**PLD 1958 Supreme Court 533**

**Present: Muhammad Munir, C. J., M. Shahabuddin, A. R. Cornelius and Amiruddin Ahmad, JJ**

**Constitutional Criminal Appeal No. 1 of 1957, Criminal Appeal No. 24 of 1957 & Criminal Appeals Nos. 60 and 67 of 1958, decided on 27th October 1958.**

**Constitutional Criminal Appeal No. 1 of 1957**

**THE STATE.- Appellant**

**Versus**

**DOSSO and another- Respondents**

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore dated the 9th August 1957, in Writ v. Petition No. 21 of 1957).

**Criminal Appeal No. 24 of 1957**

**SABZ ALI and another- Appellants**

**Versus**

**GOVERNMENT OF WEST PAKISTAN and others- Respondents**

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore, dated the 15th May 1956, in Writ

**Petition No. 149 of 1956.)**

**Criminal Appeal No. 60 of 1957**

**THE DISTRICT MAGISTRATE & DEPUTY COMMISSIONER SIBI AT ZIARAT and another- Appellants**

**Versus**

**MALIK TOTI KHAN and another- Respondents**

(On appeal from the judgment and order of the High Court of West Pakistan, Quetta Circuit, Quetta, dated the 5th August 1957, in Writ Petition No. 17 of 1957).

**AND**

**Criminal Appeal No. 67 of 1958**

**THE STATE- Appellant**

**Versus**

**ABDUL LATIF KHAN- Respondent**

(On appeal from the order of the High Court of West Pakistan, Peshawar Bench, Peshawar, dated the 11th November 1957, in Misc. Application No. 93 of 1954).

**(a) Constitution**--Destruction of, by successful revolutionary change in Government-Effect on prevalent law "-Validity depends upon will of new law-creating organ-Constitution of Pakistan-Abrogation of, by President-Laws Continuance in Force, Order (Post-Proclamation') (I of 1958) Art. II cls. 1, 4 & 7, Art IV cl. I-Effect-Frontier Crimes Regulation (111 of 19013, continues in force-Pending proceedings, on writ applications based on infraction of a Fundamental right granted by abrogated Constitution, abate-Constitution of Pakistan (1956), Arts. 4, 5, 170.

By the Proclamation of October 7, 1958, the President of Pakistan annulled the Constitution of 2nd March 1956, dismissed the Central Cabinet and the Provincial Cabinets and. dissolved the National Assembly and both the Provincial Assemblies. Simultaneously, Martial Law was declared throughout the country, and, Commander-in-Chief of-.the Pakistan Army, was appointed as the Chief 'Martial Law Administrator: Three days later was promulgated by' the President the Laws Continuance in Force' Order, 1958, the general effect of which was the validation of laws, other than- the late Constitution, that were in force before the Proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts. The Order contained the further direction that the country, thereafter to be known as Pakistan and not the Islamic Republic of Pakistan, should be governed as nearly as may be in accordance with the late Constitution.

Each of the four appeals before the Supreme Court involved the question whether the writs-issued by the High Court in respect of orders of reference to a Council of Elders or convictions under S. 11 of the Frontier Crimes Regulation (111 of 1901) on the ground of the invalidity of the latter Regulation as contravening Art. 5 of the late Constitution-had abated under cl. 7 of Art. 1 of the Laws Continuance in Force Order, 1958 promulgated by the President on October 10, 1958.

**Held (per Muhammad Munir, C. J.,)** that since Art. 5 of the late Constitution itself had now disappeared from the new legal order the Frontier Crimes Regulation (111 of 1901) by reason of Article IV of the Laws Continuance in Force Order, 1958, was still in force and all proceedings in cases in which the validity of that Regulation had been called in question having abated, the convictions recorded and the references made to the Council of Elders were good.

A victorious revolution or a successful coup d' E' tat is an internationally recognised legal method of changing a Constitution.

After a change of that character has taken place, the national legal order, must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution.

If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State.

[Hans Kelsen: "General Theory of Law & State" translated by Anders Wedberg; 20th Century Legal Philosophy Series pp. 117-118].

Where revolution, is successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws Continuance in Force Order, however transitory or imperfect, was a new legal order and it was in accordance with that Order that the validity of the laws and the correctness of judicial decisions had to be determined.

Jibendra Kishore Achharyya Chowdhury and 58 others v. The Province of East Pakistan & Secretary, Finance and Revenue (Revenue Department, -Government of East Pakistan P L D 1957 S C (Pak.) 9 ref.

The Order applied to the situation that came into existence under the President's Proclamation of October 7. The laws that were in force after that date were enumerated in Article IV, but- from the list of such laws the Constitution of 23rd March 1956 had been expressly excluded. This meant that when under clause (4) of Article II of the Order the Supreme Court or the High Court was moved for a writ, the ground for the writ, could only be the infraction of any of the laws mentioned in Article IV, or any right recognised by that Order and not the violation of a right created by the late Constitution. The so-called fundamental rights which were described in Part II of the late Constitution were therefore no longer a part of the national legal order and neither the Supreme Court nor the High Court had under the new Order the authority to issue any writ on the ground of the violation of any of the fundamental rights . . . . . Under the new legal Order any law could at any time be changed by the President and therefore there was no such thing as a fundamental right, there being no restriction on the President's law-making power. Under Article 4 of the late Constitution there was a restriction on the power of the legislature to make laws involving breaches of fundamental rights and invalidity attached to all existing laws, customs and usages having the force of law if they were inconsistent with any of the fundamental rights. This test to determine the validity of the laws and the fetters on the power of the legislature to make laws had both disappeared under the new Order. Unless therefore the President expressly enacted the provisions relating to fundamental rights, they were not a part of the law of the land and no writs could issue on - their basis.

It was true that Article II provided that Pakistan shall be governed as nearly as may be in accordance with the late Constitution but this provision did not have the effect of restoring fundamental, rights because the reference to Government- in this Article was to the structure and outline of Government and not to the laws of the late Constitution which had been expressly abrogated by Article IV. Article II and Article IV could therefore stand together and there was no conflict between them. But even if some inconsistency be supposed to exist between the two, the provisions of Article IV which were more specific and later must override those of Article II.

Position in regard to future applications for writs, therefore is that they lie only on the ground that any one or more of the laws mentioned in Article IV or any other right preserved by the Laws Continuance in Force Order has been contravened.

As regards pending applications for writs or writs already issued but which are either sub judice before the Supreme Court or require enforcement, the relevant

provision is clause (7) of Article II. This provision means that, excepting the writs issued by the Supreme Court after the Proclamation and before the promulgation of the Order, no writ or order for a writ issued or made after the Proclamation shall have any legal effect unless the writ was issued on the ground that any one or more of the laws mentioned in Article IV or any other right kept alive by the new Order had been contravened. And if there be a pending application or proceeding in respect of a writ which is not covered by clause (4) of Article II, or any other provision of the new Order, that is to say, the application or proceeding relates to a writ sought on the ground that a fundamental right has been contravened, then the application or the proceeding shall abate forthwith. This means that not only the application for the writ would abate but also the proceedings, which require the enforcement of that writ. The abatement must therefore be held to govern all those writs, which were the subject-matter of appeal before the Supreme Court either on certificate or by special leave.

No judgment, order, or writ of a High Court can considered to be final when either that Court has certified the case to be a fit one for appeal and proceedings for appeal have been taken or when the Supreme Court itself has granted special leave to appeal from that judgment, order or writ.

**Cornelius, J**., was unable to hold beyond doubt that the concluding words of subsection (7) of S. 2 of the Laws (Continuance in Force) Order, 1958 had the effect of bringing to an abrupt end in the circumstances of the two cases, the proceedings in the High Court which were under-examination before the Supreme Court in Appeals No. 1 of 1957 and 60 of 1958.

**Per Cornelius, J**.-"I am unable to hold beyond doubt that the concluding words of subsection (7) of section 2 of the Order of the 10th October 1958, have the effect of bringing to an abrupt end the proceedings in the petitions before the High Courts commenced by the convicted persons in the two cases here under consideration. I do not therefore consider that it is open to me to reverse the judgment of the High Court in these two cases and to re-call the writs issued by them unless I am satisfied that the view of the High Court on the point of repugnancy to Article 5 of the Constitution of 1956 is not tenable."

His Lordship held that that view was not tenable.

**(b) Frontier Crimes Regulation (III of 1901),** S. 11-Council of Elders ceasing to function-Case on remand may be referred to another Council.

**(c) Frontier Crimes Regulation (III of 1901),** S. II-Deputy Commissioner after referring case to Council of Elders is empowered to issue directions in regard to custody of accused.

**(d) "Abatement"**-Concept examined.

**(e) Frontier Crimes Regulation (III of 1901)**–Whether necessarily an illiberal instrument.

**(f) Frontier Crimes Regulation (III of 1901),** S. 11-Not a discriminatory provision-Constitution of Pakistan (1956), Art. 5.

**(g) Frontier Crimes Regulation** (North-West Frontier Province Amendment) Act (X111 of 1954)-Validity.

**(h) Constitution of Pakistan (1956)**, Art. 178-High Court not competent to declare invalid a conviction had in a "special area" though the convicted person was later confined in a place within jurisdiction of the High Court-Prisoners Act (Ill of 1900), Ss. 15 & 16.

Constitutional Criminal Appeal No. 1 of 1957.

Mushtaq Ahmad, Advocate-General, West Pakistan (Iftikhar-ul-Haq Khan, Advocate, Supreme Court, with him), instructed by Ijaz Ali, Attorney for Appellant.

Respondents: not represented.

Criminal Appeal No. 24 of 1957.

Muhammad Shafi, Advocate, Supreme Court, instructed by Mushtaq Ahmad, Attorney for Appellants.

Mushtaq Ahmad, Advocate-General, West Pakistan (Iftikhar-ul-Haq Khan, Advocate Supreme Court, with him), instructed by

Ijaz Ali, Attorney for Respondents.

Faiyaz Ali, Attorney-General for Pakistan, instructed by Iftikhar-ud-Din Ahmad, Attorney, under O. XIV, r. 1, S. C. R. 1956.

Criminal Appeal No. 60 of 1958.

Mushtaq Ahmad, Advocate-General, West Pakistan (Iftikhar-ul-Haq Khan, Advocate, Supreme Court, with him), instructed by Ijaz Ali, Attorney for Appellants.

Yahya Bakhtiar, Advocate, Supreme Court, instructed by Siddique & Co., Attorneys for Respondents.

Criminal Appeal No. 67 of 1958.

Mushtaq Ahmad, Advocate-General, of West Pakistan, (Iftikhar-ul-Haq Khan, Advocate, Supreme Court, with him), instructed by Ijaz All, Attorney for Appellant.

Abdul Latif in person.

Dates of hearing : October 13 and 14, 1958.

