

**In Re:** E.P.T. Valyudam and ors.

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**Court :** Chennai

**Decided On :** Nov-03-1949

**Reported in :** AIR1950Mad324

**Judge :** Govinda Menon and ; Basheer Ahmed Sayeed, JJ.

**Acts :** Madras Maintenance of Public Order (Removal of doubts and Amendment) Ordinance, 1949 - Sections 1(3), 3, 4A and 19; [Government of India Act, 1935](#) - Sections 42 and 88

**Appeal No. :** Criminal Misc. Petn. Nos. 800, 801, 803, 814, 816, 818, 848, 851, 853, 855, 862, 885, 886, 887 to 89

**Appellant :** In Re: E.P.T. Valyudam and ors.

**Advocate for Def. :** Advocate General and ;N.T. Raghunathan, Adv. for ;Public Prosecutor and Crown Prosecutor

**Advocate for Pet/Ap. :** A. Ramachandran, Adv. of Row and Reddy

**Judgement :**

**Govinda Menon, J.**

1. These are petitions under Section 491, Criminal P. C., by the various petitioners herein praying that directions in the nature of habeas corpus to be issued to the superintendent of the respective jails in which they are confined to produce them

before this Court so that they might be set at liberty. In all these cases the petitioners are detained under the provisions of Madras Maintenance of Public Order Act, 1947 (Act I [1] of 1947) as amended by the Madras Maintenance of Public Order (Amendment) Act, 1948 (Act XVII [17] of 1948). Madras Act I [1] of 1947 was to remain in force for a period of one year from 12th March 1947 and there was a provision therein that the Provincial Government may, from time to time, by notification in the Fort St. George Gazette, extend the continuance of the Act for a further period or periods not exceeding one year in the aggregate. In accordance with that provision contained in Section 1 (4) of Act I [1] of 1947, the Provincial Government extended the operation of the Act by notification. Later on, by Act XVII [17] of 1948, an amendment was made to Section 1 (4) of Act I [1] of 1947, by which for the words 'for the further period or periods not exceeding one year in the aggregate', the words 'for a further period or periods not exceeding three years in the aggregate', were substituted. While matters were in this state, the Governor of Madras, acting under Section 88(1), [Government of India Act, 1935](#), promulgated Ordinance I [1] of 1949 on 11th August 1949 with the object of the removal of doubts regarding the validity of the continuance of Madras Act I [1] of 1947. By this Ordinance certain new provisions were introduced, viz., Section 3 (a) by which it was declared that the validity of the Madras Maintenance of Public Order (Amendment) Ordinance, 1948 (Ordinance II [2] of 1948) and Madras Act XVII [17] of 1948, shall not be questioned on the ground that the Act amended thereby was not in force at the time when the Amending Act was enacted or the Amending Ordinance was promulgated. Section 3 (b) reads as follows:

'(b) No action or proceeding taken, no notification issued, no order made, and nothing done, by any authority in accordance with the provisions of the said Act at any time on or after 12th March 1948 shall be questioned on the ground that the said Act was not in force at that time.'

A further Section 4-A was also inserted in Act I [1] of 1947 which is in the following terms :

'No order of detention made in respect of any person in pursuance of any of the foregoing provisions at any time, whether before, on or after 12th March 1948,

shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency, or any delay, in any communication made to such person under this Act.'

On 10th October this year the question regarding the validity of Ordinance I [1] of 1949 was considered and decided by this Court in *In re Veerabhadrayya* : AIR1950 Mad243 to which my learned brother Basheer Ahmed Sayeed J. was a party. It was held therein that the notification by the Government of Madras (vide G. O. No. 446 (General) dated 27th February 1948 published in the Fort St. George Gazette of 2nd March 1948) extending the duration of Act I [1] of 1947 for a further period of one year commencing from 12th March 1948 was ultra vires and illegal in view of the decision of the Federal Court in *Jatindranath Gupta v. Province of Bihar* . The amendment of Sub-section (4) of Section 1 by Madras Act XVII [17] of 1948 by substituting three years for one year was also declared to be ultra vires the Legislature, because Madras Act I [1] of 1947 expired on 12th March 1948 and its term could not be extended by a notification by the Provincial Government. I do not intend to discuss that aspect of the case now because my learned brothers have given enough reasons for holding that to the extent Madras Act I [1] of 1947 was extended by the notification of the Provincial Government as well as by Act XVII [17] of 1948, the action of the Government was ultra vires, and therefore on 12th March 1948 Act I [1] of 1947 ceased to be in force. My learned brothers also held that Section 3 (b) of Ordinance I [1] of 1949 was valid and operative whereas the new Section 4-A was invalid and void.

