EDWINGSON BAREH

v.

STATE OF ASSAM AND OTHERS

November 29, 1965

[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.]

Constitution of India, 1950, VI Schedule, Para 1(3)—Scope of Governor's power—If Parliamentary legislation necessary to make changes effective.

On 26th January 1950, the United Khasi-Jaintia Hills District was formed as one of the Tribal Areas of Assam. The area along with other Tribal Areas mentioned in Parts A and B of the Table appended to paragraph 20 of the Sixth Schedule to the Constitution, are governed by the provisions prescribed by that Schedule. Under Paragraph 2(4) of the Schedule, the administration of the United Khasi-Jaintia Hills District vested in the District Council inaugurated on 27th June 1952. The appellant was elected as Chief Executive Member of the District Council in March 1963, and by various notifications the term of the District Council has been extended up to 2nd May 1965. On 26th August 1963, the Governor of Assam appointed a Commission under paragraph 14(1) to examine and report on the creation of a new autonomous district for the people of Jowai sub-division and for excluding it from the United Khasi-Jaintia Hills District. The Commission made its report for such creation and exclusion on 20th January 1964. The Council of Ministers considered the report, decided to accept the recommendation, drew up an explanatory memorandum as required by paragraph 14(2) of the Schedule and sent the entire file to the Governor who noted on it "seen thanks". The Minister in charge, then laid the report of the Commission and the explanatory memorandum, stating that the Government had decided to accept the recommendation of the Governor on the report, before the Assembly, and the Assembly passed a resolution approving the action proposed. On 23rd November 1964, the Governor issued a Notification by which the new autonomous district was created and was excluded from the United Khasi-Jaintia Hills District with effect from 1st December 1964. The appellant challenged the Notification by a petition for the issue of a writ in the High Court, which was dismissed.

In appeal to this Court, it was contended that: (i) Paragraph 1(3) of the Schedule does not confer upon the Governor power to constitute a new autonomous district and that it could be done only by Parliamentary legislation under Paragraph 21 of the Schedule under which powers are granted to Parliament to amend the Schedule and even if he had the power, the Governor's decision must be confirmed by Parliamentary legislation; and (ii) the Notification was invalid because the mandatory provisions of paragraph 14 had not been complied with.

HELD (*Per* Chief Justice, Wanchoo, Ramaswami and Satyanarayana Raju, JJ.) : (i) When paragraph 1(3)(c) provides that the Governor may, by public notification, create a new autonomous districts; it does not contemplate, that the Constitution requires something more to be done by Parliament, in order to make the notification effective. [782 A]

A Paragraph 1(3) confers on the Governor power to issue a notification for the purposes of bringing about any of the results enumerated by cls. (a) to (g) of the paragraph. Clause (c) refers to the power of Governor to create a new autonomous district; cl. (e) refers to the power to diminish the area of any autonomous district, and cl. (g) refers to the power to define the boundaries of any autonomous district. The proviso to the paragraph imposes a condition on the exercise of the powers conferred by cls. (c) to (f) by requiring the Governor before exercising the B powers to appoint a Commission under Paragraph 14(1) to report on those matters and then to consider its report. Paragraph 1(3) indicates that the Constitution has delegated to the Governor a part of the power conferred on Parliament itself by paragraph 21. If the Governor has been clothed with the relevant power, the exercise of the power must by itself, be effective to bring about the results intended by cls. (c) to (f) of paragraph 1(3). The power must be exercised subject to the C condition prescribed by the proviso, but once it is properly exercised it becomes effective and there is no need for parliamentary legislation in that behalf. [780 H; 781 A-B, C-D; 782 B, C-D]

The two Acts, namely Act 18 of 1954 and Act 42 of 1957, one for renaming a District and the other for excluding an item from Part A and including it in Part B, do not show any legislative practice requiring parliamentary legislation with respect to the matters covered by the Notification. [782 G; 783 D]

D It is not necessary that for an effective exercise of his power by the Governor there should be confirmation by Parliamentary legislation, because, the power of Parliament under paragraph 21 is very wide and includes the power to take away the Governor's power, and in the very unlikely event of the Governor attempting to challenge the decision of Parliament in respect of any of the matters mentioned in Paragraph 1(3), Parliament can take away his power altogether by suitable legislation. E [783 F]

The modification made by the impugned Notification does not affect the contents of paragraph 20(1), because, even after the Notification the paragraph truly and correctly provides that the areas specified in Parts A and B of the table shall be tribal areas within the State. What the Notification purports to do is to change one item into two. Since the power to bring about the change is expressly conferred on the Governor by paragraph 1(3)(c) to (g), the exercise of that power, which leads to F a consequential change in paragraph 20(2) which just gives a discription of the areas, does not require Parliamentary legislation to make the change effective. Therefore, it would not be reasonable to hold that without Parliamentary legislation the impugned Notification cannot validly effect any change in item 1 of Part A of the table appended to paragraph 20. [784 C-E, H; 786 B, C]

(ii) The power conferred on the Governor by paragraph 1(3) had G been validly and properly exercised by him.

One of the conditions prescribed by paragraph 14 is that the Governor should consider the report submitted by the Commission and make his recommendations. Even if the Governor was expected to apply his mind and make a recommendation, he is not precluded from receiving the assistance of the Council of Ministers before he makes up his mind, and on the record it must be held that the Commission recommended H that a new autonomous district should be created and that the Governor agreed with the recommendation. [789 F; 790 B]

Though the Commission appointed under paragraph 14 used the words "District Council" on considering its recommendations as a whole

there is no doubt that what it recommended was the creation of a new autonomous district. [787 F-G] A

Per Hidayatullah, J. (dissenting) : No action could be effective without Parliamentary legislation under Paragraph 21 to amend the operative portion of paragraph 20 which Parliament alone can amend, Further, the Governor, far from playing the key role which the policy underlying the Schedule envisages, left the entire matter to the Government. B

(i) When the final step is taken to divide a tribal area it amends the Sixth Schedule. Paragraph 1(3) says nothing about the amendment of paragraph 20, and the Governor has no power under cls. (c), (d) and (e) to amend the paragraph or the Table appended to it. A power to amend paragraph 20 and an amendment of the paragraph and the table cannot be implied, in view of paragraph 21, under which powers are granted to Parliament to amend the Schedule. Even if it is not an amendment for purposes of Art. 368, the amendment cannot be such a simple affair that a Notification of the Governor amends the provisions by implication. If the Notification alone did that there would be antinomy between the Notification and the Schedule. Paragraph 20 and the Table will remain unaltered and the Notification will render them obsolete. Therefore, to complete the chain of steps the power under paragraph 21 must be exercised to alter the autonomous districts, the names and areas of which are laid down by Parliament. The Governor's Notification is one of the means of achieving the change but effectiveness can only be given by Parliament as it was done on previous occasions when Act 18 of 1954 and Act 42 of 1957 were passed. There is no material as to what the practice or procedure was that was followed when changes were made in the tribal areas, except that on previous occasions Parliamentary legislation was undertaken, and while it is not conclusive, it is a circumstance which also points in the direction that Parliamentary legislation must cap all other steps if the Schedule is to read true to the new situation. [803 C.F-H; 804 F-H; 813 F1H] C D E

(ii) The history of these backward tracts and the scheme of the Sixth Schedule show that the Governor is intended to discharge special functions in the administration of the tribal areas in Assam in which a start in democratic institution is being made. In the present case the Governor was very much in the background and the initiation and formation of opinion was by the State Government. He was only informed after everything was over. [810 F; 813 E] F

The functions of the Governor are not made subject to the scrutiny of the Government of Assam, and the Union also has not been given the power to give directions as to the administration of these autonomous districts. The Governor is expected to act independently and not with the advice of Ministers. Should difference arise between them the legislature would decide. Under paragraph 14(2) there is provision for the appointment of Commissions for various purposes mentioned in that paragraph and paragraph 16. As regards the changes in autonomous districts contemplated by paragraph 1(3)(c) to (f), if the State Government agreed with the Governor there would be no need to explain what action the Government was going to take; it has only to implement the decision administratively and the Governor would notify the changes. The need for an explanatory memorandum arises if the Governor's recommendations are not accepted by the State Government. Apart from this control by the Legislature in specified matters, there is nothing to show that in addition the District and Regional Councils, which are autonomous in almost every way, are to be controlled by the Council of G H

A Ministers through the Governor. The Governor's note hardly squared with the special responsibilities contemplated by the Schedule. [805 D-E; 810 G; 811 B, D-G; 812 A, F]

Even in the Commission's recommendation there was some confusion, though it may be conceded that when reference was made to a council, an autonomous district was meant. [813 D]

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 968 of 1965.

Appeal from the judgment and order dated February 5, 1965 of the Assam and Nagaland High Court in Civil Rule No. 286 of 1964.

C *M. C. Setalvad,* and *D. N. Mukherjee,* for the appellant.

C. K. Daphtary, Attorney-General, and *Naunit Lal,* for the respondents.

The Judgment of GAJENDRAGADKAR, C.J., WANCHOO, RAMASWAMI AND RAJU, JJ. was delivered by GAJENDRAGADKAR, C.J. HIDAYATULLAH, J. delivered a dissenting Opinion.

D

Gajendragadkar, C.J. The appellant, Edwingson Bareh, belongs to the village of Barato in Jowai area of the United Khasi-Jaintia Hills District in Assam. He is an elector from the said area to the District Council of the said United Khasi-Jaintia Hills District. In fact, he was elected as a member to the said E District Council from Nongjngi Constituency (No. 23). This constituency fell within the Jowai area of the said District. Later, the appellant was elected as Chief Executive Member of the District Council in March, 1963. By virtue of his office, he draws a monthly salary and other allowances under the provisions of the United Khasi-Jaintia Hills District Council Chairman's, F Deputy Chairman's and Executive Member's Salaries and Allowances Act, 1953. He is entitled to hold the said office till a new District Council is elected and takes over.