**JUDGMENT**

**MUHAMMAD MUNIR, C. J**.-This order will determine Constitutional Criminal Appeal No. I of 1957, Criminal Appeal No. 24 of 1957 and Criminal Appeals Nos. 60 and 67 of 1958, which arise out of orders made either by the Lahore or by the Peshawar Bench of the High Court of West Pakistan on certain petitions for writs under Article 170 of the late Constitution successfully calling in question either an order referring the case to a Council of Elders or a conviction recorded under S. 11 of

the Frontier Crimes Regulation, Act III of 1901. Constitutional Criminal Appeal No. 1 of 1957 is a certified appeal, while the others are by special leave of this Court. The question involved. in each one of them is whether the writ issued by the High Court abates under clause (7) of Article 1 of the Laws Continuance in Force Order, promulgated by the President on October 10, 1958.

By the Proclamation of October 7, the President annulled the Constitution of 2nd March 1956, dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both the Provincial Assemblies. Simultaneously, Martial Law was declared throughout the country and General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army, was appointed as the Chief Martial Law Administrator. Three days later was promulgated by the President, the Laws Continuance in Force Order, the general effect of which is the validation of laws, other than the late Constitution, that were in force before the Proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts. The Order contained the further direction that the Government of the country, thereafter. to be known as Pakistan and not the Islamic Republic of Pakistan, shall be governed as nearly as may be in accordance with the late Constitution.

As we will have to interpret some of the provisions of this Order, it is necessary to appraise the existing constitutional position in the light of the juristic principles, which determine the validity or otherwise of law-creating organs in modern States which being members of the comity of nations are governed by International Law. In judging the validity of laws at a given time, one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests, requires a jurist to presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alterations in the Constitution and the validity of all laws made thereunder is determined by the first Constitution. Where a Constitution presents such continuity, a law once made continues in force until it is repealed, altered or amended in accordance with the Constitution. It sometimes happens, however, that a. Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change maybe attended by violence or it may be perfectly peaceful. It may take the form of a coup d' E' tat by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and .the annulment is effective. If .the attempt to break, the Constitution fails those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the success that the persons assuming power under the change can successfully require the inhabitants of the country to conform to' the new regime, then the revolution itself becomes a law-creating -fact because thereafter its own legality is judged note by reference to the annulled

Constitution but by' reference to its own success: On the same principle the validity of the -laws to-be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern juristic doctrine., no change in the corpus or international entity of the State' and. the revolutionary government and the new constitution ace, according to International Law, the' legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d E'tat is an internationally recognised legal method of changing a Constitution.

After a change of the character I have mentioned has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions; and can function only to the extent and in the manner determined by the new constitution. While on this subject Hans Kelsen, a renowned modern jurist, says-:

"From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase `remains valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution, which is not the result of a constitutional alteration of the former. If laws, which, are introduced under the old constitution continue to be valid under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. * * * * * * * *

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The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus it is never the constitution merely but always the entire legal order that is changed by a revolution.

> "This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only de facto but also de jure. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in -force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order-to which no political reality any longer corresponds-has ceased to be valid, and that all norms, which are valid

within the new order, receive their validity exclusively from the new constitution, It follows that, from this juristic point- of view, the norms of the old order can no longer be recognised as valid norms. [General Theory of Law & State translated by Anders Wedberg, 20th Century Legal Philosophy Series,

Bearing in mind the principle just stated let us now approach the question involved in these cases. If what I have already stated is correct, then the revolution having been successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws Continuance in Force Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined. The relevant provisions of this Order are:

**Article II-1.** Notwithstanding the abrogation of the Constitution of the 23rd March 56, hereinafter referred to as the late Constitution by the Proclamation and subject to any order of the President or Regulation made by the Chief Administrator of Martial Law the Republic to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution . . . . . .

4. The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari . . . . .

**Article IV**-Notwithstanding the abrogation] of the late Constitution, and subject to any order of the President or regulation, made by the Chief Administrator of Martial Law, all laws, other than the late Constitution, and all Ordinances, Orders-in-Council, orders other than orders made by the President under the late Constitution, as are set out in the schedules to this order, rules, by-laws, regulations, notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before the Proclamation, shall, so far as applicable and with such necessary adaptations as the President- may see fit to make, continue in force until altered, repealed or amended by competent authority.

(2) In this article a law is said to be in force if it has effect as law whether or not the law has been brought into operation.

(3) No Court shall call into question any adaptation made by the President under clause "1"

The Order applies to the situation that came into existence under the President's Proclamation of October 7. The laws that are in force after that date are enumerated in Article IV, but from the list of such laws the Constitution of 23rd March 1956, has been expressly excluded. This means that when under clause (4) of Article II of the Order the Supreme Court or the High Court is moved for a writ; the ground for the writ can only be the infraction of any of the laws mentioned in Article IV, or any right recognised by that Order and not the violation of a right created by the late Constitution. The so-called fundamental rights which were described in Part II of the late Constitution are therefore no longer a part of the national legal order and neither the Supreme Court nor the High Court has under the new Order the authority-to issue any writ on the ground of the violation of any of the fundamental rights. The very essence of a fundamental right is that it is more or less permanent

and cannot be changed like the ordinary law. In Jibendra Kishore Achharyya Chowdhury and- 58 others v. The Province of East Pakistan & Secretary, Finance and Revenue (Revenue) Department, Government of East _Pakistan (P L R 1957 W P 684 (Vol. II): P L D 1957 S C (Pak.) 9), I had the occasion to point out that the very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law and that it is .not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law. Under the new legal Order any law may at any time be changed by the President and therefore there is no such thing as a fundamental right there being no restriction on the President's law-making power. Under Article 4 of the late Constitution there was a restriction on the power of the legislature to make laws involving breaches of fundamental rights and invalidity attached to all existing laws, customs and usages having the force of law if they were inconsistent with any of the fundamental rights. This test to determine the validity of the laws and the fetters on the power of the legislature to make laws have both disappeared under the new Order. Unless therefore the President expressly enacts the provisions relating to fundamental rights, they are not a part of the law of the land and no writs can issue on their basis. It is true that Article II provides that Pakistan shall be governed as nearly as may be in accordance with the late Constitution but this provision does not have the effect of restoring fundamental rights because the reference to Government in this Article is to the structure and outline of Government and not to the laws of the late Constitution which have been expressly abrogated by Article IV. Article II and Article IV can therefore stand together and there is no conflict between them. But even if some inconsistency be supposed to exist between the two, the provisions of Article IV which are more specific and later must override those of Article II:

The position in regard to future applications for writs therefore is that they lie only on the ground that any one or more of the laws mentioned in Article IV or any other right reserved by the Laws Continuance in Force Order has been contravened.

As regards pending applications for writs or writs already issued but which are either sub judice before the Supreme Court or require enforcement, the relevant provision is clause (7) of Article II which provides

> "All orders and judgments made and given by the Supreme Court between the Proclamation and the promulgation of this order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving these orders and judgments no writ or order for a writ issued or made after the Proclamation shall hate effect unless it is provided for by this order, and all applications and proceedings in respect of any writ which is not so provided for sate forthwith".

Analyzed, this provision means that excepting the writs issued by the Supreme Court after the Proclamation and before the1 promulgation of the Order, no writ or order for a writ issued or made after the Proclamation shall have any legal effect unless the writ was issued on the ground that any one or more of the laws mentioned in Article IV or any other right kept alive by the new order had been contravened, And if there be a pending application or proceeding in respect of a writ which is not covered by clause (4) of Article II, or any other provision of the new Order that is to say, the application or proceeding relates to a writ sought on the ground that a

fundamental right has been contravened, then the application or the proceeding shall abate forthwith. This means that not only the application for the writ would abate but also the proceedings which require the enforcement of that writ, The abatement must therefore be held to govern all those writs which were the subject-matte of appeal before the Supreme Court either on certificate or by special leave. No judgment, order or writ of a High Court can be considered to be final when either that Court has certified the case to be a fit one for appeal and proceedings for appeal, have been taken or when the Supreme Court itself has granted special leave to appeal from that judgment, order or writ. I am therefore of the view that the writs issued by the High Court in these cases are not final writs, and that all proceedings in connection with such writs, including the original applications in the High Court, have abated.

The Frontier Crimes Regulation had been held by the High Court to be invalid on the ground that it contravened Article 5 of the Constitution and since that Article itself has now disappeared from the new legal order that Regulation by reason of Article IV is still in force and all proceedings in these cases in which the validity of that Regulation had been called in question having abated, the convictions recorded and the references made to the Council of Elders are good.

In making this order I have not given effect to the contention raised in Criminal Appeal No. 24 of 1957 that the reference to the Council of Elders was bad because the Deputy Commissioner had not stated in his order that it was inexpedient that the question of guilt or innocence of the accused should be determined by an ordinary Court or the contention in Criminal Appeal No. 60 of 1958 that the reference to the second Council after remand to the original Council was illegal. In the former the reference was not under S. 11 but under S. 15 which does not require any such expediency or inexpediency as is mentioned in S. 11 and in the latter the remand to the original Council j proved infructuous as the Council declined to function after the remand. I have also rejected the argument in the first of these appeals that after a case is referred to a Council, the Deputy Commissioner ceases to have the jurisdiction to detain an accused person in custody. Every Deputy Commissioner acting in criminal proceedings under the Regulation is necessarily ' a Magistrate and as such is competent to issue directions as to the custody of the accused.

Parties will bear their own costs throughout.

**SHAHABUDDIN, J**.- These I are appeals against the decisions of the High Court of West Pakistan, Constitutional Criminal No. 1 of 1957 on a certificate granted by the High Court and the other three by special leave. In stating the facts giving rise to these appeals it is convenient to take up Criminal Appeals Nos. 60 & 67 of 1958 first.

A case of murder against Malik Toti Khan and Mehraban Khan, respondents in Criminal Appeal No. 60 of 1958, and several others was referred by the District Magistrate and the Deputy Commissioner, Sibbi, under S. 11 of the Frontier Crimes Regulation to a Council of Elders, who while finding the others guilty held that these respondents were not guilty. Under S. 11 (3) the Deputy Commissioner could accept the finding or remand the case to the same Council of Elders for a further finding or refer it to another Council of Elders. He adopted the second of the above courses but the Council of Elders after keeping the case pending for sometime expressed their

inability to give an opinion on the ground that the parties had approached them and they did not have an open mind on the question. The case was then referred to another Council of Elders (Special Jirga) who found the respondents guilty, whereupon the Deputy Commissioner convicted them under S. 302/149, P. P. C. and sentenced them to rigorous imprisonment for five years and a fine of Rs. 500 each. The respondents then applied to the High Court for a writ. ,or habeas corpus and certiorari on the ground that the provisions of the Frontier Crimes Regulation enabling the executive authorities to refer criminal cases to a Council of Elders were void under Art. 4 of the Constitution of the Republic of Pakistan, being repugnant to Art. 5 of that Constitution. This contention was accepted by the High Court. The learned Judges held that as the provisions referred to above could be enforced under subsection (4) of S. 1 of the Regulation only against Pathans and Baluchis and against such other class of persons the local Government may notify and as this was not a reasonable classification those provisions were ultra vires of Art. 5 of the Constitution. The convictions and sentences were set aside, and the respondents were ordered to be treated as undertrial prisoners, it being left to Government to refer their cases to a Court of law. The State has preferred this appeal by special leave, which was granted for considering whether the above said provisions of the Frontier Crime Regulation were unconstitutional by reason of Art. 5 of the Constitution.