2. Subsequent to the decision in *In re Veerabhadrayya* : AIR1950 Mad243 , on 16th October 1949, the Governor of Madras promulgated ordinance No. IV [4] of 1949 whereby the Madras Act I [1] of 1947, as amended by Madras Act XVII [17] of 1948, with the additional sections inserted by ordinance I [1] of 1949, was re-enacted with some additions as well. Section 1 (3) of the Ordinance lays down that it shall be deemed to have come into force on and from 12th March 1948, and therefore the operation of the Ordinance has been specifically made retrospective from the day on which Madras Act I [1] of 1947 expired. Section 4-A of the Ordinance is, in the language the same as Section 4-A of ordinance I [1] of 1949 and is practically ad idem. Section 19 of the Ordinance is much wider in its scope

and amplitude than the same section in Act I [1] of 1947 and it reads as follows:

'19. (1) Any rule or order made or deemed or purporting to have been made, any notification issued or deemed or purporting to have been issued, any direction given or deemed or purporting to have been given, any action or proceeding taken or deemed or purporting to have been taken, or anything done or deemed or purporting to have been done--

(a) under any provision of the Madras Maintenance of Public Order Act, 1947 (hereinafter referred as the said Act) and in force immediately before 12th March 1948, or (b) on or after 12th March 1948, under any provision of the said Act or of the said Act as amended by Madras Ordinance No. II [2] of 1948 or Madras Act XVII [17] of 1948, on the footing that the said Act or the said Act as so amended was in force at the relevant time, shall, subject to any subsequent modification or cancellation thereof purporting to have been made on or after that date under the said Act or under the said Act as amended as aforesaid on the footing that the said Act or the said Act as so amended was in force at the relevant time, be deemed to be a rule or order made, notification issued, direction given, action or proceeding taken, or thing done under the corresponding provisions of this Ordinance.(2) Any liability or penalty incurred or deemed or purporting to have been incurred, any punishment awarded or deemed or purporting to have been awarded, and any prosecution commenced, or deemed or purporting to have been commenced --

(a) under any provision of the said Act before 12th March 1948, or (b) on or after 12th March 1948 under any provision of the said Act or of the said Act as amended by Madras Ordinance No. II [2] of 1948 or Madras Act, XVII [17] of 1948, on the footing that the said Act or the said Act as so amended was in force at the relevant time, shall be deemed to have been incurred, awarded, or commenced under the corresponding provision of this Ordinance. (3) No order of detention made or deemed or purporting to have been made in respect of any person in pursuance of any of the provisions of the said Act or of the said Act as amended by Madras Ordinance No. II [2] of 1948 or Madras Act XVIII [17] of 1948 on the footing that the said Act or the said Act as so amended was in force at the relevant

time, shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency or any delay, in any communication made to such person under the said Act or the said Act as amended as aforesaid.'

The main ground on which the petitioners in these petitions dispute the legality of their detentions is that since Madras Act, I [1] of 1947 has automatically expired on 12th March 1948, the arrests and detentions made subsequent to that date by virtue of either its extension by a notification or the continuance of it by Act XVII [17] of 1948 cannot be justified because, firstly, the Provincial Government could not have extended the scope of an Act by notification, as such a procedure amounted to delegated legislation; and secondly Act XVII [17] of 1948 which intended to amend and alter Act I [1] of 1947 cannot have any force and validity, because a statute which has expired by efflux of time cannot be amended or altered. Their further contention is that even if the extension of the Act was valid by notification as well as by enactment of Madras Act, XVII [17] of 1948, the detentions are unlawful on the ground that there are defects, vagueness and insufficiency, as well as delay in the communication made to them. Such being the case, the contention raised is that granting that the original order of detention can be justified, the further detention is absolutely illegal. Having regard to the fact that in *In re Veerabhadrayya*, Cri. M. P. No. 1529 of 1949 : : AIR1950 Mad243 this Court had held that Section 3 (b) of ordinance I [1] of 1949 was valid and operative, it cannot be said that the arrest and detention subsequent to 12th March 1948 is without any legal foundation. The learned advocate for the petitioners did not accept the correctness of the decision of this Court regarding the validity of Section 3 (b) of Madras Ordinance No. I [1] of 1949 and wanted to contend that the judgment of my learned brothers required reconsideration. No further reasons have been urged before us in order to justify me for taking a different view. I am therefore in entire agreement with the judgment in *In re Veerabhadrayya*, Cri. M. P. No. : AIR1950 Mad243 regarding the validity of Section 3 (b). Therefore the question that has to be considered is whether the detentions can be said to be illegal on account of any of the other matters mentioned in Section 4-A of ordinance I [1] of 1949 which had been declared to be illegal. In view of the decision regarding the validity of Section 3 (b), whether the decision holding that Section 4-A was invalid and ultra vires is justified, need not be considered now,

though with all due deference to my learned brothers I find myself unable to agree with their conclusion regarding the invalidity of Section 4-A of Ordinance I [1] of 1949. Assuming that Section 4-A of ordinance I [1] of 1949 is invalid, the question that arises is whether Sections 4 and 19 of Ordinance IV [4] of 1949 are valid or not.

