

Pailwan Abdul Khader and ors. Vs. State of Mysore

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SooperKanoon Citation : sooperkanoon.com/372001

Court : Karnataka

Decided On : Jan-22-1951

Reported in : AIR1951Kant72; AIR1951Mys72

Judge : Venkata Ramaiya, ;Balakrishnaiya and ;Mallappa, JJ.

Acts : Mysore Special Criminal Courts Act, 1942; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 9; [Constitution of India](#) - Articles 13, 13(1), 14, 21, 141, 372, 374(2) and 395; [Abolition of Privy Council Jurisdiction Act, 1949](#) - Sections 8; [General Clauses Act, 1897](#) - Sections 6

Appeal No. : Cri. Petn. Nos. 69 to 72 of 1950-51 (Cri. Referred Nos. 6 and 7 of 1949-50)

Appellant : Pailwan Abdul Khader and ors.

Respondent : State of Mysore

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : K.S. Jayarama Iyer, Adv. in Nos. 69 & 70 and ;Md. Askar Ali and ;M.A. Allam, Adv. in Nos. 71 & 72

Disposition : Petitions dismissed

Judgement :

Venkata Ramaiya, J.

1. These are applns. filed under Article 226, [Constitution of India](#), for issue of writs of certiorari calling for records & quashing the proceedings in Crim, case Nos. 1 & 2 of 1948. 49 on the file of the Ct. of the Sp. J, Tumkur & writs in the nature of habeas corpus directing the release of petnrs. from detention. The two cases referred to arise out of disturbances which occurred on 1-3-1949 in the shandy of Sira, a Town in Tumkur District, from a clash between Hindus & Musclemans resulting in the death of a Jamedar, grievous hurt to a Police Inspector & injuries to others. It is alleged in the affidavits filed in support of the petns. that charge sheets for offences under Sections 302, 326, etc., I. P. C., were presented on 9-4-1949 in the Ct. of the Sp. First. Clasa Mag, Madhugiri, by the Police against the petnrs. that by a Notn dated 22 4-1949, the Govt. of Mysore constituted the Ct. of the Special J. Tumkur, under Section 2 of the Sp. Criminal Courts Act, 1942 (Act XXIV [24] of 1942), that the cases against the punters were sent to that Ct. on 16-4-1949 & that the Sp. J. Tumkur, following the procedure laid down by Section 5 of the Act tried the said cases as warrant cases. The cases before the Sp. J. ended on 5-10-1949 with punters 1 & 2 in crim. petn. No. 69 of 1950-51 being sentenced to death for the murder of the Jamedar & rigorous imprisonment for causing grievous hart to the Inspector; Petnr. 3 to transportation for life for the same murder & to R. I. for grievous hurt to the Inspector. The patnrs. In the other cases ace sentenced to varying terms of imprisonment. The grounds on which the writs are sought are that the entire proceedings before the Sp J. are void & of no effect, that the Special Criminal Courts Act, by prescribing a procedure contrary to that provided in Criminal P. C. has prejudicially affected the

fundamental rights the petnrs. are entitled to under Part III of the [Constitution of India](#) & that the punters are also deprived of many valuable rights which they had under the Criminal P. C. by vir'ue of the Notn. of the Govt. The conviction & sentences passed by the Sp. J are challenged as illegal & as being no better than those of a private person without authority. These petns. were filed just before a day fixed for review of the sentences by the learned Chief Justice of Mys)re appointed for the purpose under Section 7 of the Act. At the request of the petnrs' counsel, the proceedings of review were stayed till the disposal of these pesos. & the petns. were first heard by a D. B. Consequent on a reference by the D. B. the petns. were posted before the P. B. & arguments were addressed on behalf of all the punters by Sri Jayarama Iyer & Janab Askar Ali of the Madras Bar in the course of which they pressed for consideration a number of important points bearing on these cases.

2. The Special Criminal Courts Act, Act XXIV [24] of 1942, was enacted on 7-7-1942. It was made applicable to Tumkur District within which the punters are alleged to have committed the offences by a Notn. issued under Clause (3) of Section 1 so far back as 5-11-1912, so that it is clear that on the date of the commission of the alleged offences the Act was in existence; but the appointment of a Sp. J. under Section 3 & the direction under Section 4 of the Act that he should try these cases were made by the Govt. subsequent to 9-4-1949 when the charge sheets were filed in the Ct. of the Sp. First Class Mag., Madbugiri.

3. Without reference to the merits of the cases the arguments were directed to show that the Act & proceedings thereunder considered either independently of or with due regard to the provisions of the [Constitution of India](#) are invalid & to this end these were attacked from every conceivable angle.

4. There can be no doubt that the Special Act curtails some of the important rights available to the accused under the Criminal P. C. by dis. allowing appeals against convictions & sentences by the Sp. J. by providing for trials in the absence of the accused by empowering a Sp. J. to take cognisance of offences without a committal after a preliminary enquiry, by permitting only a memorandum of the substance of the evidence instead of the full evidence of the witnesses examined being recorded & by requiring the proceedings before the Sp. J. being reviewed only in certain cases & that by a nominee of the Govt. Section 25 of the Act places the proceedings before the Sp. J. beyond the scrutiny, revn. or control of the H. C. in any manner. The provisions of this Act are virtually the same as those of Ordinance II [2] of 1942 passed by the Governor-General of India. The validity of the Ordinance & its application to cases concerning offences committed prior to it were questioned before several Cts. in what was then British India but were upheld by all the High Cts. except the Calcutta H. C. a F. B. of which set aside the convictions & sentences passed in trials conducted under the Ordinance. The appeal preferred by the Govt. against this to the Federal Ct. was unsuccessful. Varadachariar C J. & Zafrnlla Khan J. having held that the Cts. constituted under the Ordinances had no jurisdiction to try the case t though Rowland J. dissented from this view. In the course of the judgment reported in Emperor v. Benoanlal A. I. R. (30) 1943 F. C. 86 : (1948 F. 0 B. 96: 45 Or. L. J. 1.) the learned Chief Justice observed thus :

"We are of the opinion that the Ordinance has not by itself repealed Sections 28 & 29, Criminal P. C. (if such repeal were necessary--as we think it was) that notwithstanding binding drafting devices, is only the order of the executive authority passed under Sections 5, 10 or 16 of the Ordinance, in respect of each case or group or class of cases that in fact operates to repeal those provisions of the Code to divest the regular Cts. of their jurisdiction & to invest the Sp. Cts. with jurisdiction to try any particular case or group or class of cases. We are also of the opinion that such executive orders cannot in law have any such effect & that Sections 5, 10 & 13 of the Ordinance are open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute & unrestricted discretion, without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised. The powers of the H. C. t though in form taken away by Section 26 of the Ordinance are in fact only taken away by the order of the executive officer, because it is only on such order or direction being given that any case becomes a proceeding before a Sp. Ct. for the purpose of Section 26. We accordingly agree with the H. C. that the Ct. which purported to try & convict the reaps, had no jurisdiction to do so.'

5. Sections 5, 10 & 16 of the Ordinance correspond to Sections 4, 9 & 15 of the Mysore Act which are as follows:

Section 4.-- 'A Sp. J. shall try such offences or classes of offences, or such cases or classes of cases as the Govt. or a servant of the Govt. empowered by the Govt, in this behalf, may, by general or special order in writing, direct.'

Section 9.-- 'A Sp. Mag. shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Penal Code, as in force in Mysore with death, as the Govt. or a servant of the Govt. empowered by the Govt. in this behalf, may, by general or special order in writing, direct.'

Section 15 gives similar powers to the Dist. Mag. to direct trials by summary Ct. In Mysore too, the legality of the convictions & sentences in cases tried under the Act was questioned in this Ct. & before the reviewing Judge though on other grounds but these were negatived. To meet the situation brought about by the decision in regard to the cases under the Ordinance in British India, the Governor-General promulgated another Ordinance no. (19 [XIX] of 1943) whereby Ordinance II [2] of 1942 was repealed & provisions were made with respect to sentences passed by the Sp. Cts. 4 to cases pe binding in such Cts. on that date. An appeal was also filed against the decision of the F. C. to His Majesty in Council. The appeal was allowed by their Lordships of P. C. in the judgment reported in Emperor v. Benonri Lall, A. I. R. (32) 1946 P. C. 48: (46 Cr. L. J. 589) holding that Sections 5, 10 & 16 of the Ordinance are not ultra vires on the ground, that they empower the executive to decide what offences or class of offences & what cases or class of cases shall be tried by the Sp. Cts. & not by the ordinary & well established criminal Cts. & that the convictions of persons tried under the provisions of the Ordinance were valid. According to the decision of the P. C. the Act in Mysore which is substantially identical with the Ordinance must be regarded as valid at the time it was passed.

6. Sri Jayarama Iyer says that nevertheless the view taken by the F. C. must prevail by virtue of Articles 141 & 374, [Constitution of India](#), Article 141 states that the law declared by the S. C. shall be bi binding on all the Cts. within the territory of India & according to Article 374 Clause (2),

'..... the judgments & orders of the F. C. delivered or made before the commencement of this Constitution shall have the same force & effect as if they had been delivered or made by the S. C.'

It is argue that since the decisions of the F. C. before the commencement of the Constitution are given the same force & effect as those of the S. C. & the law declared by the S. C. is bi binding on all the Cts. it is unnecessary for this Ct. to examine the question of validity of the Act as it cannot in any event give a fi binding contrary to that in Emperor v. Benonri Lall, A. I. R. (30) 1943 F. C. 36: (1943 F. C. R. 96 : 45 Cr. L. J. 1). There are difficulties in the way of accepting the suggestion as up to the date of the Constitution neither the judgments of the F. C. nor those of the P. C were bi binding on this Ct. Both were of persuasive & not authoritative value & deviational of this Ct. were final, not subject to appeal or judicial interference from any tribunal. Under the [Constitution of India](#) the decisions of this Ct. are subject to appeal to the S. C. & this Ct. is bound by the law declared by the S. C. I do not think that this can ba construed as giving retros retrospective force to previous decisions of the F. C. fo as to bind Cts. not formerly subject to its jurisdiction. It is conceded that as regards the particular cases in which judgments of the F. C. were reversed by the P. C. what determines the rights of parties & to be given effect to is the decision of the P. C because of Articles 372 & 395 of the [Constitution of India](#). Under Article 372 the laws in force before the commencement of the Constitution shall continue in force but subject to the other provisions of this Constitution. The laws repealed under Article 393 except the [Abolition of Privy Council Jurisdiction Act, 1949](#). Section 8 of this Act is as follows :

'Any order of His Majesty in Council made on an Indian appeal or petn. whether before, on or after the appointed day, shall for all purposes have effect, not only as an order of His Majesty in Council, bat also as if it were an order or decree made by the F. C. in the exercise of the jurisdiction conferred by this Act.'

Sri Jayarama Iyer seeks to limit the application of the section to conclusions as distinguished from the reasons assigned in support thereof, to orders in Council & not to judgments of P. C. which are expressed in an advisory or recommendatory form. Such a construction seems to be narrow & opposed to the spirit if not the letter of the section. Section 213, Govt. of India Act, 1936, expressly states that the law declared by the F. C. & by any judgment of the P. C. shall, so far as applicable be recognised as binding on, & shall be followed by, all Cts. in British India, & so far as respects the application & interpretation of this Act or any order in Council thereunder or any matter with respect to which the Federal Legislature has power to make law in relation to the State, in any Federated State. The judgments of the P. C. prior to 1935 are couched in the same advisory form as those subsequent to it. The H. Cts. in India have in several cases referred even to obiter dicta in the judgments of the P. C. as binding on them & in *Mata Prasad v. Nageshar Sahai*, A. I. B. (12) 1955 P. c. 273 : (47 ALT., 883),

'their Lordships think it desirable to point out that it is not open to the Cts in India to question any principle enunciated by the P. C. although they have a right of examining the facts of any case before them to see whether & how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of 'judicial dignity,'- or otherwise, to question its decision on any particular issue or fact.'

These observations cannot apply to this Ct. as the Govt. of India Act had no operation in this State & this Ct. was under the Mysore High Court Act the highest Ct. of criminal jurisdiction at the time of the decision in *Emperor v. Banom Lall*, A. i. b. (30) 1943 F. C. 36 : (1943 F. O B. 96 : 45 Cr. L.J. 1).

7. The constitutional position of this State was also different from that of British India at that time & considerations about competency of the Governor-General to promulgate the Ordinance cannot be applied to the authority of the local legislature to enact the law as this has to be ascertained from the Govt. of Mysore Act. Under this Act it was perfectly open to the Legislature to pass the Special Criminal Courts Act.

8. What needs to be considered is whether the Special Act falls in the category of 'delegated legislation' on account of the constitution of S. Cts. & cases for trial before them being left to the discretion of the Govt or a servant of a Govt. & not fixed by the Legislature itself. The P. C. treated it as conditional & not delegated' legislation referring to *Empress v. Burah*, 4 Cal. 172 : (5 I. A. 178 P. C.) and *Charles Russell v. The Queen*, (1882) 7 A. C. 829 in which legislation of this kind was held to be valid. Treating the point as *res integra*, I think that the Act cannot be impugned as delegating legislation, since it does not give any right to the executive to make the law but only provides that it will come into operation at such time & in such areas as may be determined by the Govt. or a servant of the Govt. The cases referred to are sufficient authority in support of this & as the view of the S. C. is the same about similar provisions as regards detention, I deem it unnecessary to state anything more on the point. The objection raised to the Act on this account is in my opinion untenable.

9. The next ground of attack is that there has been deprivation of the rights vested in the persons for a trial under the Criminal P. C. by reason of the trial being held under the Act & that this is not legal. It is argued that since the cases were instituted in the Ct. of the Sp. First Class Mag., Madhugiri, these were taken cognizance of & proceeded with to some extent in that Ct. it is only that Ct. which had to dispose them of under the Code either by passing judgment or an order of commitment to the Ct. of Session. As already mentioned, the trial under the Special Act denies to the accused some of the rights available to them in a trial under the Code. Unless all such rights are shown to have accrued to the persons before the Sp. J. started the proceedings the grievance on this account is not justified. The stage at which in proceedings under the Criminal P. C. the accused is vested with rights to claim the benefit of its provision is sometimes alleged to be the time at which the case is taken cognizance of & sometimes at the time of the initiation of the proceedings. The expression "taking cognizance of" is not defined in the Code but the circumstances under which a Mag. can take cognizance of an offence are specified in Section 190 of the Code. Clause (a) provides for it on receiving a complaint of facts which constituted such offence & Clause (b) on getting a report in writing by any police officer. In 46 Mys. H. C. R. 435 at p. 451, Eerily C. J. observed as follows :

'If we examine SECTIONS 190, 191 & 192, which all appear in the same part, i. e., Part B, of Chap. XV of the Code as that in which Section 195, appears, & if we further examine Sections 200, 202 & 204 of the Code, we find that 'taking cognizance' of a case is used in the sense of taking up the case for judicial disposal the sense in which we say in our official language that a Ct. takes a case on file.'

Applying this rule, it must be held the cases were taken cognizance of by the Mag. What is its effect? In 48 Mys. h. c. R. 430, the trial under the Special Act was upheld though the offences were committed before the Act came into force, the Sp. J. under the Act had not appointed when the charge sheet was filed & the case was subsequently tried by him as directed by an order of the Govt. The question now is not whether the Act may be applied to cases relating to offences alleged to have been committed prior to the enactment as it is long after that the cases arose but whether the accused acquired any rights by virtue of the proceedings in the Mag's. Ct. which could not be later disturbed or taken away. One of the rights affected is the right of appeal. Though it is settled that no one has a vested right in procedure [See *Wilbur v. Parker*, (1916) 2 Ch. 1 : (85 L. J. Ch. 564)] and as stated in *Delhi Cloth & General Mills Co. Ltd. v. Income-tax Comr. Delhi*, provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible have retrospective effect attributed to them, a right of appeal is held to be a substantive right. (*Salmond's Jurisprudence* page 647). [See *Colonial Sugar Refining Co. Ltd. v. Irving*, 1905 A. C. 369 : (74 L. J. P. C. 77), *Delhi Cloth & General Mills Co. v. Income-tax Comrs. Delhi* and *In re Vosudeva Samiar*, 52 Mad. 361 : (A. I. R. (16) 1929 Mad. 381 S. B.) which says that the institution of a suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career.] The date on which an offence is taken cognizance of cannot be treated as analogous to the date on which a suit is instituted for the purpose of determining the rights, as process need not necessarily be issued to the accused & without it the case cannot be said to be instituted against him. There are two decisions of the Patna H. C. in *Banwari Gope v. Emperor*, A. I. R. (30) 1943 Pat. 1 at p. 18 : (44 Or. L. J. 273 F. B.), which is of a P. B. & the other of a Sp. B. *Gopal v. Emperor* at p. 245 : (45 Cr. L. J. 177 S. B.) in which the question as to when a case can be said to be taken cognizance of & the accused is vested with rights under procedural law is discussed. The proceedings in both cases at first were started under the Criminal P. C. in a Mag's Ct. but the trial was by a Mag. under the Ordinance. In the earlier case at p. 22 *Fazl Ali J.* as he then was, stated :

'In my opinion as soon as the Mag. takes cognizance of an offence there is a criminal case against the accused person & at that point of time he acquires such right of appeal or revn. as the case may be as the law confers on him.'