A case of criminal breach of trust against the respondent in Criminal Appeal No. 67 of 1958 Abdul Latif Khan said to have been committed in Peshawar was referred by the Deputy Commissioner of Peshawar under the Frontier Crimes Regulation to a Council of Elders. An application was made by him to the High Court for a writ of certiorari on the same ground as in the first mentioned case and the High Court accepted that application had issued the writ prayed for. This appeal (Cr. A. No. 67/58) was preferred by the State with the special leave granted by this Court for considering whether Ss, 11 to 20 of the Frontier Crimes Regulation were repugnant to Art. 5 of the Constitution.

The respondents in Cr. A. No. 1 of 1957 Dosso and Muhammad Khan who were convicted by the District Magistrate Loralai in the special areas under. S. 376 read with S. 12 (2) of the Frontier Crimes Regulation and sentenced to five years' rigorous imprisonment each on the basis of an award by a Jirga (Council of Elders) and were detained in jail at Machh which is outside the special area and within the jurisdiction of the High Court, applied to that Court for an 'appropriate writ for their being set at liberty on the ground that they were being illegally detained. The learned Judges for the reason given in the case mentioned above of Malik Toti Khan and Mehraban Khan via. that the relevant provisions of the Frontier Crimes Regulation were void being repugnant to Art. 5 of the Constitution, held that the convictions of Dosso and Muhammad Khan were without jurisdiction; but they found themselves unable to set them aside as the trial had taken place, in special areas which under Art. 178 of the Constitution was not within their jurisdiction. They however ordered their release on the ground that they were illegally detained. A certificate was granted to the State to enable it to appeal to this Court.

The appellants Sabz Ali and Muhammad Akbar in appeal No. 24 of 1957 were committed to the Court of Session under Ss. 302 & 307, P. P. C. but the Public Prosecutor withdrew from the prosecution under S. 15, Frontier Crimes Regulation, whereupon as required under that provision the Sessions Judge stayed the proceedings and the Deputy Commissioner referred the case to a Council of Elders

consisting of three Magistrates and a non-official. The appellants applied for a writ directing that the trial be not proceeded with under the Frontier Crimes Regulation, that the reference to the Council of Elders be quashed and that the respondents should be tried in a Court of law. The contentions were (1) that a- trial before the Council of Elders deprived them of their fundamental right of consulting a counsel given under Art. 7 of the Constitution; (2) that their detention being by a Deputy Commissioner was illegal as under the said Article detention could be only with the authority of a Magistrate; (3) that the reference was invalid as it did not expressly say that the Deputy Commissioner considered it expedient to have petitioners tried in a Court of law and that (4) the Council of Elders was illegally constituted as three of the four members were Magistrates. The learned Judges held that the Frontier Crimes Regulation did not become unlawful because it did not allow the appearance of counsel and that Art. 7 of the Constitution could be treated as part of every law relating to the trial. of an offence. They, therefore, gave a direction that no evidence should be heard or recorded before the accused were given an opportunity of defending themselves by a pleader. As for the second-contention their view was that the Deputy Commissioner was acting as a Magistrate. The other two contentions also were not accepted. Absence of the word 'inexpedient' in the reference did not, they held, make it invalid and as far as the composition of the Council of Elders was concerned they found that as long as the members were Pathans or Baluchis their being Magistrates did not matter. Special leave was granted to consider the last three questions i.e., contentions 2 to 4 mentioned above. Though in' this case the question that the Frontier Crimes Regulation was in conflict with Art. 5 of the Constitution was not raised yet there was a reference to the fundamental right under Art. 7. In the other three cases the main question was whether the Frontier Crimes Regulation was in conflict with Article 5 of the Constitution.

While these appeals stood posted to the 13th October for hearing the President abrogated the Constitution by a Proclamation issued on the 7th; and then on the 10th he promulgated "the Laws (Continuance in Force) Order, 1958 which for the sake of convenience will be referred to hereafter as `the nevi order' empowering all the Courts in existence immediately before the Proclamation toJ1 continue in being and exercise their powers and jurisdiction subject to the provisions of the said Order.

Its relevant provisions with reference to which the points raised before us have to be considered are these.

> "2(1) Notwithstanding the abrogation' of the Constitution of the 23rd March 1956, hereinafter referred to as the late Constitution, by the Proclamation and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law the Republic to be known henceforward as Pakistan, shall be 'governed as nearly as may be in accordance with the late Constitution.
>
> (2) Subject as aforesaid all Courts in existence immediately before the Constitution shall continue in being and, subject further to the provisions of this Order, in their .powers and jurisdictions.

(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus prohibition quo warranto and certiorari.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and Promulgation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith.

3 (1) No Court or person shall call or permit to be called in question-

(i) the Proclamation;

4 (1) Notwithstanding the abrogation of the late Constitution and subject to any Order of .the President or Regulation made by the Chief Administrator of Martial Law, all laws, other than the late Constitution, and all Ordinances, Orders in Council, Orders other than Orders made by the President under the late Constitution, (such orders made by the President under the late Constitution as are set out in the Schedule to this Order, Rules, bye-laws, Regulations, Notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before proclamation, shall, so far as applicable and with such necessary adaptations as the President may see fit to make, continue in force until altered, replaced or amended by competent authority".

It was contended for the State by the learned Attorney-General and. the learned Advocate-General that as the late Constitution was no longer in force, Art. 5 of that Constitution did not apply and the Frontier Crimes Regulation, which comes within the expression `all laws' in paragraph 4 (1) of the new order having been validated thereunder was applicable, subject only to the limitation indicated therein and not to the provisions of the late Constitution, which is specifically excluded in the said clause. Mr. Bakhtayar for the respondents in Criminal Appeal No. 60 of 1958, on the other hand, argued that the fundamental rights are preserved by `the new order' as according to its Art. 2 (1) Pakistan `shall be governed as nearly as may, be in accordance with the late Constitution'. According to hire the expression `govern' includes governance by laws also. The respondent in Cr. A. No. 67 of 1958 who appeared in person had nothing to say on the question while the respondents in Cr. A. No. 1 of 1957 did not appear. The learned advocate for the appellants in Cr. A. No. 24 of 1957 did not address us on the question of fundamental rights, but confined his arguments only to the contention that the order of reference was invalid as the Deputy Commissioner did not expressly say that he considered it inexpedient to allow the case to be tried in a Court of law. This point, which is raised on the provisions of the Frontier Crimes Regulation will be considered after the main point stated above is dealt with.

According to the Proclamation which is not and cannot be called or permitted to be called in question as well as in actual effect the late Constitution stands abrogated, and the new order under which the Courts are exercising their respective jurisdictions at present takes its place with regard to the matters to which it relates. The adoption in the new order of any of the provisions of the late Constitution does not affect the abrogation, as those provisions, as pointed out by Hans Kelsen in his book General Theory of Law and State (translated by Anders Wedberg, 20th Century Legal Philosophy Series)- relied on by the learned Attorney-General, receive validity

only from the new Order. In the words of the learned author "the laws, which in the ordinary inaccurate parlance, continue to be valid are, from a juristic view point, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity 4s the new, not the old constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other". Therefore, for such provisions to have. in the new Order the same effect as in the old, there must be a clear indication in the new order that they were adopted with that intention. Viewing the provisions oh the new order from this standpoint I am unable to agree with Mr. Bakhtayar that fundamental rights are preserved by it. It is true that under Art. 2 (1) "Pakistan shall be governed as nearly -as may be in accordance with the late Constitution", but there is also a specific provision in the same Order, Art. 4 (1) which validates all laws in force immediately before the Proclamation other than the late Constitution. This specific exclusion of the late Constitution means that it is not amongst the laws, which have received validity from the new Order and therefore none of its provisions can affect the laws validated in Art. 4 (1) which includes the Frontier Crimes Regulation. The words in Art. 2 (1)1 relied on by Mr. Bakhtayar have to be taken to refer rather toy the machinery of Government than to legislation and matters, affecting the validity of laws. Art. 2 (1) and Art. 4 (4) should be' read together and so read they do not conflict with each other. '

It was then contended by Nor. Bakhtayar that this might be so with regard to a future applications for writs, but as in these cases the High Court had issued the writ when the late Constitution was in force, we should not interfere at this stage. This argument overlooks clause (7) of Art. 2 of the new Order where under pending applications and proceedings in respect of any of the writs not provided for by the new order, shall abate forthwith. The writs provided for by the new order i.e., those mentioned in clause (4) of Article 2 cannot be utilised to enforce the fundamental rights conferred by the late Constitution, as, for reasons already stated, those rights no longer exist as such. The, fact that the High Court has issued the writs and only appeals are pending in this Court does not save the orders of the High Court as in the above-mentioned clause "all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith". In the present cases, the entire proceedings are before this Court in virtue of the special leave granted in three of them and the certificate of the High Court in the fourth.

In Appeals Nos. 1 of 1957 and 60 and 67 o€ '1958, therefore, the applications and proceedings in respect of the writs which were based on Art. 5 of the late Constitution have to be regarded as having abated. It was however contended in Appeal No. 60 of 19.58 that the Deputy Commissioner Sibi having once remanded the case to the Jirga, which had given its award had no jurisdiction to send it again to a second Jirga. This point was not raised specifically in the application, nor does it appear to have been raised before the High Court. However, there is no force in it. Section 11 (3) no doubt empowers the Deputy Commissioner to adopt only one of the courses indicated in it, but the order of remand. in this case proved infructuous as the Jirga concerned was unable to reconsider the matter. Had it given an award on a reconsideration of the case the Deputy Commissioner would not have had jurisdiction to refer the case to a second Jigra. The result, therefore, is that tht convictions and sentences imposed on the respondents in Appeals Nos. 1 of 1957 and 60 of 1958 and the order of the Deputy Commissioner, Peshawar, referring the case

of the respondent in Appeal No. 67 of 1958 to a Jirga get restored in consequence of the abatement.

