of section 8 of the Indian Independence Act). Section 6 details the plenitude of the powers of the Legislature of the Dominion to make laws of the Dominion to which the Governor-General "shall have full power to assent" under subsection (3) of this section. In other words, the laws were to be made by the Legislature of the Dominion and the Governor-General's assent would render them operative. Thus the Governor-General was only a constituent part of the legislative machinery and none of the parts could independently perform the functions of the Legislature of the Dominion. Both must conjoin and act together to produce the result. At p. 18 of the Constitutional Law, Seventh Edition, Professor Keith observes: "The case of Stockdale v. Hansard (I) is instructive as showing that neither House can by its own resolution negative the effect of an Act of Parliament, nor make any new law".

The powers of the Governor-General to promulgate Ordinance during the recess of the Federal Legislature are described in section 42 of the Government of India Act. The relevant portion reads as follows :

"42 (1) The Governor-General may, in cases of emer­gency, make and promulgate ordinances for the peace and good Government of Pakistan or any ' part thereof, and any ordinance so made shall have the like force of law as an Act passed by the Federal Legislature, but the power of making ordinances under this section is subject to the like restrictions as the power of the Federal Legislature to make laws, and any ordinance made under this section may be controlled or superseded by any such Act.

(3) An ordinance promulgated under this section after the thirty-first day of December 1949, shall be laid before, the Federal Legislature and shall cease to operate at the expiration of six weeks from the re-assembly of the Legis­lature, or, if before the expiration of that period a resolution disapproving it is passed by the Legislature, upon the passing of that resolution".

On the making of a proclamation by the Governor-General under section 102 of the 'Government of India Act, 1935, that a grave emergency exists whereby the security or economic life of Pakistan or any part thereof is threatened by war or internal disturbance or circumstances arising out of any mass movement of population from or into Pakistan, the Federal Legislature shall have powers to make laws for, a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List, or to make laws, whether or not for a Province or any part thereof, with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act. Subsec­tion (5) of this section reads as follows :

"(5) A Proclamation of Emergency declaring that the security or economic life of Pakistan is threatened by war or internal disturbance or circumstances arising out of any mass movement of population from or into Pakistan may be made before the actual occurrence of war or disturbance or circumstances if the Governor-General is satisfied that there is imminent danger thereof",

It means that, where an emergency has been proclaimed, the Federal Legislature can also trespass into the Provincial field, from which it is ordinarily kept out, or legislate on the other matters referred to in section 102, but the Federal Legislature would still be acting within the framework of the Government of India Act, 1935, of which it is the creation) It can in no circumstances transcend the boundaries of the Statute itself. Consequently, the Governor-General acting under section 42 of the Government of India Act could not do better or exercise greater powers than the Federal Legislature. On the other hand, while the Governor-General is so acting, there must be in existence the Federal Legislature or, if it is under dissolution, its successor must be in sight. To think that the Governor-General pan govern without the, Federal Legislature is a notion wholly repugnant of the Government of India Act.

Section 42 is the only provision in the Government of India Act which empowers the Governor-General to legislate under exceptional circumstances and its limitations have been defined above. There used to be section 45 where the Governor-General was invested with extraordinary powers in the case of failure of constitutional machinery and he could assume to himself all or any of the powers vested in or exercisable by any Federal body or authority. The only check imposed was that the Governor-General could not assume to himself any of the powers vested in or exercisable by the Federal Court or to suspend, either in whole or in part, the operation of any provision of this Act relating to the Federal Court. This section„ however, was omitted by the adaptations made under sections 9 of the Indian Independence Act and could not, therefore, be availed of after the 15th' August 1947.

It must follow from the above that in an emergency, howsoever grave it might be, the Governor-General could not legislate d a matters which fell beyond the purview of the Federal legislature. It has been shown above that the amendment of the existing constitution can only be made by the Constituent Assembly, acting under sub-section (1) of section 8 of the Indian Independence Act. In the recent case of Usif Patel v. The Crown (PLD 1955 FC 387) decided by this Court on 12th of April 1955, it was laid down that "under the Constitution Acts the Governor-General is possessed of no more powers than those that are given to him by those Acts. One of these powers is to promulgate Ordinances in cases of emergency but the limits within which and the checks subject to which he can exercise that power are clearly laid down in section 42 itself. On principle the power of the Governor-General to legislate by Ordinances is always subject to the control of the Federal Legislature and he cannot remove these controls merely by asserting that no Federal Legislature in law or in fact is in existence. No such position is contemplated by the Indian Independence Act, or the Government of India Act, 1935. Any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General is wader Constitution Acts precluded from exercising those powers. The sooner this position is realized the better And if any one read anything to the contrary in the previous judgment of this Court, all that Lean say is that we were grievously misunderstood. If the position created by the judgment in the present- case if that past constitutional legislations cannot be validated by the Governor-General but only by the Legislature, it is for the Law Department of the Government to ponder over the resultant situation and to advise the Government accor­dingly."

Earlier, in the same judgment, it was observed: "The rule hardly requires any explanation, much less emphasis that a Legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates, the principle governing validation being that validation being itself legislation you cannot validate what you cannot legislate upon. Therefore if the Federal Legislature, in the absence of a provision expressly authorising it to do so, was incompetent to amend the Indian Independence Act or the, Government of India Act, the Governor-General possessing no larger powers than those of the Federal Legislature was equally incompetent to amend either of those Acts by an Ordinance. Under the 'Independence Act the authority competent to legislate on constitutional matters being the Constituent Assembly, it is that Assembly alone which can amend those Acts."