In the later case the learned Chief Justice, as he then was, explained this at p. 268 as having reference to

only those cases where the Mag. having taken cognizance of an offence decides to proceed against the accused either by summoning him or taking snob step as is equivalent to the issuing of summons.' ,

Meredith J. at p. 251 also construed the decision at p. 18 as laying down that "such rights as accrued to an accused person become vested in him. at the point when judicial proceedings are commenced against him' & proceeds to state :

'The prosecution does not start until the Mag.- makes up his mind to act upon a charge-sheet & takes some overt action to implement his decision That is the point, at which vested rights such as a right of appeal or right of trial by jury may accrue to a person proceeded against if the law as it stands at that date gives them to him.'

The proceedings in the Mag's. Ct. *Madhugiri*, show that after the charge-sheets were presented on 9-4-1949, the cases were posted to 20-4-1949, adjourned on that date to 22-4-1949 with a note that the accused were remanded & that some properties were produced : that on the latter date a bail appln. was heard & the accused were remanded till 6-5-1949; that on 27-4-1949 orders on the bail application were passed & the case was posted to 6-5-1949 with a direction that P. ws. will be produced: that on 6-6 1949 it is noted that the Sp. Ct. was constituted & the case was adjourned to 16-5-1919. Beyond passing orders on the bail appln. the Mag.

does not appear to have done anything else. Even if it is assumed that the prosecution was started against the accused by the Mag. the trial by the Sp. J. was proper for the reason that those proceedings preceded the trial & had to be carried on in that Ct. As Meredith J. points out at p. 250 in *Gopal v. Emperor*, A. I. R. (30) 1943 Pat, 245 : (45 or. L. J.177).

'An examination of the Ordinance as a whole shows that it sets up new Cts. & prescribes a new procedure for trial of cases in those Cts. The procedure it sets up is only for the trial of cases. It lays down no new procedure for dealing with cases in the preparatory stages up to the point when the case becomes ready for trial. It clearly contemplates that the taking of cognizance & all preliminary orders such as orders for inquiry, shall be made by the Sub-Divisional Officer or the Dist. Mag. as the case may be in the ordinary way under the provisions of the Criminal P. C.'

Fazl Ali C. J. also states at p. 273 thus:

'The words of Section 27 (26 of the Mysore Act) are wide enough to suggest that Section 192 as well as a number of other provisions, specially those relating to matters which precede the commencement of a trial, were never intended to be abrogated. The Ordinance itself contains no provision for the stages which pervade the trial & the order under Section 192 which is passed before the trial begins must necessarily be governed by the Criminal P. C.'

10. In *Srikant v. Emperor*, A. I. R. (80) 1948 Bom-169 : (44 Cr. L. J. 616 P. B.), Beaumont C. J. too observed at page 174, '... any case or offence which is awaiting trial can be placed for trial before the Special Judges.' The trial begins in a case exclusively triable by the Ct. of Session only after the charge is framed by the committing Mag., See *In re Palmiandi*, 32 Mad. 218 : (9 Cr. L. J. 146) & in a warrant case when the accused is called upon to plead to a charge. As the proceedings in the Ct. of the Sp. First Class Mag. had not reached either of these stages when the cases were sent to the Sp. J. & the Special Act was already in force when the proceedings commenced, I do not think that the trial can be challenged on the ground of the procedure adopted being at variance with the provisions of the Criminal P. C.

10A. The learned counsel for the petitioners urged that apart from the contentions discussed so far which pertain to the validity of the Special Act prior to the [Constitution of India](#) it must be now held void under Article 13 as its provisions contravene Articles 14 & 21. He urged that the convictions & sentences should be quashed as these cannot be given effect to without being reviewed & no review is possible under a void Act. Section 7 of the Act requires that the proceedings in the cases in which the sentence is that of death or imprisonment for more than seven years & other cases referred by the Sp. J. are to be reviewed by a Judge nominated by Govt. & states that his decision is final. Without the review the sentences awarded by the Sp. J. cannot be executed as, in cases which fall under Section 7 it is obligatory for giving validity & finality to the decision in the cases. The powers of the Reviewing Judge are not defined in the Act but I think are meant to be exercised for giving relief when the convictions or sentences are unjust. So construed, the review in two previous instances, crim. refd. cases Nos. 1 & 4 of 1942-48 resulted in acquittal of some of the accused & modification of the sentence passed on some persons tried under the Special Act. By the date of the Constitution the cases had been submitted for review & interim orders too obtained from the Reviewing Judge on petitions, for suspension of the sentences imposed on some of the accused. While it is not disputed that if the review was over these petitions would not be competent, the pendency of those proceedings has been urged as being sufficient to attract the operation of the constitutional provisions. In *Emperor v. Shibnath Banerjee*, 1944 P. C. B. 1 : (A. I. R. (30) 1943 P. C. 75 : 45 Cr. L. J. 341), for the purpose of distinguishing cases which were terminated & those which were still binding under Sections 3 & 4 of the Ordinance by which the Special Courts Ordinance was repealed, cases which were awaiting review were held to be pending.

11. The question therefore is as to how far still binding cases are affected by the Constitution & this has to be determined by the construction of Article 13 which states,

'all laws in force in the territory of India immediately before the commencement of this Constitution, in so far

as they are inconsistent with the provisions of this Part shall, to the extent of such inconsistency be void.'

Two other Articles 372 & 367 need to be noticed to make out the scope of this article. Article 372 declares that 'notwithsta binding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.'

As this is not an enactment referred to in Article 395, it must be deemed to continue in force unless the other provisions in the Constitution forbid it. Article 367 provides that

'unless the context otherwise requires, the [General Clauses Act, 1897](#), shall, subject to any adaptations & modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.'

Relying on Section 6, General Clauses Act, by which,

'unless a different intention appears, the repeal shall not --... (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder;... (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be Instituted, continued or enforced, & any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.'

the learned Advocate-General argued that the combined of act of Articles 367 & 372 is to leave the proceedings under the Special Act untouched & unaffected by the provisions of the Constitution, that the words 'be void' in Article 13 are synonymous with 'repeal.' Learned counsel of the peters, argued that there is a distinction between Acts which are void & which are repealed, that the latter imply Acts having had validity & the former denote Acts without validity at any time, in ether words, void ab initio. To emphasize this to be the proper construction he mentioned that the word 'be' was deliberately employed instead of 'become' so that there may be no doubt that Acts which offend provisions in part III of the Constitution must be treated as invalid from the inception. The para in Mathews' American Constitutional system containing the following quotation waa referred to. Field J. in Norton v. Shelly County, (1886) 118 Tj. S. 425, ias observed thus :

'An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as t though it bad never been passed.'

There are no provisions in the American Constitution correspo binding to Articles 13, 367 or 372 of the Indian Constitution & the effect of the Constitution coming into force upon existing laws & pe binding actions depends on the meaning conveyed by the words employed in these Articles. As pointed out in A.K. Gopalan v. The State of Madras, A. I. R. (37) 1960 S. C. 27 :(51 Cr. L. 1383), by the S. C. the Constitution as a whole has to be read with the same sanctity without giving undue weight to Part in except to the extent expressly provided for. The import of the words 'shall be void' in Article 13 & applicability of provisions in part III to pe binding cases was considered by a F. B. of the Bombay H. C. in In re Keshav Madhav, (: AIR1951Bom188), when objection was raised to a case instituted under the Press Emergency Powers Act 1931 prior to the Constitution being proceeded with on the ground that Section 18 of the Act was in conflict with Article 19. The learned Chief Justice held on an examination of this words in Articles 13, 367 & 395 that there is no difference between an Act which is repealed & an Act which is declared void, that Section 6, General Clauses Act, applies to those laws which have become void on their becoming inconsistent with the provisions of part III of the Constitution & therefore the proceedings under the Press Act instituted prior to the Constitution were not affect, ed by the provisions of the Constitution. This case is referred to & the view expressed therein has been adopted by a D. B. of this Ct. composed of my learned brothers in Amritlal v. Govt. of Mysore, Cr. B. P. No. 7 of 50-51:(A. I. R.

(38) 1961 Mys. 26 : 53 Cr. L. J. 251) & by one of them in Abdul Sattar v. Govt. of Mysore, Cr. B. P. No. 17 of 50-51, Showkat-un nissa Begum v. State of Hyderabad, A. I. R. (37) 1950 Hyd. 20 (FB), cited in support of petnra. was a case of detention & as such is distinguishable. The point is not free from doubt or difficulty. But having regard to all the factors to be taken into account it seems to me that the interpretation of the article in the above cases may be adopted in these cases. Section 1 of the Special Act provides that trials & proceedings pe binding at the time of rescission may be continued or completed as if the provisions of this Act were still in force.

12. Assuming that there is anything in the Act which impairs the rights conferred by part III of the Constitution it does not follow that the Act as a whole is void. If what remains to be done is the criterion it is difficult to treat review as 'inconsistent' with the articles in part III as that would not offend any of these & the result if at all would be of benefit to the accused. Amongst the accused tried by the Sp. J. about twenty, nine are said to have been acquitted. Of those who were convicted one is said to have fully served the sentence & the period of sentence in the case of some is nearing completion. The consequence of holding that the review should not proceed is to invalidate the convictions & sentences by the Sp. J. t though these were legal at the time the cases were tried, write off all that is done, deprive the petnrs. of the chances of possible early relief & subject them to expense, trouble & suspense of a fresh & prolonged proceeding under the Criminal P. C. These are considerations which may have a bearing on the question whether provision in the Special Act for the review can be regarded as 'inconsistent' with Part Hi. It seems to me that the proceedings under the Special Act in these cases are not affected by the Constitution. In this view the other contentions advanced on behalf of the petnrs, about the provisions of the Special Act being in conflict with those in the Constitution da not require to be examined in detail & need be briefly referred to. The articles which the Special Act is alleged to contravene are Articles 14 & 21, the corresponding provision to both of which is contained in the 5th & the 14th Amendment of the American Constitution in these words :

'.. ... Nor shall any statute deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection, of the laws.'

The words 'procedure established by law' are substituted for 'due process of law' in Article 21 which reads thus : 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' In A. K. Gopalan v. The State of Madras, : 1950CriLJ1383 the learned Chief Justice of the S. C has stated thus :

'The omission of the word 'due,' the lim citation imposed by the word 'procedure' & the insertion of the word 'established' thus brings oat more clearly the idea of legislative prescription in the expression used in Article 21. By adapting the phrase 'procedure established by law' the Constitution gave the Legislature the final word to determine the law.'

and at p. 187

'No extrinsic aid is needed to interpret the words of Article 21, which; in my opinion, are not ambiguous. Normally read, & without thinking of other Constitutions, the expression 'procedure established by law' 'must mean procedure prescribed by the law of the State.'

Belying upon the observation of Patanjali Sastry J. in the same case ai p. 238 that :

'Procedure established by law' may well be taken to mean what the P. C. referred to in King Emperor v. Benoari Lal (as 'the ordinary & well-established criminal procedure,' that is to say, those settled usages & normal modes of proceeding sanctioned by the Criminal P. C. which is the general law of Criminal Procedure in the country . . . In the view I have indicated, it must not be a change ad hoe for any special purpose or occasion, but a change in the general law ot procedure embodied In the code';

the provisions of the Special Aob are impugned on the ground that these are applicable only to some cases &

constitute a drastic change in the general law of procedure. The reasonableness or otherwise of these is not a matter for inquiry by the Ct. The Act was passed eight year back & not for the purposes of these cases; when the legislating authority has allowed it to remain in force eo long, when it has been applied in several cases previously tried, it cannot be regarded as a change ad hoc for these cases. T though the rights & facilities conferred on the accused by the Code are materially abridged, it cannot be said that what remains will not satisfy the test of an orderly procedure. Willis in his book on Constitutional Law at p. 672 under the heading 'Essentials of Orderly Course of Procedure' states :

'What will amount to an orderly course of procedure when it is required; neither a jury trial nor an appeal is necessary for an orderly course of procedure. An orderly course of procedure does not require a Ct. to weigh the evidence; but it does require it to examine the entire record, to ascertain the issues, to discover whether there are facts not reported and to see whether or not the law has been correctly applied to the facts. The requirement of an orderly course of procedure does not require any particular form of procedure. Procedure sanctioned by settled usage will satisfy the requirement but an orderly course of procedure is not limited to procedure which has been sanctioned by settled usage. New forms of procedure are as much due process of law as old forms, provided they give a person a fair opportunity to present his case.'

Mathews in his book on American Constitution, at p. 439, states thus :

'In criminal trials the only lim citation upon the States found in the Federal Constitution is the due process clause in 14th amendment. This clause requires that the defendant shall have due notice and a fair hearing. Provided these conditions are fulfilled the methods of procedure in criminal trials are within the control of the State, the due process clause prevents arbitrary procedure but does not require any particular procedure. . . . Due process does not require the right of appeal nor does it require that the deft, in criminal trial be exempt from compulsory self-incrimination.'

In these cases it is not suggested that the accused had not the assistance of counsel or that the proceedings were in any respect arbitrarily conducted. Under the Constitution there is also a right of appeal to the S. C. provided for in Article 136. In view of these & the interpretation of Article 21 by the S. C. in the above case, the Special Act cannot be regarded as contravening Article 21.

13. As regards Article 14 viz., 'The State shall not deny to any person equality before the law or the equal protection of the laws. .' the learned Advocate General argued that ib does not apply to procedural law, that there is no discrimination made in the application of the substantial law in regard to these persons, that the direction for the cases being tried by the Sp. J. makes no distinction between the petnrs. & the other offenders involved in the disturbances, as the order was that the cases against all persons accused of offences committed at that time should be tried by the Sp. J. Willis, at p. 579, on Constitutional Law states thus :

'The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed. The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.'

At the next p. 580, it is stated that a law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it.

14. T though the Special Criminal Courts Act mainly relates to procedure, apart from other handicaps entailed on the accused it takes away the right of appeal which as pointed out is a substantive right. It is true that nothing is stated in the Act as being applicable to any one in particular. Nor does it specify the class of persons or cases subject to its provisions but leaves the option of selecting cases to be tried under it, to the

discretion of the executive without regulating the exercise of such discretion.

15. As is said in an American case,

'the constitutional command for a State to afford equal protection of the law sets, a goal not attainable by the invention & application of a precise formula.'

It is by examining the nature of the provisions! in the light of well recognized principles of law that an opinion may be formed in a case. Pollock, in his first book of Jurisprudence at P. 37 explaining the general marks of law says

'every rule must at least have regard to a class of members of the State & be bi binding on or in respect of that, class as determined by some definite position In the community,'

and in regard to procedural law at p. 78 states,

'when we consider a system of law from the citizen's point of view rather than the lawyer's as a material element in the political stability of the commonwealth, we may almost say that certainty in procedure is more important than certainty in the substance of law.'

The existence of two enactments governing procedure one of which restricts the rights available under the other, absence of anything to indicate as to which class of offenders or offences the Special Act will apply render its operation arbitrary & uncertain. In support of the argument that Article 14 does not prevent the State from making different laws & different systems of judicature in different parts the learned Advocate General cited the case, *Missouri v. Lewis*, 101 U. S. 22, in which the question was whether the law providing a Sp. C. of appeals with exclusive jurisdiction over certain areas denying to people in those areas access to the general Ct. of appeals was constitutional & did not deny equal protection. The S. C. field

'there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory The 14th amendment does not profess to secure to all persons in the United States the benefit of the same laws & the same remedies.'

The facts are distinguishable inasmuch as the law in question in that case was applicable to all the litigants in a locality or area, whereas tbe Special Act may be made applicable or not to any offence in a place at the will of the Govt. or its servant. It was also argued on the analogy of the executive having power to order detention under the Preventive Detention Act, discretion could be legally vested in the Govt. to direct trials under the Special Act. Reasons are requ;red to be furnished to order the detention & absence of a provision for it was held to be opposed to the Constitution, by the S. C. The Special Act is silent about the need for giving any reason to dispense with the ordinary mode of trial in any case. Willoughby in his book on the American Constitution, at p 1677, states

'generally speaking it may be said that while wide discretionary power may be constitutionally granted to administrative agents, this discretion must be one which must be guided by reason, justice, impartiality & must be exercised in the execution of policies predetermined by legislative act or fixed by the common law.'