3. The learned advocate for the petitioners contended that both Sections 4-A and 19 of Ordinance IV [4] of 1949 are ultra vires the powers of the Governor and as such the Ordinance to that, extent should not be understood as having enacted the law.

4. It will be convenient to trace in brief the history of legislation by an Ordinance at least from the time of the passing of the Government of India Act, 1915, as amended by the Government of India Act, 1919, 9 and 10. Geo. V, ch. 101. Section 72, Government of India Act, 1915, wherein for the words 'Governor-General in Legislative Council' the words 'Indian Legislature' were substituted by the Act of 1919, reads as follows :

'The Governor-General may, in cases of emergency, make and promulgate Ordinance for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Act.'

It was under the provisions of this section that Ordinances were promulgated by the Governor-General for the whole of India or a part thereof. During the period when Government of India Act, 1915, as amended by the Government of India Act, 1919 was in force, the Governors of the various provinces did not have any right or power to promulgate an Ordinance, which power was solely vested in the Governor-General. But when [Government of India Act, 1935](#), was passed, the Provincial Governors were also given powers of promulgating ordinances. Section

42, [Government of India Act, 1935](#), laid down the power of the Governor-General to promulgate Ordinances during the recess of the Central Legislature and Section 88 laid down the power of the Governor to promulgate Ordinances during the recess of the Provincial legislature. But since that portion of the Government of India Act relating to the establishment of a federation was never brought into existence, though provisions relating to the administration of provinces were introduced in the provinces, by Schedule 9 to the Government of India Act, certain provisions of the earlier Act were continued with amendments as a transitory measure before the establishment of the federation. Therefore, it is seen that Section 42 as enacted in the [Government of India Act, 1935](#), was never brought into force while Section 88 of the Act of 1935 was in force in the provinces. After the passing of the Indian Independence Act, the Government of India Act of 1935 was adapted by the India (Provisional Constitution) Order, 1947, and by such adaptation Section 42 of the Act as it stood before the adaptation was changed and amended into the form in which it is seen today. The present section is to the following effect :

'The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good Government of the Dominion or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation have the like force of law as an Act passed by the Dominion Legislature; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Dominion Legislature under this Act to make laws; and any Ordinance made under this section may be controlled or superseded by any such Act.'

It will be seen that the present Section 42 incorporated in it the pre-requisite of an emergency before the Governor-General can promulgate the Ordinance and this is taken from Section 72 of the old Act enacted in Schedule 9 as a transitory measure, whereas if the federal structure of the statute had been brought into existence, the unamended Section 42 did not necessitate the existence of an emergency before the Governor-General could promulgate an Ordinance. At present the Governor-General can promulgate an Ordinance for the peace and good Government for the whole of the Indian Union or any part thereof only in

cases of emergency. Comparing the present Section 42 with Section 88, it will be evident that whereas an emergency is a pre-requisite for the Governor-General to promulgate an Ordinance, in the case of a Governor, when the Legislature of the Province is not in session, it will be sufficient, if circumstances exist which render it necessary for the Governor to take immediate action. Under Section 42, even when the Legislature is in session, the Governor-General can promulgate an Ordinance, whereas under Section 88 the Governor cannot promulgate an Ordinance when the Legislature is in session. It seems to me therefore that though the Governor-General's powers for promulgating Ordinances are much wider because he can do so even when the Legislature is in session, the Governor's powers can be exercised only when the Legislature is not in session. But whereas the Governor General can promulgate an Ordinance only if an emergency arises, the Governor can do so when the Legislature is not in session when he is satisfied that circumstances exist which render it necessary to take immediate action. He should also get the previous sanction of the Governor-General before an Ordinance is promulgated.

The following observations, viz, 'the power of the Governor under this section is analogous to the power of the Governor-General to promulgate Ordinances in cases of emergency' contained in the judgment in *In re Veerabhadrayya*, Cri. M. P. No. 1529 of 1949: : AIR1950 Mad243 , in my opinion, do not give the correct picture of the powers of the Governor and Governor-General. As I have already shown, the Governor-General's power to promulgate an Ordinance is not affected in any way by the Legislature being in session, whereas the Governor's is, and the Governor-General's power is circumscribed to those of emergency whereas the Governor's power can be exercised when he is satisfied that there are circumstances which render it necessary to take immediate action. It will therefore be clear that though similar in some respects, there is no complete analogy between the Governor's powers and the Governor-General's powers. But there can be no doubt that the Governor's power of making law by Ordinances is co-extensive with the power of the Legislature to legislate subject to the restrictions contained in Section 88.

