

(1950) 03 MAD CK 0051

In the Madras High Court

Case No : Criminal Miscellaneous Petition No. 283 of 1950

M.R. Venkataraman

APPELLANT

Vs

Commissioner of Police and Another

RESPONDENT

Date of Decision : 27-03-1950

Acts Referred:

Constitution of India, 1950 — Article 13, 20, 21, 22, 22(4)

Madras Maintenance of Public Order Act, 1949 — Section 15, 19, 2, 2(1), 3

Preventive Detention (Extension of Duration) Order, 1950 — Section 16

Citation : AIR 1951 Mad 1015

Hon'ble Judges : Krishnaswami Nayudu, J; Govinda Menon, J

Bench : Division Bench

Advocate : M.K. Nambiar, for the Appellant; Adv.-General, for Govt. Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Govinda Menon, J.—Madras Act I of 1947 designated the "Madras Maintenance of Public Order Act of 1947" came into force on 12-3-1947 and was intended to be in force for a period of one year. But by Sub-clause (4) of Section 1 the Legislature had authorised the Provincial Government to extend the operation of the Act by means of notification in the Provincial Gazette; and this was done by the notification of the Provincial Government for a period of one year more, on the 11th March 1948, which meant that the Act was to continue till the 12th March 1949. The Act had also provided that the power of arrest and detention under the Act could be delegated by the Provincial Government to District Magistrates and to the Commissioner of Police of the City of Madras and by G. O. 907 dated 21st March 1947 this power was delegated to the Commissioner of Police of the City of Madras. Acting under that delegation, an order u/s 2(1) (a) of the said Statute was issued by the Commissioner of Police against the petitioner herein on 1-4-1948 and in pursuance to that he was arrested on 17-8-1948 and was detained in a jail. On 27-10-1948 he applied, u/s 491 of the Criminal Procedure Code, for orders in the nature of a writ of habeas corpus

praying that as his detention was illegal, he should be released forthwith. This application, Criminal Miscellaneous Petition No. 1910 of 1948, came on before our learned brothers" Subba Rao and Mack, JJ. who, by their judgment dated 27-10-1948, dismissed the application holding that the detention was legal. Thereafter, on the 28th May 1949, the Federal Court of India in a decision reported in "Jatindra Nath v. Province of Bihar 1949 2 Mad L Jour 356, ruled that the extension of the operation of an Act, similar to the Madras Maintenance of Public Order Act, by an executive order, or a resolution of the legislatures of a Province, was "delegated legislation" which such legislatures had no power to delegate. Therefore in order to remove certain doubts regarding the validity of the extension by notification, the Governor of Madras promulgated Ordinance No. I of 1949 on 11-8-1949 which came on for judicial consideration by a Bench of this Court consisting of Satyanarayana Rao and Basheer Ahmed Sayeed JJ. in In Re: Kalyanam Veerabhadrayya, . The learned Judges were of opinion that certain portions of Ordinance I of 1949 were invalid and ultra vires. On 15-10-1949 the Governor of Madras again promulgated Ordinance IV of 1949 & questions regarding its validity and its retroactive nature came on for consideration before one of us and Basheer Ahmed Sayeed, J; and the decision reported in "Valayudam In re", 1950 Mad W N 24 is to the effect that Ordinance IV of 1949 was "intra vires." Thereafter, on 9-12-49 the Madras Legislature passed Act XXIII of 1949 which confirmed Ordinance IV of 1949 in most of its essential details. By Section 19 (1) of Madras Act XXIII of 1949 it was enacted that any order made, or any action taken, under the Madras Act I of 1947, which was immediately in force before the 12th March 1948, shall, subject to any subsequent modification or cancellation, be deemed to be an order made under the provisions of that Act. There were similar provisions in Ordinance IV of 1949 which this Court held was validly promulgated. It was laid down that there was no prohibition under the Government of India Act, 1935, against the passing of "ex post facto" legislation or retro-active legislation even in the field of criminal law and therefore the Governor could promulgate an Ordinance creating a crime for the first time and give it retrospective effect and such an Ordinance will have the same force and effect as an Act of the Provincial Legislature.

Therefore, Section 1 Clause (3), Section 4-A, and Section 19, or the Madras Ordinance IV of 1949, were not "Ultra vires". u/s 88, Clause (2) of the Government of India Act, 1935, the Ordinance promulgated by the Governor during the recess of the Legislature has to be laid before the Provincial Legislature within six weeks of its promulgation; and if a resolution disapproving it has been passed by the Legislative Assembly and agreed to by the Legislative Council, it will cease to operate. But otherwise such an Ordinance will be valid; and if the Legislature confirms the Ordinance by enacting it, the force and validity of the Ordinance would be just like that of an Act of the Legislature. Madras Act XXIII of 1949 confirmed Ordinance IV of 1949 and therefore in accordance with the decision reported in "Valaydam In re", 1950 Mad WN 24, it took effect from 12-3-1948 and was retrospective in operation.

2. The first contention urged on behalf of the petitioner is that in view of the decision of the Federal Court reported in "Jatindra Nath v. Province of Bihar 1949 2 Mad L Jour 356 the extension of Madras Act I of 1947 for one year after 12-3-1948 was void; and therefore when the petitioner was arrested on 17-8-1948, there was no valid, law in force under which he could be arrested and his detention was hence illegal. It was further contended that there was no extension of the delegated power given by G. O. No. 907 dated 21-3-1947 and under those circumstances even the order dated 1-4-1948 was void and inoperative. To this, the answer of the Advocate-General was that in view of the passing of Madras Act XXIII of 1949 which was made retrospective in nature, the petitioner's arrest and detention should be deemed to be under the provisions of Madras Act XXIII of 1949 which took effect from and after the expiry of the original term fixed in Madras Act I of 1947. The petitioner's counsel countered this argument by saying that it was not competent for the Legislature to validate a void Act which was unconstitutional in its inception. In other words, according to Mr. M.K. Nambiar for the petitioner, granting that the Provincial Legislature had power to enact a statute with retrospective effect and create an offence for the first time retrospectively, still in this particular case since in accordance with the decision of the Federal Court in "Jatindra Nath v. Province of Bihar", 1949 2 Mad 356 the original detention under delegated extension was invalid, it is not competent for the Legislature to pass an Act thereby validating a void or an unconstitutional Act. The extension of an Act by a legislative or executive order, says the counsel is a completely null and void one; and that which in its inception was "ultra vires" and void was unconstitutional and it cannot, be amended or set right by a subsequent legislation; if that is done, such an act would be void and would have no effect. Our attention was invited to a number of authorities on this point. In Gooley's "Constitutional Limitations", VIII Ed., volume I, at pages 382 and 383, the consequences if a statute is void are seen discussed in the following terms:

"When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one which has acted under it, and no one can be punished for having refused obedience, to it before the decision was made. And what is true of an Act void in toto is true also as to any part of an Act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force. An unconstitutional Act is not law. It confers no rights; it imposes no duties; it affords no protection; it creates no offence; it is, in legal contemplation, as inoperative as though it had never been passed."

Reference was also made to certain observations at pages 175, 182 and 205 of the same book. In "the Legislative and Executive Powers in Australia" by Wynes at pages 37 and 38 there is a discussion regarding the unconstitutional legislation in the following terms:

"The phrase "unconstitutional", as is well known, bears a different meaning when used with reference to the legislative Acts of the respective political communities under a Federal system such as that of the Commonwealth of Australia or the United States of America than when applied to the enactments of a sovereign Parliament such as that of Great Britain. In the latter case all that is meant by the term is that the legislation is contrary to general principles or practice. In Australia the term has, strictly, a more precise meaning, namely that the legislation is in excess of the powers of the Commonwealth or State Parliament as the case may be, although it is also used in reference to a breach of the conventions of the Constitution. A law of the Commonwealth or State which (in its entirety) is contrary to the provisions of the Constitution is "ultra vires" and void. It is a complete nullity; no rights can be acquired, no duties imposed, under its provision--"defectus potestatis nullitas nullitatum"; it is void "ab initio."

In his "Book on Constitutional Law of United States", 2nd Edn., Willoughby discusses this aspect of unconstitutional legislation at pages 14 and 15:

"The principle that statutory law, in order to be recognised as valid by the Courts, must, in all cases, be in conformity with constitutional requirements, is a product of American law, and, though now found in the jurisprudential systems of some other countries, has nowhere received the development and extended application that it has received in the United States. That, granting the supremacy of the National Government, and the subordinate constitutional status of the member States of the Union, the laws and other acts of these States should have their validity tested by the provisions of the United States Constitution, is, of course, a very different proposition from that which holds that measures enacted by the National Legislature must meet the requirements of the National Constitution, for, in the one case, we have to deal with an inferior political body "vis a vis" a superior political authority; while, in the other case, we have presented the examination by the Courts of the validity of the acts of a legislative body which derives its powers from the same constitutional source as do the Courts themselves. Thus, when it is held that the enactments of the legislatures of the member States of the Union are of no legal force and effect, if not warranted by the provisions of the United States Constitution, there is applied a principle that is recognized and applied in the private as well as the public law of all constitutionally administered States, namely, that, to be valid, an agent must act within the authority granted him by his principal. Hence, when a law of a State of the American Union, whether embodied in an enactment of its legislature, or in the Articles of its written Constitution, is held void because not warranted by the United States Constitution, the rule applied is exactly similar to that which controls the Courts of other countries when they have to deal with the acts of colonial or administrative bodies which have only those legislative or other ordinance-making powers which the sovereign authority has granted to them. In short, what controversy there has been in the United States as to the validity of laws at the individual States, as tested by the United States Constitution, has related solely to the constitutional status and powers of the

individual States. No one has attempted to deny, that, if these States be viewed, as they now are universally viewed, as subordinate and non-sovereign bodies, their acts are without legal force in so far as they are not warranted by the provisions of the National Constitution."

Proposition 186 in "The Doctrine of Ultra Vires" by Street, 1930 Edn., begins by stating that an "ultra vires" statute cannot be validated by acquiescence but an acquiescing party may be estopped from questioning it. Proposition 185 is to the effect that an "ultra vires" colonial statute may be ratified by the Imperial Legislature. I do not think that the citation from Street on this proposition is of any assistance. In paragraph 398 at page 230 of Halsbury's Laws of England", Volume I, Hailsham Edn. the learned author observes as follows:

"An act may be void in its inception, and therefore not capable of ratification, because it is one which the intended principal had not the power to do. Many cases illustrate this rule, largely connected with acts done on behalf of corporations or companies which are not within, the scope of their powers as limited by the special Act, charter, or memorandum of association under which they are incorporated."

3. From these passages it is contended that the delegated power to extend the operation of the Act being void as not within the power of the legislature, the subsequent act validating orders passed, thereunder are to be considered as null and void. Observations from the speech of Lord Birkenhead, L. C. in "McCawley v. The King", (1920) A C 691 , regarding controlled and uncontrolled legislation were also brought to our notice. From these authorities Mr. Nambiar contends that Madras Act XXIII of 1949 could not have validated a piece of executive action which was void from the beginning and therefore it would be as if nothing had taken place. In the judgment above referred to, viz., "Velayudam In Re", 1950 Mad 24, this Court has given reasons why the conclusion is arrived at that an "ex post facto" legislation creating a crime for the first time can be validly made. If that is so, it cannot be disputed that by the operation of Section 19, Madras Act XXIII of 1949, an acts done in pursuance of Madras Act I of 1947 on or after 12-3-1948 will be valid. It is conceded that but for the declaration by the Federal Court on the question of the extension of the Act by delegated legislation such an argument cannot be advanced. In other words, the learned counsel for the petitioner agrees that if the petitioner had been arrested on 17-8-1948 and detained and subsequently a provision like Madras Act XXIII of 1949 was passed by the Provincial Legislature which took effect retrospectively from a date anterior to 17-8-1948, such an arrest and detention would be valid. But since the Federal Court has laid down that delegation of legislative function is invalid, the order of detention cannot be validated. I am unable to find the distinction between the two. Therefore in my opinion, according to the decision in "Velayudam In Re", 1950 Mad 24, it must be taken to have been held that the petitioner was validly detained on 17-8-1948. In this view I have to hold that the detention of the petitioner was a perfectly legal and valid one before 26-1-1950

when the Constitution of India came into force.