In Cr. A. No. 24 of 1957 the proceedings in respect of the writ have to be taken as having abated only as far as' the direction given- by the High Court that no evidence shall be heard and recorded before the appellants have been given an opportunity of defending themselves by a pleader is concerned, because that direction was based on Art. 7 of the late Constitution. But the other questions to consider which special leave was granted arise on the provisions of the Frontier Crimes Regulation independent of the late Constitution. , The learned advocate' for the appellants however pressed only one of those three points, viz., that in the absence of a finding of the Deputy Commissioner that it was inexpedient that they should be tried by a Court of law, the order of reference to a Jirga was not valid. I see no force in this argument. As already stated, the reference in this case, was made under S. 15 of the Frontier 'Crimes Regulation which is to the effect that when a trial before a Court of Session the Public Prosecutor at any time before an order of conviction or acquittal withdraws from the prosecution the, Sessions Judge shall stay proceedings and the Deputy Commissioner shall refer' the case to a Council of Elders. There is nothing in this section requiring the Deputy Commissioner to determine the question of expediency. He has no choice as he is bound to make a reference. This appeal has to be dismissed in respect of this contention. The result will be that the trial of the appellants before the Jirga will proceed according to the Frontier Crimes Regulation and the direction of the High Court referred to above will have no effect.

I would determine these appeals in the manner indicated above _ and pass no order, as to costs.

**CORNELIUS, J**.-I agree with the resulting order proposed in these cases by my Lord the Chief Justice, with whom my learned brothers have concurred, but as on certain points I find myself, with great regret, unable to accede to the reasoning which has prevailed with my Lord and my learned brothers, it is necessary that I should give my own reasons for varying the orders made in these four cases by the learned Judges of the High Court of West Pakistan, in my own words.

It will be convenient to state, at the outset, the nature of the orders, which came under consideration in each of these cases in the High Court. In Constitutional Criminal Appeal No. 1 of 1957, which has been preferred by the State against Dosso and Muhammad Khan, the position was that Dosso and Muhammad Khan had been convicted under the Frontier Crimes Regulation, 1901 by the Deputy Commissioner of Loralai, a "special area" excluded from the jurisdiction of the High Court (as well as of this Court) by Article 178 of the late Constitution (to which I shall refer hereafter as the Constitution of 1956), and had been sentenced to imprisonment of certain terms. They were undergoing imprisonment in a jail at Machh in Baluchistan, which is within the jurisdiction of the High Court as well as of this Court. It was represented before the High Court by Dosso and Muhammad Khan that their detention at Machh was illegal, on the major ground that the provisions of the Regulation relating to criminal references were void by operation of Article 4 of the Constitution of 1956, as these provisions involved discrimination on grounds of race. Article 5 of the Constitution of 1956, which declared that all citizens were equal before the law and were entitled to equal protection of law, was cited in this behalf. A Division Bench of the High Court allowed the petition which was for a writ of

habeas corpus on the ground that the High Court had jurisdiction in respect of persons detained within their territorial jurisdiction, and as for the conviction, it was held to be without valid legal sanction having been obtained by a proceeding under section 11 and other relevant provisions of the Regulation, which were repugnant to Article 5 and consequently were void under Article 4 of the Constitution of 1956. A number of questions arose out of the case. The first was whether the Jailer of the Machh jail was acting in compliance with a valid warrant in detaining the two petitioners. This question does not appear to have received any consideration at the hands of the learned Judges. The second question is whether in the absence of jurisdiction in respect of things done within the "special areas" in which Loralai is included, the High Court acted properly in declaring that the conviction by the Deputy Commissioner of Loralai was "an illegal order". .

Criminal Appeal No. 24 of 1957 has been brought by Sabz Ali and Muhammad Akbar, by special leave granted to them to consider the following questions, namely, (i) whether Sabz Ali's detention by order of the Deputy Commissioner was legal; in view of the fact that he was being tried by a jirga, (if) whether the Deputy Commissioner's order referring the case to jirga was legal, in the absence of' an expression of an opinion that trial in the ordinary Courts was "inexpedient", and (iii) whether the constitution of the jirga was proper in view of a certain decision by the Supreme Court, notwithstanding that it was in compliance with an Act of the North-West Frontier Province passed in 1954. The first question had been agitated before the High Court, which had held that the detention of Sabz Ali was under the orders of a Magistrate and that those orders were not rendered unlawful by the fact that the case had been preferred to a jirga for enquiry and report. As regards the second question of fact the reply of the High Court was that the reference to jirga had been made under section 15 of the Regulation and necessarily implied that the Deputy Commissioner had decided that it was inconvenient to have the question of the guilt or innocence of the accused persons tried by the ordinary Courts. On the third question, the learned Judges were of the view that the constitution of the jirga, which consisted of three Magistrates and one non-official was not illegal. The High Court decided one further matter, namely, that the petitioners were entitled to be defended by a lawyer at the trial, and made a direction accordingly acting under Article 7 of the Constitution of 1956. This question will also require to be considered in this judgment.

Criminal Appeal No. 60 of 1958 has been brought by the Deputy Commissioner of Sibi and the Superintendent of the Central Jail at Machh to call in question the writ granted by the High Court of West Pakistan, in favour of two convicted persons Malik Toti Khan and Mehrban Khan, setting aside the convictions and sentences awarded by the Deputy Commissioner under the Regulation and directing him not to refer the case against these two persons to a jirga, while leaving it open to the authorities to proceed against them in the ordinary Courts. This case related to a settled area in Baluchistan, i.e., not a "special area", and the facts were as follows. A case instituted against Malik Toti Khan, Mehrban Khan and I1 other persons for the murder of one Zarif, had been referred to the district jirga, which found certain persons to be guilty, but recommended the acquittal of the two appellants. The Deputy Commissioner "did not feel satisfied" in regard to the jirga's proceedings, upon which the recommendation in favour of Malik Toti Khan and

Mehrban Khan were based. He accordingly remanded the case to the same jirga, which at first asked for time, but after some five months, when the case again came before the same jirga, the members returned it to the Deputy Commissioner expressing "inability to submit a final award as they thought that their minds had been greatly prejudiced by the approach of different persons on behalf of the parties". Thereupon, the Deputy Commissioner constituted a special jirga of four persons from other areas, which made different recommendations, and in particular reported that Malik Toti Khan and Mehrban Khan were accomplices and abettors in the murder of Zarif. The Deputy Commissioner accepted this recommendation after having obtained from the special jirga replies to various objections raised to their report by the different accused persons and other parties to the case. He convicted Malik Toti Khan and Mehrban Khan along with other persons and sentenced them to undergo terms of imprisonment. This was on the 22nd April 1957, and on the 5th of August 1957, the High Court of West Pakistan issued the writ of certiorari mentioned above. They held that the provisions of the Frontier Crimes Regulation under which the enquiry had been made into the question of the guilt or innocence of Malik Toti Khan and Mehrban Khan were void, as offending against the provision of Article 5 of the Constitution of 1956, on two grounds. The first ground accepted by the learned Judges was that the Regulation was intended to apply in the first instance to Pathans and Baluchis, and being based principally on recial or tribal considerations, could not be regarded as falling within the rule of reasonable classification. The learned Judges also referred to the power given by the Regulation to extend its provisions, and inferred therefrom with respect to the discrimination effected by the Regulation that "classification may be wholly arbitrary and capricious at the sweet will of the executive". The second ground on which these provisions were held to be discriminatory was that the executive authority viz., the Deputy Commissioner had an unfettered discretion as to the choice of persons "belonging even to Baluch or Pathan tribes as to whether their cases should go to a regular Court of law or to a jirga". It was held that the choice was arbitrary and was not governed by any guiding principle applicable to its exercise by the executive authorities. Special Leave to Appeal was granted to consider whether the provisions in question did indeed contravene the provisions of Article 5 of the Constitution of 1956. It may conveniently be mentioned here that it was stated at the Bar by Mr. Yahya Bakhtiar for the respondents that by a notification issued many years ago, the application of the Regulation to f` British Baluchistan" was put on a territorial basis, thus excluding discrimination 'on the ground of race.

Criminal Appeal No. 67 of 1958, relates to the North-West Frontier Province, like the appeal of Sabz Ali and Muhammad Akbar. It is brought by the State against one Abdul Latif Khan who is an accused person in a case of embezzlement in the capacity of treasurer to the Government treasuries at Peshawar, Charsadda, and Naushera. The case against him was referred by the Deputy Commissioner, Peshawar to a jirga consisting of the City Magistrate, Peshawar, the Assistant Commissioner, Peshawar, the Assistant Secretary, Public Works Department, Peshawar and an Assistant Secretary in the Finance Department of the North West Frontier Province Government. The High Court of West Pakistan upon motion by Abdul Latif Khan held that the relevant provisions of the Regulation offended against Article 5 of the Constitution of 1956, and granted a writ as prayed. All the three learned Judges who heard the case were of the opinion that section 11 of the Regulation offended against the equality clause, because there were no well-defined rules to guide and control the discretion vested in the executive

authorities to withdraw a case from the ordinary Courts and refer it to a jirga for trial. Two of them held that there was no discrimination such as to offend against Article 5 by reason of subsection (4) of section 1 of the Regulation providing for application in the first instance to Pathans and Baluchis, and such other clauses as the Provincial Government with the previous sanction of the Governor-General in Council, might declare to be subject thereto. It may be noted here that all the three learned Judges who heard the case have mentioned that by a notification published many years ago, the provisions in question were extended to all persons residing in the territories included in the North-West Frontier Province, which was absorbed in the Province of West Pakistan in 1955. In this case also leave was granted to consider whether the relevant provisions of the Regulation were repugnant to Article 5 of the Constitution of 1956.

The cases, before the Court thus fall into two classes. Two of them relate to orders of reference to jirgas by Deputy Commissioners. The other two relate to orders of conviction by Deputy Commissioners and therefore to what might be described as completed proceedings. The cases of Sabz Ali and of Abdul Latif Khan fail in the first category, but the orders made in these cases are not by any means similar. In Sabz All's case, it has been held that the reference to the jirga was valid under law and should be allowed to proceed except that, by way of enforcement of Article 7 of the Constitution of 1956, a direction has been made that the accused persons should be allowed, the benefit of counsel at the trial. In the latter case, on the other hand, the finding of .the High Court is that the reference- is illegal because it was made under a law offending against Article 5 of the Constitution of 1956, and they have directed that it should not be proceeded with. The question common to both these cases is whether today, and for the future, which is important since the trial in each case is yet to commence, the law allows of the making of references to jirgas, and the other consequential proceedings provided for by the Regulation. For, as from the 7th October 1958, a great change has come about in respect of the fundamental law of Pakistan. On that date, the President of Pakistan made a Proclamation whereby he abrogated the Constitution, and declared Martial Law in the entire country. On the 10th October, 1958, however, the President, acting in the capacity assumed under the Proclamation, made an Order providing for the continuance of laws which is Order (Post-Proclamation) No. 1 of 1958 and is described as the Laws (Continuance in Force) Order, 1958. This Order is deemed to have taken effect upon the making of the aforesaid Proclamation and proceeds to declare in section 2 that "the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution", this however being expressly made "subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law". Then in section 4 it is declared that "notwithstanding the abrogation of the late Constitution" all laws other than the late Constitution and all Ordinances and other legal instruments, a number of which were expressly mentioned, were to continue to have legal force, "until altered, repealed or amended by competent authority" and in the section itself it was provided that the validity was to be "subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law".