5. It is contended by the learned advocate for the petitioners that even though a Legislature with plenary powers has power to legislate retrospectively, the Governor, in promulgating the Ordinance, does not possess that power. It is very much inferior to the powers of the Legislature and such being the case, Clause (3) of Section 1 which lays down that the Ordinance shall be deemed to have come into force on and from 12th March 1948 is ultra vires and illegal. Reliance is placed upon the absence in the preamble of any words making the Ordinance explicitly retrospective, and since the preamble, according to the learned counsel, makes no mention of an intention to have retrospective legislation, it should be understood that the purpose of the Ordinance was to apply it only to the future and for the same reason, it is urged that despite Section 1 (3), the Ordinance should be deemed to be only prospective. There can be no dispute regarding the following maxim:

'Laws should be construed as prospective unless they are expressly made applicable to past transactions and to such as are still pending. Leg seet constitutiones futuris certum est dare fornam negotiis non ad facta praeterita arevocari.'

In this Ordinance it cannot be said that there is no express provision that the Ordinance is to apply to a time anterior in date to its promulgation, because Section 1 (3) clearly says so. In spite of the fact that the preamble does not in so many terms refer to the retrospective aspect, it seems to me that that portion of it mentioning that it was necessary for the Governor to take immediate action for the maintenance of public safety and to prevent and to put down disorders involving menace to the peace and tranquillity of the province is sufficiently wide to include cases of detentions under a previous invalid statute or Ordinance. Relying on the following sentence 'to what extent under the Ordinance making power the Governor can pass retroactive legislation, is a point on which there is some doubt or difficulty' in the judgment in *In re Veerabhadrayya*, on. M. P. No. 1529 of 1949 : : AIR1950 Mad243 , the learned counsel for the petitioner contend a that there is no clear exposition in that judgment to the effect that the Governor has such power. On a reading of the judgment as a whole, especially where the learned Judges quoted extracts from the judgment of the Federal Court in *Jatindranath*

Gupta v. Province of Bihar it seems to me that the learned Judges did not entertain any doubt about the Governor's power. At page 243 Mahajan J. categorically states that the only apt manner of reviving an expired Act was by enacting a fresh statute or by enacting a statute expressly saying that that Act was revived. At page 252 Mukherjee J. puts it more expressly in the following words:

'It is certainly competent to the Legislature in exercise of its plenary powers to revive or re-enact a legislation which has already expired by lapse of time. The Legislature is also competent to legislate with retrospective effect.'

These observations have been extracted from the judgment in *In re Veerabhadrayya*, Cri. M. P. No. 1529 Of 1949 : A. I. R. 1960 Mad. 243 The really serious objection urged on behalf of the petitioners is that Ordinance IV [4] of 1949 is ultra vires because of its retrospective nature as it is ex post facto legislation and in the field of criminal law an ex post facto legislation, according to the petitioner's counsel is prohibited. We have therefore to find out the scope of such legislation and how far the present Ordinance is a retroactive law. In the matter of ex post facto legislation having retroactive effect, there is considerable difference between what obtains in the United States of America and what is in vogue in England. At page 383 of 'Law in the Making' by C. K. Allen, the learned author observes as follows:

'There is, in all civilized states, the strongest prejudice against retrospective or ex post facto legislation, since it is, in the words of Willes J., 'prima facie' of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.'

The decision in *Phillips v. Eyre*, (1871) 6 Q. B. 1 : 40 L. J. Q. B. 28. is cited.

6. The learned author further observes: 'However, this great common law authority is quite clear that there is no principle known to the law which actually prohibits such legislation. Nor is there any objection to it when it operates for the protection of an individual or individuals. Legislation of this kind has not been infrequent.'

Therefore it is seen that ex post facto legislation is not prohibited so far as England is concerned. In the United States of America, ex post facto legislation is expressly prohibited by the Constitution. See Article 1, Section 9, Sub-section (8) of the United States Constitution, In his book on 'Constitutional Law of the United States' Edn. 2 (page 458) Willoughby states as follows :

'Ex post facto legislation upon the part of the States as well as by Congress is specifically forbidden by the Constitution. It thus results that, for the determination of what Constitutes ex post facto legislation, within the meaning of the Constitution, the decisions of the Supreme Court with reference to State laws alleged to be of this character are of equal weight to its decisions with regard to acts of Congress against which the same defect is charged.