4. The really difficult and the important point for consideration arises in the second part of the arguments by the learned counsel for the petitioner, viz., that Madras Act XXIII of 1949 offends, the fundamental rights conferred by Part III of the Constitution of India and therefore is void at least so far as preventive detention is concerned and such being the case on and after 26-1-1950 the petitioner's detention under this Act should be deemed to be an unwarranted invasion of the liberty of the subject which this Court, acting under the powers conferred under Article 226 of the Constitution, should declare as illegal and direct the liberation of the incarcerated individual. At the very outset, one has to consider the principles underlying the construction of a charter of liberty like the Indian Constitution and for this purpose it is necessary to bear in mind the well-known maxim which lays down that statutes made for the public good ought to be liberally construed; "*Statuta pro publico commodo late interpretantur.*" In doing so another principle should not be lost sight of, viz., that the safety of the people is the supreme law; "*salus populi est suprema lex.*" But the application of these doctrines does not mean that the exact meaning of the words can be departed from or that in order to give effect to what is considered to be the underlying principle it is open to the Court to add by implication, intentions and objects to a statute, which cannot be properly construed from a clear reading of the written words, (*sentus verborum est anima legis*); "the meaning of the words is the spirit of the law."

5. In construing statutes like the Constitution of India, we have to bear in mind the principles laid down in the well-known "Heydon's Case" (1584) 3 Co. Rep. 8a p. 93. In dealing with this subject Craies on "Statute Law", 4th Edn., at pages 118 and 119 observes as follows:

"In "Heydon's Case", (1584) 3 Co Rep 8a p. 93, it was resolved that for the sure and true interpretation of all statutes "four things are to be discerned and considered: 1st, What was the Common Law before the making of the Act? 2nd, What was the mischief and defect for which the Common Law did not provide? 3rd What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth; and, 4th, The true reason of the remedy. And then the office of all the Judges is to make such construction as shall suppress the mischief and advance the remedy..... according to the true intent of the makers of the Act."

It need hardly be said that prior to 26-1-1950, there were no statutory fundamental rights conferred upon any citizen of India by any act of the British Parliament. The Proclamation by Queen Victoria in 1858 conferred equality before the law for all subjects of Her Majesty whether Indian or British. But there was no provision in any statute applicable to India similar to Articles 39 and 40 of the "Magna Charta" wrested from King John by the Barons of England at Runnymede. The Government of India Act, 1915, as amended by the Act of 1919 did not lay down any special fundamental right. For the first time Section

298 of the Government of India Act, 1935, enacted that no subject of His Majesty domiciled in India shall, on grounds only of religion, place of birth, descent, colour, or any of them, be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding, or disposing of, property, or carrying on any occupation, trade, profession, or business, in India. But there were certain provisos to these rights laid down by Sub-section (2) of Section 298 of the same Act. The Indian Constituent Assembly, after considerable deliberation, has decided that there should be a chapter on fundamental rights in the Constitution of India similar to what are contained in the Constitution of the United States or of the Irish Republic. Some guidance might be got in this measure by a persual of the constitutions not only of United States and Ireland but also of the original constitution of Czechoslovakia which State came into existence as a result of the disintegration of the Austro-Hungarian Empire consequent upon the defeat of the Central Powers in World War No. 1. For the first time a country like Czechoslovakia was created by the Treaty of Versailles. In the provisions now adumbrated in the Constitution of India there are certain features resembling the Constitution of Czechoslovakia. But the Indian Constitution cannot be really said to be modelled on any of the existing constitutions of the World. It is a special document intended to suit the conditions, the culture, and the ancient history of a secular state like ours. Article 13 in Part III is of vital importance regarding the continuation or otherwise of the laws that were in force prior to 26-1-1950. As I have already stated, the fundamental canons of constitutional construction have to be gathered from the rules laid down in "Heydon's case", (1584) 3 Co Rep 8a p. 93, and it is not always a literary construction of the words that should be adopted but a construction that a statute made for the public good should be liberally construed in the interests of the public. The object and intention of this statute have first to be gathered and that interpretation which fulfils such an object should be followed, remembering that it is a constitution newly made for the welfare of the people whose safety is the supreme law. In other words, what has to be adopted is to find out what the existing law was and to consider the reason for the change bearing in mind the object which was intended to be fulfilled. In doing so, the historical aspect and perspective have, also to be placed in the forefront. In such a matter it is not possible to derive much guidance from precedents in England for except what is contained in Articles 39 and 40 of the "Magna Charta" as well as the petition of rights in 1688, we have no statutory definition of the fundamental rights of every citizen. The British Parliament was supreme and could, at any time, make any law infringing on the rights of the citizen. It could even pass an Act regarding the succession to the throne as was done in the case of Edward VIII. It can curtail the powers of the House of Lords as the Parliament Act of 1911 did. What we have, therefore, to see is the state of circumstances existing before the constitution which necessitated the change; and in doing so, some bit of historical perspective is also necessary. Reference may be made to the decision of the House of Lords in "Viscountess Rhonda's case", 1922 2 A C 339, as well as to the observations of Sankey, J., as he then was in "Attorney-

General v. Brown" (1920) 1 K B 773 :

"The case turns upon the construction of Section 43 and in construing an Act of Parliament it is, in my view, legitimate to consider (1) the state of the law at the time the Act of Parliament was passed, and the changes it was passed to effect; (2) the sections and structure of the Act of Parliament as a whole, See "Stradling v. Morgan", (1550) 1 Plowd 199 where it is said, "The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular

The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things,

which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, some times by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion"; and see also "Hedyon's case", (1584) 34 Co. Rep 8a p. 93 and "Hawkins v. Gathercole", (1855) 6 De GM & G 1, per Turner, LJ., where he says: "In determining the question before us, we have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject." Bearing these canons of interpretation in mind, it is necessary to consider whether the argument of the Attorney-General that the Executive have absolute power to prohibit imports is correct, or whether I have to hold that the narrower construction of the section contended for by the defendants is the right one."

In "Viscountess Rhonda's case", (1922) 2 A C 399, the House of Lords had to consider, the question regarding the right of peeresses to sit in the House of Lords as a matter of right, as to how changing conditions of society are moulding ideas into different forms; and their Lordships were, of opinion that in understanding such socio-political matters, the environments of the day cannot be ignored.

6. The key to the Indian Constitution can be gathered from the preamble which states that the people of India, having solemnly resolved to constitute India into a sovereign democratic Republic in order to secure to all its citizens, justice, social, economic, and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity, and to promote among them all fraternity assuring the dignity of the individual and the unity of the Nation, adopted and enacted and given to the Nation the Constitution. In these

circumstances, it is for the Court to ascertain how far the objects enunciated in the preamble have been translated into the provisions of the Constitution by the Chapter relating to fundamental rights. Let us now have a cursory glance at the salient features of the important articles contained in Part III relating to the subject of discussion, viz., protection of personal liberty; and they are Articles 13, 19, 21 and 22. Clauses (1) and (2) of Article 13 are the most important and relevant portions of it, and they deal with inconsistency of laws which are in derogation of the fundamental rights specified in the Article. Clause (1) says that all laws in force in the territory of India immediately before the commencement of the Constitution in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void; and Clause (2) prohibits the State, which includes the Centre as well as the constituent states, from making any law which takes away, or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent of the contravention, be void. That means that no law abridging the positive restriction on legislative power can be allowed to stand. What is a "law" is defined in Clause (3) (a) and the expression "law in force" is defined in Clause (3) (b). In this connection it is useful to refer to the definition of "existing law" contained in Article 366 Clause (10) where that expression is defined as any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation. Bearing in mind these three terms, one finds that the expression "law" is intended to connote prospective laws made subsequent to the coming into operation of the Constitution, whereas the term "laws in force" is intended to include laws passed by the Legislature or other competent authority before the commencement of the Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be in operation either wholly or in part at the commencement of the Constitution either throughout the whole of the territory of India or in particular areas. The term "existing law" is much wider in scope and import because it includes such things as Ordinances, orders, bye-laws, rules, or regulations made not only by a competent legislative authority taut by other bodies and persons empowered or authorised to make or promulgate such things. It is, therefore, seen that a "law in force" must have been a law passed, or made, by a Legislature or other competent authority whereas an "existing law" includes even an order or a bye-law made by a person having power to make such an Ordinance or order. Both the expressions "existing law" and "law in force" refer to positive legal Acts which were in existence at the time of the Constitution whereas the word "law" in Clause (3) (a) to Article 13, denotes those that have to be passed here-after.

7. The next Article to which reference has to be made is Article 19 which emphatically lays down the seven freedoms as substantial fundamental rights and for the purpose of our case it is only necessary to refer to Article 19(I)(d) to the effect that all citizens shall have the right to move freely throughout the

territory of India. These seven freedoms have been qualified and circumscribed by Clauses (2) to (6) of the same article and Clause (5) is an important provision so far as the point under discussion now is concerned. It is in the following terms:

"Nothing in Sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said Sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

I am referring to Clause (I) (d) and (5) because it is Mr. Nambiar's contention that the Madras Maintenance of Public Order Act of 1949 is repugnant to, and inconsistent with the fundamental right of any Indian citizen to move freely throughout the territory of India, because, when once his liberty is curtailed by preventive detention, he cannot move freely throughout the country. How far Clause (5) validates the existing law, viz., the Madras Maintenance of Public Order Act even though the same is repugnant to Article 19(I)(d), will have to be considered. In passing, reference may be made to Article 20 which gives protection in respect of conviction for offences wherein it is laid down that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. This means that "ex post facto" legislation regarding crimes is made illegal. That is, it is not competent either to me Parliament or to the Legislature of a State to enact a law creating a crime for the first time and make the same retrospective. This is a fundamental difference between the powers of the British Parliament and those of the various self-governing Dominions and the right of the Indian Parliament and the Legislatures of the States.

8. The next important Article is Article 21 which runs as follows:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

This corresponds to the 5th and 14th amendments of the American Constitution popularly known as the "due process clause" whereby the citizen is given the fundamental right against laws made by the Federation by the 5th amendment and the constituent States by the 14th amendment. There are similar provisions in the Constitution of other countries. For example, one may refer to Article 107 of the Constitution of Czechoslovakian Republic which is as follows:

"Personal liberty shall be guaranteed; detailed provisions shall be made by law which shall form part of this constitutional Charter. Clause 2: deprivation of or limitations upon personal liberty shall not be permitted "save in accordance with law." Public authorities may not require personal service from any citizen save in cases provided for by law."

Article 6 of the Constitution of the Irish Free State enacts as follows:

"The liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law."

Article 8 of the Constitution of the Estonian Republic adopted by its Constituent Assembly on 15-8-1920, lays down the following:

"Personal liberty is guaranteed in Estonia. No person may be prosecuted save in Courts and according to the forms prescribed by law. No person may be arrested or in any way deprived of his personal liberty save by order of a Judicial authority except when apprehended "flagranti delicto."

Omitting the irrelevant portions of the fifth amendment to the United States Constitution, we have the following:

"No person shall be deprived of life, liberty, or property, without due process of law."

and the same words occur in the 14th amendment, viz., "No state shall deprive any person of life, liberty or property without due process of law."

" It is unnecessary for me to multiply similar provisions in other Republican Constitutions of the World, because not much guidance can be obtained from them though we have analogous provisions in other Republican Constitutions as well. The Draft Constitution of India before it was finalised by the Constituent Assembly did not have Article 21 in the same form in which it is now. The original draft numbered as Clause 15 was as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law; nor shall any person be denied equality before the law or the equal protection of the law within the territory of India."

The Drafting Committee added a footnote giving their reasons why they changed the expression "due process of law" into "according to procedure established by law" and in doing so they stated as follows:

"The committee has also substituted the expression "except according to procedure established by law" for the words "without due process of law" as the former is more specific (C.E. Article 31 of the Japanese Constitution of 1946.)"

The corresponding provision in the Irish Constitution runs thus:

"No citizen shall be deprived of his personal liberty save in accordance with law."

It is, therefore, clear that the words "according to procedure established by law" do not denote the same meaning in connotation as the words "due process of law" and whether any change was intended in the Indian Constitution will be discussed later.

9. The all important Article which was the subject of keen discussion at the Bar may now be referred to and that is Article 22 which runs as follows:

(1) "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate, (a) to any person who for the time being is an enemy alien; or

(3) Nothing in Clauses (1) and (2) shall apply (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless:

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this Sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under Sub-clause (b) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under Sub-clauses (a) and (b) of Clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in Clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose. (7) Parliament may by law prescribe:

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under Sub-clause (a) of Clause (4)."