The Frontier Crimes Regulation is a law, which was in force immediately before the Proclamation, and as such, this law is saved by section 4, which however expressly does not retain the provisions of the Constitution of 1956 as law. Now, the question in the first two cases viz., those of Sabz Ali and of Abdul Latif Khan is

whether the provisions of the Regulation are to be applied according to their tenor and without reference to Articles 5 and 7 of the Constitution of 1956 which are included in Part 11 of that Constitution under the heading "Fundamental Rights". Article 4 in that part provided that every law and every custom or usage having the force of law should be void to the extent of its inconsistency with the Fundamental Rights. It is clear that these Fundamental Rights and the supporting Article 4 have not been retained as law, whereas the provisions of the Regulation have been so retained. This is so far as section 4 of the President's Order of the 10th October 1958, goes, but we were invited to say that because, by that Order, it is also provided that the country "shall be governed as' nearly as may be in accordance with the late Constitution", therefore, the Fundamental Rights, being related generally to all matters within the province of Government, should be deemed to have been kept alive. The argument is 'attractive, but does not take into account the discrepancy between the direct provision in the Order, which makes the Frontier Crimes Regulation a law with effect from the 7th October 1958 (in continuance of its previous existence as law under other instruments up to the 7th October 1958), and the equally direct exclusion of the provisions of the Constitution of 1956, from the laws of Pakistan. The Order does not furnish any indication, which might tend to weaken the primary and basic proposition upon which the Order itself is based, namely that the Constitution of 1956 is abrogated. To say that the Government of the country shall be carried on "in accordance with the late Constitution" is not equivalent to giving new life to that Constitution, or accepting that any of its provisions retained the slightest validity, of their own force. For that Constitution, as well as for the new dispensation, which replaced it, the date 7th October 1958, marks a point of no return. The abrogation of the Constitution of 1956 represents an irrevocable act of the Supreme authority by which it was performed. It has a definitive effect in relation, both to that Constitution, as well as to the order of things, which has replaced it. Consequently, the words in section 2 of the Order, viz., "in accordance with the late Constitution" only mean that in matters affecting the Government of the country, for which no provision is made in any instruments issued under the authority of the new regime, where guidance is needed, it is to be sought by reference to the wording of provisions contained in the Constitution of 1956 applicable in the like case. The direction is one, which operates by reference to a previous instrument, without giving validity to that instrument. Equally, the supreme authority may have declared that in some particular respect the actions of the Government would be in accordance with some provision contained in the Government of India Act, 1935, or other constitutional instrument, or even in a constitution of some other country. By the Constitution of 1956, the highest authority of an overriding character, governing all laws and legislation in the country, had been given to the principles, which were set out and enumerated as Fundamental Rights in Part II thereof. No law could be made in contravention of those rights on pain of invalidity. That prohibition is obviously not intended to continue, for the Order gives overriding power now to the President and the Chief Administrator of Martial Law to make Orders and Regulations contrary to anything appearing from the words used in the Constitution of 1956. Therefore, there is no room for the argument that the Frontier Crimes Regulation must still, in the new order of things, conform to the requirements of Part II of the Constitution of 1956. It derives its validity afresh from the Order, and its vires must be tested by reference to that Order only. On that basis, it is clear that the

Regulation may be applied, as from the 7th October 1958, according to its terms.

In the case of Sabz Ali a reference to jirga had been made, which must be held to be valid under the existing law. The direction by the High Court in Sabz Ali's case that he should be allowed to be defended by counsel at the jirga trial, being founded on Article 7 of the Constitution of 1956, is today without force and must therefore be set aside. The other questions arising in that case present little difficulty. It was said that the detention of one of the accused persons under the orders of the Deputy Commissioner, pending the proceedings before the jirga was illegal, because such detention should, after the making of the reference, be solely within the jurisdiction of the jirga. The argument is fallacious for, it does not appear that such a jurisdiction vests in the jirga, and since the function of the jirga is to enquire into the matter and report to the Deputy Commissioner as to the guilt or innocence of the accused persons, upon which recommendation the Deputy Commissioner is empowered to act in one of several ways, it seems clear that the duty of deciding as to whether or not the accused person shall remain in custody pending the disposal of his case, still inheres in the Deputy Commissioner despite the reference to the Jirga. It is o course perfectly clear that all Deputy Commissioners are Magistrates, and in that capacity qualified to order the detention of persons accused of criminal offences. The second point, as to the validity of the reference for lack of expression of an opinion as to the expediency of trial before the ordinary Courts is equally, of no weight, for the reference in this case was under section 15 of the Regulation which by its terms enables a Deputy Commissioner to instruct a Public Prosecutor to withdraw from a prosecution before a Court of Sessions at any time prior to the making of a final order in the case, with the object that the case may be referred to a jirga, and thereupon the Sessions Court is required to stay proceedings and the Deputy Commissioner is required to refer the case to a jirga. The law does not require any declaration as to inexpediency or otherwise. The third question raised was as to the constitution of the jirga i.e., whether it was constituted in accordance with the Pathan or Baluch usage. It seems that out of the jirga members nominated, three were stipendiary Magistrates. The High Court has held that this circumstance by itself did not vitiate the constitution of the jirga so long as it was convened "according to the Pathan, Baluch or other usage". Reference was also made to Act XIII of 1954 passed by the North-West Frontier Province Legislative Assembly providing that jirgas should consist of three or more persons, whether officials or otherwise, convened by the Deputy Commissioner and presided over by a section 30 Magistrate. At a later stage in this judgment, I propose to consider the purpose and effect of this amendment at length, but at this point I think it is sufficient to say that like the Frontier Crimes Regulation of 1901, this amending Act of 1954, is law having full validity in the new dispensation and therefore it is not open to any party today to challenge the legality of a reference to a jirga, so long as that jirga is constituted in accordance with the law as at present in force: Reference was made in the arguments to the decision of this Court in the case Crown v. Ghulam Muhammad Khan of Lundkhowar (P L D1956 F C 197), where also the jirga had included a majority of officials, but no reference was made during the arguments in that case to Act X111 of 1954 mentioned above, as will appear from the following observations of my Lord the Chief Justice in his judgment :-

> "It seems to us to be clear that this letter has the effect of amending the Regulation, and that for that reason it was ultra vires the Provincial Government. Neither before the Court of the Judicial Commissioner nor in the concise statement or arguments before us was any provision mentioned

under which the Provincial Government could amend the procedure laid down in the Regulation for the Constitution of the Council of Elders".

(The letter in question had been issued by the N.-W. F. P. Government to ail Deputy Commissioners directing them to form jirgas of competent Magistrates and where a sufficient number, that is to say three, of competent Magistrates were not available to appoint Tehsildars in lieu). That judgment clearly does not provide authority for holding that the 9onstitution of the jirga in the case of Sabz Ali is not in accordance with law, since there is a valid legislative enactment under which such a jirga may be appointed. Accordingly; it would seem that the appeal of Sabz Ali and Muhammad Akbar should fail, and, further more, the direction that these persons must be allowed the benefit of counsel before the jirga, must be cancelled as not being valid in law.

In the case of Abdul Latif Khan, also, the jirga was composed of officials. By itself, that circumstance does not affect the legality of its constitution. The other questions raised in this case as to the effect of Article 5 of the Constitution of 1956 upon the relevant provisions of the Regulation, is no longer, since the 7th October 1958, a living issue in view of the lapse of Article 5 along with other Fundamental Rights enumerated in the Constitution of 1956. These conclusions are sufficient for holding that the writ issued in this case by the High Court must be set aside, and the case against Abdul Latif Khan should be allowed to proceed before the jirga to which it has been referred by the Deputy, Commissioner. In the view, which I am inclined to take regarding .the effect of the Order of the 10th October, 1958, upon completed proceedings of prior date, it will be necessary for me later in this judgment to examine the question whether indeed the relevant provisions of the Frontier Crimes Regulation offended against Article 5 of the Constitution of 1956. But as to the case of Abdul Latif Khan, I am of the opinion that the appeal of the State should be allowed and the writ issued by the High Court should be withdrawn.

I proceed now to the consideration of the cases of Dosso and Malik Toti Khan, both of which come from that part of West Pakistan Province, which was previously described as Balouchistan. The first question, which arises is whether these two appeals can continue, in face of the provisions contained on the, Order of the 10th October 1958. In other words, is it within the expression and the intention of that Order that proceedings of the nature of these two appeals should be continued to a proper conclusion, or is it by expression and intention, the effect of that Order upon these appeals, that they should abate? It is on this point that I find myself with regret, at variance with the view which has found favour with my Lord the Chief Justice and my learned brethren.

The point falls to be considered upon the reading and interpretation of subsections (4) to (7) of section 2 of the Order of the 10th October 1958. These provisions are reproduced below:-

"(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari.

(5) No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administrator of Martial Law, or any person exercising powers or jurisdiction under the authority of either.

(6) Where a writ has been sought against an authority which has been succeeded by an authority mentioned in the preceding clause, and the writ sought is a writ provided for in clause (4) of this Article, the Court notwithstanding that no writ may be issued against an authority so mentioned may 'send to that authority its opinion on a question of law raised.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and the proclamation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith".

The particular words whose effect is to be judged are the words at the very end of subsection (7) proving that "all applications and proceedings in respect of any writ which is nod' so provided for shall abate forthwith". It is necessary for the purpose of this judgment to ascertain which is meant by the expression "abate" in this sentence and further what "applications and proceedings" are to suffer abatement.

The expressions "abate" and "abatement" do not appear to be capable of being defined generally with any exactness. They are used in a number of legal contexts, and their effect in each case may be gauged with precision, either from the context or from the terms of the relevant statute. The incidents of abatement vary from law to law. In several forms of law, one prominent feature of abatement is that the proceedings may be revived upon the happening of certain events, and the performance of certain conditions, so that it might be thought that in such cases, abatement is not a final conclusion, but has the effect of keeping the matter in a state of suspense, pending certain developments.

It seems scarcely possible to apply that conception of abatement to the provision here under examination. Every circumstance combines to create the impression that the provision is for an immediate and peremptory cessation, beyond hope of recall. It for that reason all the more necessary that it should be ascertained with precision, what applications and proceedings are Mended by this Order to suffer immediate and final cessation.