In the early case of *Calder v. Bull*, 3 Dall 383 the prohibition was declared to relate only to criminal law and not civil proceedings, and, as thus limited, ex post facto laws were declared to be 'every law that makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.'

At page 683 the learned author again states as follows:

'Retroactive legislation which does not impair vested rights, or violate express constitutional prohibitions, is valid, and therefore, particular legal remedies, and, to a certain extent, rules of evidence, may be changed, and, as changed, made applicable to past transactions for it is held that, so long as the general requirements of due process of law are satisfied, no person has a vested right in any particular legal remedy or mode of judicial procedure. Again, in certain cases, the Legislature is competent to validate proceedings otherwise invalid because of formal irregularities. But substantial rights may not thus be interfered with.'

Article 310 at pages 462 and 463 of Samuel P. Weaver's 'Constitutional law and its Administration' is instructive regarding the position in the United States, and may be usefully extracted here :

'Both the Federal and the State Governments are forbidden to enact ex post facto laws. This means that the Constitution forbids the application of any new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrong doer. An ex post facto law is a retroactive law. Ex post facto means, literally 'from what is done afterwards.' As defined by the Supreme Court, it is: 'First. Every law that makes an action done before the passing of the law and which was innocent when done, criminal; and punishes such action; Second. Every law that aggravates a crime, or makes it greater than it was when committed; Third. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed; Fourth. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time. of the commission o! the offence in order to convict the offender.' To this definition may be added any change in procedure retroactive in effect which results in depriving the accused of substantial protection. The principle is well settled that this constitutional prohibition applies only to penal statutes. Laws which affect only civil rights or which regulate only civil remedies are not within the prohibition. Neither is deportation of aliens a punishment so as to be subject to the prohibition. This constitutional provision is a restraint upon Congress or upon the legislative power of the States. It is not a limitation upon the power of the Courts to interpret existing statutes even though their decisions may be erroneous or inconsistent . . . . .'

At page 539 of the Manual of Government in the United States by R. K. Gooch, we find similar observations:

'An ex post facto law is not merely a retroactive law. It is a retroactive law that belongs to the category of criminal law ; and it establishes conditions that are more unfavourable to an accused person than they were at the time the alleged crime was committed.'

It is unnecessary to multiply authorities for a matter like this, though I find interesting discussions on the same in 'Statutory construction, Interpretation of Laws' by Crawford, at pages 562 and 563 Article 277 and pages 573 and 574. It is also instructive to note that in the footnote at page 562, the learned author states that the words 'retroactive' and 'retrospective' are synonymous.

7. Though it cannot be doubted that Order IV [4] of 1949 is a penal statute and but for the express provision making it retrospective, it could not be construed as such the question still remains whether such a legislation which attempts to set right matters declared illegal is proper or not; because the contention is that this is also a piece of curative legislation. Curative statutes are those which attempt to cure or correct errors and irregularities in judicial or administrative proceedings and which seek to give effect to contracts and other transactions between private persons which otherwise would fail to produce their intended consequence on account of some statutory disability or failure to comply with some technical requirement. Though the learned Advocate. General contended that this is a piece of curative legislation, it is difficult to agree with him because it does not cure a defect in an agreement between private parties. At p. 577 of Crawford's 'Interpretation of Laws' the learned author says that curative statutes are obviously retroactive and hence entitled, as a general rule, to retrospective operation. In view of the express prohibition in the constitution of the United States against retroactive nature of criminal laws, it is not very helpful to refer to the American decisions on this aspect.

8. So far as the British system of jurisprudence is concerned, there is no principle of law which actually prohibited retroactive legislation even as regards crimes. See Salmond 'Jurisprudence', p. 216. That Acts of indemnity to validate measures for public safety taken in times of emergency have been frequent cannot be disputed, and on this point the observations of Lord Atkinson in *Rex v. Halliday*, 1917 A. C. 260 : 86 L. J. K. B. 1119, on statutes invading the liberty of the subject are instructive. In England, during the second World War, there have been statutes which increased the penalty for an offence with retrospective effect and it has been held that such increase of penalty can have valid retroactive effect upon an offence completed before the making of the law. See *Director of Public*

Prosecutions v. Lamb, 1941 2 K. B. 89 : 1941 2 ALL. E. R. 499; Buckman v. Button, 1943 K. B. 405: 1943 2 ALL. E. R. 82 and Rex v. Oliver, 1944 K. B. 68 : 1943 2 ALL. E. R. 800.