The subsequent articles in this part relating to various other fundamental rights

are not quite relevant for the discussion of the present topic and therefore I do not wish to touch upon that aspect except stating that Articles 12 to 35 are intended to confer fundamental rights on the citizens of India which are justifiable at law.

10. The general principle that personal liberty shall not be deprived except according to the procedure established by law has been, in my opinion, clarified and crystallized by Article 21. Where as the deprivation of life or personal liberty in future can be done only in accordance with the procedure established by law, that is by legislative enactments, passed either by the Parliament or by the State Legislatures in accordance with the division of functions elaborated in the seventh schedule, in so far as preventive detention is concerned, Article 22 prescribes what ought to be the procedure established by law. Therefore we may now discuss as to whether the case-law in the United State of America explaining what is meant by "due process of law" can be usefully called in aid for understanding the expression "according to procedure established by law."

11. At page 483 of Cooley's "Constitutional Limitations 7th Edn.," the learned author in considering limitations of personal liberty observes as follows:

"It still remains to mention one of the principal safeguards to personal liberty, and the means by which illegal restraints upon it are most speedily and effectually remedied. To understand this guaranty, and the instances in which the citizen is entitled to appeal to the law for its enforcement, we must first have a correct idea of what is understood by personal liberty in the law and inquire what restraints, if any, must exist to its enjoyment.

Sir William Blackstone says, personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. It appears, therefore, that this power of locomotion is not entirely unrestricted, but that by due course of law certain qualifications and limitations may be imposed, upon it without infringing upon constitutional liberty. Indeed in organized society, liberty, is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surround him and every other citizen with protection against the lawless acts of others."

Again at page 502, regarding the difference between due process of law and the law of the land, we have the following dissertation:

"If now we shall ascertain the sense in which the phrases "due process of law" and "the law of the land" are employed in the several constitutional provisions which we have referred to, when the protection of rights in property is had in view, we shall be able, perhaps, to indicate the rule, by which the proper conclusion may be reached in those cases in which legislative action is objected to, as not being "the law of the land"; or judicial or ministerial action is contested as not being "due process of law", within the meaning of these terms as the Constitution employs them. If we examine such definitions of these terms as are

met within the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflected that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another."

We may also refer to various observations of Cooley at pages 733, 734, 735, 736, 737 and 738 regarding the interpretation of the term "due process of law."

"The protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the twenty-ninth chapter of "Magna Charta", "which alone", says Sir William Blackstone, "would have merited the title that it bears of the Great Charter." The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from anyone for a due observance of individual rights; but the aggressive tendency of power is such that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of the State Constitutions; and though verbal differences appear in the several provisions, no change in language, it is thought, has in any case been made with a view to essential change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process (or course) of law" is sometimes used, sometimes "the law of the land", and in some cases both; but the meaning is the same in every case. And, by the fourteenth amendment, the guarantee is now incorporated in the Constitution of the United States. If now we shall ascertain the sense in which the phrases "due process of law" and "the law of the land" are employed in the several constitutional provisions which we have referred to, when the protection of rights in property is had in view, we shall be able, perhaps to indicate the rule, by which the proper conclusion may be reached in those cases in which legislative action is objected to, as not being "the law of the land"; or judicial or ministerial action is contested as not being "due process of law", within the meaning of these terms as the constitution employs them. If we examine such definitions of these terms as are met within the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one's case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "The words "by the law of the land" as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: "You shall be vested with the Legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In mother words, you shall not do the wrong unless you choose to do it." "Due process of law" does not meant "the general body of the law, common and statute, as it was at the time the Constitution took effect; for that would deny to the legislature the power to change or amend the law in any particular. Neither on the other hand, does "the law of the land" or "due process of law" mean anything which the legislature may see fit to declare to be such; for there are certain fundamental rights, which our system of jurisprudence has always recognized, which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty or property..... Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless, subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights which have been always recognised and observed in judicial procedures." When the law of the land is spoken of, "undoubtedly a pre-existing rule of conduct" is intended, "not an "ex post facto" rescript or decree made for the occasion. The design is "to exclude arbitrary power from every branch of the Government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute." There are nevertheless many cases in which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called; and in preceding pages it has been shown that special legislative acts designed to accomplish the like end, are allowable in some cases. The necessity for "general rules" therefore, is not such as to preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in Court."

12. In Willoughby's "Constitutional Law of the United States", 2nd (Students)

Edn., Chapter XXXXIII, page 782, paragraphs 836 and 837, we have the following observations:

"Personal Liberty : Compulsory Vaccination: In "Jacobson v Massachusetts", (1905) 197 U S 11, it was strenuously contested that a State law which required citizens to submit themselves to anti-small pox vaccination was an unconstitutional violation of their personal liberty--that such compulsion was nothing short of an authorized assault upon their persons. The Supreme Court, however, upheld the law, saying: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." The Court declared that the law in question was a sanitary law and pointed out that the vaccination was to be required only when, in the opinion of the local health authorities, the public health or safety demanded "Sterilization": In a number of States laws have been passed for the sterilization of certain classes of criminals and of insane and feeble-minded persons. In "Buck v. Bell", 274 U S 200, one of these laws relating to the sterilization of feeble-minded persons was upheld by the Supreme Court as a reasonable police measure."

Other portions of Willoughby's "Constitutional Law" where the term "due process of law" is discussed in extenso are at pages 721 to 730, 734 and 736 and at the last page at 736 the four items of procedural due process are discussed.

13. In a very recent book under the title "The Constitution and what it means today" by Corwin, at page 172 we find the following observation:

"But as was earlier indicated, this clause also goes to the substantive content of legislation, or in other words, requires that Congress exercise its powers "reasonably", that is to say, reasonably in the judgment of the Court. A similar requirement is laid upon the state legislatures by the Fourteenth Amendment, but with two differences which potentially operate to Congress's advantage. In the first place, whereas the "police power" of the States is an indefinite power to provide for the public health, safety, morals, and general welfare", most of Congress's powers are defined by reference to a specified subject-matter, like "post offices and post roads", "commerce among the states", etc., and this difference is sufficient to invoke in Congress's favour and against the States the rule of legal interpretation that the specific is to be preferred to the general. In the second place, the Fifth Amendment contains no "equal protection" clause, but this does not signify that the Court will not pass upon the soundness of the factual justification urged in support of a specially drastic discrimination by the "National Government against a particular class of its citizens, as, for example, that which characterized its policies towards the West Coast Japanese early in World War II. And in another respect national and state legislation stand much more nearly on a parity with each other, since in the case of both the Court has

at all times available from. its own past decisions two widely different approaches to the question of the "reasonableness" of a challenged legislative measure, and hence of its conformity with the "due process of law" requirement. One approach is furnished by the proposition that a legislative act is presumed to be valid and deduces from this the further one that if facts could exist which would render the legislation before it "reasonable", it must be assumed by the Court that they did exist. The other, on the contrary, invokes the idea that "liberty is the rule and restraint is the exception", and hence demands that special justification be adduced in support of any new inroad upon previous freedom of action, as almost any law is bound to be."

At page 170 of this book also there are the following observations:

"Originally "due process of law" meant simply the modes of procedure which were due at the common law, especially in connection with the accusation and trial of supposed offenders. It meant, in short, the kind of procedure which is described in detail in the more definite provisions of Amendments V and VI. Today "due process of law" means "reasonable" law or "reasonable" procedure, that is to say, what a majority of the Supreme Court find to be reasonable in some or other sense of that extremely elastic term. In other words, it means, in effect, the approval of the Supreme Court; but, as will be pointed out presently, this approval will sometimes be extended on easier terms than at others.

"Due process of law" requires that criminal cases be tried judicially and in accordance with the specifications "of Amendments V and VI; also that "actions at common law"--that is, suits for damages--be tried by a jury if more than twenty dollars is involved. Not so with Administrative Proceedings, which in recent decades have become an important feature of Government, both in the National Government and in the States."

14. In "the Government of the United States" by Munro, this aspect of the meaning of the words "due process of law" is discussed in the following words : at page 447 :

"The meaning and scope of these four words "due process of law", however, have given the Courts and the Commentators a great deal of trouble, and even today their exact application is not absolutely clear. Few legal phrases in the whole history of jurisprudence have proved so elusive. Due process has become a sort of palladium covering all manner of individual rights. The highest American tribunal has refrained from committing itself to any hard and fast definition of the term, preferring rather that "its full, meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise." But all students of American Government know in a general way what the phrase means. Due process of law is roughly synonymous with a square deal. It means that there must be, in all actions to deprive a man of his life, liberty, or property, an observance of those judicial forms and usages which by general consent have become associated with fair dealing. Daniel Webster, in a famous

argument before the Supreme Court, gave a definition of due process which will probably serve the layman as well as any other. It is the process of law, he asserted, "which hears before it condemns, which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." Where the difficulty comes, however, is in the practical application of these "general rules which govern society." In the main the Courts have held that due process of law requires a hearing of the issue by competent authorities before it is decided; but it does not necessitate that this hearing shall be by a jury or even by a judge. Questions involving a deprivation of property are sometimes determined by administrative officers, for example, the sale of lands for default in the payment of taxes. Due process does not require that an accused be given the right of appeal to the Courts from the rulings of an administrative official or of appeal from a lower Court to a higher one."

15. In "The Law of the American Constitution by Charles K. Burdick, at page 513, the learned author discusses the meaning of the terms in the following way:

"Notice and hearing as elements of due process; It is a principle applicable to most circumstances that due process requires notice and an opportunity to be heard before a person shall be deprived of life, liberty, or property. Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved..... It is certainly true that a person may not generally be deprived of life or of personal liberty by the authority of the State without personal notice, and a hearing, ordinarily held before a judicial tribunal. This, of course, applies to criminal prosecutions..... It also applies to proceedings for the determination of a person's sanity..... In accord with the general principle as to notice and hearing it seems that an alien may not be deported without some notice and an opportunity to be heard.....though the proceedings may be conducted by an administrative officer instead of a Court.....So a defendant brought before a Court upon due notice may not have judgment rendered against him without an opportunity to present a defence and support it by evidence..... But under the constitutional provision adopted for that purpose the executive of a state may extradite a person as a fugitive from justice upon requisition without any notice or hearing.....As to interstate extradition. See Chapter 205. It is also constitutional for a governor in time of public danger caused by insurrection, to call out the National Guard and. to direct that persons resisting be killed or imprisoned, as long as he acts in good, faith..... Furthermore, as we shall see a little later, there are circumstances under which property may be taken for taxes without any notice or hearing (Section 259) and under the police power the use and acquisition of property, and the return which may be received from it, may be limited, also without notice or an opportunity to be heard."

16. From the above quotations it will be clear that so far as the United States of America are concerned it will be right to say that at present as understood the term "due process of law" has become a matter of procedure and not one of substantive law. But the learned Advocate-General contends that in so far as preventive detention is concerned, the matter has now become, in the United States, a feature of what is called "police power of the State." Since the freedom and liberty of the individual has to be subordinated to the welfare, safety and benefit of the State, in America, an inroad has been made in the matter of personal liberty by interpreting the expression "due process of law" as being included in the police power of the State. He contends that preventive detention not being a punishment for any crime, it has to be viewed in the light of the surrounding circumstances and the purpose for which the Act was passed should be considered. A few cases from the United States Supreme Court defining the expression "due process of law", as to whether it is one of substantive nature or of procedural aspect may be referred to. In "*Hurtado v. People of California*", (1884) 110 U S 516, there is a very exhaustive discussion of the procedural aspect and it is there laid down "at page 238" of the reprint as follows:

"The conclusion is equally irresistible, that when the same phrase was employed in the 14th Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the 5th Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon the Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

17. Various authors who have written on the American Constitution have tried to explain away the meaning of the term "due process of law"; but neither the Judges nor the text-book writers have given an exhaustive definition of the term. It may be taken to mean in the words of Mathews, J., to be "the law of the land deriving its authority from the inherent and reserved powers of the State exerted within the limits of the fundamental principles of liberty and justice. In "*Etbroren v. State of Mississippi*", 297 US 278, we find the same procedural aspect emphasised especially at "page 285" where it is stated that the law cannot be inconsistent with the immutable idea of justice inherent in democracy and free government. Similar observations are found "at page 389 of *Holden v. Hardy*", (1898) 169 U S 366, where words to the effect that the intention was to emphasise the procedural aspect of it and not the substantive right as

interpreted by the Supreme Court are used. Though the earlier interpretations of this term in the decisions of the United States Supreme Court proceeded on a basis of substantive rights, recent decisions have narrowed down to the procedural part of it and the substantive aspect has receded to the background. It is therefore contended on behalf of the petitioner that the law which infringes the right of liberty must be a law which lays down a procedure according to natural justice for hearing the other side and deciding the point in accordance with the principles inherent in the notions of all civilised societies. Reference was also made to page 312 of "Leading Cases on Constitutional Law" by Keir and Lawson as well as to "Local Government Board v. Arlidge", (1915) A C 120, "Board of Education v. Rice", (1911) A C 179.