Even before the [Constitution of India](#) was framed, the Ordinance wag held to give power to discriminate between one accused & another by directing trial in different Cts. & held valid in *Emperor v. Benoari Lal* , with the the following remarks :

"It may be that as a matter of wise & well-framed legislation it is better if circumstances permit to frame a statute in such a way that the offender may know in advance before what Ct. he will be brought it he is charged with a given crime ; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute which does not accord with this principle.'

These reasons cannot now prevail since there is a written constitution in which Article 14 guarantees a fundamental right. Had the trial by the Sp. J. taken place after the date of the Constitution all these considerations may have been of force but cannot be of help to the petitioners. since the trial was concluded & the cases had reached a stage beyond it when the Constitution came into force. 16. The remaining contentions against the validity of the Special Act are that it is repugnant to the Criminal P. C., & by virtue of Article 254 the latter has to prevail ; that it purports to deprive the H. C. of the powers vested in it by the Constitution & this cannot be done by State Legislation. The Criminal P. C., does not state that the procedure it prescribes has to be followed in all criminal proceedings & on the other hand provides in Section 1 for procedure being different under Special Laws. The attack based on the score of repugnancy must therefore fail. As regards the Act interfering with the powers of this Ct. the learned Advocate-General argued that consideration of the legality of this does not arise, since the petitions are filed only under Article 226 of the Constitution & this is not affected by the Special Act. The question whether in spite of Section 25 of the Special Act this Ct. can exercise any powers under other provisions of law in cases tried under the Act does not arise now for decision & I refrain from expressing any opinion about it at present. The petitions are, in my opinion, to be dismissed.

Balakrishnaiya, J.

16a. These four petitions are filed under Article 226, [Constitution of India](#), against the convictions by the Sp. J. Tumkur, acting under the Mysore Special Criminal Courts Act, 1942. The petitions in Cr. Petns. Nos. 69 & 70 of 1950-51 are by the three accused in C. C. No. 1 of 1948 49 & orim. Petns. Nos. 71 & 72 of 1950-51 by 21 accused in C. C. No. 2 of 1948 49 on the file of the Sp. J. The relief asked for by each of the two sets of accused in the twin petitions is the grant of writs in the nature of certiorari & of habeas corpus respectively.

17. Briefly stated, the facts leading to the petitions are as under. On 1-3 1949 in the town of Sira belonging to the Revenue District of Tumkur there was a rioting between the Hindus & Muslims in consequence of which five persons were killed & seven injured amongst whom were one Police Daffedar who died on the spot & one Police Constable who sustained injuries.

18. The two cases were filed against the accused 55 in number on 9-4-1949 before the First Class Mag. Madhugiri, under Sections 302, 307, 333 & 335 of the Penal Code & adjourned to 22-4 1949 after remanding the accused to custody. On 22-4-1949 arguments were heard on the bail petitions which were posted for orders to 27-4-1949 & the main cases were adjourned for further action to 6-5-1949.

19. In the meantime, i. e. on 22-4-1949 a Notfn. was issued by the Govt. under Section 3, Special Criminal Courts Act of 1942 appointing a Sp. J. subsequently, by another Notfn. under Section 4 of the same Act, the cases were directed to be tried by the Sp. J. so appointed. The Sp. J. took cognizance of the cases on 6-5-1949 & posted them for trial to 16-5-1949. After trial judgment convicting some of the accused was passed on 5.10-1949 awarding varying sentences. The proceedings in entirety were submitted by the Sp. J. for review & they are still pending before the learned Chief Justice of this Ct. nominated by the Govt. under Section 7 of the Act.

20. The petitions under consideration were filed on 10-7-1950. They are all heard together as the points involved are common to all, touching the validity of the trial. The main contentions raised by the petitioners are two-fold, viz., that the Mysore Special Criminal Courts Act, even when Mysore had not become integrated into the Union is ultra vires the Legislature, & that even conceding that the Act is valid it has been after the commencement of the [Constitution of India](#), rendered ab initio void as its provisions are repugnant to the fundamental rights guaranteed under Articles 14 & 21 of the Constitution. In connection with the first objection, it was urged by Sri, Jayarama Iyer, the learned Advocate for the petitioners that the Special Act is delegated legislation & therefore ultra vires the legislature. Reliance was placed on the decision in Emperor v. Benoari Lall, 6 P. L. J. 79: (A. I. R. (30) 1943 P. C. 36. 45 Cr. L. J. 1), where it is held that the Special Criminal Courts Ordinance of 1942 is a delegated legislation. It was strenuously urged that the above ruling is binding on all the H. Cs. in the Indian Union including this Ct. after the commencement of the Constitution. It

is argued that Article 374(2) of the Constitution declared that--

'.... the judgments & orders of the P. C. delivered or made before the commencement of the Constitution shall have the same force & effect as if they had been delivered by the S. C.'

& this Article read with Article 141, it is urged has the same effect as the law declared by the S. C. The judgment of the F. C. above referred to has since been reversed by the P. C. & the order in Council of His Majesty under Section 8, [Abolition of Privy Council Jurisdiction Act, 1949](#)-

'shall for all purposes have effect, not only as an order of His Majesty in Council, but also as if it were an order or decree made by the F. C. in the exercise of the jurisdiction conferred by this Act.'

The F. C. at that time was bound by that decision of the P. C. & its decree stood modified & the decree so modified had to be given effect to as if it were its own decree. A distinction is sought to be made between a decree & a judgment on the ground that the decree reversed or modified by an order in Council of His Majesty will be given effect to & not the judgment of the Judicial Committee which forms the report which is merely of an advisory character. It is maintained that the judgment of the Federal Ct. is not superse. ded bat is left intact & has still the force of law in view of Article 374 of the Constitution.

21. Before the commencement of the Constitution, the decisions of this Ct. were final in the sense that they were not subject to appeal. The judgments of the F. C. or the P. C. were, however, entitled to much respect. After the Constitution, this Ct. is bound by the law declared by the S. C. under Article 141. Articles 374 found in the Chapter styled as 'Temporary & Transitional Provisions' is in my opinion intended to give a continuity of the proceedings & the provision that judgments & orders of the F. C. delivered & made before the commencement of the Constitution shall have the same force & effect as if they had been delivered & made by the S. C. is meant only to give a finality & the bi binding effect on the parties & causes so as to facilitate further proceedings.

22. Before the commencement of the [Constitution of India](#), the principles enunciated by the P. C. were not open to question by the Cts. in India as has been starved by the Board in Mata Prasad v. Nageshar Sahai, A. I. R. (12) 1955 P. C. 272: (47 ALL. 883) thus:

' It is not open to the Cts. in India to question any principle enunciated by tbe P. C.,, all though they have a right of examining the facts of any case before them to see whether & how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, when on account of 'Judicialdignity' or otherwise, to question its decision on any particular issue of facts;'

That such precedents are bi binding has been reiterated by the Indian H. Cs. also. The principle of law enunciated before the Constitution is, however, unaffected by the new Constitution. The theory put forward by the petnrs. that the law enunciated by the Judicial Committee in Emperor v. Benoari Lal should be treated as non-existing & the judgment of the F. C in Emperor v. Benoari Lal, A. i. r. (80) 1943 P. C 36: (45 Cr. L J. 1) t though reversed by the P. C. should be held to be of a bi binding nature appears to be rather too extravagant to ba accepted.

23. This leads me to examine the grounds upon which tbe impugned act is characterised as a delegated legislation. It is not disputed that the Mysore Special Criminal Courts Act, 1942 was passed by the State Legislature. The State Legislature was supreme at the time & had plenary powers under S. 28 of the Govt. of Mysore Act 1940 to piss an Act of that nature. That the powers exercised by the Legislature in passing the Act are well within the limits prescribed by the Constitution & not beyond the competency of the Legislature admits of no doubt. That an Act of a Legislature should be presumed to be valid is an established proposition of law both in India & elsewhere & when a Ct. is called upon to pronounce an Act of legislation ultra vires the presumption is always in favour of ita validity as laid down in Shyamakantlal v. Bambhajan, A. I. R. (S6) 1939 P. C.74: (I. L B. (1939) Kar 165). Their Lordships hold :

'When the question is whether a provincial legislation is repugnant to an existing Indian Law, the onus of showing its repugnancy & the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, . . .'

The same principles are affirmed by the S. C. in *A. K. Gopalan v. State of Madras*, A. I. R. (87)

24. It is undoubted that the impugned Special Criminal Courts Act is an existing law which is in force. Article 395 of the Constitution repeals certain Acts in existence at the time, while Article 372 declares the continuance of certain other existing laws & their adaptation. Clause 1 of the said Article reads thus:

'Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.'

The Special Criminal Courts Act of Mysore is not an Act repealed under Article 395 of the Constitution & it is one of the Acts of the State which was in force immediately before the commencement of the Constitution & continues to be in force until altered or repealed or amended by a competent Legislature.

25. In order to appreciate the arguments in this respect, it is necessary to briefly set out the substance of the provisions of the impugned Act, The Mysore Special Criminal Courts Act substantially follows the provisions of the Special Courts Ordinance of 1942 of India. The first three sections deal with the Constitution & the rest pertain to the appointment of Judges & the procedure to be adopted in the trial of cases. Though it is conceded that the portion dealing with the Constitution of the Cts. is *intra vires*, it is all the same maintained that the provisions dealing with the procedure are wholly unconstitutional. The relevant sections about which objections are raised are reproduced below.

26. Section 4 deals with jurisdiction of Special Judges & runs as follows:

'A Sp. J. shall try authority offences or classes of offences, of such cases or classes of cases, as the Govt. or a servant of the Govt. empowered by the Govt. in this behalf, may, by general or special order in writing, direct.'

27. Section 5 contains procedure of Special Judges & reads thus:

'(1) A Sp. J. may take cognizance of offences without the accused being committed to his Ct. for trial, & in trying accused persons shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates: Provided that a Sp. J. shall ordinarily record a memorandum only of the substance of the evidence of each witness examined, may refuse to summon any witness if satisfied after examination of the accused that the evidence of such witness will not be material, & shall not be bound to adjourn any trial for any purposes unless such adjournment is, in his opinion, necessary in the interests of justice.

(2) In matters not coming within the scope of Sub-section (1) the provisions of the Code, so far as they are not inconsistent with this Act, shall apply to the proceedings of a Sp. J. ; and for the purposes of the said provisions the Ct. of the Sp. J. shall be deemed to be a Ct. of Session.'

28. Section 7 provides for review of convictions & runs as follows:

'If in any proceedings before a Sp. J.--(a) a person convicted is sentenced to death, or to transportation for life, or to imprisonment for a term of seven years or more, or (b) though no person is so sentenced the Sp. J. certifies that in his opinion the case has involved questions of special difficulty, whether of law or fact, or is of such a nature which for any other reason ought properly to be reviewed, the proceedings shall be submitted for review by a person nominated in this behalf by the Govt., which person shall be chosen from the Judges of the H. C. & the decision of that person shall be final.'

29. Section 25 excludes the interference of other Cts. & runs thus:

"Notwithstanding the provisions of the Code, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this Act, be no appeal from any order or sentence of a Ct. constituted under this Act & save as aforesaid, no Ct. shall have authority to revise such order or sentence or to transfer any case from any such Ct. or to make any order under Section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Ct.'

30. Section 26 is concerned with the application of ordinary law & runs thus :

'The provisions of the Code & of any other law for the time being in force in so far as they may be applicable & in so far as they are not inconsistent with the provisions of this Act, shall apply to all matters connected with, arising from or consequent upon a trial by Special Criminal Cts. constituted under this Act.'

31. It is argued that Section 4 of the Act invests arbitrary powers to the Govt. or a servant of the Govt. to direct a tribunal for trial of any offence & such direction has the effect of repealing the ordinary law of procedure & divesting the regular criminal Cts. of the powers to deal with offences. This, it is argued, constitutes delegation of powers of the Legislature to an external authority who by an administrative act brings into operation the Special Act which has the effect of abrogating the ordinary law of Criminal Procedure & is thus opposed to the principles of legislation & renders the Act wholly unconstitutional.

32. Legislature has ample powers to pass any Act either conditional or absolute. It is the basic rule that the power conferred on Legislature to make laws cannot be delegated by that Dept. to any other body or authority; but it is however recognized that for the sake of convenience, the commencement of the Act or the application of the same to a certain area are generally allowed to depend on the discretion of a local authority, without the Legislature by itself directly fixing them. If the external authority is not enabled to make laws but only empowered to give effect to the provisions of the Act, it cannot be said that it amounts to delegation of Legislative powers. As observed by their Lordships of the P. C. in *Emperor v. Burah*, 4 Cal. 172 : (5 I. & 178 P. C.).

'the proper Legislature has exercised its judgment as to the place, person, laws, powers; & the result of that judgment has been to legislate conditionally as to all things. The conditions having been fulfilled, the legislation is now absolute.'

The House of Lords, in *Charles Russell v. Queen*, (1882) 7 A. C. 829 when an objection was raised that the Parliament of Canada though it had the authority to pass a law could not delegate its powers to bring into force the prohibitory & penal provisions of the Act on a vote of majority of voters, answered thus :

'..... The Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on matters with which it deals. The provision that certain parts of the Act shall come into operation only on a petn. of a majority of the electors does not confer on these persons power to legislate. Parliament itself enacts the conditions & everything which is to follow upon the condition being fulfilled.'

The competency of Legislature is stated thus at p. 138 by Willis in his Constitution : 'Legislature may delegate the power to determine the conditions or contingencies under which a Statute shall be operative' It may also 'delegate the power to ascertain the facts & to apply rules of law in controversies, i. e., to administer standards etc.' In considering the validity of the Special Courts Ordinance their Lordships of the P. C. stated their opinion in *Emperor v. Benarilal*, thus :

'The actual setting up of a Special Ct. under the terms of the Ordinance should take place at the time & within the limits judged to be necessary by the Provincial Govt. specially concerned.. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity.'

While interpreting Section 4, Punjab Public Safety Act, His Lordship the C. J. of the S. C. expressed that 'the power to make the order of externment given to the Provincial Govt. or the Dist Mag. whose satisfaction is

final is not legislative delegation' : (See N. B. Khare v. State of Delhi, : [1950]1SCR519). Again, while considering the scope of s. 8, Preventive Detention Act of 1950 the learned C. J. of the S. C. observed at p. 42 in A. K. Gopalan v. State of Madras, : 1950CriLJ1383), thus:

'This contention of delegation of the legislative power in such cases has been considered & rejected in numerous cases by our F. C. & the English Cts. A reading of the various speeches in *Liversidge v. Anderson*, (1942) A.C. 206: (110 L.J.K.B. 724), clearly negatives the contention that Section 3 of the impugned Act is no delegation of legislative powers to make laws. It only confers discretion on the Officer to enforce the law made by the Legislature.'

32. The Mysore Special Criminal Courts Act, 1942, under consideration, extends to the whole of Mysore; & under Section 1 (2) & under sub Clause (3), it comes into force in any part of the Mysore State by a notfn. of the Govt. declaring it to be in force in such area & Section 4 gives jurisdiction to the Sp J. to try a case entrusted to him. The Govt. may by an order in writing direct such offence or class of offences to be tried by a Sp. J. & after such direction the trial is subject to the procedure fixed by the Special Act itself which should be followed. The Act is complete & self-contained. The mere fact that the Legislature has left it to the discretion of the Govt. to constitute Sp. Cts. in appropriate cases does not amount to any delegation of legislative authority; but if the Legislature has laid down in the Statute the principles & left it to the executive to carry them out subject to the provisions of the enactment, the enactment would be constitutional, & the provisions of the enactment are automatically attracted. The provision that the Act would be brought into operation at the discretion of the Govt. does not amount to the delegation of the legislative powers. The executive Govt. is not empowered to make laws but is only allowed to exercise powers fixed by the Legislature itself. The mere provision that the operation of the Act is to be determined by some officer does not amount to delegation of any legislative power but merely an authorisation to enforce the Act on the fulfilment of the conditions specified therein. I am unable to accept the contentions of the petnrs. & therefore, hold that the impugned Act is only conditional legislation & not "delegated" legislation.

33. It is next urged that the trial in the Sp. Ct. is illegal as the charge-sheets were in the first instance placed in ordinary Ctp. of the land & subsequently the cases were tried in the Sp. Ct. by the Sp. J. without the formality of the transfer provided for in the ordinary procedure. It is urged that these were pe binding cases in the ordinary Cts. & the application of the Special Act deprived the right of the petnrs. to be tried under the ordinary procedure. This Court has held in *Sandada Gurusanthappa v. Government of Mysore*, 48 Mys. H. C. B. 430, that a change in procedure will apply to pe binding proceedings unless there is something in the Statute showing that it is not to apply to pe binding proceedings. *Maxwell on Interpretation of Statutes*, at pp, 198 & 199 states thus :

'No person has a vested right in procedure. He has only a right of prosecution or defence in the manner prescribed for the time being by or for the Ct. in which he sues & if an Act of Parliament alters that mode of procedure he has no other right than to proceed according to the altered mode. The general principle however seems to be that alterations in procedure are retrospective.'