On the 26th January, 1950, when the Constitution came into force, the United Khasi-Jaintia Hills District was formed as one G of the Tribal Areas of Assam, and in this area were merged the Khasi States with the other areas of the Khasi-Jaintia Hills. The boundaries of this area are defined by paragraph 20(2) of the Sixth Schedule to the Constitution. All the Tribal Areas mentioned in Part A and Part B of the Table appended to paragraph 20 of the Sixth Schedule are governed by the provisions H prescribed by the Sixth Schedule.

Under paragraph 2(4) of the said Schedule, the administration of the United Khasi-Jaintia Hills District vested in the District

Council which was inaugurated on the 27th June, 1952. This Council consists of 24 different constituencies out of which 6 are in the Jaintia Hills area. The District Council has been clothed with administrative, legislative and judicial powers over the territory of the District by the relevant provisions of the Sixth Schedule. By the notification issued on the 1st of June, 1964, No. TAD/R/8/62, the term of the present District Council was extended up to the 2nd January, 1965, or until the newly elected District Council takes over. By a subsequent notification issued in December, 1964, No. TAD/R/8/62, the period of the said Council was further extended from 3rd January, 1965 to the 2nd May, 1965. Under the present administration set up, the Executive Committee of the District Council consists of three members including the Chief Executive Member and two other members, and all the executive functions of the said Council are vested in the Executive Committee.

Purporting to act on certain representations received by him, the Governor of Assam appointed a Commission under paragraph 14(1) of the Sixth Schedule on the 26th August, 1963. This Commission was required "to examine and report in the matter of, (1) creation of a new autonomous District for the people of Jowai Sub-Division of the United Khasi-Jaintia Hills Autonomous District, and (2) exclusion of the area from the United Khasi-Jaintia Hills Autonomous District." The Commission made its report on the 20th January, 1964 and recommended "the creation of a new autonomous District Council for the Jowai Sub-Division of the United Khasi-Jaintia Hills Autonomous District by excluding the areas comprising the area of the said Sub-Division from the United Khasi-Jaintia Hills Autonomous District."

Thereafter, the Minister-in-charge of the Tribal Areas and Welfare of Backward Classes Department of the Government of Assam laid before the Assam Legislative Assembly during its autumn session of 1964 the report of the Commission with an explanatory memorandum made on the 25th September, 1964. This memorandum stated that the Government had decided to accept the recommendation of the Governor on the said report and give effect to it.

After the report was thus placed before the Legislative Assembly, the Assembly passed a resolution approving of the action proposed to be taken by the Government of Assam on the report in question. On the 23rd November, 1964, a notification No. TAD/R/50/64 (hereinafter referred to as 'the Notifica-

A tion') was issued by the Governor of Assam in accordance with the memorandum which had been placed before the Legislative Assembly of Assam. By this notification, the Governor of Assam was pleased "to create a new Autonomous District to be called the Jowai District by excluding the Jowai Sub-Division of the United Khasi-Jaintia Hills District with effect from 1st December, B 1964; and that the boundaries of the Jowai District shall be the boundaries of the Jowai Sub-Division of the United Khasi-Jaintia Hills District."

The appellant challenged the constitutional validity of this notification by filing a writ petition before the High Court of C Assam and Nagaland on the 30th November, 1964. In his writ petition, the appellant alleged that the notification was invalid and *ultra vires* the powers of the Governor. Alternatively, it was urged that in exercising his powers, the Governor has contravened the mandatory requirements prescribed by paragraph 14 of the Sixth Schedule to the Constitution. The appellant's case was D that even if it was assumed that the Governor had the power to issue the impugned notification, inasmuch as the mandatory provisions of paragraph 14 had not been complied with, the notification was invalid. To this petition, the appellant impleaded five respondents; the first amongst them was the State of Assam; the others were : the Minister-in-charge of Tribal Areas and Welfare E of Backward Classes Department; the Secretary to the Government of Assam, T.A., O.B. & W.B.C. Department; the Chief Secretary to the Government of Assam; and the Deputy Secretary to the Government of Assam, Tribal Areas & Backward Classes Department, respectively.

F The respondents disputed the validity of the contentions raised by the appellant in his writ petition. They urged that the notification had been issued by the Governor in exercise of the powers conferred on him by paragraph 1(3) of the Sixth Schedule and that all the relevant requirements of paragraph 14 had been complied with. The respondents did not accept the correctness of G the appellant's argument that in issuing the notification, the Governor had acted outside his authority.

Since the point raised by the petition was of considerable importance, and related to the construction of the relevant provisions contained in the Sixth Schedule, the writ petition was placed for hearing before a special Bench of the Assam High H Court consisting of three learned Judges. After the writ petition was argued, the High Court, by a majority decision, has rejected the contentions raised by the appellant and has dismissed the writ

petition filed by him. The minority judgment has upheld the arguments of the appellant and has held that the impugned notification is invalid. After the decision of the High Court was pronounced, the appellant applied for and obtained a certificate under Art. 132 of the Constitution, and it is with the said certificate that he has come to this Court in the present appeal.

On behalf of the appellant, Mr. Setalvad argues that paragraph 1(3) of the Sixth Schedule does not confer on the Governor the power to constitute a new autonomous district. For the valid creation of a new autonomous district, parliamentary legislation is necessary. In support of this plea, Mr. Setalvad has relied on what he describes as "legislative practice" in that behalf. He further contends that even if the Governor had the power to create new autonomous district under paragraph 1(3), the exercise of that power can be effective only after Parliament passes a law in accordance with the decision of the Governor. In other words, the argument is that the Governor may, by virtue of his power, decide to create a new autonomous district under paragraph 1(3), but the decision of the Governor must be confirmed by parliamentary legislation before it becomes effective. In the alternative, Mr. Setalvad contends that even if the Governor can effectively create a new autonomous district by virtue of his powers under paragraph 1(3), he can do so only after complying with the mandatory provisions of paragraph 14; and since these provisions have not been complied with, the impugned notification is invalid.

Before dealing with these points, it would be convenient to refer broadly to the scheme of the Sixth Schedule which contains the provisions in relation to the administration of tribal areas in Assam. Article 244(2) provides that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam; and that means that tribal areas in Assam would be governed not by the other relevant provisions of the Constitution which apply to the other constituent States of the Union of India, but by the provisions contained in the Sixth Schedule. These provisions purport to provide for a self-contained code for the governance of the tribal areas forming part of Assam and they deal with all the relevant topics in that behalf. The areas described in the table appended to paragraph 20 of the Sixth Schedule, consisting of Part A and Part B, constitute the tribal areas within the State of Assam; sub-paragraph (1) of the said paragraph so provides. Sub-paragraphs (2), (2A), (2B) and (3) of paragraph 20 describe the boundaries of the

A items mentioned in the Table. Part A of the table originally consisted of six items; the first amongst them was the United Khasi-Jaintia Hills District. The item of 'The Naga Hills-District' which was originally included in Part A has been subsequently taken out of Part A and has been added to Part B. Part B which originally consisted of only one item, now consists
B of two items; the first item is North East Frontier Tract including other Tracts therein described; and the second is the 'Naga Hills-Tuensang Area'. Thus, paragraph 20 read with the Table gives a comprehensive description of the tribal areas falling within the State of Assam for whose administration provision is made by the other paragraphs of the Sixth Schedule.
C

Paragraph 1 of the Sixth Schedule deals with autonomous districts and autonomous regions and confers certain specified powers on the Governor. It is necessary to read this paragraph :—

> "1. (1) Subject to the provisions of this paragraph,
> D the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedule shall be an autonomous district.
>
> (2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notifi-
> E cation, divide the area or areas inhabited by them into autonomous regions.
>
> (3) The Governor may, by public notification :—
>
> (a) include any area in Part A of the said table,
>
> (b) exclude any area from Part A of the said table,
> F
> (c) create a new autonomous district,
>
> (d) increase the area of any autonomous district,
>
> (e) diminish the area of any autonomous district,
>
> (f) unite two or more autonomous districts or parts
> G thereof so as to form one autonomous district,
>
> (g) define the boundaries of any autonomous district :
>
> Provided that no order shall be made by the
> H Governor under clauses (c), (d), (e) & (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule."

Then follow several paragraphs dealing with the constitution of District Councils and Regional Councils; their powers to make laws; the administration of justice in autonomous districts and autonomous regions; conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences; these are covered by paragraphs 2, 3, 4 and 5 respectively. Paragraph 6 deals with the powers of the District Council to establish Primary Schools, etc. Paragraph 7 deals with the District and Regional Funds; paragraph 8 refers to powers to assess and collect land revenue and to impose taxes. Para. 9 has relation to licences or leases for the purpose of prospecting for, or extraction of, minerals. Para. 10 confers on the District Council power to make regulations for the control of money-lending and trading by non-tribals. Paragraphs 11 & 12 deal with the publication of laws, rules and regulations made under the Schedule; and the application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions respectively. Paragraph 13 is concerned with the question of estimated receipts and expenditure pertaining to autonomous districts which have to be shown separately in the annual financial statement. Paragraph 14 is concerned with the appointment of a Commission and for the purpose of the present appeal, it is necessary to read it :

A B C D E F G H

> "(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—
>
> (a) the provision of educational and medical facilities and communications in such districts and regions;
>
> (b) the need for any new or special legislation in respect of such districts and regions; and
>
> (c) the administration of the laws, rules and regulations made by the District and Regional Councils;
>
> and define the procedure to be followed by such Commission.

A (2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

B (3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State."

C Paragraph 15 deals with the annulment or suspension of acts and resolutions of District and Regional Councils. Paragraph 16 deals with the dissolution of a District or a Regional Council; paragraph 17 is concerned with the exclusion of areas from autonomous districts in forming constituencies in such districts. Paragraph 18 is concerned with the application of the provisions D of this Schedule to areas specified in Part B of the table appended to paragraph 20; while paragraph 19 deals with the transitional provisions. Paragraph 21 which is the last paragraph in the Sixth Schedule, is relevant for our purpose; it reads thus :—

"(1) Parliament may from time to time by law E amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph F (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368."