18. I do not think it necessary to discuss all these cases for a proper understanding of the expression "procedure established by law." The word "established" denotes an idea of settlement or fixation. The dictionary meaning of the term "established" is "fixed; ratified; instituted by law and supported by state."

Mr. Justice Holmes in "Baldwin v. Missouri", 281 US 586, expressed the following view:

"There is hardly any limit but the sky for invalidating any Act passed by the State if the provision of the Act happens to strike a majority as unreasonable; I cannot believe that the 14th Amendment was intended to give a carte-blanche to embody our economic or moral beliefs."

From this it is clear that in the U.S.A., the expression has been interpreted: and understood in the widest possible terms. In my opinion, the Indian constitution desired to clarify, crystallise and define the fundamental rights and not to leave it as indefinite; and so a man's life or personal liberty cannot be taken away except in accordance with and after following certain forms and modes fixed by the law of the land. One of the modes of depriving the personal liberty is indicated in Article 22 which should be read as a proviso to Art. 21. The curtailment of personal liberty should be in accordance with what is prescribed by Article 22. If that article is followed both in letter and spirit, in my judgment, the Court cannot question the Act. As Article 22 prescribes the procedure established by law for making preventive detention valid, it is essential that its terms should be complied with and observed, if preventive detention has to be legally recognised and given effect to. Otherwise the detention will be unlawful. It is, therefore, abundantly clear that the Indian Constituent Assembly intended to define and explain what is meant by "procedure established by law" in Article 21 by enacting Art 22 as a proviso to it. So with regard to preventive detention Article 22 clearly lays down the procedure to be adopted.

19. Recently the United States Supreme Court had to consider the meaning of the term "due process of law" in two cases in "Koremutsu v. United States", 323 US 214, and "Ex parte Endo", 323 U S 283, where the Supreme Court upheld

laws regarding curtailment of personal liberty as not being inconsistent with the due process clause. As I have already stated, the learned Advocate-General invited our attention to passages in Willoughby where preventive detention is now included within the power of the police power of the state. But whatever that might be it is a procedural aspect that is now emphasised rather than the substantive part of it. My conclusion therefore is that the expression "according to procedure established by law" means a procedure fixed in accordance with legislative enactment passed by the Parliament or the State Legislature which does not offend or is revolting to, notions and ideas of dignity of the human being and is neither indecent, unconscionable or repugnant to civilized beliefs.

20. But as I have stated, Article 22 embodies the procedure relating to preventive detention, it is now necessary to refer in detail to its various provisions. We are here concerned with Clauses (4), (5), (6) and (7) of the said article. It need hardly be said that this article is prospective in nature and cannot be construed as retrospective so that the Madras Maintenance of Public Order Act could not be held to be invalid before 26-1-1950 if its provisions did not conform to this article. Clause (4) of the article states that any law providing for preventive detention cannot authorize detention, for a period more than three months unless an Advisory Board of persons who are or have been, or are qualified to be appointed, as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. There is a proviso added that nobody can be detained beyond the maximum period prescribed by law made by the Parliament under Sub-clause (b) of Clause (7) of this article. It is not necessary to discuss the meaning of the various clauses and Sub-clauses of this Article at this juncture because that task can be achieved and accomplished when the relevant portions of the Madras Maintenance of Public Order Act, XXIII of 1949 are discussed in order to find out how far they are inconsistent with or repugnant to, this Article. At this juncture we may refer to Article 372, Clause (1) of the Constitution of India which lays down that notwithstanding the repeal by the Constitution of the enactments referred to in Article 395, but subject to the other provisions of the 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. Therefore Madras Maintenance or Public Order Act XXIII of 1949 shall be in force except such portions of it as are repugnant, or inconsistent to the Constitution as mentioned in Article 13. The learned Advocate General, therefore, argued that Clause (4) of Article 22, can only be prospective and Madras Act XXIII of 49 does not offend the fundamental rights because of Article 372. He also referred to Sections 292 and 293 of the Government of India Act, 1935, which, correspond to Article 372 of the Constitution of India- Article 73 of the Irish Constitution was also referred to.

21. It is, therefore, necessary to consider the argument advanced by the learned Advocate-General relying on Clause (1) of Article 372 read with Clause (5) of

Article 19 and how far Madras Maintenance of Public Order Act would be inconsistent with Article 13 if it is valid according to the provisions of Article 372, Clause (1) and Article 19, Clause (5). According to Article 372 Clause (1), all laws in force in the territory of India immediately before the commencement of the Constitution, shall continue in force until altered or repealed. Article 19 Clause (5) says that the operation of the citizen's right to move freely throughout the territory of India shall be governed by any existing law which imposes reasonable restrictions on the exercise of any of the right conferred by Sub-clause (d). Therefore Article 13, Clauses (1) and (2) read with Article 19, Clause (5) and Article 372, allows the existing statute to be in force until amended by proper legislature and in such a context, according to the learned Advocate-General, the Madras Act in force in the present form is valid. In other words, the learned Advocate-General contends that if the Madras Act does not contain a certain provision which would be necessary and obligatory, if the same had been enacted after 26-1-1950, merely by such absence or omission, the Act will not be repugnant to, or inconsistent with, the fundamental rights. He referred to Cooley's "Constitutional Limitations", 8th Edn., Vol. 1, page 133, as well as to the foot-note at page 137 wherein a case is considered, viz., "Albeyr v. State." In short the contention comes to this: Article 372, Clause (1) speaks of "all existing laws subject to the provisions of the Constitution"" and since the prohibition contained in Article 13(1) applies only to future laws, and especially because Article 22, Clause (4) is prospective and not retrospective and cannot affect existing laws, it is void only to the extent of the non-existence of an Advisory Board with the requisite qualification for the members; but the Act is valid in its entirety. It seems to me that this contention of the learned Advocate-General cannot be justified.

22. Now we may refer to the relevant provisions of Madras Act XXIII of 1949 to find out how far the whole or part of it, is inconsistent with, or repugnant to, Article 13 of the Constitution of India. The Act, in its preamble, says that it is intended to provide for preventive detention, imposition of collective fines, control of meetings and processions and of essential services, and certain other purposes. Various portions of this Statute are set apart to deal with separate subjects. What we are concerned in this case are the sections relating to preventive detention. The question will arise whether if the sections relating to preventive detention are inconsistent with the fundamental rights laid down by the Constitution and such sections are so inextricably intertwined with the sections relating to other subjects such as the imposition of fines, etc., that it is impossible to separate the different subjects as they forms it were an amalgam, then the whole Act would be repugnant. But the learned counsel for the petitioner has conceded that so far as the present controversy is concerned he is not interested in discussing the validity of those portions of the Act relating to imposition of collective fines and other allied matters but would confine himself to the sections relating to preventive detention alone. He did not argue that the provisions regarding the other subjects such as imposition of collective fines,

etc., are not inextricable from the provisions regarding preventive detention; the result is that each of these matters constitute separate portions of the enactment and even if we were to hold that the sections regarding preventive detention are inconsistent with the fundamental rights, the sections dealing with other subjects cannot be held to be so inconsistent. In such circumstances, our task is made easier because we have to consider the inconsistency or repugnancy only as regards persons held in preventive detention. The marginal note to Section 2 says: "Power to make orders restricting the movements or actions of or detaining certain persons." Now looking at the section itself it is seen that if the Provincial Government is satisfied with respect to any particular person that he is acting, or about to act, or is likely to act, in a manner prejudicial to the public safety, or the maintenance of public order, and with a view to preventing him from so doing it is necessary so to do, then the Provincial Government may make anyone or more of the orders designed to achieve that object as are described subsequently. The first of them is that such a person can be detained; Secondly that such a person may be externed from any particular area. Thirdly, such a person may be required to remain within the ambit of a particular area. Fourthly, such a person may be required to notify his movements in such manner and at such times and to such authority as may be specified. There are also four other methods of curtailing the liberty of the subject mentioned in this Sub-section with which we are not concerned now. Sub-section (2) of Section 2 says that when anyone of the orders mentioned in the various categories (a) to (i) of Sub-section (1) of Section 2 is made by an officer or authority empowered by the Provincial Government u/s 15, that officer shall forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and other particulars.

23. We are next concerned with Section 3. This section provides for the disclosure to the person concerned the grounds on which he is directed to be detained and also the constitution of an Advisory Council. It is said that the Provincial Government shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which the Provincial Government considers would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are, in their opinion, sufficient to enable him to make, if he wishes, a representation against the order. Sub-section (2) of this section states that after the receipt of the representation referred to in Sub-section (1), or if no representation is received, after the expiry of the time fixed by the Provincial Government, they may place before an Advisory Council constituted under Sub-section (3), the grounds on which the order has been made for their advice. Sub-section (3) provides that the Provincial Government shall constitute one or more Advisory Councils and each Council shall consist of not less than three members one of whom shall be its Chairman. Sub-section (4) defines the functions of the Advisory Council and the procedure to be followed by it, and the submission of the report by the Council to the Provincial Government. Sub-section (5) says that

after considering the report of the Advisory Council, the Provincial Government may confirm, modify, or cancel the order originally made under Sub-section (1) of Section 2.

24. Section 4, Sub-section (1) says that no order made u/s 2 shall be in force for more than six months from the date on which it is confirmed or modified; but it is open to the Provincial Government to cancel the order before the expiry of that time. Sub-section (2) speaks of the extension of the period of detention by the Provincial Government after getting the advice of the Advisory Council for any length of time after the expiry of the first six months. Section 4-A lays down that no order of detention made in respect of any person purporting to be under provisions of the Act shall be deemed to be invalid, or unlawful, or improper on the ground of any defect, vagueness, insufficiency, or delay, in any communication made to such person under the Act.

25. The next provision which we have to deal with is Section 15, Herein is provided for delegation of power by the Provincial Government to its officers and it is enacted that the Provincial Government may, by order, direct that any power conferred, or duty imposed on them shall, in such circumstances and under such conditions as may be specified, be exercised or discharged by any officer or authority subordinate to the Provincial Government. In effect, the combined result of Sections 2, 3, 4, 4-A, and 15 would amount to this. If it appears to the Provincial Government that a person is acting, or about to act, or likely to act, in a manner prejudicial to the public safety, or the maintenance of public order in the Province, by conforming to the provisions of this Statute it is possible for the Government to detain him for an indefinite period, after obtaining the opinion of the Advisory Council, the members of which need possess no qualifications whatever and those opinion need not have any binding force on the Provincial Government, as it is open to them to accept or reject any such opinion. It has also to be considered whether the constitution of the Advisory Council and the mode of obtaining its opinion as contemplated in Sections 3 and 4 can be severed from the other provisions of the Act regarding preventive detention, viz., Sections 2 (1) (a), and whether the latter provision can stand by itself.

26. I have already stated that counsel for the petitioner does not dispute the circumstances that the relevant sections relating to preventive detention are an exhaustive code by themselves, apart from the other provisions of Act XXIII of 1949, so that even if the preventive detention provisions are inconsistent with the fundamental rights, still the other provisions will not be affected thereby. It is, therefore, necessary to analyse and find out how far the sections abovementioned are inconsistent with, or repugnant to, Part III of Constitution. Taking Section 2 (1), (a) it is found that when it lays down that a person may be detained it does not fix a period for such detention; it may be for an indefinite length of time and in the absence of a fixation of a period, it has to be said that this provision is inconsistent with Sub-clauses (a) and (b) of Clause (4) of Article 22. As such it should be said that this clause is void. But the learned Advocate-

General contends that since Article 22 provides for a detention for a period of less than three months without obtaining the opinion of an Advisory Board, to that extent Sections 2 (1) (a) of the Act can be held valid. That is, the indefinite duration as contemplated in Section 2 (1) (a) can be held to be valid to the extent of three months. It seems to me that such a contention is not acceptable. If Section 2 (1) (a) is void, it need hardly be said that Section 2 (2) is void.