Abatement is ordinarily a concept of the procedural law. It takes effect frequently upon a proceeding becoming defective by the death or loss of capacity of any of the parties to a cause or matter. It may be based upon a defect of form, i.e., the plea may be raised on account of an informality or it may be founded upon a change or transfer of interest. The common cases of abatement in the Civil Law arise upon the death or bankruptcy of the party or upon the devolution of the estate in dispute. In all these cases there is provision for substitution of parties and for the proceedings to continue thereafter. In the law of election petitions a petition abates upon the death of a sole or the last surviving petitioner, but it may be revived by a competent person entitled to pursue it. In affiliation proceedings, i.e., proceedings commenced by a mother to obtain maintenance for an illegitimate child from the putative father, it has been held that the proceedings abate upon the death of the mother, because only the mother is competent to commence them and equally they abate upon the death of the

putative father. In these cases, the abatement is final. Proceedings in lunacy are abated by the death of the patient, and they remain so until a personal representative has been duly constituted, when they may be , revived.

These are the familiar cafes in which the law provides for abatement, but it is clear also that abatement may take place by operation of law. The last sentence in subsection (7) of section 2 of the Order of the 10th October 1958, is clearly such a law. It remains to consider what particular applications and proceedings are liable to abatement by the operation of this law. The proceedings with which we are concerned, namely, the convictions obtained in the two cases here under consideration, derive their force and owe their validity to the Constitution of 1956, and their validity would ordinarily fall to be judged against the provisions of that Constitution. The Order of the 10th October 1958 does not explicitly have any retrospective operation, and one would therefore hesitate, on the strength of a possible interpretation of the Order to declare the invalidity of anything done or suffered so long as the Constitution of 1956 was in force and operation. On the other hand, should the implication be clear, the Order of the 10th October 1958, must necessarily prevail over anything appearing in the Constitution of 1956 or anything seeming to have validity only by reference to the provisions of that Constitution.

We have been asked to declare that the proceedings instituted in the High Court to challenge the convictions in the two cases presently under discussion are being continued in this Court upon appeal, that these are proceedings "not so provided for", within the meaning of the last sentence in subsection (7) of section 2 of the Order of the 10th October 1958, and that they must consequently abate forthwith.

I have read with great care the reasons advanced in the judgments of my Lord the Chief Justice and my learned brethren which favour that conclusion, but I find myself still in doubt upon the question, and since the decision involves a question of the liberty of the subject, I feel that, consistently with the long accepted rules governing the interpretation and application of statutes, which is a matter strictly within the judicial field, it is my duty to refrain from coming to a conclusion in the sense desired by the learned Attorney-General arguing for the State. I shall state my reasons as briefly as may be.

To accept the proposition advanced by the Attorney-General amounts to holding that the provision in question provides for abatement of a proceeding not on the ground of procedural defect or lack of capacity or competency, but by reason of the cancellation of the Fundamental Rights which took effect from the 7th October 1958, so that as from that date, the validity of any law still in force was not to be judged in relation to those rights. Now, it will be clear from the discussion above in the cases of Sabz Ali and Abdul Latif Khan that, with reference to proceedings which on a date after the 7th October 1958 are still pending proceedings under section 11 of the Frontier Crimes Regulation, there can be no manner of doubt that the validity of these proceedings is not to be judged in the light of any of the Fundamental Rights enumerated in the Constitution of 1956, as from the 7th October 1958. But it is equally clear that up to that date, the duty of the Courts was plainly to declare any law, which did not comply with the said Fundamental Rights, to be invalid. Therefore, any words contained in the Order of the 10th October 1958, which are to have the effect of nullifying that duty as applying up to the 7th October 1958, must be words of the clearest possible import, since they would be words having

retrospective operation in respect of the high judicial authority of the superior Courts. That authority has been maintained and continued by the Order of the 10th October 1958, and as has been seen, in relation to the questions before the Court, there are no words in the Order, which may be thought to have retrospective operation. Therefore, I hesitate to accept an interpretation which would involve retrospective deprivation of the jurisdiction and annulment of the duty of the High Courts, existing on a date in the past, when under the then prevailing instruments, that jurisdiction and that duty were plain for all to see.

Secondly, I do not recollect having found the expression "abatement" to be ever used in relation to the failure of a proceeding resulting from the failure of the right upon v, hick it T was based. Abatement ordinarily follows upon defect of form or procedure or loss of capacity in parties, and it may not be safe to assume that the meaning of the word "abate" as used in the Order of the 10th October 1958 is so widely different from the generally accepted senses of that word, as is claimed by the learned Attorney-General. It is true that if by the Order of the 10th October 1958, any law has been wholly destroyed or deprived of effect whatsoever, then the issue of a writ to enforce any right provided for by such law becomes impossible. Any application or proceeding that may be pending whose purpose may be to obtain enforcement of such a right must therefore fail by reason of the right no longer being available, and not by reason of procedural or formal defects, or loss of capacity etc. The Order of the 10th October 1958, could have been worded to provide that no writ should issue in such cases, although it might have been thought that such a provision was superfluous. But, does the last sentence in subsection (7) of section 2 make any such provision? I note that the words are not that "no writ which is not provided for shall abate forthwith" but they read "no writ which is not so provided for shall abate forthwith" and immediately it becomes clear that there is a reference, by the use of the word "so", to something which has been stated earlier. That something is contained in the immediately foregoing clause in subsection (7) of section 2 which reads as follows:-

> "no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order . . . . . ."

It therefore becomes necessary to examine the Order to see what kinds of writs have been expressly provided for, and it is in my opinion a reasonable assumption that when the words ` unless it is provided for" are used what is meant is something stronger than a conclusion based upon mere inference, as to the provision. One must look diligently first for express provision, and if such be lacking, then for provision by implication of a strong and necessary character directly affecting not the right sought to be enforced by the writ, but the competency of the writ itself.

The search for expression in the above-mentioned sense need not take one far a field. In subsection (4) of section 2, it is expressly, stated that the Supreme Court and the High Courts shall have power to issue writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is clear that there is provision empowering the issue of writs by the Courts mentioned, and also for the kinds of writs, which these Courts may issue. By the operation of the prohibitive provisions in subsection (7), writs other than the writs provided for in subsection (4) cannot issue. But to the power given by subsection (4) there are exceptions contained in subsections (5) and (6). The Courts mentioned are expressly debarred from issuing

writs of any of the kinds mentioned in subsection (4) against the Chief Administrator of Martial Law, the Deputy Chief Administrator of Martial Law, and any person exercising power or jurisdiction under the authority of either. Specifically then, the Order makes a prohibitive provision, in respect of every kind of writ against these authorities, and therefore under subsection (7) any writs directed to any of these authorities shall have no effect. In subsection (6) there is a further provision, saving the authorities specified in subsection (5) from receiving writs in the capacity of successors to some other authority, against whom it was competent for the Courts mentioned to issue writs. When such a replacement takes place, the proceedings do not immediately terminate, or become terminable. The Court may continue the proceeding, but at the conclusion thereof, if it is of the opinion that ordinarily a writ should have issued, it may instead send its opinion upon a point of law arising in the case, to the successor authority.

These matters, appearing from within section 2 itself, furnish direct instances of writs provided for as well as writs not provided for by that section. Still bearing in mind that abatement is an incident applicable ordinarily to procedure and on grounds of formality or capacity, to which may be added the ground of immunity, I think it is plain that the expression "any writ which is not so provided for shall abate forthwith" is capable of full application to matters specifically expressed within section 2 of the Order of the 10th October 1958. 1 have read the remainder of that Order with great care for the purpose of determining whether it contains any other words having a strong and necessary implication of the abatement of a writ; and in especial a writ, i.e., as a specific process or machinery by which law is enforced. If the concluding words in subsection (7) of section 2 of the Order had been devoid of meaning or application unless they were understood to bring about a termination of writs and proceedings relating thereto, which had the effect of enforcing rights which have ceased to be available after the 7th October 1958, although they were available and had in fact been enforced in relation to a matter concluded long before that date, I might have felt it necessary to accept that the words must have the latter meaning, but I find in section 2 itself, sufficient material to indicate what was meant by the draftsman in using the expression "unless it is provided for by this Order" and the further expression "which is not so provided for".

One final reason for my being in a state of doubt upon this question may be added in brief. It is that the validity of writs issued prior to the 7th October 1958, under the provisions of the Constitution of 1956 does not appear to be generally hit by anything contained in subsection (7) aforesaid, on the interpretation for which the learned Attorney-General has contended before us. Only those of such writs which happen to be still subject to legal revision upon the coming into force of the new regime are sought to be avoided on the basis of this interpretation, and this, not on any consideration whether they were rightly or wrongly granted at the time when they were issued in the eye of the law as then in force, but merely because they happen to be pending by virtue of having been appealed against. It is, in my view, more reasonable to infer, especially since the Order of the 10th October 1958, does not appear, by expression, to have retrospective effect, that as to matters which were concluded during the period which finally terminated on the 7th October 1958, the intention of the Order is that the law in force during that period, at the relevant time, should be allowed to prevail. For, it remains further to be said with reference to a number of Fundamental Rights enumerated in Part II of the Constitution of 1956 that they do not derive their entire validity from the fact of having been formulated in

words and enacted in that Constitution. A number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilised mode, and speaking with great respect, it seems to me that the view pressed before us by the learned Attorney-General involves a danger of denial of these elementary rights, at a time when they were expressly assured by writing in the fundamental law of the country, merely because that writing is no longer of any force.

For these reasons, I am unable to hold beyond doubt that the concluding words of subsection (7) of section 2 of the Order of the 10th October 1958, have the effect of bringing to an abrupt end the proceedings in the petitions before the High Court commenced by the convicted persons in the two cases here under consideration. I do not therefore consider that it is open to me to reverse the judgment of the High Court in these two cases and to recall the writs issued by them unless I am satisfied that the view of the High Court on the point of repugnancy to Article 5 of the Constitution of 1956 is not tenable.