That, broadly stated, is the scheme of the provisions contained in the Sixth Schedule.

G It is plain that under paragraph 21, Parliament can make a law amending by way of addition, variation or repeal any of the provisions of the Sixth Schedule and when such an amendment is made, reference to the Sixth Schedule in the Constitution shall naturally be construed as a reference to such Schedule as so amended. In other words, Parliament is clothed with legislaH tive competence of the widest amplitude in relation to any changes it likes to make in any of the provisions contained in the Sixth Schedule. Paragraph 21(2) has provided that any changes

sought to be introduced by parliamentary legislation under the power conferred on Parliament by sub-paragraph (1) thereof shall not be deemed to amount to an amendment of the Constitution for the purposes of Art. 368. There can thus be no doubt that if Parliament wants to make any changes in any provisions of the Sixth Schedule, it is entitled to do so; and that obviously means that the change which has been introduced by the impugned notification might as well have been made by Parliament. The question which calls for our decision is : can the same change be validly introduced by the Governor in exercise of the powers conferred on him by paragraph 1(3) or not ?

We have already noticed that the effect of paragraph 20 read with the table appended to it is that the areas specified in Part A and Part B of the said table amount to tribal areas within the State of Assam. Now, paragraph 1(1) of the Sixth Schedule provides that the tribal areas in each item of Part A of the table appended to paragraph 20 shall be an autonomous district, subject to the provisions of paragraph 1. This provision is clear in two respects. It does not cover the areas specified in Part B of the table; its application is confined to the areas in each item of Part A of the table alone. It is also clear that the tribal areas in each item of Part A aforesaid shall be an autonomous district, but that would be so subject to the provisions of paragraph 1. In other words, if any changes are made by the Governor in exercise of the powers conferred on him by paragraph 1(3), those changes will have to be read into the relevant item in Part A of the table, and paragraph 20 will have to be considered in the light of the changes thus introduced in the said item. What is the extent of the power conferred on the Governor by paragraph 1(3) and how it can be exercised, are matters to which we will turn presently; but confining ourselves to the provisions of para 1(1), it seems clear that the exercise of the powers prescribed by para 1(3) has an impact on the description of the items in Part A of the table appended to para 20; and that impact is that the changes made in the description of the items will be introduced in Part 9 and thereby the scope and effect of para 20 will, in consequence, be suitably modified.

Paragraph 1(3) confers on the Governor power to issue notification for the purpose of bringing about any of the results enumerated seriatim by clauses (a) to (g). In the present case, we are not called upon to consider what clauses (a) and (b) really denote. The notification with which we are concerned is referable to clauses (c), (e) and (g). Clause (c) refers to the power

A to create a new autonomous district, and this power has been exercised by the Governor in creating a new autonomous district to be called the Jowai District. Clause (e) refers to the power to diminish the area of any autonomous district, and this power has been exercised by the Governor by diminishing the area of the pre-existing United Khasi-Jaintia Hills Disrict. Clause (g) B refers to the power to define the boundaries of any autonomous district, and this power has, in substance, been exercised by the Governor inasmuch as after the creation of the new Jowai District, the boundaries of the pre-existing United Khasi-Jaintia Hills District, as well as the boundaries of the newly created District are automatically defined. Similar power can be exercised C under clauses (d) and (f).

The proviso to para 1(3) imposes a condition on the exercise of the power prescribed by clauses (c), (d), (e) and (f) of para 1(3). It requires that before the Governor exercises his power under any of the said four clauses, he has to appoint a Com- D mission under para. 14(1) and consider its report. The reason why the condition prescribed by the proviso is not made applicable to cases falling under clause (g) can be easily understood; the power conferred by the said clause appears, in the context, to be merely consequential on the powers prescribed by the previous four clauses. It is, however, not quite clear why the exercise E of the power conferred by clauses (a) and (b) has not been made subject to the condition prescribed by the proviso; but, as we have already indicated, we are really not called upon to consider that aspect of the matter.

Now, reading para 1(3) by itself, it seems difficult to appre- F ciate Mr. Setalvad's argument that though the Governor may have the power to create a new autonomous district, the notification that he may issue in exercise of the said power, will not take effect unless Parliament by law provides for the creation of the said new district. It is true that the said power has to be exercised subject to the condition prescribed by the proviso to para 1(3). G But if the said condition is satisfied, and the requirements prescribed by para 14 are complied with, is there anything in the provisions of para 1 as well as para 14 which would justify the argument that the exercise of the relevant powers is not intended to be effective unless it receives the approval of parliamentary legislation? In our opinion, this question cannot be answered H in favour of the appellant. When clause (c) of paragraph 1(3) provides that the Governor may, by public notification, create a new autonomous district, it does not seem to contemplate that for

the creation of a new autonomous district, the Constitution requires something more to be done by Parliament itself in order to make the public notification issued by the Governor effective. In our view, paragraph 1(3) clearly indicates that the Constitution has delegated to the Governor a part of the power conferred on Parliament itself by paragraph 21. Paragraph 21 shows that Parliament has undoubtedly the power to make any change in any of the provisions contained in the Sixth Schedule. A part of this wide power has, however, been conferred on the Governor, because the Constitution-makers apparently thought that Parliament need not be called upon to exercise its own power for bringing about comparatively smaller and minor changes in Part A of the Table, and it accordingly decided to confer the appropriate power on the Governor to take action in that behalf. If the Governor has been clothed with the relevant power, the exercise of the power must, by itself, be effective to bring about the results intended by clauses (c), (d), (e) and (f) of para 1(3). This power must, no doubt, be exercised subject to the condition prescribed by the proviso to para 1(3). But once it is properly exercised as required by the relevant provisions of the Sixth Schedule, it becomes effective and there is no need for parliamentary legislation in that behalf.

In support of his contention that Parliament has legislated in respect of matters falling under para 1(3). Mr. Setalvad has referred us to two parliamentary statutes. The first one is Act No. 18 of 1954. This Act was passed by Parliament on the 29th April, 1954 to change the name of the Lushai Hills District. Section 2 of this Act provides that the tribal area in Assam now known as the Lushai Hills District shall, as from the commencement of this Act, be known as the Mizo District. Section 3 made a corresponding change in paragraph 20 of the Sixth Schedule and in Part A of the table appended thereto. It is doubtful if the power exercised by Parliament in re-naming a District by passing Act 18 of 1954 is covered by any of the clauses of para 1(3); but even if it was, the exercise of the said power by Parliament cannot show that the same power, if delegated to the Governor, cannot be exercised by him without the assistance of parliamentary legislation in that behalf. This Act, therefore, is not at all decisive on the point raised by Mr. Setalvad.

The other Act on which Mr. Setalvad relies is Act No. 42 of 1957. This Act was passed by Parliament on the 29th November, 1957. Section 3 of this Act omitted item 4—'Naga Hills District' from Part A of the table appended to para 20 of the

A Sixth Schedule; and substituted "The Naga-Hills-Tuensang Area" as item 2 in Part B of the said table; and made the necessary change in para 20. What we have said about Act No. 18 of 1954 is equally true about this Act also. It is doubtful whether excluding an item from Part A and including it in Part B would fall within any of the clauses prescribed by para. B 1(3); but even if it is so, the fact that Parliament exercises its legislative power in regard to an item delegated to the Governor will not show that the Governor does not possess that power. Therefore, Mr. Setalvad's argument based upon what he calls "legislative practice" does not really assist him.

C Incidentally, Mr. Setalvad suggested that it would be anomalous to hold that the power conferred on the Governor by para 1(3) of the Sixth Schedule can be effectively exercised by him without confirmation by parliamentary legislation. He illustrates this point by taking a case where the Governor decides to exercise his powers under para. 1(3) and issues a public notifica- D tion accordingly. If Parliament does not approve of the said decision, it may make a law reversing the decision in question; and the Governor may adhere to his earlier decision and issue another public notification. Such a course of events, says Mr. Setalvad, would lead to a very anomalous situation; and the anomaly can be avoided by holding that the exercise of the E Governor's power under para. 1(3) has to be confirmed by parliamentary legislation under para. 21 before it becomes effective. We are not impressed by this argument. As we have already observed, the power of Parliament under paragraph 21 is very wide; it includes the power to modify or take away the power conferred on the Governor by para. 1(3), and in the very unlikely F event of the Governor attempting to challenge the decision of Parliament, Parliament can take away his power altogether by suitable legislation. We have no doubt that the argument based on a possible anomaly overlooks the fact that such an anomaly can inherently be said to exist wherever the same power is vested in two alternative authorities. That being so, the argument of G possible anomalies does not assist Mr. Setalvad's contention that parliamentary legislation is necessary before the Governor's decision becomes effective.

Before we part with this topic, it is necessary to refer to another aspect of the problem which has relation to paragraph 20 of the Sixth Schedule. We have already observed that the H exercise of the powers prescribed by paragraph 1(3) has an impact on the description of the items in Part A of the Table appended to para 20, and we have also indicated that the said impact is

that the changes made in the description of the items will be introduced in Part A and thereby the scope and effect of para 20 will, in consequence, be suitably modified. It is now necessary to consider the nature of the modifications which may be made in paragraph 20 and their impact on the question as to whether parliamentary legislation is necessary to make the impugned notification effective.

Paragraph 20(1) provides that the areas specified in Parts A and B of the table shall be the tribal areas within the State of Assam. The impugned notification has made a change in the composition of the United Khasi-Jaintia Hills District by carving out of the said item in Part A of the table two separate items, *viz.*, the United Khasi-Jaintia Hills District, and the Jowai District. It is, however, clear that this change does not make any addition to or subtraction from, the total area covered by Part A of the table, and in that sense, the modification made by the Governor by the impugned notification does not affect in any manner the contents of para 20(1). Even after the said notification has come into force, para 20(1) truly and correctly provides that the areas specified in Part A and B of the table shall be the tribal areas within the State of Assam.