9. The learned counsel for the petitioners invited my attention to the law of the Constitution by A. V. Dicey, Edn. 9, at pp. 99 and 100 and contended that whatever might be the prerogative of a sovereign Parliament like the British Parliament, to enact penal laws with retrospective effect, so far as the Indian Legislative bodies are concerned their authority in the way of law-making is completely subordinate to and as much dependent upon Acts of Parliament as is the power of the London and North Western Railway Company to make by-laws. The learned author observes that under the Acts mentioned in his book, the Indian Legislature is, in the strictest sense a non-sovereign body. The learned counsel also referred me to pages 100 and 101 of Dicey's book. Whatever might have been the situation prior to 1935, after the passing of the [Government of India Act, 1935](#), and especially after the Indian Independence Act of 1947, it cannot be held that the Indian Legislature is a subordinate one. In the foot-note at p. 99 in Dicey's book, the editor observes that the main text dealing with the subordinate nature of the Indian Legislature was based upon a law that has since been repealed by the Government of India Act of 1935. In such circumstances it is futile to refer to the observations of the learned author regarding the subordinate nature of the Indian Legislature. After the passing of the Indian Independence Act, the Dominion of India stands in the same position as the other Dominions like Canada, Australia or New Zealand and the provisions of the Statute of Westminster 1931, are applicable to India. Therefore, it may be useful to refer to the powers of the Dominion Legislatures regarding such ex post facto legislation. At pp. 86 and 87 of Vol. II of Halsbury's Laws of England, Article 149, there is a statement regarding the powers of such Legislature. Article 149 reads as follows :

'No other bounds are set to the character of Dominion, State, or provincial Acts. There is nothing to forbid confiscatory measures of any kind, and it is quite regular for a Legislature to interfere with private property rights, such as wills, or to provide a code to secure a just treatment of dependents by their deceased husband or father. Though in the Irish Free State Constitution rights of the subject are

asserted, these can be reduced by ordinary legislation, for the constitution can thus be amended. The Legislature may legislate to interfere with pending proceedings in the law Courts, as well as to declare unsound a view of law taken by the Courts. Ex post facto legislation is as a rule perfectly legal, and, though prohibited in the Irish Free State, the prohibition can be removed by a simple Act.'

From the foot-note it is seen that by applying the Quebec Act of 1923 one John D. Roberts, an editor, was sentenced to a year's imprisonment for an alleged slander of the Legislature though the offence was committed before the Act was passed. From a survey of the authorities adverted to by me above, it is clear that so far as the British Parliament is concerned it has full power to enact legislation regarding crimes which may have retrospective effect. In the United States such law-making is prohibited by the articles of the constitution. In the various dominions constituting the British Commonwealth as well as in India there is no such prohibition. See observations of the Privy Council in *Abeyesekara v. Jayathilake*, 1932 A. C. 260 : 101 L. J. P. C. 40. Observations of their Lordships of the Privy Council in *Empress v. Burah*, 4 Cal. 172 : 51. A. 178, to the effect that when plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally, also indicate that there was no restriction so far as the Indian Legislature was concerned even in the sixties of the last century, regarding the power of legislation. Our attention has also been invited to two cases in which it has been held that a Governor promulgating an Ordinance having co-equal powers as the Provincial Legislature is empowered to create offences with retrospective effect. See *Jnan Prosanna v. Province of West Bengal*, . Clause 4 of Section 2, West Bengal Security (Amendment) Ordinance, which created a new offence, viz., harbouring a person against whom an order of detention had been made with retrospective effect, was held by a Full Bench of five Judges of the Calcutta High Court as a perfectly valid provision. At pages 12 and 13 Harries C. J. discussing the retrospective effect of the ordinance and following the decision in the *United Provinces v. Mt. Atiqah Begum* as well as the observations of Viscount Simon in *Emperor v. Benarilal Sarma* , came to the conclusion that such retrospective effect is legal. In *Ahmed Khan v. Emperor* A. I. R. 1948 Lah. 120 : (1948) Cri. L. J. 305, the effect and the retrospective nature of an Ordinance which

created an offence was considered and the learned Judges observed that the powers of a Governor to make Ordinances are as wide as the powers of the Legislature to make laws and if the Legislature can legislate retrospectively, the Governor also can. The learned Judges observed that there can be no legal objection to an Ordinance being allowed to operate retrospectively.

10. The powers of a Governor to make Ordinances are as wide as the powers of the Legislature and there is no reason why a Governor should not be at liberty to promulgate retrospective Ordinances having the effect even of re-opening transactions which had been adjudicated upon by Courts of law. The decision of the Privy Council in *King Emperor v. Benoari Lal Sarma* as well as that of the Calcutta High Court in *Jnan Prosanna v. Province of West Bengal*, establish definitely that the Governor can promulgate an Ordinance having retrospective effect. Kania J. as he then was in a case reported in *Hirji Laxmidas v. Fernandez*, : AIR1945 Bom352 after considering various authorities was of opinion that the Governor of a Province has authority to pass laws having retrospective effect just as the Provincial Legislature. The learned Judge further observed as follows :

'If his powers are the same as of the Provincial Legislature, he has the power to pass laws having retrospective effect. This cannot be disputed because a Provincial Legislature, within the orbit of its legislative sphere, has plenary powers and all legislatures having plenary powers are held to have power to make laws with retrospective effect within the scope of their authority.'