27. Dealing with Section 3 (1) it is seen that in the absence of any imperative direction to the Provincial Government that the grounds of the detention should be served on the detenu, as soon as may be, as contemplated in Article 22, Clause (1) of the Constitution, it has to be held that this section also is inconsistent with the Constitution. Now coming to Section 3 (2) of the Act we have necessarily to hold that since the representation received from the detenu need not be placed and the opinion of the Advisory Board obtained within three months, this provision offends Clause (4), Sub-clause (a) of Article 22 of the Constitution. Moreover, there are no qualifications fixed for the Advisory Board to be set up and as much it is repugnant to Article 22, Clause (4), Sub-clause (a) of the Constitution. We need hardly add that Section 3, Sub-section (3) is silent with regard to the qualifications prescribed for the membership of the Advisory Board. As Section 3, Sub-section (4) does not fix any time for the Advisory Board to submit its report to the Provincial Government this should be held to be against the provisions and spirit of Article 22 of the Constitution. Sub-section (5) of Section 3 of the Act which does not impose upon the Government the obligatory duty of accepting the decision of the Advisory Council must, on the face of it, be held to be against the imperative provisions of the Constitution.

28. As Sub-section (1) of Section 4 of the Act does not fix a time for confirming the original order of detention which accordingly can be postponed for any indefinite period of time and it is only the subsequent detention confirming the original order that should enure for a further period of six months, we have necessarily to hold that it offends Article 22, Clause (4), Sub-clause (a) of the Constitution. Again Sub-section (2) of Section 4 is inconsistent with the provisions of Article 22. Now Section 4-A in so far as it declares valid an order which is defective on account of delay in communication, is directly conflicting with the provisions of the Constitution which provide for speedy disposal of such matters. Section 15 is consequential to Sections 2, 3, 4 and 4-A and when the main prop on which Section 15 is supported falls to the ground, the latter section can have no justification for existence. In such circumstances, it seems to me that the provisions of the impugned Act relating to preventive detention are practically inconsistent with the letter and spirit of the Constitution.

29. Now we have to find out whether the contention on behalf of the State that Section 2 (1) (a) to the extent that the detention can be held valid for a period of three months can be divorced from the other provisions of the Act and held to be binding even if the other sections could not stand the test of scrutiny in the light of the obligatory provisions of the Constitution. Reliance is placed by the learned

counsel on the observations of the Chief Justice of the Supreme Court at page 360 of "Jatindra Nath Gupta v. Province of Bihar", 1949 2 Mad 356, where the learned Chief Justice in discussing the provisos contained to the Bihar Maintenance of Public Order Act laid down that the power to extend that Act for a period of one year is one power and cannot be divided into two severable powers. Questions of repugnancy and inconsistency have arisen in the Commonwealth of Australia when the point regarding the trenching of one legislative authority over another had to be considered. The High Court of Australia in a case reported in "Clyde Engineering Co. Ltd. v. Cowburn Metters Ltd.", and Lever Bros. Ltd. v. Pickard", 37 C L R 466 had to decide the question regarding an award made by a Commonwealth Court, of Conciliation and Arbitration pursuant to the Commonwealth Conciliation and Arbitration Act 1904-1921 and held that the Parliament of a State cannot alter the terms of the award, or confer, or impose, on the parties to it rights or obligations which are inconsistent with such terms. Knox, C. J., and Gavan Duffy, J., at page 478 observe as follows:

"Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties; they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it. It has been suggested that our decision is inconsistent with a proposition laid down in "Whybrow's case", (1910) 10 C L R 266. In that case it was said that arbitration was no more than a substitute for agreement, and that the award of an arbitrator must be such an adjustment as the parties to the arbitration could themselves have made by agreement, and that, as the parties could not by agreement get rid of the prescription either of an existing or of a future statute, so the award must not only be consistent with every existing statute but becomes invalid in so far as it becomes inconsistent with any future statute. In our opinion the learned Judges who decided that case had in their minds the question that then arose for decision, namely, the antinomy between an existing legislative enactment and a proposed award of the Court of Conciliation and Arbitration, and they did not intend to declare the right of a State--Parliament to alter the relations established--between parties to an arbitration by an award duly made. If, and so far as, the judgment in that case purported to establish such a principle, we cannot accept it as a correct statement of the law."

In the judgment of Higgins, J., "at page 503" we find the following observation:

"When is a law "inconsistent", with another law? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other. Where two Legislatures operate over the same territory and come into

collusion, it is necessary that one should prevail; but the necessity is confined to actual collision, as when one Legislature says "do" and the other says "don't." but in the present case the award says "don't work the employee beyond 48 hours", and the State law says, as to the State citizens,--"don't work the employee beyond 44 hours. By obeying the State law the award is obeyed also."

The conclusion deducible from the observations of the learned Judges is that where the power is unrestricted on one case and in the other case it is a restricted one, the question is whether the unrestricted power can be held to be valid to the extent afforded by the restriction in the other statute and in the opinion of the learned Judges it cannot be so restricted. In the result, where in the Madras Maintenance of Public Order Act, the detention can be for an indefinite period, the fact that the constitution provides for detention for three months without obtaining the advice of the Board, cannot make the provisions of the earlier Act valid for a period of three months. What has to be considered is the inconsistency in the provisions of the Act and not the method by which it is exercised. Another useful case which depends upon the construction of Section 109 of the Commonwealth of Australia Act similar to Section 107 of the Government of India Act, 1935, is reported in "Ex Parte McLean", 43 C L R 472. The relevant observations are "at pages 479, 482, 483 and 486. I need only refer to the observations of Dixon, J. at page 482 in the following words:

"The question raised is whether a State law is inconsistent with a Commonwealth law and therefore invalid by reason of Section 109 of the Constitution. This is not a question as to the limits "inter se" of the constitutional powers of the Commonwealth and of the State. But the question turns upon Section 109 of the Constitution, and for this reason the matter is a cause arising under the Constitution or involving its interpretation which may be removed into this Court pursuant to Section 40 of the Judiciary Act 1903-1927. An application was made on the part of the applicant that the cause should be so removed and, in the special circumstances attending this litigation, the application is to be granted. The question of substance was fully argued before us and, the cause having been removed, there is no reason why it should not be determined at once without further argument. Section 44 of the Commonwealth Conciliation and Arbitration Act 1904-1928 penalizes any breach or non-observance of an award, and, inasmuch as the award in this case commanded performance of the applicant's contract, his neglect to fulfil it would constitute an offence under this provision. The same acts or omissions were therefore made subject to the penal sanctions of the Federal enactment and the somewhat different penal sanctions of the State enactment. When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and Section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse..... But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject-matter and provide what the law upon it

shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing, the particular conduct or matter to which its attention is directed. When a Federal statute-discloses such an intention, it is inconsistent with it for the law of a state to govern the same conduct or matter. But in the present case, conduct which the State law prescribes, namely, the performance of contracts of service, is a matter with which the Commonwealth Parliament has not itself attempted to deal. Although neglect by a shearer to perform such a contract constitutes an offence against Federal law, this does not arise from any statement by the Federal Legislature of what the law shall be upon that subject. The conduct which the Federal statute penalizes is the breach of industrial awards. There is no collision between an intention to deal exclusively with disobedience of awards and a law for the punishment of breach of contract. The Federal instrument, which prescribes performance of the shearers' contract of service, is the award of the Commonwealth Court of Conciliation and Arbitration. But unlawful as it is to depart from the course which such an instrument describes and requires, the instrument itself is, nevertheless, not "a law of the Commonwealth" within the meaning of those words in Section 109. Section 109 cannot, therefore, operate directly upon it so as to render a State law invalid because it is inconsistent with the intentions which the arbitrator expresses in the award. But these considerations do not end the matter. They do establish that, if State law is superseded it must be upon the ground that the State law thereupon becomes inconsistent with the meaning and effect of the Commonwealth Conciliation and Arbitration Act itself. But the provisions of that Act itself, which establish awards made under its authority, may have a meaning and effect consistently with which State law could not further affect a matter for which such an award completely provides. If the Act means not only to give the determinations of the arbitrator binding force between the disputants but to enable him to prescribe completely or exhaustively what upon any subject in dispute shall be their industrial relations, then Section 109 would operate to give paramountcy to these provisions of the statute, unless they were ultra vires, and they in turn would give to the award an exclusive operation which might appear equivalent almost to paramountcy."

30. It will be useful to refer to page 747 of American "Cyclopedia of Law and Procedure" where we find the following observations: ""Repeal of existing Laws, Constitutions or Charters: a. In General". When a new constitution containing provisions repealing all laws inconsistent therewith goes into operation, the effect is that all laws, whether legislative enactments or constitutional provisions, that are inconsistent with such constitution are repealed, while all such laws or provisions that are not inconsistent with it and in force at the time of its adoption

remain in force. New constitutions operate prospectively only, and all pre-existing laws remain undisturbed, unless an intent to repeal all such is expressed or necessarily implied."

I may also refer to the decision in "Whybrow's case" (1910) 10 CLR 266 referred to by Knox, C. J. and Gavan Duffy J. in "Clyde Engineering Co. Ltd. v. Cowburn". "Metters Ltd. and Lever Bros. Ltd. v. Pickard", 37 CLR 466.

31. The Colonial Laws Validity Act, 1865, 28 and 29 Vict. Chapter 63 contains certain provisions which may be useful in considering this question and Section 2 of that Act is as follows:

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

In "The Initiative and Referendum Act, In re." (1919) AC 935 the extent of repugnancy of a law made by the Manitoba legislature was considered by the Privy Council and "at page 944" Viscount Haldane in delivering the judgment of the Judicial Committee observes as follows:

"Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in Section 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-general u/s 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority."

In Cooley's "Constitutional Limitations", 7th Edn., page 246, the following passage occurs:

"It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other " arts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, taut not connected with, or dependant on, others which are unconstitutional. Where, therefore a part of a statute is unconstitutional, that fact does not authorize the Courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable or being separated with the meaning of this rule."

32. If Section 2(1) (a) of Madras Act XXIII of 1949, had provided for a maximum period of detention consistent with the provisions of Article 22 of the Constitution and then laid down the rules and regulations for making such detention effective, if such rules and regulations are not consistent with the provisions of the Constitution, probably to the extent that Section 2(1) (a) provides for a detention for three months, it might be valid. But here there is no such provision and I am not satisfied that even to the extent of a detention for three months Section 2 (1) (a) can be validated.

33. The learned Advocate-General made a distinction between the ultra vires

nature of an Act, either of the Provinces or of the Federation, if it does not conform to the provisions of the entries in the various schedules to the Government of India Act, 1935, and contrasted the provisions of Section 100 of the Government of India Act, 1935, with the repugnancy section, viz. Section 107 of the Act. Then he contended, on the analogy of Section 2 of the Colonial Laws Validity Act, 1865, that Section 2(1) (a) can be held to be valid to the extent of three months. For reinforcing this argument, he referred us to pages 212 and 213 of the report in "*Shayamakant Lal v. Rambhajan Singh*", 1939 FCR 193 where Sulaiman, J., in discussing the principles of construction observed as follows:

"When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and 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, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. "Their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not and may never be in force."..... It is a well established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be ultra vires in the former, while intra vires in the latter. The test is said to be whether "the Statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it."....A particular section of an Act however may not be an isolated and independent clause, and may form part of one connected indissoluble scheme for the attainment of a definite object; in which case it would have to be considered as an inseparable part of the whole. A law which is ultra vires in part only may thereby become ultra vires in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid.....For instance, the whole texture of the Act was found inextricably interwoven in "*Att.-Gen. for British Columbia v. Att.-Gen. for Canada*", 1937 AC 377 . The words "to the extent of the repugnancy" occurring in Section 107 indicate that it is not essential that the whole Act, or even a whole section, must be declared invalid, but that it is necessary to ascertain exactly how much of it is void on account of repugnancy. In India a clear distinction exists between a provision being ultra vires by virtue of Section 100 on account of overlapping and its being void u/s 107(1) owing to

repugnancy to the extent of such repugnancy. Unlike the former, there is competency to enact in the latter case, but the Legislation is invalid to a limited extent on account of a conflict."