It cannot, however, be disputed that as a result of the modification made by the impugned notification, paragraph 20(2) has to be changed. Paragraph 20(2), as it originally stood, describes in detail the territories comprised in the United Khasi-Jaintia Hills District, and as a result of the impugned notification, the said description will have to be modified, because the said District has now been split up into two Autonomous Districts. That, however, is a change consequent upon the change made by the Governor by issuing the impugned notification in exercise of the powers conferred on him by para 1(3). In our opinion, where the Governor makes changes by virtue of the powers conferred on him by para. 1(3)(c), (d), (e), (f) and (g), what follows is a change in the internal composition of the different items in Part A of the table. The exercise of the said powers does not change, and in the present case it has not changed, the total area comprised in Part A. What it purports to do is to change one item into two items of Autonomous Districts. Since the power to bring about this change is expressly conferred on the Governor by paragraph 1(3)(c), (d), (e), (f) and (g), it is not unreasonable to hold that the exercise of the said power should, as in the present case, lead to a consequential change in para 20(2). Such a change in para 20(2) is a logical corollary of

the exercise of the power conferred on the Governor by para 1(3)(c), (d), (e), (f) and (g).

It is possible that by the exercise of the powers conferred on the Governor by paragraph 1(3)(a) and (b), the area included in Part A of the table may conceivably be either increased or diminished, because the powers conferred on the Governor by para 1(3)(a) and (b), *prima facie*, refer to the inclusion of any area in Part A, or exclusion of any area from Part A of the table. We have not thought it necessary to consider or decide what is the nature of the power prescribed by para. 1(3)(a) or (b). If the power prescribed by para. 1(3)(a) or (b) is construed in a narrow way in the light of the context of para. 1(3) and is confined to making changes either by inclusion or exclusion in regard to areas already included in Part A, the total area of Part A may not be altered even by the exercise of such power.

But assuming that the exercise of the said power would enable the Governor to add to the area included in Part A of the table, or to diminish the area included in the said Part by excluding it from the said Part, a question may arise as to the effect of such modification. In such a case, paragraph 20(1) itself may be affected, and if that happens, it would become necessary to enquire whether the exercise of the Governor's power prescribed by para. 1(3)(a) or (b) can, without parliamentary legislation, validly make a change in para. 20(1). In dealing with this question, different considerations would arise. If an addition is made to the area covered by Part A of the table by including in it some outside area, or if a portion of the area included in the said Part is taken out, it would alter the content and complexion of the table considered as a whole, and the question about the necessity of parliamentary legislation to make such a change effective may assume a different aspect. Including any area in Part A, or excluding any area from Part A in the wide sense of the terms used in the said two clauses may, *prima facie*, import considerations of general policy which, it may be urged, can be effectively dealt with only by parliamentary legislation; such considerations do not apply where the exercise of the powers conferred on the Governor by para. 1(3)(c), (d), (e), (f) and (g) means nothing more than permutation and combination of the areas already included in Part A, and that is purely a matter of internal administration. We are, however, not concerned with the aspect of the problem relating to para. 1(3)(a) and (b) in the present case, and need not, therefore, pronounce any opinion on it.

What has happened in this case is that one Autonomous District has been split up into two separate Autonomous Districts without making any change in the totality of the area included in Part A of the table; and that does not bring about any change in para 20(1). Paragraph 20(2), however, stands on a different footing; it just gives a description of the area included in the United Khasi-Jaintia Hills District, and the change made in the said description by the impugned notification is of such a purely consequential character in relation to the internal adjustment of the areas mentioned in Part A of the table that we do not think parliamentary legislation is required to make such a change effective. Therefore, we are satisfied that it would not be reasonable to hold that without parliamentary legislation, the impugned notification cannot validly effect any change in item 1 of Part A of the table appended to paragraph 20.

In this connection, we may incidentally refer to the provisions of paragraph 18 which deals with the problem of the application of the provisions of the Sixth Schedule to areas specified in Part B of the table appended to para. 20. Para. 18(1)(b) provides that the Governor may, with the previous approval of the President, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area. This shows that where any area from Part B of the table has to be excluded from it, it can be done by the Governor with the previous approval of the President. Action taken by the Governor in exercise of this power may conceivably fall under paragraph 1(3)(a), and in that sense, the inclusion of the area in Part A of the table would, in substance, be the result of the decision of the President. It is significant that paragraph 18(3) specifically provides that in the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President, the Governor shall act in his discretion. Thus, it is clear that paragraph 18 deals with the areas in Part B of the table independently, and in respect of them, the Governor functions as the agent of the President when he exercises his power under sub-paragraph (2) of the said paragraph.

That takes us to the question as to whether Mr. Setalvad is right in contending that the notification is invalid, because before issuing it, the mandatory requirements of paragraph 14 have not been complied with. What then are the requirements of para 14? The first requirement is that before taking any action in exercise of the powers conferred on him by clauses (c), (d), (e) and (f) of para. 1(3), the Governor must appoint a Commission to

A examine and report on any matter covered by the said clauses. The second requirement is that the Governor should consider the report made by the Commission and make his recommendations with respect thereto. The third requirement is that the Commission's report along with the Governor's recommendations has to be placed before the Legislature of the State by the Minister
B concerned, and this has to be accompanied by an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam. There is no doubt that in the present case, the Governor of Assam did appoint a Commission. We have already indicated the terms of reference under which the Commission was appointed. There is also no doubt that the
C Commission made its report, and it recommended the creation of a new autonomous District Council for the Jowai Sub-Division of the United Khasi-Jaintia Hills Autonomous District by excluding the areas comprising the areas of the said Sub-Division from the United Khasi-Jaintia Hills Autonomous Districts.

D Mr. Setalvad contends that this report did not in fact recommend the creation of a new Autonomous District at all; and in support of this argument, he relies on the fact that the recommendation, in terms, refers to the creation of a new autonomous District Council. He also points out that the Commission has observed that "if the inhabitants of the Jaintia Hills work together
E and maintain the existing system of administration, there is no reason why a separate District Council for Jowai should not be a success." The Commission also added that the establishment of a separate District Council would resolve the prevailing tension and bitterness, due to a lack of uniformity in administration, between them and in Khasis; and the Commission hoped that the
F creation of a separate District Council would lead to a better understanding between them. It is true that the reference to the creation of a new District Council is somewhat inappropriate in the context; but on considering the Commission's recommendations as a whole, there is no doubt that what the Commission recommended was the creation of a new Autonomous District.
G It would be noticed that the Commission has expressly recommended that the areas comprising the areas of the Jowai Sub-Division should be excluded from the existing Autonomous District known as the United Khasi-Jaintia Hills Autonomous District, and that necessarily means that the Sub-Division area has to be taken out and formed into a new Autonomous District.
H Therefore, there can be no doubt that the condition about the appointment of a Commission has been satisfied, and that, in fact, the Commission which was appointed by the Governor, has

recommended the creation of a new Autonomous District on the lines ultimately adopted in the impugned notification. A

It still remains to consider whether the other two conditions prescribed by paragraph 14 have been satisfied or not. Has the Governor considered the report submitted by the Commission and made his recommendations, and have those recommendations B along with the report been placed before the Legislature by the Minister concerned along with an explanatory memorandum? As to the latter requirement, there is no dispute. The evidence shows that the report along with an explanatory memorandum was placed by the Minister concerned before the Legislature. This memorandum set out the history about the appointment of the C Commission, and the receipt of its report; and it added that "after a careful consideration of the report and the recommendations of the Governor, the Government has decided to accept the recommendations of the Commission and give effect to them by taking necessary administrative and other steps in this direction." The main controversy centres round the question as to whether the D Governor considered the report and made his recommendations.

In pressing his argument that it is not shown that the Governor considered the report and made his recommendations thereon, Mr. Setalvad assumes that the Governor, in the context, is not functioning as the Constitutional Governor who receives the E advice of his Council of Ministers, but is functioning in his own individual character as Governor; and before the validity of the notification can be upheld, it must be established that the Governor did consider the report and did make his own recommendations. It is not seriously disputed by Mr. Setalvad that the power which is conferred on the Governor by para. 1(3) F of the Sixth Schedule, has to be exercised by him as a Constitutional Governor; that is to say, he must act on the advice of his Council of Ministers. It is also not disputed by Mr. Setalvad that ultimately it is the Government of Assam which has to decide what action to take in such matter. Paragraph 14(2) expressly says that the explanatory memorandum which has to be laid G before the Legislature of the State must indicate the action proposed to be taken by the Government of Assam. Mr. Setalvad, however, argues that having regard to the context of para. 14(2), it is clear that the Governor acts on his own in considering the report and making his recommendations. His suggestion is that H under para. 14(2), the report must first go to the Governor; he must consider it and make his recommendations; and the Council of Ministers must then decide what action to take. After that

A stage is over, the report made by the Commission, the recommendations of the Governor thereon, and the explanatory memorandum drawn by the Government of Assam had to be placed before the Legislature of the State.

According to the respondents, what actually happened in
B the present case was that after the report of the Commission was received, the Council of Ministers considered the report at its meeting on the 28th April, 1964, and decided to accept the recommendations of the Commission. An explanatory memorandum was then drawn up, and the whole file was placed before the Governor. After the Governor read the file, on the 21st
C September, 1964, he wrote on it "Seen, thanks". The affidavit filed by the respondents shows that after the matter was considered by the Council of Ministers, the proceedings were placed before the Governor, and he read the proceedings and expressed his concurrence with the words "Seen, thanks" The question is whether the procedure thus followed in the present case complied
D with the relevant conditions prescribed by para 14(2) or not.