In Vol. 31 of *Halsbury's Laws of England*, at p, 537, the principle is stated thus : 'A penal Statute which does not create a new offence but deals only with procedure & punishment, may be retrospective.' The application of the Criminal P. C. is also limited by Sub-section 1 of Section 2 of the Code. The portion relevant runs thus :

'In the absence of any specific provision to the contrary nothing herein contained shall.... affect any Special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force.'

The provision of the Criminal P. C. will not affect any special jurisdiction or power conferred by any other law for the time being in force & the Special Criminal Courts Act is one such law & the special form of procedure prescribed by such law will not be affected by the Criminal P. C. Consequently, on the application of the Special Act, the procedure prescribed by the Criminal P. C. ceases & the Sp. J. gets jurisdiction & the special

form of procedure prescribed by the Special Act will apply. The trend of decisions in India are all to the same effect. Beaumont O. J. in *Shreekant v. Emperor*, A. I. R. (30) 1943 Bom. 169 at p. 174 : (44 Cr. L. J.

616 F.b.), held thus :

'If the trial has not commenced it seems to me plain, that under Section 5, (Section 5, Special Criminal Courts Ordinance corresponds to Section 4, Mysore Special Criminal Courts Act) the case can be placed before a S. J. & I see no reason why this Ct. should not give effect to the plain & natural meaning of the words used.'

In *Gopal v. Emperor*, A. I. R. (30) 1943 Pat. 245 at p. 250 : (45 Cr. L. J. 177 S. B.), while examining the Ordinance of 1942, Meredith J. observed that:

'An examination of the Ordinance as a whole shows that it sets up new Cts. & sets up new procedure for trial of cases in those Cts. The procedure it sets up is only for the trial of cases. It lays down no new procedure for dealing with cases in the preparatory stage up to the point when the case becomes ready for trial. It clearly contemplates that the taking of cognizance & all preliminary orders, such as orders, for inquiry, shall be made by the S. D. O. or the Dist. Mag. as the case may be in the ordinary way under the provisions of the Criminal P. C.'

In another passage, the learned Judge states thus :

'The fact that cognizance is in the first instance taken by the S. D. O. & preliminary orders are passed by him can be no indication that trial in the ordinary Cts. is contemplated, & obviously the fact that such steps are taken in the Ct. of the S. D. O. can give rise to no right to be tried in his Ct. or under Ordinary procedure.'

A Sp. J. is not therefore debarred from taking cognizance of the case pending before another Mag.

34. It is next urged that the provisions of the Special Act curtail ordinary procedure prescribed in the Criminal P. C. & the Evidence Act & also deprive the right of appeal. It is also argued that the provisions relating to the procedure prescribed in the Special Criminal Courts Act is a discriminatory legislation offending binding the fundamental rights guaranteed under Articles 14 & 21 of the Constitution. Article 14 lays down that the State shall not deny to any person equality before the law or the equal protection of the laws', & Article 21 provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law.' Article 14 is analogous to the Fourteenth Amendment of the American Constitution & Article 21 is included in the Fifth Amendment to the Constitution to the effect that no person will be deprived of life, liberty or property without due process of law. The expression 'procedure established by law' in Article 21 of our Constitution, is substituted for 'due process of law.'

35. It may here be useful to examine the principles laid down in the interpretation of the Fifth & Fourteenth Amendment to understand the scope of Articles 14 & 21 of our Constitution. The American law aims at equality of treatment & all persons enjoy the protection of due process. Equality before law means that there should be absence of privilege & equal subjection of all classes to the law of the land. Willis in his Constitutional Law at p. 579 states :

'The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed.' *Hayes v. State of Missouri*, (1887) 120 U. S. 68. 'The inhibition of the amendment. was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, (1888) 125 U. S. 181-187.

The same learned author observes at p. 580 thus :

'Many different classifications of persons have been upheld as constitutional. A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it.'

It is contended that the Special Criminal Courts Act deprives the persons their vested rights in the ordinary procedure prescribed by the general law in the matter of evidence & the right of appeal. No person could be said to have a vested right to a particular remedy in procedure. In *Brown v. State of New Jersey*, (1899) 176 U. S. 172 it is laid down that :

'The State has full control over the procedure in its Courts in both civil & criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights.'

'Prescribing of different modes of procedure & the abolition of Courts, & the creation of new ones leaving untouched the substantial protection with which the existing laws surround the person accused of crime, are not considered within the Constitutional inhibition *ex post facto* laws.' Vide, *Dunne v. State of Missouri*, (1894) 152 U. S. 485.

It is open to the legislature to determine what evidence may be received & the effect of such evidence so long as fundamental rights are preserved. A right of appeal is not considered to be essential for protection of due process of law. Willoughby on the Constitution at p. 1727 states that : "Due process of law does not require the provision of a right of appeal.' In *Mckane v. Durston*, (1894) 153 U. S. 684, the Ct. declared that: 'A review by an appellate Ct. of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, & is not now a necessary element of due process of law.' According to *State of Ohio v. Akron Metropolitan Park*, 281 U. S. 711 :

' The equal protection of the provisions of the Federal Constitution do not require a State to adopt a unifying method of appeals which will insure to all litigants within the State the same decisions on particular questions which may arise. '

It, therefore, follows that equal protection of law affords no guarantee as to a particular form of procedure, or the usual form of evidence, or the right of appeal so long as there is equal protection in the treatment of all persons equally circumstanced.

36. It is not disputed that the Legislature has wide discretion in determining the subject matter of laws. The State of Laws & judicial systems are not required to be uniform throughout the State. Willoughby in his Constitution, at p. 1941, states as follows :

'In *Missouri v. Lewis*, 101 U. S. 22, the important principle was laid down that the equal protection clause of the Fourteenth Amendment does not prevent the application by a State of different Laws & different systems of judicature to its various local sub-divisions. In this case was questioned the constitutionality of a law providing a Special Ct. of appeals with exclusive jurisdiction for the City of St. Louis & a few specified countries. To the claim that this law denied to the people of these districts the equal protection of the laws in that they were denied access to the general Ct. of appeals of the State, the S. C. replied : ' There is nothing in the Constitution to prevent any State from adopting any systems of laws or judicature it sees fit for all or any part of its territory The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws & the same remediesDiversities which are allowable in discrete States are allowable in different parts of the same State'. '

37. It may be observed here that equality before the law does not require mathematical equality of all persons in all circumstances. From the very nature of Society there should be different laws in different places & the Legislature controls the policy & enacts laws in the best interests of the safety & security of the State.

'So long as the fundamental rights of the litigants to a fair trial as regards notice, opportunity to present evidence, etc., & adequate relief, are provided & specific requirements of the Constitution are not violated, the Congress has full discretion as to the form of trial & adjudication & the character of remedy to be furnished.'

(See Joseph Hurtado v. People of the State of California., (184) 110 U. S. 232 and Maxwell v. George N. Dow, (1900) 176 U. S. 581.

Dodd on Constitution states at p. 919 thus :

'The due process clause does not guarantee to the citizen of a State any particular form or method of State procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice & reasonable opportunity to be heard & to present his claim or defence, due regard being had to the nature of the proceeding & the character of the rights which may be affected by it (Dohany v. Rogers, 281 U. S. 362 at p. 369) '

The essentials of an orderly course of procedure are set out in p. 673 of the Constitutional Law by Willis thus :

'Neither a Jury trial nor an appeal is necessary for an orderly course of procedure. An orderly course of procedure does not require a Ct. to weigh the evidence; but it does require it to examine the entire record, to ascertain the issues, to discover whether there are facts not reported, & to see whether or not the law has been correctly applied to the facts.

The requirement of an orderly course of procedure does not require any particular form of procedure. Procedure sanctioned by settled usage will satisfy the requirement but an orderly course of procedure is not limited to procedure which has been sanctioned by settled usage. New forms of procedure are as much due process of law as old forms, provided they give a person a fair opportunity to present his case. New methods in jury trial are legal; thus a verdict may be set aside in part.'

38. In Article 21, Const. Ind, in the expression 'procedure established by law' the word ' procedure ' is not used in its technical sense indicating a particular law as contained in the Civil or Criminal P. C. but is employed in a general sense to mean the steps to be taken in an orderly trial. The expression 'procedure established by law' has been recently interpreted by the S. C. of India in A. K. Gopalan v. State of Madras, : 1950CriLJ1383 . The learned Chief Justice observes at p. 39 that :

'No extrinsic aid is needed to interpret the words of Article 21, which in my opinion are not ambiguous. Normally read & without thinking of other constitutions, the expression 'procedure established by law' must mean procedure prescribed by the law of the State By adopting the phrase 'procedure established by law' the Constitution gave the Legislature the final word to determine law.'

The principles that could be gathered with reference to the authorities quoted above are, that there is neither vested right to any particular form of trial or procedure, nor to a right of appeal; they being the creation of the Statute should be governed by the Statute with which a particular offender is tried; & the expression 'procedure established by law' means the law of the land having statutory origin.

39. Applying these tests to the case under consideration, the Special Criminal Courts Act is the law of the land having been enacted by the State Legislature in the year 1948. The Act had been extended to the revenue district of Tumkur so far back as 1942. Once the law is declared to be in force, & the subjects of the District are put upon notice of that fact by official publication, no one can have any just grievance, if the acts & rights are thereafter to be determined in accordance with that law. In fact, the Special Act was in existence long prior to the commission of the offence & even before any steps were taken against the persons. Though the Ct. under the Special Criminal Courts Act were not actually functioning, yet the persons must be deemed to have known that these Ct. could be brought into existence at any time by an order of the executive Govt. which in fact was a natural consequence particularly after the promulgation of the law in the District. As the persons do not get a vested right of trial in the ordinary Ct. merely because the proceedings were initiated in such Ct., trial of such persons by the Special Ct. after a direction by the Govt. that the offences committed are to be tried by the Special Ct., cannot be said to be illegal.

40. The trial Ct. finished the trial & convicted the accused to varying terms of imprisonment. The sentences

are given effect to & are being served by the petitioners. & some of them who had been awarded smaller sentences have fully served out their terms of imprisonment. The actual existence of a Statute prior to such a determination is an operative fact & may have consequences & this cannot justly be ignored. The past cannot always be completely erased by a new declaration. It is argued that the power vested in the Govt. or any servant of Govt. who may be empowered in that behalf by the Govt, is too drastic & is capable of being arbitrarily applied. But an Act cannot be declared to be invalid, merely because it may be feared that the Govt. may abuse it in future; nor are 'the Courts at liberty to declare an Act void, because it is in their opinion opposed to the spirit that is supposed to pervade the Constitution but not expressed in words'. See *A. K. Gopalan v. State of Madras*, : 1950CriLJ1383. In the present case the accused had notice & were in fact tried regularly by the Court. The Special Criminal Courts Act was applied to the town of Sira & to the group of persons--both Muslims & Hindus--concerned in all the offences said to have been committed on that particular day. It is not the case of the accused that there was any discrimination made in regard to persons involved in the rioting. If the Act is applied to the entire town of Sira, & there is no discrimination made in respect of persons or offences involved therein, all the persons concerned must be held to have been treated alike without offending fundamental rights. The law in itself does not make any discrimination & no distinction between the offenders has been made within the ambit of the particular law for the trial of all the offences in the particular circumstances. It is not shown that either the petitioners or other persons accused of similar offences were tried otherwise than under the Special Act. The petitioners in my opinion have not substantiated their claim that the law under which they were tried is inconsistent with fundamental rights & is therefore void. I am constrained to hold that the existing Special Criminal Courts Act is not unconstitutional.

41. Article 13 deals with laws inconsistent with or in derogation of the fundamental rights & Clause (1) of the said Article declares that

'all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III, Fundamental Rights, shall to the extent of such inconsistency, be void,'

& it is claimed that the provisions of the Special Criminal Courts Act are inconsistent with Article 14 providing equality before law & Article 21 dealing with protection of life & personal liberty. Assuming that certain provisions of the Special Act are void they shall become void only after the commencement of the Constitution. The petitioners contend that the expression 'shall be void' in Article 13(1) renders the Act void from its very inception with the result, the action taken already while the Act was in force will automatically be rendered illegal. I am unable to agree with that contention & am of opinion that the words 'shall be void' are to be interpreted to mean that such laws will 'become void' from the date of the commencement of the Constitution, & not from the very inception. Article 13(1) of the Constitution is not retrospective but prospective.

42. The Advocate General representing the State very ably assisted the Court with elaborate arguments touching all aspects involved. It is argued that even should the Court deem any of the provisions of the Special Act void after the commencement of the Constitution, it does not in the least affect the proceedings that were taken & continue to be taken under the said Act. In the view I have taken that the Special Criminal Courts Act is not repugnant to the Constitution, it is unnecessary to deal at length about this aspect. I may however briefly state my view on that aspect.

43. Assuming that an Act has become void after the Constitution, its bearing on the pre-binding proceedings launched earlier to the commencement of the Constitution has now to be considered. The petitioners contended that the trial cannot be said to have been concluded inasmuch as the proceedings of the Special Judge are still pre-binding review. Review being a proceeding in continuation of the trial & the trial being incomplete without the review, the trial it is argued should be deemed to be a pre-binding proceeding which cannot be continued under law which has become void. The action taken under a valid Act which is subsequently declared void can not be erased out. The consequences ensued, remain unaffected & could never be undone. The policy of

Legislature is that a subsequent repeal or rescission of an Act could not have retroactive effect so as to completely undo the consequences already ensued or continue to be ensuing. Not merely the previous operation of the Act is saved but that the continuation of the pe binding proceedings under the repealed Act are suffered to continue as if the Act had not been repealed.

44. Section 6, General Clauses Act, declares that:

'Where this Act, or any Act, repeals any enactment hitherto made or therefore to be made, then, unless a different Intention appears, the repeal shall not--

'(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ; & any each Investigation, legal proceeding or remedy may be instituted, continued or enforced, & any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not, been passed.'

Article 367(i) of the Constitution lays down as follows :

'Unless the context otherwise requires, the [General Clauses Act, 1897](#), shall, subject. to any adaptat'.ons & modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.'

Clause 6, General Clauses Act, therefore applies to cases where the effect of a subsequent legislation is to make as earlier legislation to have no effect. Presumably, Article 13(1) provides that those laws alt though valid when they were enacted & valid up to the date of the commencement of the Constitution become void: When he Constitution comes into force by reason of the inconsistency with the fundamental rights. In *Piare Dusadh v. Emperor* , Spans C. J. observes at p. 7 :

'On the principle embodied in Section 6(e), General Clauses Act, the result of the repeal of an enactment on cases pe binding at the time of the repeal would be that they would continue as if the enactment had not been repealed. But this is subject to the qualification that the repealing enactment contains no provision or indication to the contrary.'

In a recent case, where prosecution under Section 18(1), Press Act, 1931 was launched before the commencement of the Constitution & was pe binding at the time of its commencement, it was held by F. B. of the Bombay H. C. in *State v. Keshav Madhav* , : AIR1951Bom188 , thus :

'The prosecution is not affected by reason of Section 18 (1) being declared as void under Article 13(1) of the Constitution, since Section 6, General Clauses Act, is not confined to cases where the Legislature expressly repeals a named legislation. Section 6 must apply even to cases where the effect of a subsequent legislation is to make an earlier legation as of no effect & therefore void. Section 6, therefore, applies to those laws which have become void.'

45. The application of the provisions of the General Clauses Act has been made in this Ct. in *Subbwna v. Government of Mysore*, 53 Mys. H. C. R. 32, wherein it has been laid down that the proceedings taken under the repelled Silk Control Order against the accused were saved in spite of the repeal by Section 6, Mysore General Clauses Act. The application of Section 6 General Clauses Act, by the F. B decision of Bombay, referred to above, has been followed by this Ct. in *Amritlal v. Government of Mysore*, or. E. p. no. 7 of 1950-51 : (A. I. r. (38) 1951 Mys 26 : 52 Cr. L. J. 251) and in *Abdul Sattar y. Government of Mysore*, or. R. P. no. 17 of 1950-51 also. Having regard to the provisions contained in Section 6, General Clauses Act, it cannot be held that the tribunal ceased to exist, or the proceedings have been rendered void. Following the principles laid down in the cases cited, I am of opinion that the review proceedings are unaffected & could continue under the impugned Act as if the Act has not been repealed.

46. In the result, the petitions are not entitled to any relief in either set of the petitions; the petitions therefore fail & are dismissed.

Mallappa, J.

46a. Petitioners have been convicted of offences under some of the sections of the Penal Code by the Sp. J. appointed under the Special Criminal Courts Act -- Act xxiv [24] of 1942. Some of the petitioners have been convicted of murder under Section 302, Penal Code, & sentenced to death or transportation for life, while others have been convicted of grievous hurt & other offences & sentenced to various terms of rigorous imprisonment. The conviction is under review by a Judge appointed under the above Act. The petitioners have filed these petitions for getting the records to examine them & to issue writs of habeas corpus for releasing them on the ground that the proceedings are void.