There is thus left no room for doubt that on constitutional matters the Governor-General is not competent to legislate and cannot, therefore, by his own act make valid laws which he himself could not enact. Realising this difficulty, the learned counsel for the Government had recourse to "the dicta like "salus populi est supreme lex" or "necessity makes lawful what is otherwise unlawful". These have been some-times invokes in times of war or other national disaster to infringe private rights or commander private property, but we have not been referred to any authority or reported case where, under the stress of circumstances created by some interpretation of law, these were extended to embrace, changes in constitutional law. It might on occasions lead to dangerous consequences if in any real or supposed emergency of which the head of the State alone must be the Judge, the constitutional structure itself could be tampered with. It has a sanctity of its own which is not to be violated. My answer, therefore, to Question No. 2 is that it is beyond the authority of the Governor-General, both under] the constitutional and the general law, to do even for at short period what the Constituent Assembly alone could do.

S. A. RAHAMAN, J.—I respectfully concur in the answers proposed to be returned by my lord the Chief Justice to the questions as finally formulated in this Reference and agree generally with the reasoning by which they are supported. I venture to add in respect of the answer to question (2) that while accepting the validity and applicability of the supreme principle of necessity embodied in the maxim "salus populi est supremo lex" to the constitutional impasse to which the country had been reduced, I was nevertheless anxious that no more than the minimum of powers requisite to meet this special contingency ought to be conceded in favour of the Governor-General. I was, ''therefore, at first inclined to hold that a power in the Governor-General to declare a sort of judicial moratorium so as to prevent all Courts from going on with proceedings or cases in which the validity of the relevant laws was canvassed, till such time as the new Constituent Assembly could provide legal cover for those laws, might be regarded as the judicially recognisable desideratum, some doubt, however, existed whether such an order passed by the Governor-General would be effective to save all such laws from the onslaught of forensic ingenuity during the interregnum. I was, therefore, persuaded that in the special circumstances envisaged in the Reference there was no alternative to recording the finding, consistently with the supreme law of necessity, that the Governor-General could exercise temporarily the powers of validation with retrospective effect, so as to prevent a constitutional break-down.

OPINION OF THE COURT

Question No. 1.—What are the powers and responsibilities of the Governor-General in respect of the Government of the country before - the new Constituent Convention passes the necessary legislation?

Answer-That this question is too general and need not be answered,

Question 2.—The Federal Court having held in Usif Patel's case (PLD 1955 F C 387), that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the Constitution or any rule of law \_applicable to the situation by which the Governor-General can, by order or otherwise declare that all orders made, decisions taken, and other ,acts done under those laws, shall be valid and enforceable and those laws which cannot with-out. danger to the State be removed from the existing legal system shall be treated as part of. the law of the land until the question of their validation is determined by the new Constituent Convention ?

Answer.-That in the situation presented by the Reference the Governor-General has during the interim period that power under the common law of civil or 'state necessity of

retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and al those laws, until the question of their validation is decided upon by the Constituent Assembly are during the aforesaid period valid and enforceable in the same way as if they had been valid from the date on which they purported 'to come into force.

Question No. 3.—Whether the Constituent Assembly was rightly dissolved by the Governor-General.

Answer.—That on the - facts stated in the Reference, namely, (1) that the Constituent Assembly, though it functioned for more than 7 years, was unable to carry out the duty to frame a constitution for Pakistan to replace the transitional constitution provided by the Indian Independence Act, 1947 (2) that in view of the repeated representations from and resolutions passed by representative bodies throughout the country the Constituent Assembly, in the opinion of the Governor-General, became in course of time wholly unrepresentative of the people of Pakistan, and ceased to be responsible to them ; (3) that for all practical purposes the Constituent Assembly assumed the form of a perpetual Legislature ; and (4) that throughout the period of its existence the Constituent Assembly asserted that the provisions made by it for the constitution of the Dominion under subsection (1) of section 8 of the Indian Independence Act were valid laws without the consent of the . Governor-General, the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly.

Question No. 4.---Whether the Constituent Convention proposed to be set up by the Governor-General, is competent to exercise the powers conferred by subsection (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?

Answer.—That subject to this :

(1) that the correct name of the Constituent Convention .it Constituent Assembly ;

(2) that the Governor-General's right - to dissolve the Assembly can only be derived from the Indian Independence Act ;

(3) that the arrangements for representation of States and Tribal Areas pan, under the proviso to subsection (3) of section 19 of the Indian Independence Act, be made only by the Constituent Assembly and not by the Governor-General ; and

(4) that the Governor-General's duty being to bring into existence a representative legislative institution he can only nominate the electorate and not members to the Constituent Assembly.

the new Assembly, constituted under the Constituent Convention Order, 1935, as amended to date, would be competent to exercise all the powers conferred by the Indian Independence Act, 1947, on the 'Constituent Assembly including those under section 8 of that Act.

Mr. Pritt, as amicus curiae will get from Government a sum of Rs. 10,000 as costs for representing; Mr. Tamizuddin Khan's case.

Reference Answered