For the purpose of dealing with this aspect of the matter in the present appeal, we are prepared to assume that when para 14(2) refers to the Governor, it refers to him as Governor who must act on his own and not be assisted by the advice tendered
E to him by the Council of Ministers. Even on that assumption, we are unable to see how the procedure followed in the present case can, in substance, be said to contravene the substantial requirements of para 14(2). What para 14(2) requires is that before the matter goes to the Legislature of the State, the Governor must apply his mind to it and make his recommendations on it.
F It would be unreasonable to suggest that in considering the report, the Governor is precluded from receiving the assistance of the Council of Ministers before he makes up his mind as to what recommendations should be sent before the Legislature of the State. If the Governor thinks that the questions raised by the report should first be considered by the Council of Ministers
G and then submitted to him, we do not see how it can be said that para 14(2) has not been complied with. On the other hand, if the Governor, in the context, is expected to act as a Constitutional Governor, it would be appropriate that the matter should first be examined by the Council of Ministers and then submitted to him for his own recommendations. However one looks at it, the facts
H disclosed in the counter-affidavit filed on behalf of the State of Assam unmistakably show that the matter has been considered both by the Governor and the Council of Ministers and they are

all agreed that the recommendations of the Commission should be accepted. The criticism that the Governor has not made any recommendations as such, but has merely contented himself with making a short note "Seen, thanks", has, in our opinion, no substance. We have looked at the counter-affidavit filed on behalf of the State of Assam and have examined the other documentary evidence to which our attention was drawn. In the present case, the record clearly shows that the Commission recommended that a new Autonomous District should be created, the Governor agreed with the said recommendation, and so did the Council of Ministers. Therefore, we see no reason to interfere with the majority decision of the High Court that the power conferred on the Governor by paragraph 1(3) of the Sixth Schedule has been validly and properly exercised by him.

The result is, the appeal fails and is dismissed with costs.

Hidayatullah, J. The appellant impugns the judgment of the High Court of Assam and Nagaland at Gauhati, dated February 5, 1965, by which his petition under Art. 226 of the Constitution, filed to challenge notification No. TAD/R/50/64, dated November 23, 1964, which set up an autonomous District of Jowai after separating the Sub-Division of Jowai from the United Khasi-Jaintia Hills Autonomous District, was dismissed. According to the appellant the notification forming the new autonomous district was ineffective without an amendment of the Sixth Schedule of the Constitution by parliamentary legislation; and even by itself was insufficient because some necessary steps leading up to the notification were not taken. In the High Court the petition, from which this appeal arises by a certificate of the High Court under Art. 132, was heard by a Full Bench and was rejected by majority. The learned Chief Justice (Dutta J. concurring) was of the view that the contentions of the appellant were unsupportable while C. S. Nayudu J. was of the opposite opinion.

I have had the benefit and the privilege of reading the judgment just delivered by my lord the Chief Justice, but I have the misfortune to disagree with the conclusion that this appeal should be dismissed. The facts are fully set out by my lord and I need not repeat them. Before I give my reasons why I hold that this appeal should succeed, I find it convenient to refer to the constitutional provisions bearing upon this matter which I apprehend differently.

Originally the territories of India consisted of the States named in Parts A, B and C of the First Schedule and the territories specified in Part D of the same Schedule. There were

A 9 States in Part A, 9 in Part B and 10 in Part C. Part D consisted of the Andaman and Nicobar Islands. Assam was the first State to be named in Part A. Its territories were described as follows :—

> "The territory of the State of Assam shall comprise the territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas."

Different parts in the Constitution laid down provisions as to the administration of the different States in the First Schedule. Part VI dealt with States in Part A, Part VII with States in Part B, Part VIII with States in Part C, Part IX with territories in Part D and such other territories not specified in the First Schedule and Part X with the Scheduled and Tribal Areas.

After the Constitution (7th Amendment) Act, 1956, the whole of the First Schedule was substituted by another Schedule and some of the States had to be renamed and classified, as a result of the reorganisation of the States. Indian territory thereafter stood divided into : I the States (14 in number) and II the Union Territories (6 in number). The reference to the territories of Assam was also altered and it now reads :

> "The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951".

The Parts of the Constitution dealing with the administration of the several territories, already mentioned, were also revised. Part VI continued to govern the administration of the States and Part VIII continued to govern the administration of the Union territories. Such changes as were necessary in view of the reorganisation effected in the First Schedule were, of course, made in these two Parts, but I am not concerned with them. Part VII and IX were repealed as they were not required. Part X continued as before with an amendment deleting reference to States in Part A or Part B of the First Schedule. As Part X consists of a single article it may conveniently be set down here :

> "244. Administration of Scheduled Areas and tribal areas.

(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam."

We are really not concerned with the first clause of Art. 244 but it may be noticed that there are two different schedules. Schedule 5 is for Scheduled Areas and Scheduled Tribes in States other than Assam and Schedule 6 is for the tribal areas in the State of Assam. It may also be noticed that the Fifth Schedule contemplates not only *administration* but also *control* of the areas referred to in Art. 244(1) while the Sixth Schedule refers to *administration only and not control.* When I contrast the provisions of these two schedules the last distinction will have some materiality. We are concerned with the tribal areas in the State of Assam and the entire question falls to be considered under the Sixth Schedule. There is no connection between Part VI and Part X and the provisions of the latter Part cannot be amplified by the provisions of the former in any respect. This is a fact which is fundamental to the view I am going to put forward.

Although strictly speaking we are not concerned with the Fifth Schedule, I shall refer to it briefly because it enables us to see the special and very different provisions regarding the tribal areas in the State of Assam. Scheduled Areas and Scheduled Tribes situated in other parts of India are governed in common by the Fifth Schedule. The tribal areas in Assam are, however, separately provided for. The difference between the two Schedules throws some light upon the way the Sixth Schedule is intended to work and it shall be my endeavour to unravel that working but I shall begin with analysing the Fifth Schedule first.

The Fifth Schedule is divided into four Parts A, B, C and D and consists of seven paragraphs. Part A is general. Paragraph 2 in that Part says that subject to the provisions of the Fifth Schedule the Executive power of the State extends to the Scheduled Areas in a State. Paragraph 1 excludes the State of Assam from the expression "State". As we shall see presently, the Sixth Schedule does not contain such provision at all. The Executive power of the State of Assam has not been extended to the tribal areas in Assam. Paragraph 3 of the Fifth Schedule then

A requires the Governor of each State to report to the President annually or as often as required by the President, regarding the administration of the Scheduled Areas in the State and the executive power of the Union extends to the giving of directions to the State as to the administration of the areas. Again, there is no provision of this kind in the Sixth Schedule. The only control B of the President there, is in respect of a portion of the Tribal Area described in Part B of the Paragraph 20 to which I shall refer later. Reverting to the Fifth Schedule Part B, which is headed 'Administration and Control of the Scheduled Areas and Scheduled Tribes', contains the following scheme. Under Paragraph 4, Tribes Advisory Councils are to be established. The C duty of these Councils is to advise on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State, referred to the Councils by the Governors. The affairs of the Councils are governed by rules made by the Governor. By paragraph 5 the Governor is authorised to direct by public notification that any particular Act of Parliament or of the Legislature of D the State shall not apply to a Scheduled Area or any part of the Scheduled Area in the State and in applying the law the Governor can make such exceptions and modifications as he may specify. The Governor is given the power to make regulations for the peace and good Government of any area in a State which is for E the time being a Scheduled Area. The words 'peace and good Government' were always understood as giving the utmost discretion in law making : *Riel* v. *The Queen*(1) and *Peare Dusam* v. *Emperor*(2). In making the law the Governor has been given the power to repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the F time being applicable to the area in question. The words "exceptions and modifications" have also been interpreted as giving powers of amendment : *Queen* v. *Burah*(3). These are legislative powers of a very wide nature. They are subject to two restrictions only. The first is that before making any regulation the Governor shall consult the Council and all regulations G must be submitted to the President and until assented to by him, do not have effect. Part C consists of one paragraph. This is paragraph 6. By sub-paragraph (1) the expression "Scheduled areas" is defined as such areas as the President may by order declare to be Scheduled Area. The President has passed two such orders in 1950 relating to Part A and Part B States respectively. H By sub-paragraph (2) the President may at any time by order—

(1) (1885) 10 A.C. 675. (2) [1944] F.C.R. 61.

(3) (1878) 3 A.C. 889.

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a a Scheduled Area; and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order."

Part D then lays down that Parliament may, from time to time, by law amend the Schedule by way of addition, variation or repeal, any of the provisions and such an amendment shall not be deemed to be an amendment of the Constitution for the purpose of Art. 368.

To summarize : under the Fifth Schedule the Governor is the sole legislature for the Scheduled areas and the Scheduled Tribes. He makes the Regulations after consulting the Tribes Advisory Council and submits them to the President for the latter's assent. The executive authority of the State extends to the Scheduled Areas but the executive authority of the Union extends to giving of directions to the State as to the administration of such areas. These areas are determined by the President by an order and may be altered from time to time by the President by another order but the President cannot alter an order made under sub-paragraph (1) except as laid down in cls. (a), (b) and (c) of the second sub-paragraph. Any amendment of the Schedule must be done by Parliament. I shall now turn to the Sixth Schedule which differs in many significant respects.

The gist of the provisions as to the administration of Tribal Areas in Assam is contained in the first and second sub-paragraphs of paragraph 1. It is that the tribal areas in each item of Part A of the table appended to paragraph 20 of the Schedule shall be autonomous districts and if there are different Scheduled Tribes in an autonomous district the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions. The word 'autonomous', that is to say,

A the possession of the right of self-government is the key note of the provisions. As will appear presently, the legislature, the executive and the judiciary (except the High Court) in the State of Assam do not freely function for these autonomous districts. The Table attached to the Schedule gives the list of these districts and the Tribal areas. It has been changed by Parliamentary B legislation from time to time.

"TABLE

PART A

1. The United Khasi-Jaintia Hills District.

C 2. The Garo Hills District.

3. The Mizo District.

4. . . . . .