47. The learned Advocates who appeared for the petitioners raised three important points in the course of their arguments. In the first place it was contended that the Special Criminal Courts Act is ultra vires even prior to the Constitution. In the second place it was contended that the Act is void as it offends Article 14 of the Constitution & that since the proceedings have not been completed before 26-1-1950, the petitioners are entitled for a writ as applied for. The third contention raised is that the proceedings had been instituted before the Sp. First Class Mag., Madhugiri, who had taken cognisance of the offences & the Sp. J. had no jurisdiction to try such cases.

48. The main contention raised regarding the first point is that the Legislature does not itself state in the Act what cases or classes of cases have to be tried by the Sp. J. but that the power to divest the regular Courts of their jurisdiction & to invest the Sp. Courts with the jurisdiction in particular cases or classes of cases is delegated to the Govt. or to any officer authorised by the Govt. It is contended that while the Legislature has full authority to legislate in whatever manner it likes it cannot delegate its powers of legislation to someone else. On this aspect of the matter, the decision of the F. C., Emperor v. Benoari Lall, 6 F. L. J. 79: (A. i. R. (30) 1943 P. C. 36 : 45 Cr. L. J. 1) is relied on. It is not disputed that this decision was the subject-matter of an appeal before their Lordships of the P. C. in the case reported in Emperor v. Benoari Lall, & that it was held in that decision that what has been referred to by the majority of the Judges of the P. C. as delegated legislation is conditional legislation & that the Legislature at that time was quite competent to pass the Special Criminal Courts Ordinance. All the while, an argument which is almost ingenious was put forward. It was urged that this Court is bound to follow the F. C. decision, though in fact their Lordships of the P. C. had, on appeal, against the very decision, taken a contrary view. It was contended that though this Court was not bound prior to the Constitution to follow either the decisions of the P. C. or those of the F. C. of India, it is now bound to follow the decisions of the F. C. while it is not bound to follow the P. C. decisions. Article 141 of the Constitution states that the law declared by the S. C. shall be binding on all Courts within the territory of India. Under Article 374(2) of the Constitution, the judgments & orders of the F. C. delivered or made before the commencement of the Constitution shall have the same force & effect as if they had been delivered or made by the S. C. It was contended that it follows therefore that the law laid down in the judgment of the F. C. delivered or made before the commencement of the Constitution is binding on all the Courts within the territory of India. It has to be observed that Article 374 is found in Part XXI which deals with 'Temporary & Transitional Provisions' & it has not been laid down that the law declared by the F. C. before the commencement of the Constitution shall be binding on all the Courts within the territory of India. The context in which the latter part of Clause (2) of Article 374 is used is important. A careful examination of Article 374 as a whole shows that the Judges of the F. C. holding office prior to the Constitution shall, unless they elected otherwise, become on such commencement the Judges of the S. C. All suits, appeals & proceedings Civil or Criminal pending in the F. C. at the commencement of the Constitution shall stand removed to the S. C. The S. C. shall have jurisdiction to hear & determine the same. In this context it is said that the judgments & orders of the F. C. delivered or made before the commencement of the Constitution shall have the same force & effect as if they had been delivered or made by the S. C. Evidently what is intended is that the judgment should be followed by decrees & that the parties would be entitled to get relief, as if the judgments & orders

are those passed by the S. C. It is true that it is not open to the persona against whom the judgments or orders were delivered or passed by the P. C. prior to 26-1-1950, to contend that the judgments & orders are of no force & effect after 26-1-1950, on the ground that the F. C. itself has based to exist. But, Article 374 does not appear to contemplate that the H. Cs of India are bound to follow the decision of the F. C. in spite of the fact that a contrary view has been taken by their Lordships of the P. C. in an appeal against that very decision. The view of their Lordships of the P. C. in *Emperor v. Benoari Loll*, 72 I. A. 57 : (A.I.R. (32) 1945 F. C. 48 : 46 Cr. L. J. 589), is, that in cases of this kind, the point involved is whether Legislature is competent to pass the impugned Act or Ordinance & that the Cts. have nothing to do with the policy. The principle laid down by their Lordships was recognized by the F. C. itself. Spens C. J. observed in *Piare Dusadh v. Emperor*, in respect of Ordinance xix [19] of 1943 that,

'it was said that the provisions of the Ordinance were hardly likely to conduce to peace & good govt..... It is sufficient answer to this to say that the judicial committee have laid down that this is not a matter for the Cts. to investigate.'

Even otherwise it has to be said that according to the opinion of the S. C. itself, legislation of the kind in question is conditional legislation & not delegated legislation. The point was for consideration in *Gopalan's case*, : 1950CriLJ1383, & his Lordship the Chief Justice of the S. C. in dealing with Preventive Detention Act observed:

'It was first argued that by Section 3, the Parliament had delegated its legislative power to the executive officer in detaining a person on his being satisfied of its necessity. It was urged that the satisfaction must be of the legislative body. This contention of delegation of the legislative power in such cases has been considered & rejected in numerous cases by our F. C. & by the English Cts. It is unnecessary to refer to all those cases. A reading of the various speeches in *Liversidge v. Anderson*, (1942) A. C. 206 : (110 L. J. K. B. 724), clearly negatives this contention. Section 3 of the impugned Act is no delegation of legislative power to make laws. It only confers discretion on the Officer to enforce the law made by the Legislature.'

Then again as observed by His Lordship in *N. B. Khare v. The State of Delhi*, in connection with Section 4, East Punjab Public Safety Act : (A. I. R. (37) 1950 3. 0. 211 at p. 214) :

'It was argued on behalf of the petnr that under Section 4, the power to make the order of externment was given to the Provincial Govt. or the Dist. Mag., whose satisfaction was final. That decision was not open to review by the Ct. On that ground it was contended that there was an unreasonable restriction on the exercise of the citizen's right. In my opinion, this argument is unsound. This is not legislative delegation. The desirability of passing an individual order of externment against a citizen has to be left to an officer. In the Act such a provision cannot be made.'

49. If prior to the Constitution, the Legislative Council in Mysore had the power to pass the Criminal P. C., it has to be said that it had equally the power to modify it or to pass a similar Code & set up other Cts. in which the procedure laid down, by it had to be followed. It has not been shown that there was any limitation on the powers of the Legislative Council in Mysore, coming in its way to legislate, that any cases or classes of cases selected by any officer referred to by it, should be tried by the new Cts. The machinery was complete when the Special Criminal Courts Act was passed by the Legislative Council & it had only to be set in motion by someone authorised in the Act. So long as the Legislative Council had the power to do it--it has not been shown that it had no such power--it cannot be said that the Special Criminal Courts Act was ultra vires prior to the Constitution. The powers of a Legislature, unless limited by Constitution is supreme & it is not open to the Cts. to find out in such cases whether any enactment is reasonable or unreasonable, Nothing came in the way of Parliament in England in legislating that

'Richard Rose who had poisoned Bishop of Rochester ie directed to be put to death by boiling in oil without any advantage of his Clergy (Statute 22, Henry VII, Sn. 9).'

Nothing came in the way of drastic actions being directed to be taken against any person or class of persons chosen by any authority named by the Legislature not bound by the Constitution of the country to act otherwise. So long as the Statute is within the powers of the Legislature, Cts. cannot say that such a legislation is ultra vires. As observed in *Queen v. Burah*, 5 I. A. 178 : (4 Cal. 172 P. c.)

'the only way in which the Cts. could touch such questions is by looking to the terms of the instrument by which affirmatively the legislative powers are created & by which negatively they are restricted.'

It cannot be said that the Legislative Council in Mysore had not the power to pass an Act like the Special Criminal Courts Act prior to the Constitution. As observed in *Russel v. The Queen*, (1882) 7 A. C. 829 at p. 935, 'Conditional legislation of this kind, is in many cases, convenient & is certainly not unusual.' The result is that the first point fails.

50. Coming to the second point it has to be observed that there is a vital change in the powers of the Legislature as under the Constitution 'the State shall not deny any person equality before the law or the equal protection of the laws within the territory of India,' as is clear by Article 14. In fact the Constitution goes further & states in Article 13, Clause (1), that

'all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void,'

The point that arises for consideration is whether the Legislature today can enact, an Act like the Special Criminal Courts Act consistently with the right of equality before the law of all persons as declared in Article 14, & if it cannot, whether the Special Criminal Courts Act is not void, as per Article 13, Clause (1) of the Constitution, after the midnight of 25-1-1950. In this connection certain observations made in the decision of the Sp. B. of the Calcutta H. C. against which an appeal had been filed before the P. C. & the decision of the F. C. in that appeal have to be referred to, as they refer to 'the grave inroads made on the rights of the subject under the ordinary law.' In the Calcutta case, Rowland J. observes :

'Derbyshire, C. J., pointed out that grave inroads were made on the right enjoyed by the subject under the ordinary law. A Mag. of the Second Class under the Code can impose a sentence up to six months' imprisonment only the same Mag. sitting as a summary Ct. can give up to two years. There is no provision that the Mag., to be vested with the powers of a summary Ct. must have had any particular length of judicial experience. Under the Code, on conviction, there would be an appeal from a conviction in all cases under the Ordinance, only if the sentence exceeds three months' imprisonment or Rs. 200 fine. Under the Code there is a further right to move the H. C. in revn. By the Ordinance this right is barred.

A Mag. of the First Class under the Code can impose a sentence limited to two years' imprisonment ; the same Mag. sitting as a Sp. Ct. can give up to seven years. Under the Code there is an appeal unless the sentence is within the limit of Rs. 50 fine under the Ordinance only if the sentence exceeds two years' imprisonment. As before there is no right to move any Ct. in revn. To be qualified to exercise these enlarged powers a Mag. must have exercised first class powers for two years.

In the Ct. of Session, powers are exercised by Ses. Jj., Addl. Ses. Jj. & Asst. Ses. Jj. under the Code. An Asst. Ses. J. can impose sentence upto seven years; a Ses. or Addl. Ses. J. any sentence authorised by law, but a sentence of death is subject to confirmation by the H. C. Under the Code there is an appeal if the sentence exceeds one month's imprisonment or Rs. 50 fine. By the Ordinance there is no appeal whatever & no one has any revisional jurisdiction. There is no reference to the H. C. for confirmation of the death penalty & no superior Ct. can be moved in revn. Where however, a sentence of seven years or upwards has been imposed, a reference is made to a certain person who must be a H. C. Judge; & his order is final. A similar submission can be made by the Sp. J. if he finds the case involves points of special difficulty. (It is to be noted that a Sp. Mag. dealing with a case of special difficulty is not able to make any such submission to any one; nor is a summary Ct. empowered to do any such thing). To be qualified to exercise the enlarged powers of a Sp. J. a person must have

exercised for two years the powers of a Ses. J. or Aset, Ses. J.

But the defeat of jurisdiction alleged is not that the Legislature could not constitute new Cts. & entrust to them new powers as wide as these; or that it could not change the procedure of inquiry & trial as has been done by permitting a memo, only of the substance of the evidence to be recorded instead of the whole of the evidence; In permitting a Sp. J. to take cognizance of offences without the accused being committed to his Ct. for trial, whereas under the Code, a Ct. of Session shall not take cognizance of any offence as a Ct. of original jurisdiction unites the accused has been committed by a Mag. duly empowered; & in abolishing completely the right of trial by jury or with assessors. It is not even said that the Legislature was incompetent to enact Section 26 barring appeals save as provided in the Ordinance & barring the exercise by any Ct. of revisional jurisdiction or jurisdiction to transfer a case or jurisdiction to make an order under Section 491 of the Code, or jurisdiction of any kind. It is said that the Legislature could do these things drastic as they are. But they could not be done by any other or subordinate authority

The learned Chief Justice dwells on the grave consequences, with which he seems to be much impressed. I may say here that I have had the advantage of seeing in advance the judgment that His Lordship the Chief Justice has just delivered; & had it been within our province to enter on questions of policy I would associate myself with much if not all of what he has said, as to the value & importance, when delegating a discretionary power,, of proper safeguards & of sufficiently directing the entrusted authority (either by provision in the Act or by rules) as to the principles in which he ought to be guided in the use of his discretion.'

51. It may be noticed here that Rowland J., who has stated that he is not speaking in a spirit of levity & was commenting on the contrary with warmth & whose view was upheld by the P. C. in preference to that of Varadachariar G. J., does not take exception to the fact that hardship is caused by the special enactment or to the fact that there is unequal treatment of different persons committing the same kind of offences in one & the same area. On the other hand, he states that if it had been within the province of Judges to enter upon the question of policy, he would associate himself with much if not all of what has been said. His point is that it was not open to him to do so & if the Indian Legislature had at that time the power to enact such an Ordinance as the one in question, it was not for the Cts. to lay down the policy. It is also equally necessary to point out that the P. C. decision in Emperor v. Benoari Lall does not also take exception to what has been stated by Varadachariar C. J. of the P. C. or by the Judges of the Calcutta H. C. as to the effect of the Ordinance. The following is a passage from the P. C. decision :

'There remains to be considered another objection to the validity of the Ordinance which is, as their Lordships, understand, the main ground on which it has been held to be ultra vires. The objection may perhaps be stated in more ways than one, but the substance of it, as appears both from the judgment of Sir Harold Derbyshire in the H. C. & of the Chief Justice in the F. C., is that the Ordinance makes it possible to discriminate between one accused & another, or between one class of offence & another, so that cases may be tried either in the sp Cts, or under the ordinary & well established criminal procedure according to the direction & decision of provincial-authorities. It is evident that this is an aspect of the matter which has greatly troubled the majority of the Judges in India who have had this case before them, & in view of the well-established practice in India by which, decisions in criminal cases are open to review by a higher Ct. it is natural that those who are versed in applying this system should feel disturbed by the totally different arrangement contained in the Ordinance.

The sections of the Ordinance which appear to have given the Judges in India most concern are Sections 5, 10, 14 & 16. (His Lordship read the Sections & continued). Sir. Harold Derbyshire found that these sections were invalid. He pointed out, with justice, that the ordinance left it to the local Govt. or to some officer of the local Govt. empowered by it in that behalf, to direct what offences or classes of offences. & moreover what cases or classes of cases, should be tried by the sp. Cts..... In the F. C, the Chief Justice dwelt on the value of the revisional jurisdiction, but considered that the most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused & another by directing trial in different Cts. He

concluded that Sections 5, 10 & 16 of the Ordinance are open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute & unrestricted discretion without any legislative provision or direction laying down the policy of conditions with reference to which that power is to be exercised.' This was the ground on which the Chief Justice & Zafrulia Khan, J., based their decision that the appeal of the Crown should be dismissed. With the greatest respect to these eminent Judges, their Lordships feel bound to point out that the question whether the Ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or of policy, It depends simply on examining the language of the Govt. of India Act & of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise & well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may know in advance before what Ct. he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a Statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle.'

52. It will be noticed here again that their Lordships of the P. C, do not take exception to the observations of Sir Derbyshire C. J. of the Calcutta H. C. or of Varadachariar C. J. of the P. C. that the Ordinance makes it possible for the Govt. or its officers to arbitrarily discriminate between one accused & another under like circumstances & in the same territorial jurisdiction. There can be no valid objection to the delegation of power but a valid objection can be taken in respect of the power that the Act conferred on the Govt. to discriminate between one accused & another. If during times of emergency, the legislature introduces a new Act superseding the Criminal P. C. in any area & prescribing another procedure in respect of all offences or in respect of offences of a particular kind, it may not be correct to say that this offends the principle of equality of all persons before the law. 'Discriminating against some & favouring others is prohibited.' Delegation by itself is harmless if the impugned 'Act does not enable "any person or class of persons from being singled out as a special subject for discrimination & hostile legis'ation.' In the present case, the persons accused of having committed murder & other offences during the disturbances have been directed to be proceeded against in the Ct. of the Sp. J. Other persons committing the same offences punishable under the Penal Code in the same territorial sub-division are being tried in the ordinary Cts. This discrimination is made possible by the Special Criminal Courts Act. The discrimination is for no public purpose. It has no reasonable basis. There is nothing to indicate in the Act what kind or class of persons have to be singled out for being summarily dealt with under the Act. Even the Police Officer authorised to discriminate need not be satisfied of the existence of any particular circumstance for his singling out any persons for this treatment. He can at his sweet will & pleasure, pick & choose any one. Only a few of the accused in these cases could have been chosen under the Act. It is true, that all persons chosen by Govt. or by an officer authorized by the Govt. for the special treatment under this Act are treated alike, but that does not take away the fact that the impugned Act makes a discrimination against them possible while persons under similar circumstances in the same territorial jurisdiction are being tried in the ordinary Cts. & have all the advantages, a trial in those Cts. admittedly has.