But in our opinion this quotation is not of real help to his contention because the learned Judge says that a particular section of an Act may not be an isolated and independent class but may form part of one connected indissoluble scheme for the attainment of a definite object in which case it would have to be considered as an inseparable part of the whole. A law which is ultra vires in part only may thereby become ultra vires in whole if the object cannot at all be attained by excluding the bad part. Here we find that Sections 2, 3, 4, 4-A and 15 of the impugned Act are so inter-connected, inter-related and indissoluble that they form one connected whole and if any portions of the same cannot be held to be valid, the other portion must be held to be strictly invalid. He also invited our attention to a decision in "Re the Rarewell", (1881) 7 CLR 380, mentioned in the foot-note to the English and Empire Digest, supplement 1939 dealing with dependencies. This dealt with a case under the Colonial Laws Validating Act but since the report is not available, we would not be justified in placing any reliance on that.

34. With regard to the severability we find a very interesting discussion at pages 46 and 47 of Wynes "Legislative and Executive Powers in Australia". The learned author observes that

"if, when the unconstitutional portion is struck out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

As authority he quotes Cooley on "Constitutional Limitation", pages 246 and 247, Blackstone on "Constitutional Law", page 65, and "Presser v. Illinois", (1886) 116 U S 252. The learned author also says that if the provisions are

"so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect legislature would not pass the residue independently, then if some parts are unconstitutional all the provisions which are thus dependent, conditional, or connected must fall with, them";

and in every case the question is one of legislative intention to be gathered from the terms of the particular statute. Therefore, suppose we strike out Sections 3, 4, 4-A and 15 from Act XXIII of 1949, can it be said that Section 2(1)(a) standing by itself is a complete Code in itself which is not repugnant to the provisions of the Indian Constitution? I think that it cannot stand by itself because it provides for an indefinite period of detention. For the reasons above stated, I find no difficulty whatever in holding that the provisions! of the Madras Maintenance of Public Order Act, XXIII of 1949, relating to preventive detention,

viz. Sections 2(1)(a), 3, 4, 4-A and 15 are totally repugnant to the provisions of Articles 21 and 22 of the Constitution of India and therefore "ultra vires and void".

35. It has now to be considered as to whether the order issued by the President under Article 373 of the Constitution of India has the effect of validating the detention of the petitioner even if the provisions of the Madras Maintenance of Public Order Act XXIII of 1949 does not appertain to his detention. Article 373 is in the following terms:

"Until provision is made by Parliament under Clause (7) of Article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in Clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President."

I have already held that Article 22 is prospective and therefore if there is an existing law which is valid in accordance with the Constitution, the President can take the place of Parliament with respect to certain powers and functions vested in the Parliament under Clauses (4) and (7) and Article 22 for a period of one year. Even if there is no valid existing law the President can issue orders on matters enumerated in Clause (7) of Article 22 within that time which will have the effect of an Act of Parliament. That is in accordance with proviso to Sub-clause (a) of Clause (4) of Article 22, it is open to the President to prescribe the maximum period of detention contemplated under Sub-clause (b) of Clause (7). It is also open to the President to prescribe the procedure to be followed by the Advisory Board in enquiries under Sub-clause (a) of Clause (4). The President can prescribe the circumstances under which, and the class or classes of cases in which a person may be detained for a period longer than three months under the law providing for preventive detention without obtaining the opinion of the Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4). On a reading of Article 22 what is contemplated by the substitution of the word "President" for "Parliament" therein is that in the case where the Parliament does not provide for certain matters laid down under that article it is open to the President to step in and take upon himself the duty of legislative functions. Now let us analyse and see how far the Presidential Order conforms to Article 22 read with Article 373. In the preamble it is stated that the President was issuing the order under the powers given by Article 373 read with Sub-clauses (a) and (b) of Clause (7) of Article 22. There is therefore no reference whatever to proviso to Sub-clause (a) of Clause (4). What was sought to be achieved is that the President was to have prescribed the class or classes of cases and the circumstances under which a person may be detained for a period longer than three months as well as the maximum period for which a person may be so detained. Paragraph 2 of the order does not define what the class or classes of cases are. It practically reiterates the provisions of Sub-clause (a) of Clause (7)

without denning which class of persons can be detained for a period longer than three months. So far as the preventive laws in force providing for detention are concerned they apply to a large body of persons who form different classes or who were detained under different circumstances. By stating that all classes of persons detained under all circumstances under any law providing for detention prior to the commencement of the Constitution can be detained for a period more than three months, the President has not in any way carried out the task contemplated by Article 22, Clause (7) Sub-clauses (a) and (b). A careful reading of Clause (7) of Article 22 leaves one with the impression that it is not open even to the Parliament, in the case of a prospective law, to provide for detention of all persons detained under the provisions of a statute made for preventive detention for a period longer than three months without obtaining the Advisory Board's opinion. But it is open for the Parliament to say that a particular class of person or persons under particular circumstances can be detained for a longer period. It is not necessary for me to give illustrations of the circumstances which arise, or the class of persons that may be necessary for being detained for more than three months. But Clause (7) (a) does not certainly provide that the Parliament can pass a legislation by which it can provide for preventive detention of all persons for a period of more than three months without obtaining the opinion of the Advisory Board. If such, a legislation is possible it goes directly against the provisions of Clause (4) Sub-clause (a). Therefore in my judgment what Sub-clause (a) of Clause (7) provides is that under certain circumstances a certain class or classes of persons may be detained for more than three months. Since the expressions "circumstances under which" as well as "the class or classes of cases in which" are connected by the conjunction "and" the two phrases should be read as referring to the same category or group and not, disjunctively. In order to make my meaning clear, I may say that it is open to the Parliament to provide for legislation that in certain circumstances a class or classes of persons may be detained for a period more than three months. It does not, mean that the Parliament can under certain circumstances provide for detention of all Classes of persons detained under preventive detention for a period more than three months. For example, the. Parliament may say that persons of certain subversive instincts who have been suspected of violent activities may be detained for a longer period than three months. But it seems to me other persons not so dangerous but who, on account of certain political views, have also been found necessary to be detained, cannot be brought within the same category. Sub-clause (b) provides the maximum period for which any person may, in any class or classes of cases, be detained under any law providing for preventive detention. That also refers to prospective legislation. The President by the order in question has not mentioned the persons belonging to a class.

36. We have next to see whether the Presidential order can come into existence where there is no valid law in existence passed either by the State legislature or by the Union Parliament at the time: the Presidential order is made, it is admitted that there was no law passed by the Central Government in existence

on 16-1-1950 which related to preventive detention in the provinces. There-fore, unless there is a valid law in force in the provinces or states after 26-1-1950 by which the detention can be validity enforced, it is not open to the President to legislate in accordance with the powers conferred by Article 373 of the Constitution of India. In effect, the oraer of the President comes to this: that all detentions made under all laws prior to 26-1-1950 shall be in force for a period of three months thereafter and subsequent detentions made under laws would be in force for a period of three months from the date of detention. As I have already remarked, there is no specification of the class or classes of cases; nor is there any crystallized expression of the circumstances which necessitated the continuance of the detention derogatory to Sub-clause (a) of Clause (4) of Article 22, especially since the order does not separate the classes and it applies to all detentions. In short, the Presidential order is an usurpation, if such a word can be used without any kind of disrespect, of the authority conferred under the concurrent list both on the State legislature as well as on the Union Parliament for passing laws relating to preventive detention for reasons connected with the security of the State and the maintenance of public order. Reference has already been made to the circumstance that the powers of the President under Article 373 can be exercised only when there is already a prospective law passed by the Parliament or the State legislature under Clause (4) (a).

Such an enactment should provide for an Advisory Board with all the special qualifications mentioned therein and making the decision of such Advisory Board final and binding upon the State government. In essence, the power conferred under Article 373 is one vested in the President to modify or alter, or amend, an existing law, a law passed after 26-1-1950. The word "prescribe" in Clause (7) makes the meaning perfectly clear. It may be contended that the true import of the expression "prescribe" in Clause (7) is only a declaratory one so that in addition to the Parliament prescribing, that is declaring, the circumstances under which, and the class or classes of cases in which, a person may be detained, it must also pass a substantive law in accordance with Sub-clauses (a), (b) and (c) of Clause (7). It is unnecessary for me to give a definite expression of opinion on that aspect because in view of my conclusion that, the President can only alter a law passed after 26-1-1950 in accordance with the provisions of Article 373, this question becomes academical. Here again the learned Advocate-General contended that the Presidential order should be read as one passed in accordance with Clause (2) of Article 372 which lays down that for the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may, by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law. The President is given this power for a period of two years from the commencement of the Indian Constitution. But

one cannot forget the circumstance that the President can amend and alter a law which was existing on 26-1-1950 or in force on 26-1-1950 and not a law which was non-existent on account of its void nature. If the view expressed by me in the earlier part of the judgment that Sections 2(1)(a), 3, 4, 4-A and 15 of the Madras Maintenance of Public Order Act are void as being repugnant to the provisions of the Constitution is accepted, it is as if such a law does not exist and in such a state of voidness no amount of application of Article 372 Clause (2) can modify, or amend, a non-existing law. To explain the matter still further, "any law" in Clause (2) of Article 372 must be differentiated from an enactment. A legislature may pass an enactment which may be beyond its powers. It would remain an enactment on the statute book; but a void enactment under no system of jurisprudence can be considered as a law. "According to the Austirian theory of jurisprudence it is only an enactment passed by a competent authority, which has the sanction to execute or enforce it or a valid, enactment that will have the force of law. Even though the learned Advocate-General in the beginning seriously contended that the President's Order would be effective to continue the detentions, still towards the close of his argument the contention became feeble and the learned Advocate-General was inclined to agree that unless there is an existing law, or a law in force, on 26-1-1950, the President cannot invoke Article 373 and perform the functions assigned to him and which the Parliament has authorised him to do. Therefore, whatever might have been the object which was intended to be achieved by the Order of the President, they remained pious intentions and did not have the effect of legally fulfilling the desired intentions. For the foregoing reasons in which I have come to the conclusion that Sections 2, 3, 4, 4-A and 15 of Madras Act XXIII of 1949 are void, the detention of the petitioner under those provisions after 26-1-1950 should be deemed to be unlawful detention.

37. Sometime after we reserved judgment in this case, the learned Advocate-General desired that he has to mention a matter and requested us to have the case posted for further arguments on 3-3-1950. We acceded to his request and on that occasion our attention was invited to a new enactment viz. The Preventive Detention Act 1950, Act IV of 1950, passed by the Indian Parliament and which came into force on 25-2-1950. This Act applies to the whole of India except to the State of Jammu and Kashmir; even where preventive detention for reasons connected with defence, foreign affairs or the security of India would be governed by this statute. Section 3 of this Act states that the Central Government or the State government may, if satisfied with respect to any person chat with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order, it is necessary so to do, make an order directing that such person be detained. This section has very close and intimate resemblance to Section 2(1) (a) of the Madras Maintenance of Public Order Act and we are informed by the Advocate-General, and also a copy of the order was shown to us, that the Madras State has cancelled the order of detention passed on the petitioner under the provisions of the Madras

Maintenance of Public Order Act of 1949 and passed a fresh order detaining him in accordance with Section 3 of the Preventive Detention Act of 1950. The Advocate-General therefore contends that even in the view that the detention of the petitioner was unauthorised as Madras XXIII of 1949 became void with regard to preventive detention on 26-1-1950, still as the Indian Parliament, in accordance with the powers conferred on it in the concurrent list, has now enacted a proper and valid law whereby a detention order has been served on the petitioner, this Court must hold that he is now validly detained and cannot be released. He invited our attention to the observations of the Federal Court of India in "*Basanta Chandra v. Emperor*", 1945-8 F L J 43, at page 43 and also to Halsbury's "*Laws of England*", volume IX, page 736, paragraph 1256. On the other hand Mr. Nambiar contends that even granting that the Preventive Detention Act of 1950 does not offend the fundamental rights conferred under Part III on which point he says he vehemently disputes the validity of this Act, still a void detention cannot be cured by an order passed under this new enactment. We were told by him that the validity of the detention under the new Act would be made the subject of a fresh application if we decide that the detention under Madras Act XXIII of 1949 is wrong. The counsel on either side expressed their desire not to address arguments on this question at this stage. We therefore do not express any opinion as regards the validity or otherwise of the detention under the Preventive Detention Act of 1950.

38. In the result, we hold that the detention of the petitioner under Madras Act XXIII of 1949 and the order of the President of 26-1-1950 are illegal and he is entitled to be released. We however make it clear that this order does not affect his detention under any order made under the Preventive Detention Act IV of 1950 or any other enactment.