Though Mr. Kamachandran for the petitioners attempted to show that the Ordinances which are impugned in the cases in *Jnan Prosanna v. Province of West Bengal*, and *Ahmed Khan v. Emperor*, A. I. E. 1948 Lah. 120 : (1948) Cri. L. J. 305 did not create an offence with retrospective effect, in my opinion, he has not seen successful. In view of the foregoing discussion it is perfectly clear that the Provincial Legislature can pass a law creating a crime for the first time and giving it retrospective effect, and a Governor exercising the power of promulgating an Ordinance, if he conforms to the provisions of Section 88 of the Act, can also do likewise and such an Ordinance will have the same force and effect as an Act of the Provincial Legislature. See also the observations of the learned Chief Justice

in *Narayanswami v. Inspector of Police, Mayavaram*, I. L. E. (1949) Mad. 377

11. The next aspect very seriously pressed by the learned counsel for the petitioners is that Ordinance IV [4] of 1949 is intended, especially Sections. 4-A and 19 of it, to circumvent the decision of this Court holding that a detention which does not conform to the specific provision of Madras Act I [1] of 1947 cannot be said to be a proper detention. Mr. Ramachandran contends that successive judgments of this Court have pointed out that delay in giving reasons for the detention, insufficiency of such reasons, as well as defects and vagueness of the same are such infirmities as would invalidate the detention because of not conforming to the provisions of the Act and since Sections 4-A and 19 of Ordinance IV [4] of 1949 declare that orders of detention should not be questioned or deemed to be invalid or unlawful on account of the defects and infirmities mentioned above these provisions of law are ultra vires. He points out that this Court in the judgment in *In re Veerabhadrayya* : AIR1950 Mad243 has declared that Section 4-A of Ordinance I [1] of 1949, which has been re-enacted in exactly the same terms by Section 4-A of Ordinance IV [4] of 1949, is ultra vires and therefore the Ordinance making authority is indirectly doing an Act which has been declared illegal by the Court. In my opinion the action of the Ordinance making authority, far from being one flouting or disregarding the opinion of the Court, is one following the directions contained in the judgment, because it is clearly stated in the judgment in *In re Veerabhadrayya* : AIR1950 Mad243 that the Governor can even pass retrospective legislation. A perusal of the judgment shows that the reason for holding that Section 4-A of Ordinance I [1] of 1949 was ultra vires, was that since Act I [1] of 1947 had expired, it cannot be resuscitated by an amending Act like Act XVII [17] of 1948 and what the Legislative authority ought to have done was to have re-enacted the same instead of passing an amending Act. The learned Judges observe that the amending provisions of the Ordinance are of no effect because the main Act came to an end on 12th March 1948 and on account of that it must be held that unless there is a re-enacting provision in the Ordinance which amounts to a new Act, the declaratory and amending provisions of the Act are not valid. But the learned counsel says that when this Court declared that an order of detention was invalid by reason of vagueness and insufficiency of detail, it is not open to the Ordinance-making authority to say the contrary. In support of it

our attention was drawn, to certain passages at pages 533 and 534 in Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters, 1940 A. C. 513 : 1940 2 ALL E. R. 220. The following observations of Viscount Caldecote L. C. were stressed to show that the action of the Governor was a colourable device to defeat the correct interpretation put upon the previous Ordinance by the High Court:

'In other words, the Act. . . . is an attempt to do by indirect means something which their Lordships are satisfied the Provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of Sections 91 and 92. . . . . Reference may be made to Lord Halsbury's statement in delivering the decision of the Judicial Committee in Madden v. Nelson and Fort Sheppard By. 1899 A. C. 626 : 68 L. J. P. C. 148. It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly.'