53. As some reference was made to the doctrine of equal protection of the laws in U. S. A., it is necessary to point out that the impugned Act offends the 14th Amendment which provides that no State shall 'deny, to any person within its jurisdiction, equal protection of the law.' The prohibition under the 5th Amendment is in respect of due process of law. The following observation by Taft C. J. in *Truax v. Corrigan* (1921) 267 U. S. 264, makes clear the principle on which both the 6th & 14th Amendments are based & the sphere of the protection they offer:

'This brings us to consider the effect in the case of that provision of the 14th Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause, & it is customary to consider them togetherThe due process clause requires that every man shall have the protection of his day in Ct., & the benefit of the general law,--a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, & renders judgment only

after trial, so that every citizen shall hold his life, liberty, property & immunities under the protection of the general rules which govern society' 'All men are equal before the law; 'This is a Govt. of laws, & not of men'; 'No man is above the law', are all maxims showing the spirit in which Legislatures, executives, & Cts., are expected to make, execute, & apply laws. But the framers & adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be inserted on, by local public opinion. They therefore, embodied that spirit in a specific guarantee.

The guarantee was aimed at under favour & individual or class privilege on the one hand, & at hostile discrimination or the oppression of inequality, on the other. It sought at equality of treatment of all persons even though all enjoyed the protection of due process.

Mathews J. in *Yick Wo v. Hopkins*, (1886) 118 U. S. 356, 369, 30 L. ed 220, 226, 6 Sup. Ct. Rep 1064, speaking for the Ct., of both the due process & equality clause of the 14th Amendment said: "These provisions are universal in their application, to all persons within the territorial jurisdiction without regard to any differences of race, of colour, or of nationality; & the casual protection of the laws is a pledge of the protection of equal laws.

The accuracy & comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this Ct. It emphasizes the additional guarantee of a right which the clause has conferred beyond the requirement of due process.'

Then again as observed in *Burlier v. Connolly*, (1835) 113 U. S. 27:

'The 14th Amendment in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection & security should be given to all under all circumstances in the enjoyment of their personal & civil rights; that all persons should be equally entitled to pursue their happiness & acquire & enjoy property; that they should have like access to the Cts. of the country for the protection of their personal & property, the prevention & redress of wrongs & the enforcement of contracts; that no impediment should be interposed to the pursuits by anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling & condition, & that in the administration of original justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.'

Then again it was laid down in *Hayes v. Missouri*, (1887) 120 U. S. 68:

'That the 14th Amendment, does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate,' It merely requires that all persons subject to such legislations shall be treated alike, under like circumstances & conditions both in the privileges conferred & in the liabilities imposed.'

The meaning & effect of guarantee according to 'Willis as stated at p. 579 of his book on Constitution Law, is as follows:

'The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed' 'The inhibition of the amendment...was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation. 'It does not take from the States the power to classify either in

the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis.'

54. It will be noticed that legislation by the State should be of the type that all persons subject to it shall be treated alike under like circumstances & volitions. But as observed by their Lordships of the P. C., the objection to the Ordinance corresponding to the Special Criminal Courts Act is, 'that it makes it possible to discriminate between one accused & another or between one class of offences & another' so that cases may be tried in the Sp. Criminal Cts., or under the ordinary & well-established Criminal Procedure according to the direction & decision of provincial authorities. The existence of such an objection was recognized by their Lordships but they were of opinion that legislature at the time was competent to pass such an Ordinance. Prior to this Act all persons who committed offences under the Penal Code were tried in accordance with what has been referred to by their Lordships as the well-established Criminal P. C. After the Special Criminal Courts Act was enacted, some persons arbitrarily chosen are tried in Sp. Cts. & are denied the safeguards which other people in the same jurisdiction committing the same offences are having, in ordinary criminal Cts, in accordance with 'well-established practice.' There is no apparent reason for this distinction. It cannot, on account of the impugned Act, be said that all persons committing offences of the same kind are treated alike under like circumstances & conditions both in the privileges conferred & on the liabilities imposed. It is no answer to say that all persons chosen arbitrarily for the special treatment under the Act are treated alike. There is no classification. The Act does not say what kind of cases are to be directed to be tried by the Sp. Ct. If the Act stated that old offenders or persons committing particular offences or persons who to the satisfaction of a particular officer are committing offences with a political object have to be tried under the special procedure fixed by the Act, one can see some kind of classification & something of reasonable grounds for distinction. The Act makes it possible even for a Police Officer to discriminate between one person & another without reasonable basis. The Act enables the Govt. or an officer authorised by Govt. to indiscriminately take away the privileges an offender has under the Criminal P. C., & thus 'equality before the law or the equal protection of the laws' is denied by the State by proceedings under the Special Criminal Courts Act. If it is said that persons are chosen arbitrarily from a class & are treated alike, the answer is as stated in 165 U. S. 150

'Classification to relieve a law from the charge of a denial of equal protection, cannot be made arbitrarily, but must be based on some difference which bears a just & proper relation to the attempted classification.'

The facts & the exposition of the law in that case are of great help for the decision of this case & a few lines are worth a perusal:

'The S. C. of the State considered this statute as a whole & held it valid & as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon rail road corps, for a failure to pay certain debts. No individuals are thus punished, & no other corps. The act singles out a certain class of debtors & punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the Cts. as other litigants under like conditions & with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful pltf.; If it terminates in their favour, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the Cts. upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while the adversaries recover if right & pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, & are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the Statute.

It is true the amount of the attorney which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, & the party who has a legal right may insist upon it, If only a shilling be involved. As well said by Bradley J. in *Boyd v. United States*, (1886) 116 U. S. 616, 635 (29: 746, 752) 'Illegitimate

& unconstitutional practices get their first footing in that way, namely, by silent approaches & slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person & property should be liberally construed. A close & literal construction deprives them of half their efficacy, & leads to gradual depreciation of the right, as it consisted more in sound than in substance. It is the duty of Cts. to be watchful for the constitutional rights of the citizens & against any stealthy encroachments thereon, Their motto should be *obstacle principiis*.

* * * *

But It is said that it is not within the scope of the 14th Amendment to withhold from States the power of classification, & that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, & all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification That must always rest upon some difference which bears a reasonable & just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily & without any such basis.'

55. It will be noticed in this case that there was a classification & the class consisted of railroad corps. The impugned Act imposed a penalty upon them for failure to pay certain debts. It is found that all railroad corps, were treated alike but it was observed:

"The Act singles out a certain class of debtors & punishes them when for like delinquencies it punishes no others. They are not treated as other debtors or equally with other debtors. They cannot appeal to the Cts. as other litigants under like conditions & with like protection.'

It will be noticed that compared to the Special Criminal Courts Act, under which some persons accused of offences are indiscriminately chosen for being deprived of some important privileges to which other persons accused of the same offences in the same territorial jurisdiction are entitled to under the Criminal P. C. during trial for the said offences, the Act referred to in the decision relied on must be regarded as practically harmless. Still it was held 'that the statute in controversy cannot be sustained'. For, as observed in the decision 'Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this.' The authorities relied on in this case support the same conclusion.

56. As observed by Black J. in *State v. Loomis*, (115 M. O. 307), 'classification for legislation purposes must have some reasonable basis upon which to stand.' After a review of a number of cases, it was concluded in *Stratton v. Morris*, 89 Tem. 497 that

'whether a statute be public or private, general or special in form, if it attempts to create distinctions & classifications between the citizens of this State, the basis of such classification must be natural & not arbitrary.'

It was observed by Mathews J. in *Yick Wo v. Hopkins*, (1886) 118 U S. 356:

'When we consider the nature & the theory of our institutions of govt. the principles upon which they are supposed to rest, & review the history of their development we are constrained to conclude that they do not mean to leave room for the play & action of purely personal & arbitrary power. The first official action of this nation declared the foundation of the govt. in these words: 'We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, & the pursuit of happiness.'

The following observation in *North & South Ala, R. Goy. v. Morris*, 65 Alien. 193, deserves mention:

"Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one. When it is given freely & open-handed to another, without money & without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, & odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, & discriminatory legislation, which secures this right to some favoured class or classes & denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear & manifest opposition to the letter & spirit of the foregoing constitutional provisions.'

Considering that the punters who are tried under the procedure laid down in the Special Criminal Courts Act, are deprived of the right to file an appeal while others tried for offences under the same section of the Penal Code are entitled to that privilege it is worthwhile noting the following observation in *Chicago St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641:

'The right of appeal cannot be fettered & clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favour by the law, & before the tribunals for administering it, & should have the same right to appeal with others similarly situated, All must have the equal protection of the law & its instrumentalities. The same rule must exist for all in the same circumstances.'

As pointed out in *Durkee v. Janesville*:

'It is obvious there can be no certain remedy in the laws, where the Legislature may prescribe one rule for one suitor or class of suitors in the Courts & another for all others under like circumstances, or may discriminate between parties to the same suit.'

Then again as observed in *Southern R. Co. v. Samuel E. Greens*, (1910) 216 U. S. 400 :

'The Federal Constitution, it is only elementary to say is the supreme law of the land & all its applicable provisions are binding upon all within the territory of the United States. Whenever its protection is invoked, the Courts of the United States, both State and Federal, are bound to see that rights guaranteed by the Federal Constitution are not violated by legislation of the State. One of the provisions of the 14th Amendment, thus binding upon every State of the Federal Union, prevents any State from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute, as it is interpreted & sought to be enforced in the State of Alabama, deprives the plaintiff of the equal protection of the laws, it cannot stand.

'The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the 14th Amendment he is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, & to bear the same burdens as are imposed upon, other persons in a like situation.'

57. A perusal of all these authorities makes it clear that mere classification of some sort does not justify unequal treatment between one set of persons & another set of persons who are proceeded against for offences under the same sections of the Penal Code in the same locality. In fact it cannot be said that a mere change in the procedure of trial does not affect the accused in a serious manner. In this case, rights such as the right to file an appeal, the right to have confirmation by two Judges of this High Court of a sentence of death, are all taken away under the Special Criminal Courts Act. As observed by Lord Macnaughten in *Colonial Sugar Refining Co., Ltd, v. Irving*, 1905 A. C. 869 : (74 L. J. P. C. 77),

'the only question is was the appeal to His Majesty in Council a right vested in the applicants at the date of the passing of the Act or was it a mere matter of procedure It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.'

These, like the right to file an appeal, are valuable rights & such rights are taken away by the impugned Act. As observed in the P. C. case, Emperor v. Benoari Lall :

'Sir Harold Derbyshire pointed out, with justice, that the Ordinance left it to the local Govt. or to some officer of the local Govt empowered by it in that behalf, to direct what offences or classes of offences, & moreover, what cases or classes of cases, should be tried by the Sp. Cts. In the F. C. the Chief Justice dwelt on the value of the revisional jurisdiction, but considered that the most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused & another by directing trial in different Cts. He concluded that Sections 5, 10 & 16 of the Ordinance are open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute & unrestricted discretion, without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised.'

If this can be said of the impugned Act with justice, can it be said that it is consistent with the principle of Article 14 of our Constitution which corresponds to the equal protection clause in the 14th Amendment of the American Constitution? The following was brought to our notice as an observation of his Lordship Mukherjea J. of the S. C. with which his Lordship the Chief Justice of that Ct. concurred in the recent case of Charanjitlal v. The Union of India, : [1950]1SCR869 & I may with respect adopt the line of reasoning :

'It would be bad law 'if it arbitrarily selects one individual or a class of individuals, one corp'n. or a class of corpns. & visits a penalty upon them, which is not imposed upon others guilty of like delinquency.' The Legislature undoubtedly has a wide field of choice in determining & classifying the subject of its laws, & if the law deals alike with all of a certain class it is normally not obnoxious to the charge of denial of equal protection : but the classification should never be arbitrary. It must always rest upon some real & substantial distinction bearing a reasonable & just relation to the thing in respect to which the classification is made and classification made without any substantial basis should be regarded as invalid.'

Judging from this standard there is hardly any doubt that the impugned Act, after the Constitution, to be declared void as it is inconsistent with Article 14 of our Constitution as well as it is inconsistent with the 14th Amendment of the Constitution of U. S. A.

58. It is not unusual to refer to the history of the country prior to the Constitution to understand the Constitution from what led to it:

'In interpreting an Act of Parliament, you are entitled & in many cases bound to look to the state of the law at the date of the passing of the Act ... in order properly to interpret the statute' (Craies on Statute Law, p. 933).

The feelings roused in our country prior to the Constitution are clear from the following extract from the introduction of Anand Swarup Chaudhri, to his book on "High Prerogative Writs".

'The emergency legislation enacted in States not democratically governed & its enforcement there presents a picture much different from the one in Democratic Countries.... The case of India furnishes the best example of such a State. The Provinces in India had at the commencement of the war attained a certain degree of autonomy & the citizen had the control of legislation in certain fields, but with the declaration of emergency by the Governor-General under Section 102 Govt. of India Act, on the commencement of the war, this power came to be vested in the Centre. The Central Legislature was in its turn altogether ignored & the Govt. was being carried on by him through Ordinances Early in 1942 was enacted an Ordinance called the Special Criminal Courts Ordinance (II [2] of 1942) making provision for the trial of offences by Sp Cts. The application of this Ordinance to any particular Province was left to the Provincial Govts. who were to decide to put it into force on being satisfied of the existence of an emergency. Power was given to the Provincial Govt. to direct that cases or class of cases were to be tried by the Sp. Cts. The procedure provided for these Sp. Cts, was a special procedure & the rights of revn, & appeal given by the ordinary law were rigorously set down. By Section 26 of the Ordinance, all authority in the H. Cts. to revise an order or sentence, or to transfer any case,

or to make any order under Section 491, Criminal P. C & all their jurisdiction were excluded in respect of the proceedings of the Sp. Cts. The validity of this Ordinance was also challenged before the Ordinary Cts. The decision of their Lordships of the F. C, in Emperor v. Benoarilal, A. I. R. (35) 1948 P. C. 48 : (46 Cr. L. J. 589) is well worth noting . . . As a result of this decision the Special Courts Ordinance was repealed and provision was made for a review of the sentence passed by the Sp. Cts.

Notwithsta binding the repeal the executive, determined to retain the widest legislative & executive power to itself appealed to the P. G. The P. C, negated the broad view of the majority of the F. C. based upon the peculiarity of conditions in India & of Great Britain.

This judgment of the P. C. has been widely criticised. It has even been characterised as a judgment based on consideration of policy.'

The passage is only referred to, in order to show how in India prior to the Constitution feelings were roused against the Ordinance correspo binding to the Special Criminal Courts Act & it is easy to sea why the line of argument was sometimes stretched in order to hold that the Ordinance, which made it possible for even a Police Officer to arbitrarily discriminate between the case of one parson & another within the same terri territorial juris, diction & under the same circumstances & conditions, was invalid. It must be stated that the argument was no doubt not tenable & nothing could have been then done as the Constitution of the country as it existed than made it possible for the foreign Govt. to enact any law however much it was opposed to the maxim, 'All men are equal before the law'. The moment India became free & independent the reaction began. It is not unlikely that Articles 13 & 14 were intended to hit at enactments like the Special Criminal Courts Act.

59. What then is the effect of holding that Special Criminal Courts Act is void on the morning of 26-1-1960? Before considering this aspect of the matter, it would be useful to consider, what stage the proceedings under the Special Criminal Courts Act are at. As observed already the Sp. J. has pronounced his judgments & the cases are under review by a Judge of the H. C. appointed for that purpose by the Govt. Sections 6 & 7, Special Criminal Courts Act are as follows :

'6, A Sp. J. may pass any sentence authorised by law.

7. If in any proceedings before a Sp. J.--

(a) a person convicted is sentenced to death or to imprisonment for ft term of seven years or more, or

(b) t though no person is so sentenced, the Sp. J. certifies that in his opinion the case has involved questions of special difficulty, whether of law or fact, or is one which for any other reason ought properly to be reviewed, the proceedings shall be submitted for review by a person nominated in this behalf by the Govt, which person shall be chosen from the Judges of the H. C. & the decision of that person shall be final.'

The words 'shall be submitted for review' make it clear that there is no option in the matter either to the prosecution or to the accused to submit to or prevent a review. It is the decision of the Re-view Judge that is final. In fact unless there is a review which is obligatory under the scheme, the accused sentenced to death cannot be hanged & the sentence of imprisonment which some of the accused have to undergo cannot be given effect to. The person sentenced to death at any rate would not run the risk of a review under those circumstances if he can stop it. It cannot be said that the review is for the benefit of the accused as, if they have a choice they would like to stop the review & that is what they are now doing. They would prefer a regular trial under the Criminal P. C. with all its advantages, that being the alternative, if review which is a portion of procedure under the impugned Act, cannot be proceeded with as being void under the Constitution. Anyway there is no doubt that in no sense can it be said that the trial under the Act is complete before the judgment of the Sp. J. is reviewed under the Act.