5. The North Cachar Hills.

D 6. The Mikir Hills.

[The name Mizo District was substituted for the Lushai Hills District by the Lushai Hills District (Change of Name) Act 1954 (18 of 1964) and item No. 4 "Naga Hills District" was omitted and was substituted as "Naga Hills-Tuensang Area" as item 2 in Part B by the Naga Hills-Tuensang Area Act, 1957 by Act 42 E of 1957].

PART B

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and F Misimi Hills District.

2. The Naga Hills-Tuensang Area".

[Item 2 has been deleted by the State of Nagaland Act, 1962 (27 of 1962)].

How deep is the autonomy in the Autonomous Districts and G in the Autonomous Regions can be gauged by a short survey of some of the other paragraphs of the Schedule. Under paragraph 2 provision is made for constitution of District Councils and Regional Councils which have power after they are constituted under rules framed by the Governor to make rules for their own composition, delimitation of constituencies, qualifications of H voters, conduct of elections and generally for the conduct of business before them and the appointment of officers. Their powers and jurisdictions go much further than that of ordinary local

authorities. They have under paragraph 3 power to make laws for various matters and such laws are effective after the Governor assents to them. Under paragraph 4 the administration of justice is entirely under the control of the District and Regional Councils and they can constitute courts and appoint persons to be presiding officers of such courts and no other court, except the High Court of the State and the Supreme Court, has jurisdiction over suits or cases assigned to the courts so set up. The Councils can also frame regulations (with the previous approval of the Governor) laying down the procedure to be followed in trial of cases and regarding such appeals as may be prescribed. Under paragraph 5 the Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable, confer on the District Council or the Regional Council, having authority over such district or region, or on courts constituted by such District Council or on any officer apointed in that behalf by the Governor, such powers under the Code of Civil Procedure 1908 or as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate. The two Codes abovementioned apply only thus far and no further. Paragraph 6 gives power to the District Council to establish primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads and waterways in the district and to prescribe the language of instruction. Under paragraph 7 District and Regional Funds have to be constituted to finance administration. Under paragraph 8 power to assess and collect land revenue on principles followed generally by the Government of Assam and to impose specified taxes is given. Under paragraph 9 the District Councils are entitled to a fair share of the royalties accruing from licences and leases for the purpose of prospecting for, or the extraction of minerals granted by the Government of Assam in respect of any area within an autonomous district. In case of dispute the Governor is to decide the matter in his discretion. Under paragraph 10 the District Council can make regulations for controlling and regulating money-lending and trading within the District and for licensing of certain trades and of money-lenders. All laws, regulations or rules made by the District and Regional Councils are to be published in the Official Gazette of the State and on publication have the force of law. Paragraph 12 provides that no Act of the Legislature of the State in respect of which the District or Regional Councils

A B C D E F G H

A have power to make law shall apply unless the District Council by public notification directs and the District Council can in so applying the law make any exceptions or modifications it thinks fit. In respect of any other law made by Parliament for the Legislature of the State the Governor shall determine whether it shall not apply to the autonomous districts or regions and, if so, the B Governor may make such exceptions or modifications as he may notify with or without retrospective effect. Under paragraph 13 the estimated receipts and expenditure pertaining to autonomous districts have to be separately shown in the annual financial statement of the State and laid before the Legislature of the State under Art. 202. I shall omit paragraph 14 at this stage and come C back to it later. Under paragraph 15 the Governor may annul any act or resolution of a District or Regional Council which is likely to endanger the safety of India and may even assume to himself all or any of the powers vested in the Councils. Any order made by the Governor is to be laid before the Legislature of the State and unless revoked by it, continues for a period of 12 D months and if so resolved by Legislature for a further period of twelve months unless cancelled earlier by the Governor himself. The Governor may, on the recommendation of a Commission appointed under paragraph 14, dissolve a Council, direct fresh general election, and subject to the previous approval of the Legislature of the State, assume the administration, or place it under E the said Commission. No action to assume the administration shall be taken by the Governor without giving the Council affected an opportunity of placing its views before the Legislature of the State. Paragraph 17 enables the Governor to exclude an autonomous district in forming constituencies in the District. I shall F presently refer to paragraph 18 which applies the above-mentioned provisions with some modifications to Part B of the Table appended to the Schedule. Paragraph 19 includes transitional provisions. The Governor was required by that paragraph to constitute a District Council for each autonomous district in the State and till then the administration of the District was to vest G in him. He could make regulations for the peace and good government and they were to become law on the President's assent. He could also direct the application of an Act of Parliament or of the Legislature of the State with such exceptions and modifications as he thought fit and unless he applied it the law was inapplicable in the Districts.

H These are the provisions for the administration of Autonomous Districts and Regions. To summarize : the laws made by Parliament or the Legislature of the State do not run automati-

cally in these areas. The laws are either made by the District Councils or are applied by them. The administration of justice is achieved by the District and Regional Councils through their own agencies except that in serious offences the Governor has to decide whether to invest the Councils and the courts set up by the Councils with jurisdiction to try them. The Councils enjoy the powers of taxation and establishing of institutions mentioned in paragraph 6. They have their own funds. Some actions of the District or Regional Councils are capable of being annulled by the Governor and the Governor may even dissolve the Councils. There is complete autonomy as far as the powers and jurisdiction of the Councils go. A check is supplied by the Governor and the Legislature of the State comes into picture only when the Governor takes action against the Councils to revoke their acts or resolutions or dissolves them and takes over the administration himself.

I shall now refer to the paragraphs I did not mention so far. I shall begin by referring to paragraph 18. That paragraph may be reproduced here :

> "18. Application of the provisions of this Schedule to areas specified in Part B of the table appended to paragraph 20.—
>
> (1) The Governor may—
>
> (a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and
>
> (b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.
>
> (2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of article 240 shall apply thereto as if such area or part thereof were a Union territory specified in that article.

A (3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

Three matters are provided here. The first is that the Government may by public notification, apply all or any of the provisions B of the Sixth Schedule contained in paragraphs 1-17 to any tribal area specified in Part B of the table quoted by me earlier. The second is that the Governor may exclude from that table any tribal area specified in Part B. Both these powers are subject to prior approval of the President. The third matter is that until the tribal areas in Part B are brought in line with the autonomous C districts, the administration must be carried on by the Governor in his discretion as the agent of the President, in the same manner as if those areas were Union territory. These provisions show that in respect of the tribal areas in Part B the Governor acts for himself when carrying on the administration and any change as contemplated by clauses (a) and (b) of sub-paragraph (1) of Para-D graph 18 must receive prior approval of the President. The State Executive or the Legislature have no say in the matter.

I now come to the provisions of paragraph 1(3) read with paragraph 14 and 20 under which the present action purports to be taken. It is convenient to look at paragraph 20 first. The table E appended to that paragraph has already been quoted. The main part which describes the extent of the autonomous districts named in Part A of the table at the end may now be read:

"20. Tribal Areas.—

(1) The areas specified in Parts A and B of the F table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States G and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Mylliem:

Provided that for the purposes of clauses (e) and (f) H of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4)

of paragraph 8, and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District) and the Mizo District or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution :

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf."

These sub-paragraphs give the extent of the autonomous districts. The table does not identify any area except by name but the demarcation of the areas is done by the above sub-paragraphs. The tribal areas are not immutable. They can be changed, so also the autonomous districts. The question is how is this to be done ? The third sub-paragraph of the first paragraph lays down one of the steps. It provides :

"1. Autonomous districts and autonomous regions.—

(1) . . . . .

(2) . . . . .

(3) The Governor may, by public notification,—

(a) include any area in Part A of the said table,

(b) exclude any area from Part A of the said table,

(c) create a new autonomous district,

(d) increase the area of any autonomous district,

(e) diminish the area of any autonomous district,

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(g) define the boundaries of any autonomous district.

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a

A Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule."

Some other steps are laid down in paragraph 14 mentioned here : It provides :

"14. Appointment of Commission to inquire into
B and report on the administration of autonomous districts and autonomous regions.—

(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State,
C including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the
D State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions;

(b) the need for any new special legislation in respect of such districts and regions; and
E

(c) the administration of the laws, rules and regulations made by the District and Regional Councils;

and define the procedure to be followed by such Commission.

F (2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken
G thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State."

H Lastly there are the provisions of paragraph 21 and the question is whether they involve the final step or are irrelevant in this behalf. Paragraph 21 reads :

"21. Amendment of the Schedule.— A

(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended. B

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368."

Now the case of the appellant is that although a Commission C was appointed and made its report to the Governor, the Governor neither considered the report nor made his recommendations as required by paragraph 14. The Government of Assam drew up its proposals which were sent to the Governor who merely noted on the file, "Seen Thanks" and returned the papers which were then placed before the Legislature of the State and the Legislature D approved the proposals by a resolution. The contention of the appellant is that far from playing the key role which the policy underlying the Schedule envisages, the Governor left the entire matter to the Government and at the end of the deliberations expressed himself by saying "Seen Thanks" which at best was a very vague expression. In the alternative it is contended that no E action could be effective without Parliamentary legislation under paragraph 21, to amend the operative portion of paragraph 20 which Parliament alone can amend. Reference is made to legislation by which the tribal areas were changed on previous occasions by Parliament. In my judgment both these criticism are well-founded. F

It will be noticed that the Governor's powers under sub-paragraph 3 of paragraph 1 are to include or to exclude any area from Part A of the Table. These are clauses (a) and (b) of this sub-paragraph. Then the powers are to create a new autonomous district (cl. (c)), to increase (cl. (d)) or diminish (cl. (e)) G the area of any autonomous district, unite two or more autonomous districts or parts thereof so as to form one autonomous district (cl. (f)), define the boundaries of an autonomous district cl. (g).

Powers in clauses (a), (b) and (g) are not subject to the proviso and the Commission under paragraph 14 need not be H consulted before taking action under them. Action taken under clauses (a), (b) and (g) need not be reported to the Legislature

A of the State. I shall have something to say about it later because unless clauses (a) and (b) are also considered it is not possible to interpret the other clauses.