I am not able to find how these observations of the Privy Council are applicable at all. The Canadian case was one in which there was conflict between the Dominion Legislature and the Legislature of Province of Alberta. It was a case where one of the Legislatures had trespassed upon the province of the other by means of a colourable device and their Lordships holding that the pith and substance of the impugned enactment should be considered held that such a device should not be allowed. The other case relied upon by the petitioners' counsel is Webb. v. Outrim, 1907 A. C. 81 : 76 L. J. P. C. 25. Here also the observations at p. 91 tending to show that what cannot be done directly should not be allowed to be done in a round about way were directed to the legislative power adopted by different legislatures of the Commonwealth of Australia. Reliance is also placed on Section 212 of the [Government of India Act, 1935](#), as adapted, enacting that the law declared by Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts in any Governor's Province, etc. From this provision the learned Counsel wants the Court to infer that the Governor has no power to make a law declaring that the law laid down by the High Court should no longer be the law. I can find no justification in Section 212 for such an argument. As I have already stated, the Ordinance-making authority was conforming to the views expressed by the judgment in In re

Veerabhadrayya : AIR1950 Mad243 . That a Dominion legislature may interfere with pending proceedings in the law Courts as well as declare unsound a view of the law taken by the Courts is evident from Article 149 of Halsbury's Laws of England, Vol. II, at p. 87. See also Trustees of the Ottawa Roman Catholic Separate Schools v. The Quebec Bank, 1920 A. C. 230 : 89 L. J. P. C. 9. Instances of the British Parliament stepping into validate matters which had been declared invalid by a Court of law can be found in the Indian Divorce Validating Act of 1921 which validated retrospectively divorces made by the Indian Courts which had been considered to be invalid by the decision in Keyes v. Keyes and Gray, L.R. 1921 P. 204: 90 L. J. P. 242. There have been, very many instances of the Indian Legislature intervening to set right the result of case. law which, in the opinion of the Legislature, was against public interests. This Court having held, following the observations of the Federal Court in Jatindranath. v. Province of Bihar that Section 4-A of the Ordinance I [1] of 1949 was invalid because it was only an amending Act and not a re-enactment, it cannot be said that the Governor by re-enacting it in Sections 4-A and 19 in the present Ordinance as pointed out by this Court, is acting in any manner in derogation of the decision of this Court. The necessity or otherwise of enacting Section 19 of the Ordinance or Section 4-A of the Ordinance has never been judicially considered and decided by this Court. The expediency of the enactment of such provisions is a matter which is beyond the jurisdiction of a Court of law. In this state of things, I am not inclined to agree with the learned counsel that there is any action by the Governor in derogation of the law laid down by the Court. Having regard to the foregoing discussion, in my view Sections 4-A and 19 of Ordinance, IV [4] of 1949 cannot be held to be ultra vires the powers of the Governor. The petitions will have to be heard and disposed of on the footing that Ordinance IV [4] of 1949 is applicable to them and if so applied, the question of the validity or otherwise of the detention in each of them will arise.

12. Basheer Ahmed Sayeed J.-- I agree with the reasoning and conclusion arrived at by my learned brother on the question of the validity of Ordinance, IV [4] of 1949 The question of the validity or otherwise of Section 4-A of Ordinance, I [1] of 1949 does not directly arise in the present petitions. No doubt, the counsel for the petitioners has contended that in so far as Section 4-A of the said Ordinance I (1) of 1949 had been held to be ultra, vires by the decision in In re Veerabhadrayya :

AIR1950 Mad243 the Governor had no power to enact the same section over again in the present Ordinance. But in view of the fact that the Ordinance now under consideration is a comprehensive one and is a validating and curative measure and has taken into account the defects and infirmities pointed out by the Bench decision in *In re Veerabhadrayya*, Cri. M. P. No. 1529 of 1949 : A. I. R. 1960 Mad. 243 and for the reasons elaborately set out by my learned brother in his judgment just delivered, I think there is no substance in the contention of the learned counsel for the petitioners. The main question in the present petitions is whether the Governor has power to enact retro, active or retrospective or ex post facto legislation; and on this point, I entirely agree with my learned brother in the findings he has arrived at. There seems to be little or no difference in retroactive and retrospective legislation in the ultimate analysis, and for all practical purposes. But so far as 'ex post facto' legislation is concerned, it is mostly validating and in the nature of a curative measure and in my view, it is perfectly open to any Legislature or legislative authority specially constituted, such as the Governor acting under Section 88, Constitution Act, to enact 'ex post facto' legislation. Very often, it may be desirable and necessary that such 'ex post facto' legislation should be enacted by the Legislatures of a healthy and progressive society. In the judgment in *In re Veerabhadrayya*, Cri. M. P. No. 1529 of 1949 ; : AIR1950 Mad243 to which I was a party, it was held that Section 4-A of the Ordinance I [1] of 1949 was ultra vires the powers of the Governor in view of the judgment in *Jatindranath v. Province of Bihar* and for the reason that it sought to amend an Act which has ceased to be in existence. These reasons have been referred to by my learned brother in the later portion of his judgment. However, while adhering to the views expressed in the decision in *In re Veerabhadrayya* : AIR1950 Mad243 to which I have been a party I entirely agree with my learned brother in the opinion that the present Ordinance, IV (4) of 1949 is intra vires and the Governor is legally entitled to enact such an Ordinance.