59a. This aspect of the matter is covered by authority in Piare Dusadh v. Emperor . Spens C. J. who pronounced the judgment of the F. C. observed :

'The word 'Review' does not appear to have been used in any technical sense there, but It obviously differs both from review as understood in the Civil P. C. as well as from an appeal, because these proceedings are ordinarily initiated by the party concerned. The scheme of Section 8 of the Ordinance II [2] of 1942 is that in the more serious classes of crimes therein referred to, the sentence of the Sp. J. should, apart from any initiative of the accused be considered by the reviewing Judge. There is of course, a difference between Clauses (a) & (b) to this extent that in oases falling under Clause (a) the review follows compulsorily & automatically, whereas in cases falling under Clause (b) the review procedure becomes available only if the Sp. J. thinks it necessary to submit the case to the reviewing Judge. But once the case has been so submitted, there is no difference in the legal position between cases falling under Clause (a) & cases falling under Clause (b) of Section 8. It may perhaps be putting the position too high to describe the sentence of the Sp, J. in these cases as only provisional or tentative; but the scheme of the section undoubtedly is that the proceeding against the accused in such cases is not to be regarded as complete till after the review is over. In this view, wa are of the opinion that in all oases falling under Section 8 (a) & in all cases where references had been made by the Sp. J. under Section 8 (b) the accused will have to be tried under Section 4 cf Ordinance XIX [19] of 1943, unless the reviewing Judge acting under the Special Criminal Courts Ordinance, had given his decision before the new Ordinance XIX [19] of 1943, came into operation.'

It is thus clear that the proceedings under the Special Criminal Courts Act have not been con-eluded There is no final order as yet. It may be stated here that the decision in Mahamad Beary v. Hasan Kutty, : AIR1951Mad280 which deals with a case in which 'the resp. became entitled to the benefit of the final order of the Subordinate Judge passed on 5-4-1949', is not applicable to the facts of the present case in which no final order has yet been passed. Similarly Rishindra Nath v. Sakti Bhusan, : AIR1950Cal512 is not applicable as it deals with an order which had become) final prior to the Constitution.

60. I have already held that the Special Criminal Courts Act is void under Article 13 of the Constitution. The procedure adopted up to 26-1-1950, cannot be void but I find it difficult to hold that after the Constitution which has declared this Act to be void, it is correct to allow the petnrs. to be subjected to the review proceedings under the Act declared to be void. It is however not without he citation that I come to this conclusion & it is so, not-merely; because I learn that my opinion on this point is opposed to the opinions of both of my learned colleagues, but also because I have, against me a portion of the reasoning in the F. B. decision of the Bombay H. C, in Keshav Madhav, In Re : AIR1951Bom188) which it must be said, has been followed in a Bench decision of this Ct. It has however to be stated that these oases are distinguishable & are not applicable to the facts of the present case as will be shown later, t though they are authorities for holding that Article 13 is not retrospective. Even otherwise, I feel in cases of this kind I would be failing in my duty if I do not express my present considered opinion & that is, that the matter requires reconsideration by this F. B. in case the reasoning referred to is applicable to the facts of this case.

61. I feel heartened to find an observation in the judgment of the F. C. decision referred to by me, i, e., Piare Dusadh v. Emperor . That case was dealing with a Special Criminal Courts Repeal Ordinance xix [19] of 1943 which was promulgated by the Governor-General repealing the Special Criminal Courts Ordinance but validating, in Section 3 (a), sentences passed previously subject, however, to appeal & revision & directing, in Section 4, fresh trials in cases which were not concluded. The opinion of the learned Judges as to what would happen to cases under Special Criminal Courts Act, not provided for under ordinance xix [19] of 1913, as a result of the repealed Ordinance declared void is clear from the following observation :

'The contradistinction made by the Ordinance is between cases in which a sentence had been passed by the Sp. Cts. & cases in which no such sentence had been passed, the former falling under Section 3 (1) & the latter under Section 4. If it should be assumed that the two categories might not be exhaustive & cases might be conceived which even while not falling under Section 4 might not fall under Section 3 (1) the result would only be that the proceedings in such cases would be void under the former decision of this Ct. & the a loused would have to be retried before the regular Cts.'

62. The F. B. decision, Keshav Madhav, In Re, 52 Bom. L. R. 540 : (A. I. R. (38) 1951 Bom. 183: 52 Cr. L J 30 F, B.), is a case in which it has however been held :

'Section 6, [General Clauses Act, 1897](#), applies not only to Acts which have been repealed, but also to those laws which have become void as a result of their being inconsistent with the provisions of Part III of the Constitution. In substance & in its effect there is no difference between an Act which is repealed & an Act which is declared void. Hence, a prosecution for an offence punishable under Section 18(1), Press (Emergency Powers) Act, 1931, already launched before the Constitution came into force is not affected by the result of Section 18 (1) of the Act being declared to be void under Article 13(1) of the Constitution.'

63. The first reason given is based on the assumption that there is no difference between a repealed Act & an Act declared void. The reasoning is as follows :

'It is argued that the Constituent Assembly was conferring fundamental rights upon the subject, & if a particular statute was inconsistent with fundamental rights, it is inconceivable that the Constituent Assembly would countenance the continuance of a prosecution for contravention of a law which has been declared to be void & contrary to the fundamental rights. Put in that form, the argument appears to be very attractive, but we have to consider, looking to Article 13 itself & to the other articles to which I shall presently draw attention, whether the Constituent Assembly contemplated a distinction being made between a repealed statute & a statute which it declared to be void, or, in other words, 'whether it was in the contemplation of the Constituent Assembly when it declared certain laws to be void under Article 13(a) that it did not intend that Section 6, General Clauses Act should apply to such laws. In the first place, we have to consider whether there is any difference in substance between a repealed statute & a statute which is declared void by a Legislature or a Constituent Assembly. It is true, as urged by Mr. Purushottam, that repealing an Act implies a legislative process by which the Legislature applies its mind to specific pieces of legislation & puts an end to their lives. In this very Constitution we have Article 395 where the Constituent Assembly has repealed certain Acts mentioned in that Article. It will be noticed that by that legislative process the Constituent Assembly applied its mind to those specific pieces of legislation & their lives. When we turn to Article 13(1) it was impossible for the Constituent Assembly to know which laws would be inconsistent with Part III of the Constitution. Therefore it could not specifically repeal certain laws as it did in the case of Article 395. Under those circumstances, all that the Constituent Assembly could do was to declare that any law or any part of the law which is inconsistent with Part III of the Constitution would be void. Mr. Purushottam is right that it will be for the Courts of law to determine which law is inconsistent with the Constitution. But in substance & in its effect there is no difference between an Act which is repealed & an Act which is declared void. In both cases the Act ceases to be operative. The law is annulled.'

It is true that both in the case of an Act repealed & an Act declared void, they cease to be operative & the law is annulled. There is however, I feel with very great respect to the learned Judges, a great deal of difference between an Act which is void & an Act repealed. An opponent, whether he is dead, unconscious or asleep is in effect equally harmless. Though there is no difference in effect, there may be substantial difference in what brings about the effect. A void sale need not be set aside. A sale that required to be set aside is as ineffective as a void sale. There is nothing in what is void & a void Act needs no repeal. Whether the word 'void' is traced to the Latin form 'Viduus' meaning bereft as some do or to the Latin form 'Vacare' meaning to be empty, the word connotes emptiness, a vacuum or a nullity. Repealing denotes withdrawing something which is in existence (repack apeler, appeler, to call--Chambers Twentieth Century Dictionary). To me it looks that to say that a law is inoperative is to say something less than to say that an Act is repealed. Anyway, the two ideas are different. The word 'void' may not have its full force & effect when it is used in an enactment for the benefit of particular persons & understood as 'voidable' at the election of those persons but

'when it relates to persons not capable of protecting themselves or when it has some object of public policy which requires the strict construction, the word receives its full force & effect,'

as observed by Maxwell's Interpretation of Statutes (p. 189, eighth Edn.). In this case the word is not used in respect of particular persons. It is used to lay down a general policy applicable to every citizen. The word void has to be understood to have its full meaning as when it is used with the word null to indicate nullity.

64. It looks to me that those words are used studiously in different articles of the Constitution & before considering this aspect of the matter it is worthwhile perusing the observation on the point, in the Bombay decision & it is as follows :

'It is clear that no particular efficacy attaches to the expression 'void' used in Article 13(1), when one looks at another Article in which the same expression has been used, & that Article is 254. That deals with the inconsistency, that there may be, between laws made by Parliament & the laws made by the Legislature of the States, & it declares that to the extent that there is such an inconsistency the laws made by the Legislature of the State shall be void. Therefore, any argument based upon the fact that the expression 'void' used in the particular context of Part III should be given a special meaning loses much of its force when one finds the same expression used by the Constituent Assembly in Article 264 which has nothing to do with any fundamental right. It is instructive to note also that in Article 251, which again deals with inconsistency between the laws made by Parliament & the Laws made by the Legislature of the States, the expression used by the Constituent Assembly is 'inoperative' & not 'void'. Therefore, the Constituent Assembly has used different expressions in different parts of the Constitution to indicate that a particular law has ceased to have any effect & as no longer in operation. There is no reason why, we should apply Section 6, General Clauses Act, only to Article 395 'where the expression 'repealed' is used & not to other articles where different expressions are used, alt though in substance the meaning & the connotation of this expression is the same.'

65. In the first place, it is desirable to remember that the expressions 'void & inoperative', cease to have effect' have been used so much near one another that it is difficult to avoid the conclusion that the different expressions have been used to convey different ideas; otherwise the same expression would have been used. Anyway, a careful examination of the articles in which these expressions are used shows that they are used to indicate different ideas. These articles are found in part XI of the Constitution & it deals with the relation between the Union & the States. It is bear from the very first article that a State is a limb of the Union. The State, it need hardly be stated is subsidiary to the Union of which it firms only a part. Under Article 245, while the Legislature of the Union has power to make laws for the whole or any part of the territory of India, the Legislature of a State has power to make laws for only the Stare or a part of it. Article 216 states that the Union has exclusively right to make laws in respect of matters mentioned in whit is known as Union list while the State has exclusive right of making laws in respect of matters mentioned in what is known as State List. There is also a con-current List of matters in respect of which both 'Union & State have powers to legislate. The policy of the Constitution is that when the Union makes laws even in respect of matters mentioned in concurrent list, the State has no jurisdiction to make laws in respect of those matters. This is necessary in order to avoid conflict. In order to show the lack of jurisdiction of the State to make laws inconsistent with the laws made by the Union Legislature, in respect of matters over which it has power to legislate the word 'void' is used in Article 254(1) to denote non-recognition of their existence. The word void is also used in Article 18 to denote the same idea when a law is inconsistent with the fundamental rights. Article 251(1) is as follows:

'254 (1) It any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an exiting law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament whether passed before or after the law made by the Legislature of such State, or as the case may 'be, the existing law, shall prevail & the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

2. Where a law made by the Legislature of a State specified in Fart A or Part B of Schedule I with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the

Legislature of such State shall, if it has been reserved for the consideration of the President & has received his assent, prevail in that State.'

It will be noted that what is declared void in Article 254(1) is 'a law made by the Legislature of the State'. It is declared void when it is repugnant to a law made by the superior Legislature i. e., Parliament on a subject it is competent to enact. For instance, the powers of the H. C. & S. C. to interfere with the decisions of lower Cts. in appeal or revn, are affected by the provisions of the Special Criminal Courts Act enacted by the State Legislature though that Subject is not either in the State List or concurrent List. It is clear that in such cases the Legislature of the State lacks total competency & the laws made by it in such circumstances are no laws at all. No question of repealing them arises. The word 'void' is therefore intentionally used to indicate that such laws should be treated as if they are not in existence.

66. The Parliament which is the Supreme Legislature has, in the interest of the Nation or when an emergency is declared, power to legislate even in respect of matters enumerated in the State List as stated in Articles 249(1) & 260(1). Here again there is a likelihood of conflict between a law made by Parliament & a law made by the State. Article 249(3) & Article 250(2) deal with the laws made by Parliament in national interest or when an emergency is proclaimed. They are as follows:

'249 (3) A law made by Parliament which Parliament would not but for the passing of a resolution under Clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.'

250 (2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.'

It will be noticed that the law referred to is a law made by the Parliament. It will then be noticed, the Parliament would not have been competent to make laws but for the resolution of two thirds of its members that to do so is in the interest of the nation or for the fact that an emergency is declared. It is not a case of total lack of competency to make laws. So it is stated that the laws made by the Parliament which was competent to make them under the exceptional circumstances shall cease to have force or effect after the time fixed, in view of the fact that it is the State that normally has to legislate in such matters. The word 'void' would be totally out of place to express the termination of the laws made by Parliament in exceptional circumstances.

67. Now Article 351 requires a careful study. It is as follows:

' 251. Nothing in Articles 249 & 350 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, & the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.'

It deals with laws which the State has power to make under the Constitution, when they are in conflict with laws which, under the exceptional circumstances referred to above, the Union has equally a power to make. The point to be noted is that both the laws are laws made by Legislatures who have power to make them. The laws made by the State are declared to be inoperative during the period in which the laws made by the Parliament continue to have effect under Articles 249(3) & 250(2). There is not in this case total lack of competency for the State to legislate & the word 'void' would be most inappropriate. It is thus clear that the word 'void' is used when total lack of existence is intended to be conveyed. The word inoperative is used when

the existence of the law is recognized but its operation is stopped during the time, a law of superior origin is prevailing. The word repeal is used when a law, which is not void, is in existence & it has to be withdrawn. It is in this sense that the word repeal is used in Article 595. Thus, if these different expressions have been used in different parts of the Constitution they have not been used indifferently to convey the same meaning. If one expression is used to convey a particular meaning, another is used to convey another meaning. Each expression is weighed & used to convey its own idea & it is difficult to find indifferent use of different expressions to convey the same meaning.

68. 'In short,' as observed by Maxwell, at p. 6 of his book on Interpretation of Statutes.

'when the words admit of but one meaning, a Ct. is not at liberty to speculate on the intention of the Legislature & to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the statute; it is, to expound it. The question for him is not what the Legislature meant, but what its language means; i. e., what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law, but to make it, & Judges are to remember that their office is Jus Dicere, not Jus Dare.'

69. The words 'void', 'repeal', 'inoperative' have been used in the sense in which they are generally used & understood. There is no reason to construe that they all have the same meaning when used in the different articles of the Constitution & not their natural meaning.

70. As observed in the Bombay decision,

'Looking to Articles 395, 13 & 372, the scheme seems to be that the Constituent Assembly has repealed the old Constitution Act & under Article 872, it has continued in force all the laws which were in force before the commencement of the Constitution subject to their being altered or repealed by a competent legislature or other competent authority. But this is subject to Article 13 which makes an exception in the case of those laws which are inconsistent with the provisions of Part III.'

What follows is that if the Special Criminal Courts Act is inconsistent with part III--I feel no doubt it is so--it is not one of the Acts that are continued. Nay, there is something more sad in respect of it. It shall be void i. e., it must be regarded from the morning of 26-1-1950 as if it does not exist after that date.

71. I may here state that it is significant that Articles 241 & 250 which deal with a law made by Parliament which, Parliament would not have been competent to make them, but for an exceptional circumstance & refer to their becoming inoperative after a period of six months, make an exception in respect of things done or omitted to be done before the expiration of the said period. On the other hand, Article 254(1) which refers to a law, made by the Legislature of the State when it is not competent at all to make such a law, in view of a superior Legislature having made a law in that matter, becoming void, does not contemplate the law being inoperative or making any exception in respect of things done or omitted to be done in accordance with that law. That is, for the reason that nothing done under a void law can ever be operative at all & a law which is declared to be void cannot be conceived to have any existence after it is declared to be void.

72. Under Article 367, the General Clauses Act, is made applicable for the interpretation of the Constitution unless the context otherwise requires. In the first place, the context in which an Act is declared to be void after the Constitution, makes it clear that the Act must, after the Constitution be treated as if it had never any existence. This is clear from the fact the word 'void' is used in laying down the policy & what is used is not a word like inoperative. The word 'void', as pointed out, previously on the authority of Maxwell, receives its natural full force & effect as it is used in laying down the policy of a law. In the second place, Section 6, General Clauses Act, itself is subject to chap. III of the Constitution. If Section 6 has to be construed as treating an Act

which is declared void, as if it exists for any purpose after the Constitution, the section itself offends Part III of the Constitution & it must be deemed void after the Constitution. In the third place it purports to refer only to repealed Acts. It has no reference to Acts declared void, I do not think therefore that Section 6, General Clauses Act, authorises the trial of the petnrs. under the Special Criminal Courts Act declared to be void, to be continued at any rate after the Constitution, in the review proceedings which form part of the procedure provided under the impugned Act.