The provisions of the Frontier Crimes Regulation with reference to the trial of crimes commence with section 11 and, as has been indicated already, they consist in the main of directions enabling executive officers where they think "it is inexpedient that the question of the guilt or innocence of any person or persons accused of any offence, or of any of several persons so accused should be tried by a Court of any of the classes mentioned in' section 6 of the Code of Criminal Procedure 1898" to refer the question to a Council of Elders (otherwise known as a jirga) and to require the Council to come to findings upon the questions arising. Upon receipt of those findings, the authority is to take requisite action which may be in the nature of acquittal or discharge, or of a remand to the same jirga, pr a reference to another jirga, and if the Deputy Commissioner convicts the accused person he must do so in accordance with a finding of not less than three-fourths of the members of the jirga. There are special provisions regarding sentences which are in the main lower than those provided by the Penal Code, and do not include a sentence of death. Power is given to the Deputy Commissioner acting through the Public Prosecutor to withdraw any case from a Court of Session and the law requires that when this power is exercised the case shall be referred to jirga. By section 48, appeals are prohibited, but by section 49 the Commissioner is empowered to revise all decisions in criminal cases inquired into by jirga, and to exercise the powers of an Appellate Court in the case as well as the power of enhancing any sentences. Final validity is given to a finding of a jirga on a question of fact where the finding has been accepted by the Deputy Commissioner by a provision barring interference by the Commissioner unless there has been a material irregularity or defect in the proceedings or such a procedure as is calculated to occasion miscarriage of justice. These provisions are materially different from those contained -in the Code of Criminal Procedure, and while in some respects, they might be thought to be less liberal than the latter provisions, in other respects, e.g. the binding nature of a finding of fact by a three-fourths majority of a jirga and in the matter of sentences, it may be thought that they are more advantageous to the accused person. The right of trial by one's equals or "peers" which is embodied in the mode of trial by jury, as known to British justice, is not one, which has been easily or cheaply won. It is certainly very highly valued in countries where it prevails, as affording a guarantee for the subject against the possibility of official oppression through the modes of justice. In the Frontier Crimes Regulation, this right is allowed to a very great extent. It is not a right which is

allowed to the majority of the citizens of Pakistan. Indeed with the exception of a few districts in East Pakistan the right of trial by jury is practically non-existent in this country. Again, the punishments awardable under the Frontier Crimes Regulation certainly make a greater concession to principles of humanity than those laid down by the Penal Code in operation all over Pakistan, as well as in most areas to which the Frontier Crimes Regulation applies. The absence of a right of appeal might be thought to be an illiberal provision. Yet it must be remembered that a sentence awarded by a Deputy Commissioner under the Frontier Crimes Regulation, upon the recommendation of a jirga does not merely present an isolated punitive action taken by the States against an erring subject. It must be regarded as an equation of all the considerations to which the parties attach importance with reference to a crime committed in their midst as well as considerations applying more directly to the administration of areas where the maintenance of law and order is no easy matter, e.g. the effect upon family and tribal feelings, the possible result in regard to the maintenance of good order within the affected area and adjacent areas and the interests of public policy generally. The correction of an order having this nature and quality cannot lie within the four corners of a precise appeal as understood in the Code of Criminal Procedure. I had occasion to consider this question, though not in the same context as in this case, in an earlier case before the Federal Court of Pakistan, which is published as Samundar v. Crown (PLD 1954 F C 228). I there expressed the opinion that if the trial of offences under section 1 I of the Regulation "can be regarded as a mode of justice at all, it is certainly not such a mode as is operated through the ordinary Courts of justice acting in accordance with the law of procedure and of evidence, but is rather to be assimilated to, and included among the agencies of the general administration". The question for decision in that case had been formulated as being "whether .the Commissioner or the Deputy Commissioner can be regarded as a Court of justice, or whether on the contrary these officers are not to be regarded as part of the administrative agency established for the settlement of criminal cases, under the special conditions obtaining in Frontier areas". With reference to decrees in civil matters which may be referred to jirga under section 8 of the Regulation, I made the following observation:-

> "Obviously, such a decree is no simple decree of the Civil Court of general jurisdiction. It is essentially to be regarded as an instrument embodying a settlement of rights between the contestants, which also satisfies the interests of public policy, by which can only be understood, in relation to any unsettled or frontier area, the general administrative policy of the Government".

These observations have some relevancy to this case. Even though the discussion of this question is confined to my judgment in the present cases, and the conclusion does not form the basis of the decision of the Court, yet it may be of some use in elucidating the matter in some later case. I conceive that it is by no means illogical, and from the point of view both of justice as well as of sound administration generally, it may in certain areas be by no means unwise, that the power to revise decisions by a Deputy Commissioner upon recommendations by a jirga should be placed in the hands of a higher executive authority, and that it should not be confined within the four corners of an appeal. Consequently if the conditions which make inquiry by jirga into criminal offences an appropriate mode of investigation of such offences for the purpose of imposition of punishment by the State be postulated, then I do not think that it can be denied that the mode of reviewing of convictions

and sentences which has been laid down in the Frontier Crimes Regulation is appropriate to the requirements.

That in certain areas the conditions which rendered it necessary to maintain a system of investigation of crimes for the purpose of imposing punishments at the hands of the State, in the manner which was traditional in those areas, still continue to exist can hardly be denied. If there be any doubt or difficulty, in the matter, it will in my opinion be found to affect only the question of the area within which or the persons to whom such a system may appropriately be applied. It is common knowledge that as the power of the British extended from Bengal in the East to the Khyber Pass in the West, in a period extending over something like a hundred years the British Administrators left behind them settled areas, and by successive stages, brought under their administration further areas which had up to that time been under less elaborate administration, and in some cases under no administration at all. In course of time, the eastern provinces of India, which had been for a considerable time under British Administration, came to be distinguished by the designation of "Regulation Provinces", and towards the west there were added one by one, provinces, which were known as "non-Regulation Provinces". In the Regulation Provinces the head of each district was known as the Collector and District Magistrate, thereby emphasising that he derived his powers from the revenue and criminal laws. In the non-Regulation Provinces, the head of the district was designated "Deputy Commissioner" emphasising his capacity as the local agent of the Government, and pointing to the possession of a high degree of initiative and freedom of action in the interests of firm and sound administration. The Punjab and the North-West Frontier Provinces were for a great many years treated.; as non-Regulation Provinces. Beyond the North-West Frontier Province were the "tribal areas" where the processes of government were distinctly loose and power was largely deposited in the hands of tribal leaders, whose actions were subject to supervision and correction by the representative of the suzerain power described as the Political Agent. A remnant of this arrangement may still be found in the "special areas" for which there was specific provision in the Constitution of 1956. It is agreed that in the "special areas" justice is administered by the jirga system alone. The Constitution of 1956 barred the jurisdiction of the High Court and the Supreme Court in respect of the special areas.

The North-West Frontier Province and Baluchistan were the particular areas where the non-Regulation provinces marched with the tribal areas, and where the new modes of trial of crimes under the Criminal Procedure Code came into contact directly with the earlier and more primitive modes operated through jirgas. A reasonable basis for the application of a measure of elasticity in dealing with crime arising within these areas was provided by reason of their being populated largely by people whose emancipation from their traditional modes of administration of justice was as yet partial, about the time when the present Frontier Crimes Regulation was enacted. When to these conditions are added the considerations that the areas in question are but sparsely populated for the most part, and that the population is largely nomadic, so that movement over the borders between the tribal areas and the provinces on the east and those areas and foreign countries on the west was constant, it wilt easily be appreciated that the decision as to whether in a particular case arising in the marginal areas, the more expedient course would be to sand the case for investigation to a jirga rather than to have it tried by one of the regular Courts, was by no means easy to make. It would involve in probably a

majority of cases considerable knowledge and experience of the ways of life and habits of thought and degree of development of the parties to the case as well as of the witnesses, .and generally of the conditions prevailing among the people of the locality. To say that in every such case the authority charged with the exercise of the discretion should act so as to preserve only the recognised overriding principles of criminal justice as applied in the regular Courts e.g. of giving the benefit of every doubt to the accused, of presuming him to be innocent until he was proved to be guilty by evidence of a clearly admissible character, etc, would be to place too great a restraint upon the decision and a restraint whose operation could not by any means be regarded as advantageous to either the administration of justice or the administration of the area in general. If a legislature in such conditions left it to the head of the local administration to decide whether in a particular case, there being concurrent jurisdiction, he should not allow the case to go before the ordinary Courts, but should have it investigated by a jirga, it would be hardly possible to condemn the provision as one designed merely to enable discrimination to be made between one person and another or one class and another within the area. As regards the question of discrimination between races, which has been discussed in some of the judgments under appeal, it falls to be observed that since notifications were made many years ago extending the provisions of the Frontier Crimes Regulation to the entire Province of Baluchistan, the statute cannot now be assailed upon this particular ground.

The High Court judgments are agreed that by placing it within the power of the Commissioner or the Deputy Commissioner to decide that a case should go before a jirga and be withdrawn from the jurisdiction of the ordinary Courts, the law has placed a naked and uncontrolled power of an arbitrary nature in their hands which was capable of producing inequality as between citizens placed in exactly similar circumstances. In coming to this conclusion, they have in my opinion overlooked the full force and effect of the words requiring that before taking a decision to this effect, the authorities should have formed the opinion that it is inexpedient that the case should go before the ordinary Criminal Courts. These authorities would be expected to exercise the power thus given to them by reference to all the considerations arising in relation to each case coming before them for an order under section 11. The word "inexpedient" is clearly not to be understood as making it a mere matter of short-sighted policy to gain a particular result. Expediency in this context is a matter to be judged widely in relation to all applicable considerations.

It has been urged that in many cases, the authorities have acted - merely because they wished to secure a conviction and knew that the evidence was such as would not satisfy a Court operating under the Code of Criminal -Procedure and the rules of evidence under the Evidence Act. But that is clearly not the same thing as saying that the authority was anxious to secure the conviction of an innocent person. There is an illuminating sentence in the judgment of the High Court in the case of Khair Muhammad Khan v. The Government of West Pakistan, which is printed in the paper-book of Sabz Ali's appeals, where speaking of the procedure adopted by jirgas, the learned Judge observes as follows:-

> "In practice even the Council holds what are called secret and open inquiries. It examines witnesses informally and visits the spot or its neighbourhood often incognito to ascertain the truth".

The difference between the attitude of a jirga when entering upon an investigation and that of a Court acting under the Code of Criminal Procedure and the law of evidence appears with great clearness in this statement. Only too often the ordinary Court considers that its d4ty is merely to produce a judgment upon strictly admissible evidence. A Court, which goes out of its way to ascertain the truth only too frequently falls into error, which may be visited by one of the corrective processes known to the ordinary criminal law. But for a jirga acting honestly, there is no duty except that ascertaining the truth by whatever means may be available to them, and there can be no doubt that in the Frontier areas, those means can hardly be confined with any hope of success within the rigid requirements of the aw of evidence and the Code of Criminal Procedure.

Therefore, it may be a fallacy to suppose that by reference of a case to jirga, ascertainment of the truth is prejudiced. On the other hand, it might often be made easier. It follows that such a reference is not necessarily to the disadvantage of an accused person and certainly it can only rarely be so in a-case where such person is innocent.

This is not say that the power under section 11 is not capable of abuse. Indeed, in one of the cases which have come under examination in these appeals, it does appear that the conditions which I may compendiously describe as "frontier conditions" are wholly absent, and the crime alleged has been committed not merely in a settled area but in old settled towns, and in all probability involves no evidence other than that of persons living in settled areas. The crime alleged is one of misappropriation of money, involving no violence. It may be a matter for consideration in revision by the Commissioner whether the reference in the case is appropriate, but a mere abuse of a statute is y certainly not sufficient for avoiding the statute on any ground relatable to such a provision as Article 5 of the Constitution of 1956.