39. KRISHNASWAMI NAYUDU, J.: As this petition raises a question of undoubted importance relating to the interpretation of the Constitution so soon after its introduction I decided to deliver a separate judgment. Since preparing my judgment I have also read the judgment of my learned brother just now delivered and I entirely agree with the conclusions arrived at by him on the two questions raised as to the validity of a detention under Madras Act XXIII of 1949 and the President's Order of 26-1-1950.

40. The petitioner was arrested and detained under the provisions of the Madras Maintenance of Public Order Act, Act I of 1947. By a further order of 5-9-1949, the petitioner's detention under the previous order of 1-4-1948 was confirmed by virtue of the power conferred u/s 3(5), Maintenance of Public Order Act of 1947. He has now filed this petition for issue of a writ of "*habeas corpus*" directing the Superintendent of the Central Jail, Cuddalore, where he is detained, to produce the petitioner before this Honourable Court and for setting him at liberty.

41. The main ground on which the petition is laid is that the detention is arbitrary and clearly illegal in view of the Constitution Act, which has become law since

26-1-1950. On 26-1-1950, the President of the Republic promulgated the Preventive Detention Extension of Duration Order, 1950, a copy of which was served on the petitioner, whereby he was further directed to be detained for a period of three months from the time of the commencement of the Constitution, i. e., 26-1-1950.

42. The contentions of the petitioner, as mentioned in the petition, are that the detention under the Madras Maintenance of Public Order Act (Act I of 1947) which has now become a detention under the latter Act, viz., Madras Act XXIII of 1949 by virtue of the saving provisions, is illegal in that it contravenes the provisions of Part III of the Constitution which confers a fundamental right on the citizen under Article 21 and that the procedure prescribed under the Madras Act XXIII of 1949 for detention and a continuation of it is a complete negation of all democratic right and procedure, that the detention further violates the specific provision relating to preventive detention as laid down under Article 22(4) of the Constitution, and that no maximum period having been fixed under Article 22(7), the detention is likely to be for an indefinite period, not envisaged by Article 22 and that the Parliament not having fixed the maximum time, no detention could be sustained, and that no procedure as directed to be laid down by the Parliament, which is to be followed by the Advisory Board, having been defined, no detention made under the Act can be regarded as valid or in force. It was further contended that in the absence of any law of Parliament or order of the President of the Republic in strict compliance with the provisions of the constitution of India providing for preventive detention after 26-1-1950, the Madras Maintenance of Public Order Act has ceased to be law from that date and no other legal provision has taken its place. As preventive detention is one of the subjects specifically provided for both in the transitory provisions as well as in the long term provisions of the Constitution of India, The Madras Maintenance of Public Order Act, Act XXIII of 1949, cannot be deemed to continue in force even after 26-1-1950 and consequently the detention of the petitioner is void as and from 26-1-1950. It was further contended consequent on the service on the petitioner, of the order of the President of the Republic issued on 26-1-1950, the detention itself being void, the order of the President could not validate it, and even assuming that the detention could not be held to be void as on 26-1-1950, the President's order could not validly continue it and the said order is not in consonance with the provisions of the constitution empowering the President to pass an order as regards preventive detention.

43. Elaborate and learned arguments were adduced on both sides but it will be unnecessary to traverse them in detail since the questions that arise for determination in this petition are confined to a narrow compass. The contention on behalf of the petitioner is that the detention under the Madras Maintenance of Public Order Act is illegal in that it contravenes the fundamental right of the citizen, the right of freedom and personal liberty, recognised under the constitution; that personal liberty cannot be deprived except according to procedure established by law and that the detention under the Madras Act XXIII

of 1949 does not satisfy the requirements of what is contemplated by the article as to the procedure established by law. Secondly that the detention being under an Act which was in force before the commencement of the Constitution, it is illegal since Article 13 lays down that all laws in force in the territory of India immediately before the commencement of the Constitution in so far as they are inconsistent with the provisions of the fundamental rights shall to the extent of such inconsistency be void, that the Madras Act XXIII of 1949, which is a law in force before the commencement of the Constitution is totally inconsistent with the provisions of Part III which lays down the fundamental rights and therefore completely void, and thirdly in any event, the President's Order of 26-1-1950 being itself not in accordance with the provisions of the Constitution cannot validate any initially void detention under a law in force prior to the commencement of the constitution. A further contention has been raised that the detention under the Madras Maintenance of Public Order Act and ordinance was itself illegal and though arguments were advanced as to the validity of the detention under the previous orders, since they have been already held to be valid by decisions of this Court, to the last of which my learned brother was party, which is reported in "In Re. Velayudam", 1950 M W N 4 it is not open to the petitioner to raise the question as to the validity of the detention under the Madras Maintenance of Public Order Act of 1947 and subsequent orders, the validity of which must be deemed to have been settled by considered decisions of this Court.

44. The fundamental right which is relied upon is the right of personal liberty as provided for under Article 21 which reads as follows:

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

Part III of the Constitution is headed "Fundamental Rights" and several such rights are dealt with under that Part, viz., right of equality, right of freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right of property and right of constitutional remedies. What we are now concerned with is that part which relates to the right of freedom.

45. Article 19 states as follows:

"1. All citizens shall have the right

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on

any occupation, trade or business." And the next relevant article is Article 21 referred to already. The sub-clause of Article 19 which may have relevance to the present question is Sub-clause (d), which states that a citizen shall have the right to move freely throughout the territory of India and Article 21 protects the personal liberty of the individual. The right to move freely throughout the territory of India and also the right of protection of one's personal liberty are not absolute, but are qualified and placed under restrictions, such restrictions being provided for in the Constitution itself. Under Clause 5 of Article 19, it is provided that nothing in Sub-clause (d) shall affect the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause, either in the interests of general public or for the protection of the interests of any Schedule tribe. The limitation that is placed on the right of personal liberty is indicated in Article 21 itself, and personal liberty can be interfered with in accordance with the procedure established by law. It can also be interfered with under the provisions relating to the law of preventive detention, which are dealt with under Article 22 with which it will be necessary to deal with later on more fully.

46. For the first time, the Constitution lays down what the fundamental rights of a citizen are. Prior to the Constitution there was no such declaration of fundamental rights. The idea of a fundamental right and its indication has found expression only in Section 298 of the Government of India Act, 1935, which states that:

"No person shall on the ground of only religion, place of birth, descent, colour or any of them, be ineligible for office under the Crown or prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India."

This is now provided under Articles 16 and 31 of the Constitution. Even that was in pursuance of the insistent demand of the Indian delegates, at the Round Table conference before the passing of the Government of India Act, to have some declaration of the fundamental rights and the only declaration is in this insufficient form as found in that section. So much so, for the first time in the history of our country, the fundamental rights of the citizen are laid down in constitution framed by its people.

47. When we are considering the law of preventive detention and how far it infringes and fundamental right of freedom and liberty it is necessary to know what is meant by personal liberty. Dicey, in his book "Law of Constitution", 9th Edn., observes at page 207 as follows:

"The right to personal liberty, as understood in England, means in substance, a person's right not to be subjected to imprisonment, arrest, or physical coercion in any manner that does not admit of legal justification."

Sir William Blackstone says:

"Personal liberty consists in the power of locomotion, of changing situation or moving of person to whatsoever place one's inclinations may direct without imprisonment or restraint unless by due course of law. It appears therefore that this power of locomotion is not entirely unrestricted but that by due course of law, certain qualifications and limitations may be imposed upon it without infringing upon constitutional liberty."

48. The Madras Maintenance of Public Order Act, 1949, is a comprehensive Act as it does not deal with only preventive detention but also imposition of collective fines, control of meetings and processions and essential services and certain other purposes. Preventive detention has been understood u/s 2 of the Act as not only detaining a person in jail but also comprises of cases where the detention can be achieved by directing that the person specified therein shall not be in any area or place in the province, or require him to reside or remain in such place or within such area in the province and if he is not already there to proceed to that place and within such time or require him to notify his movement in such manner, at such times and to such authorities, or prohibit him from being out-of-doors between, such hours or prohibit him from travelling except in accordance with the permission given to him by such authority or person as may be specified in the respective orders, or by imposing restrictions as may be specified in respect of employment or business, in respect of association or communication with other persons. It is therefore comprehensive enough to include not only restraint of personal liberty in the strictest sense of confining him within jails, but also controlling and regulating his movements. That would amount, to interference with the fundamental rights of freedom to move freely throughout the territory of India as provided for under Article 19(d). If the detention under Madras Act XXIII of 1949 could be considered to be an interference of the fundamental right of freedom of movement within the territory of India, such interference could be justified under Clause (5) of Article 19, since that right of freedom of movement as declared shall not affect, the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of such rights. Then it requires to be considered whether the detention under Madras Act XXIII of 1949 can be said to be a reasonable restriction on the freedom of movement. Secondly since preventive detention is an interference with one's personal liberty whether that detention under the act, which affects one's personal liberty, can be said to be made in accordance with the procedure established by law.

49. Though the learned Advocate-General in replying to the arguments on behalf of the petitioner relied upon Article 19 Clause (5) and contended that it was for the Court to consider whether the detention made under the said Act amounted to a reasonable restriction of one's freedom of movement considering the circumstances under which the Act was passed, he did not however pursue his arguments in support of this contention, because the present detention being a case of arrest and, detention in jail was in direct violation of the personal liberty

and more appropriately could be said to be an interference with the right of one's personal liberty as provided for under Article 21.

50. The question therefore now turns upon, whether the detention under Madras Act XXIII of 1949 can be a justifiable interference of a person's liberty and is in accordance with the procedure established by law. The procedure laid down under the Constitution, which could take away from a person his right of personal liberty by preventive detention is contained in Article 22 Clause (4) to (7). Arguments were advanced as to the meaning that is to be attached to the words "according to the procedure established by law." It was contended on behalf of the petitioner that these words really mean what was understood as "due process of law" in the American Constitution. The fundamental right as to life, liberty and property is laid down under Amendment V of the Constitution of the United States, where it is stated that no person shall be deprived of life or liberty or property without due process of law. Edward S. Corwin in his book on the "American Constitution and What it means today" states as follows:

"Originally "due process of law" meant simply modes of procedure which was due at the common law, especially in connection with the accusation and trial of supposed offenders. It means in short kinds of procedure which is described in detail in the more definite provisions of amendments 5 and 6. To day "due process of law" means reasonable law, or "reasonable procedure, that is to say, what a majority of the Supreme Court find to be reasonable in some or other sense of that extremely elastic term. In other words, it means, in effect, the approval of the Supreme Court; but, as will be pointed out presently, this approval will sometimes be extended on easier terms than at others." The application in America of the requirements of the due process of law had been made in two important respects. It was used to operate as a limitation upon legislature as well as the executive branch of the Government and that was applied to not only procedural rights but to substantive rights. And in so far as English Constitution is concerned the procedural side has been emphasised, as pointed out by Willoughby in his book "The Constitutional law of the United States." But it may be pointed out that in the Indian Constitution the words employed are not "due process of law" but "procedure established by law." The words "Procedure established by law" have not been employed in any other constitution except in the American sponsored Japanese constitution framed in 1946. It may also be remembered that in the draft constitution of India prepared by the Drafting Committee, Article 21 which was Article 15 in the draft stated thus:

"No person shall be deprived of his life or liberty without due "process of law" nor shall any person be denied equality before the law within the territory of India."

And the committee substituted the expression "except according to procedure established by law" for the words "without due process of law" and added the word "personal liberty" and the reason given is that the words "except according

to the procedure established by law" was more appropriate, reference being made to Article 31 of the Japanese Constitution of 1946. Article 6 of the Irish Free State Constitution, (Saorstát Éireann) Act I of 1922, states that no person shall be deprived of his liberty except in accordance with law.

51. The contention on behalf of the petitioner is that the words should receive the same meaning as is given to the words "due process of law" under the American Constitution, that it means reasonable law or reasonable procedure, that applies both to substantive and procedural requirements, that it is not open to deprive the man's liberty by some law in the sense of an enactment passed by the legislature, however unreasonable, unconscionable and revolting to human conscience it may be, that the Courts are empowered to scrutinise when such fundamental right is interfered with, whether the interference has been according to the procedure established by law, and that such law, which lays down the procedure as in the United States, has to be tested by High Court whether it is reasonable or not. On the other hand the contention of the learned Advocate-General is that the Constituent Assembly by substituting the word "Procedure established by law" in the place of "under due process of law" intended to lay emphasis on the procedural rights alone of the subject to be protected, and once the procedure was laid down by the legislature competent to prescribe the procedure, it is not open to the Courts to further scrutinise and find out whether the procedure so laid down is reasonable or whether it conforms to the principles of natural justice, equity and good conscience. He further contended that the language as it stood in Article 21 intended to make the legislature supreme without interference from Courts and so long as the procedure is laid down by a competent legislature, it is not open to the Court to examine the procedure and adjudicate, whether the procedure so laid down so as to affect the fundamental right of the personal liberty, was proper or reasonable. The learned Counsel for the petitioner argued that if that was the meaning that should be given to the words "procedure established by law" there was no purpose in the framers of the Indian Constitution laying down the fundamental rights, which if the argument on behalf of the Government is to be accepted, liberty could be taken away by any law passed by a legislature however unreasonable or revolting to notions of fair-play and justice they may be. Reference was made to several decisions bearing on the subject, but in the face of subsequent events it has become unnecessary to decide as to what we understand by the words "procedure established by law."