73. The recent decision of this Ct. in which the Bombay F. B. decision was followed & the said F. B. decision have to be distinguished from the facts of this case. Such a distinction is made in another F. B. decision of the Bombay H. C. *Jeshingbhai v. Emperor*, : AIR1950Bom363). The question before the F. B. was that a restriction placed upon a petnr. in that case to the effect that he should not be in any area in the district of Ahmedabad except with the permission of the Dist. Mag. affected a fundamental right guaranteed to the citizen under the Constitution That order was made on 12-12-1949. The contention was that prior to the Constitution the H. C. had no power to interfere with such an order. Chagla C. J. with whom the other Judges concurred on this point observed as follows:

'The other argument advanced by the Advocate-General is that this order was made, as I pointed out, on 12-12-1949 & inasmuch as the order was made prior to the commencement of the Constitution, the Advocate-General contends that in view of Section 6, General Clauses Act, the operation of the order is saved & the order cannot be challenged. But what Mr. Parshottam is doing before us today is not so much the challenging of that order as the assertion of a fundamental right which is granted to him after 26-1-1950. If we are satisfied that to day when we are hearing this petnr. the petnr. is deprived of his fundamental right of movement & of residence, then we can undoubtedly interfere. The saving of the order under Section 6 does not mean that the State is entitled after the 26th January to deprive a citizen of a fundamental right which is guaranteed to him. These fundamental rights have come into existence after 26th January. Our Constituent Assembly has provided remedies for safeguarding these rights. Three rights have been made justiciable & therefore, even though the operation of the order may have been saved by Section 6, General Clauses Act, as I said before, we are not so much concerned with the validity of the order as the violation of the fundamental rights which have come into existence after 26-1-1950.'

In the same case Shah, J. observed :

'Even though prior to 26-1-1950 this Ct's jurisdiction to issue high prerogative writs was a limited jurisdiction & was confined to certain specified writs I agree with my Lord the Chief Justice that the jurisdiction of this Ct. is now not confined to the issue of these writs but extends to the issue for the purpose of enforcement of the rights conferred by Part III or for other purposes. This Ct. is constituted, under the provisions of Article 226, a custodian of the fundamental rights which have been guaranteed to the citizens of the State, & for the purpose of protecting those rights & for enforcement of the obligations arising therefrom, it is open to this Ct. to issue writs, though they may not be writs which have been recognised heretofore. It was argued by the learned Advocate-General that so far as the present application is concerned by reason of the provisions of Section 6 General Clauses Act, the petnr. is not entitled to claim any fundamental right contrary to the order passed on 12-12-1949. It is difficult to accept that contention. What the petnr. is seeking to do is not to ask for an order or a writ to have the order, dated 12-12-1949, set aside but he is asking this Ct. to grant him protection against what he conceives to be a threatened action of the executive against his personal liberty which has been guaranteed to him under the provisions of Article 19 of the Constitution. Consequently, there is no question of applying the provisions of Section 6, General Clauses Act. Section 6, General Clauses Act, only effectuates what has already been done or suffered & provides that the rights, obligations & proceedings which have already arisen or taken place under the authority of a statute will not be affected by reason of a subsequent repeal of the Statute. But in the present case, if by reason of the provisions of Article 19, a right of freedom of movement or a right to reside & settle in any part of the territory of India is granted & guaranteed to the petnr. for the first time that provision does not in any manner repeal the provisions of any earlier statute so as to bring into operation the provisions of Section 6.'

74. Even in this case what the petrs. are entitled to seek for is not that the trial under the procedure prescribed by Special Criminal Courts Act up to the date of the Constitution is bad, but that it is illegal that they should be proceeded against, at any rate after the date of the commencement of the Constitution, when proceedings under the Act have been declared to be void. They could have no objection to what has been done prior to the Constitution being regarded as valid for any purpose. They are entitled to object to their being proceeded against in review proceedings prescribed in the Special Criminal Courts Act after it has become void. The earlier Bombay decision in which it had been held that Clause (6), General Clauses Act is applicable, as well as the recent decision of this Ct. which followed the Bombay H. G. decision, dealt with the question whether the act of an accused which had been committed prior to the Constitution & was then an offence could be punished after the Constitution. It was rightly held that Article 13 is not retro-spective & the act which had been done prior to the Constitution could be punished even after the Constitution, as the act was an offence when that was committed. When a Ct declares an Act void on the ground that the Legislature which enacted it had no power to enact it, the Act is declared void ab initio i. e., treated as if it had never any existence. Nothing comes in the way of Parliament recognizing the validity of an Act & of what is done under it, till it declares it to be void. That is in fact what the Constitution has done under Article 13. In that sense Article 13 is pro-spective & not retro-spective. If what was done by any one was an offence under the Press Act prior to 26-1-1950, it could be regarded as an offence even after 26-1-1960. In that sense what Article 18 does, is as good as repealing Acts inconsistent with fundamental rights. The word 'repeal' is not used & the word 'void' is used in order to emphasize the fact that nothing can be done after 26-1-1960 if it is inconsistent with the fundamental rights & that it is so even if what remains to be done is to complete what was validly done prior to 26-1-1960, when what remains to be done is inconsistent with the fundamental rights.

75. The Bombay F. B. case of Keshav Madhav, In re, : AIR1951Bom188 F.B was for publishing an Urdu pamphlet sometime in December 1949. The prosecution case was that he committed an offence under Sections 26, 15 & 18, Press (Emergency Powers) Act, & that even though Section 15 of the said Act might be deemed to have become void from the date, the Constitution came into force, the case was not thereby affected as the publication of the pamphlet had taken place & the case put up before the Mag. prior to 26-1-1950. It may be stated here that the case of this Ct., in which, the Bombay H. C. decision has been followed, is a similar one. This case dealt with an act which was committed prior to the Constitution coming into force. The act was admittedly an offence prior to the Constitution. It was assumed that the sections of the Press (Emergency Powers) Act, were ultra vires of Article 19(1)(a) read with Article 13 of the Constitution. The question was whether what was done by the accused could be punished as an offence after the Constitution came into force when such acts were no longer offences, though they were offences prior to the Constitution. This very much depends upon the question whether Article 13 of the Constitution must be regarded as pro-spective or retro-spective. Article 13 itself is not very clear on the point. When it is not clear the presumption is, that it is pro-spectiva. According to the Constitution, enactments which are repugnant to any of the Articles in part III of the Constitution are declared to be void. If it is considered that the words 'to be void' are intended to mean that the sections must be deemed to have been void even prior to the Constitution, what was done by any one cannot be punished as, though it was regarded as an offence prior to the Constitution, it must be regarded after the commencement of the Constitution as if it was not an offence even prior to the Constitution. However, what is meant by Article 13 is that the enactments repugnant to the Constitution become void on the commencement of the Constitution. What follows is, that when what was done by any one was an offence at the time it was committed, it must be regarded as an offence & punished even after the date of the Constitution, though if a similar thing is done after the Constitution that cannot be regarded as an offence. It is in this sense that in cases of that kind dealing with the question as to what had been done prior to the Constitution, that one has to see whether Article 18 of the Constitution is merely pro-spective & not retro-spective. Such a question does not arise in a case where what is impugned is not complete prior to the Constitution. What is impugned in this case is the procedure in accordance with which the accused have been tried. If the trial of the accused had been completed under that procedure prior to the Constitution, the question whether Article 18 is pro-spective or retro-spective would arise

for consideration. What is meant is, if in the cases on hand, the convictions & sentences awarded to the accused were confirmed in review prior to the Constitution or if no review was provided in cases tried under the Special Criminal Courts Act, the judgment of the Special Judge could have been given effect to even after the Constitution. It cannot be said that writs could have been obtained after the Constitution declaring that such procedure was void & the persons were illegally detained. In such a case, it could be said that the persons had been tried in accordance with the procedure fixed by the Special Criminal Courts Act when that enactment was not void & that the trial had been completed by that procedure before the Constitution declared the enactment void. In the view that Article 13 is only prospective, it cannot be said that the persons in such a case are illegally detained. That is not, however, the case now. As already pointed out, the accused were rightly tried in accordance with the procedure laid down under the Special Criminal Courts Act, which was not void up to the date of the Constitution. To the extent of their trial up to 26-1-1950, it cannot be said that the procedure is illegal or void. The evidence recorded, for instance, may be good in the sense that if any person has perjured he could be proceeded against for perjury. But however good might be the procedure under which the trial proceeded before the Constitution, it cannot be said that the proceedings against the persons were completed prior to the Constitution & the conviction & sentence could be given effect to without further review proceedings, as has already been pointed out. Now what is sought to be done after the Constitution came into force is for continuing the proceedings under the Special Criminal Courts Act, that is, after that Act has become void. It is true that Article 13 is not retro retrospective & it is only prospective. But the review proceedings under the Special Criminal Courts Act cannot be allowed to proceed after the commencement of the Constitution as after that date, they are void. The accused have been detained pending review proceedings under the Special Criminal Courts Act, which has become void after the Constitution & as such their detention cannot be legal. The Bombay F. B. decision of Keshav Madhav, In re, : AIR1951Bom188 F. B. & the decision of this Ct. following the decision are not applicable to cases of this kind, as in cases of that kind what was done by the accused had been completed before the commencement of the Constitution & was an offence. It continued to be an offence as Article 13 could be said to be merely prospective & not retrospective. Those decisions do not apply to the facts of this case as even if it is held that Article 13 is not retrospective, the procedure prescribed under the impugned Act had not been completed before the Constitution & what remained to be done in accordance with that procedure cannot be allowed to be completed after that procedure prescribed under the Special Criminal Courts Act has become void. In this view also it may be said that the Bombay F. B. case is not applicable.

76. The following observation of Spens C. J. in *Piare Dusadh v. Emperor*, made prior to the Constitution, not only brings to our mind the change brought about by the Constitution in the power of the Indian Legislature but also makes it clear how proceedings which are void cannot be validated by retro retrospective legislation:

'It is again necessary to examine the basis of the American rule in order to determine whether it can be followed here. It is clear from the American authorities, that this limitation has been derived from the interpretation placed by the American Courts on what are known as the Fifth & fourteenth Amendments which provide against any person being deprived of life, liberty or property without due process of law. The expression 'due process of law' has been interpreted as referring only to 'judicial process' & as not including legislation, & 'judicial process' was held to imply competence or jurisdiction in the Court & an opportunity for a hearing. As this requirement had been made part of the written constitution, it followed that no enactment passed by a Legislature limited by that constitution could authorise anything in violation of it : (See Willongby's Constitution of the United States, paras. 1115 to 1117, 1123 & 1123). Hence the rule (stated by Cooley) that

'it would be incompetent for the Legislature, by retro retrospective legislation, to make valid any proceedings which had been had in the Courts but which were void for want of jurisdiction over the parties.' The Constitution position in India is different. Comparing the American Amendments with the provisions of the Constitution Act, 1950, it will be seen that the latter contains nothing corresponding to so much of the Amendments as related to deprivation of 'life or liberty' & that even as to 'property' it only requires that such

deprivation should be 'by authority of law'. See Section 209. This does not, of course, mean what the well-established principle of British jurisprudence as to the sacredness of personal freedom is not part of the law of British India. But as pointed out by Dicey, the rule remains only as a principle of 'private law' & is not a part of the Constitution (See Dicey's Law of the Constitution, Edn. 9, p. 203, & Wade & Phillips, Constitutional Law, Edn. 2 p. 354). While its enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental.'

The constitutional position of India now is different from what it was at the time of the above decision. Article 14 of the Constitution, it may be noted, corresponds to the equal protection clause in the Fourteenth Amendment of the American Constitution which declares no state shall deny to any person within its jurisdiction the equal protection of law,' as per observation of Mukherjea J. in the recent case of Charanjilal v. The Union of India, : [1950]1SCR869 . It cannot now be said that the Special Criminal Courts Act is within the competency of the Indian Legislature. If it is therefore void under Article 13, it cannot be said that anything in Clause 6, General Clauses Act, can make what had become void on the morning of 26-1-1950 valid to enable the accused being proceeded against after that date on which, at any rate, they are declared to be void.

77. This aspect of the matter may be concluded by referring to the decision reported in Thiaga rayan Chettiar v. Emperor, 1947 M. W. N. 45 : (A. I. R. (34) 1917 Mad. 325 : 48 Cr. L. J. 403) in which it is observed that 'Section 6, General Clauses Act, & Section 38 (1), English Interpretation Act, relate to repealed Acts & not to temporary Acts which have expired by efflux of time.' This observation is inconsistent with the observation of the Bombay decision that:

'The Constituent Assembly has used different expressions in different parts of the Constitution to vindicate that a particular law has ceased to have any effect A is no longer in operation. There is no reason why we should apply Section 6, General Clauses Act only to Article 395, where the expression repeal is used & not to other Articles where different expressions are used although in substance the meaning & connotation of this expression is the same.'

The Madras decision supports the contention that Section 6, General Clauses Act, applies to repealed Acts & not even to temporary Acts which have ceased to have any effect & are no longer in operation as they expired by efflux of time. I am, therefore, of opinion that there is much to be said against the view taken by the Bombay H. C. & the matter requires reconsideration by this F. B. In my view Section 6, General Clauses Act, is not applicable either to revive, for any purpose whatsoever, Acts which have ceased to have any effect, having expired by efflux of time of Acts which have been declared to be void by the Constitution itself.

78. The last point that remains to be considered is whether the Sp. C. had jurisdiction to try the cases under consideration even prior to the constitution as they had been taken cognizance of by the First Class Mag, at Madhugiri in whose Ct. a charge sheet had been placed prior to the starting of the proceedings before the Sp. J. under the Special Criminal Courts Act. This question was raised before this Ct. & after consideration at length has been answered in the negative in the decision reported in 48 Mys. H. C. R. 430 & those relied on in it. The decisions reported in Ram Pratap v. Emperor, A. I. R. (so) 1943 pat. 289 : (44 Cr. L. J. 708) & Gopal T. Emperor, A.I.R. (30) 1943 pat. 245 : (45 Cr. L. J. 177 S. B.) explain the scope of the earlier decision in Banwari Grope v. Emperor, A.I.R. (30) 1943 pat. 18 : (44 Cr. L. J. 273 F.B.) which appeared to be against the view taken in our Ct. I agree with respect with the view taken in these decisions.

79. To sum up, the Special Criminal Courts Act was perfectly valid prior to the commencement of the Constitution. After the Constitution it is void under Article 13 of the Constitution. A section like 25 of the Act, as observed by Nagesvara Iyer J. in 48 Mys. H. C. R. 430 'undoubtedly deprives an accused person of some of the valuable rights which he had under the Criminal P. C.' He had then to observe, 'the policy underlying the Act is a matter with which I am not concerned.' He has also added :

'No doubt, In several matters the provisions of the Act operate very much to the prejudice of the accused. But

that is not a matter with which we are concerned.'

Now we are concerned with the policy underlying the Act as a different policy is laid down in Article 14. There is unequal treatment & unhappy distinction made between persons arbitrarily chosen, under the Special Criminal Courts Act & those committing similar offences & are allowed to be proceeded against under the Criminal P. C. Classification is permitted but arbitrary selection is not classification & is not protected under Article 14. The Special Criminal Courts Act is also void under Article 254 as it takes away the powers vested in the H. C. under the Constitution and a State Legislature cannot do so. All the same it is possible to consider that acts done prior to the Constitution are not affected by it & Article 13 may be regarded as pros retrospective & not retrospective. In this view an act completed prior to the Constitution & was an offence then, may be punished subsequent to the Constitution, Article 13 being regarded as declaring only that a similar act done subsequent to the Constitution is not an offence, if it offends Article 14. But if an act which was an offence prior to the Constitution is partly done prior to the Constitution & partly after the Constitution & what was done after the Constitution has to be taken into consideration before the act could be said to be an offence but not Article 14, it is clear that Article 13 which is at least pros retrospective applies & the offender cannot be punished. In this case the act said to have been affected by the Constitution is the proceeding under the Special Criminal Courts Act. If the proceeding had been completed, i. e., if the review was over prior to the Constitution, it may not have been open to the petnrs. to have stated after the Constitution that their trial is illegal & they have to be let off. No trial under the procedure prescribed in the Special Criminal Courts Act can begin against any person, at any rate after the Constitution, as it is void under Article 13 of the Constitution, what we are concerned in such a case being the pros retrospective operation of Article 13 about which there is no doubt & not its retros retrospective operation. For the same reason no proceeding which is incomplete at the time of the commencement of the Constitution, however good or valid it was prior to the Constitution, can be allowed to continue after the Constitution, when the Special Criminal Courts Act which prescribes the procedure or any portion of it is declared to be void under Article 13. This is so whether the proceeding had just begun before the Special Judge or is under review before a Judge appointed for the purpose under that Act, so long as the portion of the proceeding which remains to be completed after the Constitution is one prescribed under the impugned Act. The result is that the petnrs. in my opinion, have to be allowed & the petnrs. set at liberty for being arrested & proceeded against before the Sp. First Class Mag., Madhugiri, in accordance with the Criminal P. C., in case the Govt. think it necessary.

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