For these reasons, I am of the view that section 11 of the Regulation is not a discriminatory provision inasmuch as treats of actual conditions existing in the areas in question, where the two separate jurisdictions, namely, the modern and the traditional, are both necessary, and the exercise of a choice as to which jurisdiction should apply to a particular case is entrusted to highly responsible officers, who are required by the statute to act upon a principle of expediency, having regard to the general administration of the area including the dispensation of justice in the particular case.

A word may be added regarding the new practice of appointing officials and Magistrates to be as members of jirga. Such a procedure may be thought to be inconsistent with the views expressed above as to the need for the jirga system in frontier areas. The appointment of Magistrates is now being' made under a legislative sanction which has become a part of the Regulation itself, and the Regulation as a whole not being contrary to the requirements of Article 5 of the Constitution of 1956, it follows that this amendment is equally saved. It may appear that this amendment does not in fact implement the purposes which underlay the enactment of the Regulation, but y that question does not affect the vires of the legislation. Moreover, it may be that the legislature has resorted to this device in order to introduce into the jirga system 'some of the practices and principles which lie at the foundation of the administration of justice by the ordinary Courts. In that

view, the provision may be one in aid of gradual modernisation of ideas of justice in the areas concerned.

These reasons are sufficient for the disposal of the case of Malik Toti Khan and Mehrban Khan. It has not been shown to our satisfaction that the reference of the case by the Deputy Commissioner to a special jirga after the failure of the previous order of remand to the first jirga constitutes an illegality so as to vitiate the order of conviction (vide section 11 (3) of the x Regulation). In any case, that is a matter, which the Commissioner is competent to deal with. Accordingly, on the view I take, the appeal of the District Magistrate of Sibi against Malik Toti Khan and Mehrban Khan should be allowed and the writ issued by the High Court should be recalled.

In the case of Dosso and Muhammad Khan, the position is materially different in so far as the trial and all proceedings up to the conviction were held in a "special area" over which the High Court had no jurisdiction. It follows that the High Court had no authority to decide whether the trial and conviction were legal or otherwise. The only matter of which they could be seized was whether these persons were properly held in custody by the Jailer at Machh. For the decision of that question the learned Judges should have referred to sections 15 & 16 of the Prisoners' Act of 1900. The Jailer at Machh was competent to give effect to a warrant for the detention of these two persons, according to the tenor of the warrant. Such a warrant under the official signature of a proper officer is by itself sufficient authority for holding these persons in custody. The judgment in the case does not show that the warrant was ever examined, much less that it was found to suffer from defect of any kind, and consequently the order for release of these two persons was clearly incorrect. It must accordingly be set aside and the appeal allowed for that purpose.

**AMIRUDDIN AHMAD, J**.- These four appeals arise out of orders made by the High Court of West Pakistan on petitions for issue of writs against convictions and orders made under the Frontier Crimes Regulation (III of 1901). As the orders of the High Court are based on Articles of the Constitution of 23rd March 1956 relating to Fundamental Rights given under Part of the said Constitution and the points involved are similar, the four appeals were heard together.

Appeal No. 1 of 1957 is a certificated appeal from the Quetta Circuit of the High Court, in which the respondents were convicted under section 376 of the Pakistan Penal Code and sentenced to five years' rigorous imprisonment by the District Magistrate of Loralai in the special areas, on the basis of an award by a jirga under the Frontier Crimes Regulation, but confined in the Machh Jail within the jurisdiction of the High Court. The High Court refused the prayer for quashing of conviction and sentences, but held that it was a detention under an illegal order as being repugnant to Article 5 of the Constitution and void under Article 4, and therefore the consequent detention was also illegal and as it was within the jurisdiction of the Court, a writ of habeas corpus was issued.

Criminal Appeal No. 60 of 1958 is by special leave of this Court from an order of the Quetta Circuit of the High Court. In this case the respondents were convicted by the District Magistrate and Deputy Commissioner, Sibi, on the basis of an award by the Council of Elders under the Frontier Crimes Regulation for instigating the murder of one Zarif and complicity in it under section 302 read with section 109 of the Pakistan Penal Code and sectenced to five years' rigorous imprionment with a

fine of Rs. 500. The convictions and sentences were set aside by the High Court as being repugnant to Articles 5 & 4 of the old Constitution and the respondents were directed to be treated as under-trial prisoners.

Criminal Appeal No. 67 of 1958 is by special leave of this Court against an order of the Peshawar Bench of the High ` Court. The respondent was charged with offences under sections 409 & 420 of the Pakistan Penal Code and the case was referred by the Deputy Commissioner to the Council of Elders under the Frontier Crimes Regulation. The respondent applied for an injunction in a civil suit before the Sub-Judge for restraining the Government from taking action under section 11 of the Frontier Crimes Regulation, but the prayer was refused. The High Court on appeal granted temporary injunction and proceedings before the jirga came to a halt. The respondent then filed a petition under section 223-A of the Government of India Act, which gave the powers of issuing a writ to the High Court similar to those given by Article 170 of the Constitution of 1956, and the Peshawar Bench of the High Court quashed the proceedings before the jirga holding sections 11 to 20 of the Frontier Crimes Regulation as repugnant to Article 5 of the Constitution of 1956 and holding that the reference to the jirga was void.

Criminal Appeal No. 24 of 1957 is by special leave of this Court from an order of the High Court of West Pakistan, Lahore. In this case the original prosecution was started before the Sessions Court, but on the application of the Public Prosecutor under section 15 of the Frontier Crimes Regulation the case was withdrawn and referred to a jirga. The charge was under section 302 read with section 34 of the Pakistan Penal Code of the murder of one Shah Zaman and was pending before the jirga, when the respondent applied for a writ of habeas corpus against his detention during trial. The High Court refused the issue of writ, but a direction was given that the respondent was Rot to be denied the right to consult, and be defended by, a legal practitioner, which was given by Article 7 of the Constitution of 1956.

These appeals came up for hearing before the Court on the 13th October 1958, when a radical change had been effected in the Government of the country, which had a far reaching effect on the laws of the land. The President of Pakistan, by a proclamation dated the 7th October 1958

(1) abrogated the Constitution of 23rd. March 1956 ;

(2) dismissed the Central and Provincial Governments with immediate effect ;

(3) dissolved the National Parliament and Provincial Assemblies ; and

(4) placed the whole country under Martial Law and appointed the then Commander-in-Chief as the Chief Martial Law Administrator of Pakistan.

On the 10th October 1958, the President promulgated the Laws (Continuance in Force) Order, which was to take effect immediately upon the making of the proclamation of 7th October 1958.

We are now to decide these appeals in the light of the change in the law brought about by the new Order becoming effective.

According to Continental Legal thought in Philosophy and Jurisprudence as represented by Hans Kelsen such a change has the effect of changing not merely the Constitution but the entire legal order. The laws that have been continued by the sub-,g sequent order are not identical with the old laws, because the reason for their validity is different and the continued laws receive their validity exclusively from the new order, subject to limitations put by the new order.

Article II of the Continuance of Laws Order provides that notwithstanding the abrogation of the Constitution and subject to any order of the President and Regulation made by the Chief Administrator of Martial Law, Pakistan shall be governed as nearly as may be in accordance with the late Constitution. By clause 4 of the said Article the Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, except as to orders made under the authority of the Chief or the Deputy Chief Administrator of Martial Law. By clause 7 of the said Order, all orders and judgments of the Supreme Court made between the promulgation and the proclamation of the Order were declared to be valid and binding, but except these orders and judgments no writ or order for a writ issued or made after the proclamation was to have effect unless provided for by this Order and all applications and proceedings in respect of any writ, which is not so provided for, shall abate forthwith. By Article IV of the Laws (Continuance in Force) Order, all laws other than the late Constitution subject to any order of the President or Regulation made by the Chief Administrator of Martial Law were continued. The result is that with the abrogation of the late Constitution the Fundamental Rights given i1-1 Part II of that Constitution, on the basis of which the writ petitions in these appeals were decided, are also abrogated. As an appeal is a continuation of the proceedings, the writ petitions, which originated these pending appeals, must also be deemed to be pending. Now we have to see whether there is any provision in the Laws (Continuance in Force) Order saving these writ petitions. Clause 7 of Article 11 of the Laws (Continuance in Force) Order says that no writ or order for a writ issued or made after the proclamation shall have effect unless it is provided for by this order. The Order only provides for issue of writ in clause 4 of Article II, and in view of the legal position that by the new Order having become effective, the new laws are not identical with the old laws, it must be held that writs can only be issued now in respect of rights given under the continued laws in the new Order, and not to enforce rights including Fundamental Rights given by the Constitution now abrogated.

It was argued in one of the appeals on behalf of the respondent that as under Article II of the Order, Pakistan is to be governed as nearly as may be in accordance with the late Constitution, the Fundamental Rights in Part II of the said Constitution are still available to the petitioners for writ. I am unable to accept that Fundamental Rights have been saved. The word `governed' relates to the structure and manner of Government, which has been changed by the dissolution of the legislative bodies and the dismissal of the Ministries, and the' words in the Article have not the effect of reviving the Funda-1 mental Rights. This view finds support also from the language of Article IV, clause 1 of the said Order.

One of the arguments raised in Appeal No. 24 of 1957 was that the order of reference to jirga made by the Deputy Commissioner does not say that it was expedient to make such a reference. The question of expediency arises only when the reference is made under section 11 of the Frontier Crimes Regulation, but in this case

it was at the instance of the Public Prosecutor and the reference was made under section 15, subsection (2) of the Regulation, which leaves .no option with the Deputy Commissioner to refuse when asked to make a reference. In Appeal No. 60 of 1958 it was argued that the Deputy Commissioner having once remanded the case to a jirga was incompetent under the Frontier Crimes Regulation to make a second order of remand. I am unable to accept this proposition, as the first remand became ineffective, the jirga having expressed their inability to submit their final award, as they thought that their minds were greatly prejudiced by the approach of different persons on behalf of the parties and returned the case. In the circumstances I think the second remand was competent.

These appeals, which must be deemed to be a continuation of the proceedings originated by applications for writ before the High Court, and not provided for by the Order, abate under Article II, clause 7 of the Order. The result is that the parties are relegated to the position at which they were at the date at which the applications for writs in these appeals were made. As by the Laws (Continuance in Force) Order, the Frontier Crimes Regulation along with other laws has been continued freed from the trammels imposed by the late Constitution, I would order that the convictions and sentences in Appeal No. 1 of 1957 and Appeal No. 60 of 1958 will stand, and the trials before the jirga in Appeal No. 67 of 1958 and Appeal No. 24 of 1957 will proceed in accordance with the provisions of the Frontier Crimes Regulation.

**ORDER OF THE COURT**

In accordance with the judgments of the majority, the proceedings for writs in each of these cases are held to have abated. The result is that the direction made by the High Court in the case of Sabz Ali and another (Criminal Appeal No. 24 of 1957) and the writs issued by the High Court in the other three cases are hereby set aside. There will be no order as to costs.

A. H. Order accordingly.