We are concerned with powers exercisable under clauses (c), (d) and (e) and the procedure contemplated by the proviso to B paragraph 1(3) read with paragraph 14 must be followed. The Governor has issued the public notification. There is no provision which bars inquiry: Is the action taken valid? Since the action is not under clauses (a) and (b) even Part A of Table attached to paragraph 20 is not altered either directly or by implication. Paragraph 1(3) also says nothing about the amendment C of paragraph 20 and as that power cannot be implied in view of paragraph 21 that paragraph also continues unaltered. The notification thus says one thing and paragraph 20 and the Table another. This is clearly a situation which could not have been intended. We are dealing with a Constitution which no agency less than Parliament can amend. Take another example. Suppose D the Governor next intends to exclude so much of the area comprised within the Municipality of Shillong as forms part of the Khasi State of Mylliem. If he can do that by a notification he may but what about paragraph 20(2) and the Table? His notification will be that the area comprised within the Municipality of Shillong as forms part of the Khasi State of Mylliem shall form E the autonomous district. The other part will form another autonomous district or go out of the tribal area. Suppose the Governor next divided the Khasi and Jaintia Hills sections and formed two autonomous districts by another notification. The Governor has no power under clauses (c), (d) and (e) to amend F paragraph 20 or the Table. Whether he has that power over paragraph 20 even under clauses (a) and (b) is open to much doubt. The paragraph and the Table will thus remain unaltered and the notification will render them obsolete. It was argued by the learned Attorney General that the paragraph and the Table will be impliedly amended. I regret I cannot accept this argu- G ment. We are dealing with the Constitution. It provides within itself how Schedules 5 and 6 can be amended. Any other mode of amendment is necessarily prohibited. There can be no amendment by any other agency much less an implied repeal and an implied amendment. Is the amendment of the Constitution such a simple affair that a notification of the Governor amends its pro- H visions by implication?

I shall now consider the cases arising under clauses (a) and (b). There is some difference between clauses (a) and (b) on the

one hand and clauses (c), (d), (e) and (f) on the other. It is significant that the procedure of paragraph 14 need not be followed when the Governor acts under the former group. Clauses (a) and (b) cannot therefore cover the same ground as clauses (c), (d), (e) and (f). They are not a summary of the action envisaged by the other clauses. They must represent inclusion and exclusion of areas from Part A of the Table. Otherwise there would be a reference to them in the proviso. The proviso covers only those cases where the area of the autonomous districts is involved and changes are made therein. The first two clauses mention the Table but not the others. Now the legislative power of the State does not extend to the tribal areas. The executive power being coextensive with the legislative power does not extend either. In Schedule 5 the executive power has been expressly extended. In Schedule 6 there is no such extension. Similarly the word 'control' is omitted in Art. 244(2). The Union Government also has not been given the power to issue directions to the State Government as is the case in Schedule 5. There is no requirement of prior consent of the President or his approval as in the Fifth Schedule or paragraph 18 of the sixth Schedule. A notification under clauses (a) and (b) would be subject to no control except that of Parliament. This demonstrates the utter need of Parliamentary legislation to amend the schedule particulary paragraph 20 and the Table.

The notification issued by the Governor is not under clauses (a) and (b) but that hardly makes any difference. It does not amend paragraph 20 or the Table. No doubt when all proper motions have been gone through the United Khasi-Jaintia Hills District will be cut down by excluding the Jowai Sub-Division and the Jowai Sub-Division will emerge as an autonomous district. But one such step and the final step must be to amend the Sixth Schedule. That can only be amended by Parliament under the powers granted by paragraph 21. If the notification alone did that there would be antinomy between the notification and the Schedule. Paragraph 21 says that Parliament may amend the Schedule by way of addition, variation and repeal. In my opinion this power still remains to be exercised to complete the chain of steps necessary to alter the autonomous districts, the names and areas of which are laid down by Parliament. The Governor's notification is no doubt one of the means of achieving the change but the effectiveness can only be given by Parliament. No wonder that on three previous occasions Parliamentary power was in fact exercised. Sub-paragraph 2(A) was added by Parliament. At

A that time consequential changes were also made in sub-paragraph (3) and item No. 3 of Part A of the Table was also changed. It is to be noticed that there is a difference between paragraph 6(2) of the fifth Schedule and paragraph 1(3) of the sixth Schedule. The former authorises the President to include in his order such incidental and consequential provisions as may appear to him to B be necessary and proper. As this extra jurisdiction is missing the Governor acting under the Sixth Schedule can only draw up a notification. He cannot do anything more. Till Parliamentary legislation follows, the final and effective step is wanting in the purported action. It is as if the key stone is missing.

C The action of the Governor is, with respect, not sustainable on the other ground also. The analysis of the provisions of Schedules 5 and 6 into which I went earlier clearly demonstrates that the Governor is made specially responsible for various matters connected with the administration of the autonomous districts. We have seen above that the executive authority of the State of Assam D does not extend to the autonomous districts as it does to the tribal areas in States other than Assam. Further the Union has not been given the power to give directions as to the administration of the autonomous districts. This is because the autonomous districts and autonomous regions are administered by Councils which, subject to the control of the Governor, function inde- E pendently. What the real position of the Governor is, *vis-a-vis* the Councils on the one hand and the State Government on the other will be clear if we look into the history of the administration of these areas and the previous constitutional provisions relating to the excluded and partially excluded areas as they were previously called. F

These areas, which were known as backward areas, were from the earliest times excluded from the operation of laws, either completely or partially and they were directly administered under laws made by the Executive under the authority of the Governor-General. These orders bore resemblance to the Orders in Council G of the Crown. As the legality of the laws was seriously in question the Indian Councils Act of 1861, made provision validating these so-called laws, by enacting that "no rule, law or regulation made before the passing of the Act, by the Governor General or certain other authorities shall be deemed invalid by reason of not having been made in conformity with the provisions of the Charter Act." H The power, which was taken away, was again conferred on the Governor General by the Government of India Act 1870 (33 and 34 Vict. c. 3) and the Governor General was allowed to legislate

separately for these backward tracts. Draft regulations were submitted by the Governors-in-Council, Lieutenant Governors or Chief Commissioners and after their approval by the Governor General became law for these areas. This state of affairs existed right down to the Government of India Act 1915. As difficulty arose in determining what laws were in force in which area, the Scheduled Districts Act XIV of 1874 was passed which enabled public notifications to be issued. The preamble of that Act clearly sets out that the object *inter alia* was to ascertain the enactments in force in any territory and the boundaries of such territories. This Act then specified the "Scheduled tracts" and the Local Governments were given the power to extend by public notification to any Scheduled District, with or without modification, any enactment in force in British India. When the Government of India Act 1915 was enacted, the Government of India Act 1870 (33 and 34 vict. c. 3) was repealed by the 4th Schedule and s. 71 was included which in effect provided the same procedure for making and applying laws as has been described above. When the Government of India Act 1919 (9 and 10 Geo. ch. 101) was passed s. 52-A was inserted which read :

> "The Governor-General in Council may declare any territory in British India to be a 'backward tract' and may, by notification, with such sanction as aforesaid, direct that this Act shall apply to that territory subject to such exceptions and modifications as may be prescribed in the notification.
>
> Where the Governor-General in Council has, by notification, directed as aforesaid, he may, by the same or subsequent notification, direct that any Act of the Indian legislature shall not apply to the territory in question or any part thereof, or shall apply to the territory or any part thereof, subject to such exceptions or modifications as the Governor General thinks fit, or may authorise the Governor in Council to give similar directions as respects any Act of the local legislature."

Thus at the inauguration of the Government of India Act 1935 the position was that the Governor General in Council or the Governor etc. under his directions legislated for these backward tracts and the Governor General could direct that any Act of the Indian Legislature should not apply at all or should apply with such exceptions and modifications as the Governor General might think fit. Most of these areas were excluded from the legislative power of the Central and Provincial legislatures and

A the Governors were responsible for their administration. In the Bill of the Government of India Act 1935 the distinction between the excluded and partially excluded areas was made. This followed the White Paper and a Sixth Schedule was framed in which the list of these areas was given. But this Schedule was withdrawn and the designation of the areas was done by the B Government of India (Excluded and Partially Excluded Areas) Order 1936, dated March 3, 1936. The distinction between the excluded and partially excluded areas was this: Excluded areas came directly under the Governor in his discretion and therefore the administration of the areas was a direct responsibility of the Governor himself. (Parl. Debates Vol. 301, col. 1395). In the C Report of the Joint Committee it was stated (para. 67) that in spite of Provincial Autonomy, "the Excluded Areas (i.e., tracts where any advanced form of political organisation is unsuited to the primitive character of the inhabitants).....will be administered by the Governor himself and Ministers will have no constitutional right to advise him in connection with them." D Paragraph 89 again stated that "Ministers shall advise the Governor in all matters other than the administration of Excluded Areas." The position about the Excluded Areas was summed up in paragraph 144 of the Report thus:

> "It is proposed that the powers of a Provincial E Legislature shall not extend to any part of the Province which is declared to be an "Excluded Area" or a 'Partially Excluded Area'. In relation to the former, the Governor will himself direct and control the administration; in the case of the latter he is declared to have a special responsibility. In neither case will any F Act of the Provincial Legislature apply to the Area, unless by direction of the Governor given at his discretion, with any exceptions or modifications which he may think fit. The Governor will also be empowered at his discretion to make regulations having the force of law for the peace and good government of any G Excluded or Partially Excluded Area. We have already expressed our approval of the principle of Excluded Areas, and we accept the above proposals as both necessary and reasonable, so far as the Excluded Areas proper are concerned. We think, however, that a distinction might well be drawn in this H respect between Excluded Areas and Partially Excluded Areas and that the application of Acts to, or the framing of Regulations for, Partially Excluded Areas is an

> executive act which might appropriately be performed by the Governor on the advice of his Ministers, the decisions taken in each case being, of course, subject to the Governor's special responsibility for Partially Excluded Areas, that is to say, being subject to his right to differ from the proposals of his Ministers if he thinks fit."

The administration of these areas thus followed the analogy of the Governor-General's reserved departments, and the expenditure for these areas required by the Governor, whether from the Provincial or Central revenues was not subject to the vote of the Provincial Legislature. In the administration of the Tribal areas the Governor was to act as the agent of the Governor-General. The administration of the partially excluded areas was a special responsibility of the Governor General.

These provisions of the Government of India Act were, therefore, so designed that the "Excluded Areas" were excluded from the Provincial and Central Legislatures and the administration of these areas was vested in the Governor in his discretion while the administration of the "partially excluded areas" was in the control of the Ministers subject to the special responsibilities of the Governor acting in his individual judgment.

As regards the machinery for transfer of areas the Parliamentary Debates (Vol. 299, cols. 1553-54) contain the following policy statement :

> "There is bound to be infiltration from one district to another, and in the course of times, we may be able to bring certain of these districts under the ordinary administration. In that case there ought to be power to make the transfer and the powers ought to be exercised in such a way that there is Parliamentary protection behind the transferred area. We ensure that the transfer can only be undertaken by an order in Council, which has to obtain the approval of both Houses."

The Order in Council now has the counterpart in the notification of the Governor and the approval of the Parliament has its counterpart in the amendment of Schedules 5 and 6 which our Parliament alone can undertake.

The resulting position was the enactment of ss. 91 and 92 in the Government of India Act 1935 which may be set out here :

> "91. Excluded areas and partially excluded areas.

A (1) In this Act the expressions 'excluded area' and "partially excluded area" mean respectively such areas as His Majesty may by Order in Council declare to be excluded areas or partially excluded areas.

The Secretary of State shall lay the draft of the
B Order which it is proposed to recommend His Majesty to make under this sub-section before Parliament within six months from the passing of this Act.

(2) His Majesty may at any time by Order in Council—

C (a) direct that the whole or any specified part of an excluded area shall become, or become part of, a partially excluded area;

(b) direct the whole or any specified part of a partially excluded area shall cease to be a partially excluded area or a part of such an area;

D (c) alter, but only by way of rectification of boundaries, any excluded or partially excluded area;

(d) on any alteration of the boundaries of a Province, or the creation of a new Province, declare any territory not previously included in any Province to be,
E or to form part of, an excluded area or a partially excluded area,

and any such Order may contain such incidental and consequential provisions as appear to His Majesty to be necessary and proper, but save as aforesaid the Order in Council made under subsection (1) of this section
F shall not be varied by any subsequent Order."

"92. Administration of excluded areas and partially excluded areas.

(1) The executive authority of a Province extends to excluded and partially excluded areas therein, but,
G notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in
H its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such regulations assented to by the Governor-General as they apply in relations to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area, exercise his functions in his discretion."

After these two sections were enacted the Scheduled District Act 1874 became obsolete and was repealed by the Adaptation of Laws Order 1936.

The question is: has the position changed in any way? I think not. The fundamental fact, as I said before, is that article 244(2) very tersely says that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam. No inspiration can, therefore, be drawn from the other parts of the Constitution. No doubt the Governor is the constitutional head of the State of Assam having a Council of Ministers. But the history of these backward tracts and the scheme of the Sixth Schedule show that the Governor is intended to discharge special functions in the administration of the Tribal Areas in Assam in which a start in democratic institutions is being made. There is no dyarchy in the Tribal areas in Assam so that the Governor may be induced by the Council of Ministers to do contrary to what his judgment requires. Nor are the functions of the Governor made subject to the scrutiny of the Government of Assam. Indeed the Government of Assam is mentioned in four places only and an examination reveals that no special power has been granted to it at least in three places. In paragraph 3(a) proviso it is provided that no law of the District or Regional Councils shall prevent the compulsory acquisition of land for public purposes by the Government of Assam, in paragraph 8

A the assessment of land revenue and its collection by the Councils is to be in accordance with the principles followed by the Government of Assam in the State of Assam generally, in paragraph 9 if any dispute arises between the Councils and the Government of Assam over the distribution of royalties the Governor is to decide in his discretion what the share of each should be. The B fourth and the last reference is at the end of paragraph 14(2). Under that paragraph there is provision for the appointment of Commissions for various purposes mentioned in the paragraph and paragraph 16. One such commission considers the formation of and changes in the autonomous districts as contemplated by paragraph 1(3)(c), (d), (e) and (f). The sub-paragraph con- C templates all these reports because the report of every commission appointed for any purpose mentioned in paragraph 14(1) or paragraph 16 together with the recommendations of the Governor and an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam has to be laid before the Legislature of the State. Confining myself D to the changes in autonomous districts contemplated by paragraph 1(3)(c), (d), (e) and (f), it is clear that if the State Government agreed with the Governor there would be no need explaining what action the Government was going to take. The State Government would not then be required to take any action (apart E from implementing the decision administratively) and the Governor would notify the changes. The need for an explanatory memorandum regarding the action proposed to be taken by the Government would really arise in a situation in which the Governor's recommendations are not accepted by the State Government. We must not forget that there are many other matters F for which diverse commissions may be appointed and there would be different kinds of reports. There may be room for detailed differences over the reports of other commissions which the Legislature may have to consider. The Governor must be expected to act independently and not with the advice of Ministers. Should differences arise the Legislature would decide. It is intended G to wield control over the Governor. It is the authority to decide whether the Governor's action in annulling or suspending acts and resolutions of District and Regional Councils should continue or not. The Governor also has to obtain the previous approval of the Legislature of the State before assuming the administration of the area of a Council dissolved by him and the Council must be H heard by the Legislature. There would be no need to bring in the Legislature if the Governor was already being advised by his Council of Ministers. Apart from this control of the Legisla-

ture of the State in specified matters, there is nothing to show that in addition the District and Regional Councils which are autonomous in almost every way, are to be controlled by the Council of Ministers through the Governor.

It is in this background that the action of the Governor must be considered and the totality of the action taken this time compared with what was done in the past. I shall first take the facts. The Commission made its report on the 24th January, 1964. In the opinion of Nayudu J. it is mentioned that the entire proceedings were placed before the High Court and the learned Judge observes that on 28th August, 1964, there was a note taken on the file which read :

> "In the present case we have not referred the matter to H.E. (the Governor) at any stage".

The report together with the explanatory memorandum regarding the action proposed to be taken by the Government of Assam was placed before the Legislature of the State on September 25, 1964. This memorandum in its last paragraph said :

> "After a careful consideration of the report and the recommendation of the Governor, the Government has decided to accept the recommendations of the commission and give effect to them by taking necessary administrative and other steps in this direction."

There is no doubt a mention of the "recommendations" of the Governor but in point of fact there was no recommendation. All that the Governor did was to see the file before it went to the Legislature and wrote "Seen, thanks". This in my opinion, and I say it respectfully, hardly squared with the special responsibilities contemplated by the Sixth Schedule. When we turn to the commission's recommendations we find some confusion as to whether a separate Regional Council was being recommended for Jowai Sub-Division or a separate autonomous district. The recommendation of the Commission reads :

> "To sum up, we feel that if the inhabitants of the Jaintia Hills work together and maintain the existing system of administration, there is no reason why a separate District Council for Jowai should not be a success. The establishment of a separate District Council would, we think, resolve the prevailing tension and bitterness, due to lack of uniformity in administration, between them and the Khasis, and we hope lead to a better understanding between them.

A We accordingly recommend the creation of a new Autonomous District Council for the Jowai Sub-division of the United Khasi and Jaintia Hills Autonomous District by excluding the areas comprising the areas of the said Sub-division from the United Khasi and Jaintia Hills Autonomous District. As we see it, the main B obstacle to smooth working of the new District Council will be the Jaintias who are opposed to bifurcation.

. . . . . .

In conclusion, we may point out that, according to the 1961 Census, the area of Jowai Sub-division is C 1,515 square miles with a population of 82,147 compared with 1,888 square miles and population of 54,319 in the North Cachar Hills, where there is already a separate District Council".

The language is appropriate to the formation of a Regional D Council but it may be conceded that on the whole an autonomus district was meant.

In view of what I have said here bearing upon the special responsibility of the Governor as envisaged by the sense and letter of the Sixth Schedule considered in the light of the long and E uniform history of these backward tracts which have always been specially administered, it is perhaps right to think that the Governor was very much in the background and the initiative and the formation of opinion was by the State Government. The Governor was apparently only informed after everything was over as to what was being done. No doubt the Governor's remarks F "Seen, thanks" did not express a dissent when he saw the file and it may be presumed that he accepted the proposals of Government. But that was hardly what the Sixth Schedule expected of the Governor. No material from any former occasion when the changes were made in the tribal areas, was placed before us to show the practice or procedure then followed. The only G circumstance that has come to light shows that on three separate occasions parliamentary legislation was undertaken, although it is not in evidence whether it was supplemental to action under paragraph 1(3) by the Governor or without it. It is true that legislative practice is not regarded as conclusive and it will be less so here because Parliament was always competent to act by H itself to amend the Schedule. But it is a circumstance which also points in the direction that Parliamentary legislation must cap all other steps if the Schedule is to read true to the new situation.

Without Parliamentary legislation amending the Schedule, readers of the Constitution will have to hunt for Governor's notifications to know what is the extent of tribal area in Assam, how it is divided into autonomous districts and what is the tribal area governed under paragraph 18. In course of time when many such notifications have issued paragraph 20 will become obsolete and out of date. On the opposite view which I have been unable to accept, it is, even today, inaccurate and does not mean what it says.

In this view of the matter I am of the opinion that the appeal should be allowed and the respondent State ordered to bear costs throughout.

ORDER

In accordance with the opinion of the majority the appeal is dismissed with costs.