52. Since reserving judgment in this case, the petition was posted for being spoken to at the instance of Advocate-General and our attention was drawn to a further order issued to the petitioner by the Madras State detaining him under the provisions of Parliament Act 4 of 1950, i.e., the Preventive Detention Act of 1950 passed after filing of the present petition. The learned Advocate-General represented that the order of detention subsisting under the earlier Act, Act XXIII of 1949 was cancelled and a new order was served on the petitioner. Mr. Nambiar contended that he did not accept the validity of the order so passed under Act 4 of 1950 and desired that we might deliver judgment in this petition

independently of the effect of the order of detention that was issued under Act 4 of 1950. That question is likely to be raised before this Court in proceedings which may be taken out by the petitioner or other detenus contesting the validity of the order passed under the Parliamentary Act 4 of 1950 as it is so stated by Mr. Nambiar when it will be more appropriate to give a considered opinion as to whether the detention order passed under the Parliamentary Act 4 of 1950 is a justifiable interference of the fundamental right of a person's liberty in accordance with the procedure established by law. I have, therefore, refrained from giving my view of what is meant by the words "procedure established by law" as employed in Article 21 of the Constitution with particular reference to the law relating to preventive detention though my learned brother has dealt with the topic and has given his views. Further it is also unnecessary now to give any opinion since this petition can be effectively disposed of on other grounds.

53. The main contention, therefore, that requires to be considered is whether the detention under the Maintenance of Public Order Act, which was a law in force before the commencement of the Constitution has become void, by reason of the Act being inconsistent with the provisions of this part, the argument for the petitioner being that it has become totally inconsistent with the provisions of Part III of the Constitution. In Part III there is reference to three categories of laws in force: "laws in force", "law" and "Existing law." Article 13, Clause (1), says 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. Article 13(2) says that the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void. In Article 13(3)(b) "laws in force" has been defined as including laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. "Existing law" is defined as any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any legislature or person having power to make such law, ordinance, order, bye-law, rule or regulation. That Act XXIII of 1949 is "a law in force" or "an existing law" can admit of no doubt. Reference to "existing law" is made when the restriction on the fundamental right of freedom is dealt with under Article 19(5.) Reference to "laws in force" is made in other articles of the constitution, especially in Article 372(1) which provides for the continuance in force of existing laws and their adaptation. Article 372(1) states:

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

Therefore it does not seem there is much distinction that is sought to be made in the Constitution as to "laws in force" and "existing laws", both apparently meaning the same thing. As the Heading of Article 372 also indicates, it relates to continuance in force of existing laws.

54. That Act XXIII of 1949, being a law in force Article 13 becomes directly applicable and it has to be considered whether it has become void by reason of any inconsistency with the provisions of Part III as contended for on behalf of the petitioner, whether the inconsistency with the provisions complete or partial, whether the inconsistent provisions are severable from the consistent provisions and whether such severance is permissible. If it could be found that certain provisions of the Act, Madras Act XXIII of 1949, are inconsistent and repugnant to the provisions of this Part and there are other provisions which stand independently of these, capable of separate enforcement without offending the provisions of Part III certainly inconsistency of some of the provisions would not affect the validity of the Act and its enforcement in other respects. Since Article 13 itself makes it clear that such laws in force as are inconsistent shall only be void to the extent of such inconsistency, it may be proper to examine what are the provisions of Madras Act XXIII of 1949, which relates to preventive detention, which are inconsistent, whether all or any of them are inconsistent and if so with what particular provisions of Part III of the Constitution.

55. It is convenient to examine in the first instance the provisions of Part III which lay down the law of preventive detention as a check on the fundamental right of a person's liberty. Article 22(4) lays down that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless:

(a) An Advisory Board consisting of persons who are or have been, or are qualified to be appointed as, Judges of a High Court, has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention: Provided that nothing in this Sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under Sub-clause (b) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under Sub-clauses (a) and (b) of Clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in Clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe:

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4)

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under Sub-clause (a) of Clause (4).

The position therefore is that a Parliament or State--since under the concurrent list of Schedule VII of the Act, dealing with Legislative powers of the Union and State preventive detention is a concurrent subject--can enact a law providing for preventive detention, if it is satisfied that in the interests of security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community, a person is to be detained; but in the first instance the detention could be for a period of three months. Before the expiry of three months his case has to be submitted to an Advisory Board, consisting of persons who are or have been or are qualified to be appointed as Judges of a High Court, who may be asked to report before the expiration of the period of three months, whether, in their opinion, there was sufficient cause for such detention and then the State could continue the detention beyond three months. If the Advisory Board thinks that there is no sufficient cause for such detention the person detained has to be released unconditionally. But if, however, it certified that there is sufficient justification for detention, the State can detain him beyond three months, but the further detention should not extend beyond the maximum period which the Parliament has to fix under Article 22(7)(b). If a person is detained in pursuance of an order made under law or enacted, providing for preventive detention, the person detained shall be informed by the authority making the order, the grounds of such detention and it should afford the earliest opportunity of making representation against the order. But a person shall not be entitled from the authority detaining him to a disclosure of facts if such authority considers such disclosure to be against public interest. In addition to the power of making laws for preventive detention, which is conferred both on the Parliament and the State under Article 22(4), the Parliament alone is invested with the additional power under Article 22(7) of extending the duration of the detention of a person without obtaining the opinion of the Advisory Board as required under Article 22(4)(a). The Parliament is also enjoined to fix the maximum period for which any person may, in any class or classes, be detained under any law either by a State or Parliament providing for his preventive detention enacted by virtue of Article 22(4). The Parliament is also and has alone to lay down the procedure to be followed by an Advisory Board in an enquiry under Article 22(4)(a). The person's liberty can, therefore, be interfered with under a law providing for preventive detention so framed in consonance with the

provisions of Article 22(4) to (7). The citizen has the certainty of the period of his detention under any circumstances, as the maximum period is fixed by the Parliament, and the person detained is aware of what that maximum period is. It is not an indefinite period but a definite period of time during which the detention will have effect. Even in exceptional cases where the Parliament has reserved itself the right of prescribing that a citizen may be detained for longer period, the period of detention should not exceed the maximum period fixed by the Parliament, but only without the prerequisite of the Advisory Board's opinion as in the normal cases.

56. So far as the Madras Act XXIII of 1949 is concerned u/s 2 (1), the Provincial Government if satisfied that any person was acting or about to act or likely to act in any manner prejudicial to the safety or the maintenance of public order, with a view to preventing him so acting, may direct that he may be detained. The other Sub-clauses of Section 2 (1) deal with the restriction of the person's movements otherwise than complete detention. Section 2 (2) directs an officer or authority empowered to detain, to forthwith report the fact to the Provincial Government together with the ground on which the order has been made. Section 3 (1) provides that the person affected by the order shall be informed of the grounds on which the order has been made against him without disclosing the facts which the Government considered would be against public interests to disclose and he is given opportunity to make a representation against that order. Clause (2) of Section 3 makes a provision for placing the representation received, if any, and the ground on which the order has been made, before an Advisory Council constituted by the Government and after the re-report of the Advisory Council is received, under Clause (5) the Government has to consider the report and confirm, modify or cancel the order of detention. The order so made shall not be in force for more than six months from the date on which it was confirmed under Clause (5) of Section 3, but if in the opinion of the Provincial Government it is necessary to extend the period of detention, the Provincial Government may, at any time before the expiry of the period of six months, and after giving opportunity to the person concerned to make a representation and after referring the matter to the Advisory Council and considering the reports direct that the order shall continue in force and the order so extended shall continue for a further period of six months from the date on which, but for such a direction, it would have ceased to be in force, and thereafter if and so often as it is again extended by further similar direction made in the same manner. This is under Clause (2) of Section 4. The only other relevant section relating to preventive detention in the Act is Section 15 where the Provincial Government has the power to delegate its authority to an officer or authority subordinate to it. The Act also incorporates other provisions enabling the Government to impose collective fines, control meetings and processions and essential services under certain circumstances. But in so far as the preventive detention is concerned the only relevant provisions are those referred to above. It has, therefore, to be considered how far the provisions relating to preventive detention as enacted in

Act XXIII of 1949 are consistent with the provisions of Para III of the Constitution.

57. As observed by Wynes in his book "Legislative and Executive Powers in Australia": "the test of inconsistency is one which gives rise to no inconsiderable difficulty and it is not easy matter to lay down precise rules." Mr. Nambiar, in an able argument, pointed out in what manner the subject has to be approached, referring to the leading text writers and decisions mostly bearing on the Australian Commonwealth Constitution. "Inconsistency, repugnancy and contrariety connote the same idea" as pointed by Issack, J., in "Attorney-General for Queensland v. Attorney-General for the Commonwealth", 20 W L R 148, , where the meaning of the word "repugnancy" was considered with reference to the Colonial Laws Validity Act, 1865. Most of the cases cited are of the Australian Commonwealth Courts which deal with the inconsistency of the State laws to that of the laws of the Commonwealth and the applicability of Section 109 of the Australian Constitution. Section 109 of the Australian Constitution provided that when a law of the State is inconsistent with the law of the Commonwealth, the latter shall prevail, the former shall, to the extent of the inconsistency, be invalid. There is, therefore, the supremacy of the Dominion over the State laws by virtue of Section 109 of the Australian Constitution. This corresponds to Section 107 of the Government of India Act, 1935, which enacted that if any provision of the Provincial law is repugnant to a provision in the Federal law, the Federal law shall prevail and the Provincial law shall, to the extent of the repugnancy, be void. In the Colonial Laws Validity Act, 1865, which is an Act of the British Parliament made applicable to all colonies, Section 2 reads as follows:

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

In the present case what has to be considered is as to whether the law existing at the commencement of the Constitution is inconsistent with the provisions of Part III which lays down the fundamental rights and in which connection it has to be considered, what is the meaning that is to be given to the word "inconsistency" in Article 21 of the Constitution, the inconsistency being a conflict between the existing law with certain rights provided under the Constitution subsequently framed. The two enactments referred to, where the words "repugnancy and inconsistency" are found are not of the same scope as the ones we have to consider in this case. In one case the inconsistency is between two laws, one of the State and the other of the Commonwealth, where both the Commonwealth and the State have concurrent powers on the same subject, but when the Commonwealth and the State enact two laws, the laws framed by the Commonwealth are given the preference establishing the supremacy of the

Dominion over the State laws. In the other case, Section 2 of the Colonial Laws Validity Act renders invalid any colonial law repugnant to the provisions of any Act passed by the paramount authority, the British Parliament. But all the same, we may usefully refer to the tests that are laid down in these decisions and the considerations which should weigh with Courts to ascertain as to what is meant by repugnancy and inconsistency between two sets of enactments. In the well-known case, "Clyde Engineering Co., Ltd. v. Cowburn Metters Ltd.", and Lever Brothers Co. v. Pickard", 37 W L R 466, known as the "44 hour case", where the question arose u/s 109 of the Australian Constitution, the State Act prescribed a 44 hour week, and provided, where a common-wealth award restricted working hours to a number exceeding 44, that the ordinary hours should not exceed 44, and that overtime should be paid for the excess. The commonwealth award prescribed a week of 48 hours and further provided that any employee not attending for duty should lose his pay for the actual time of such non-attendance and it was held that the State law was inconsistent with the award and therefore prevailed. Referring to what was laid down as the "obedience" test in "Australian Boot Trade Employees Federation v. Whybrow & Co.". 10 W L R 266, Knox, C. H., and Graven Duffy, J. observed as follows:

"It appears to us that the test is not sufficient or even appropriate in every case. Two enactments may be inconsistent although obedience to each of them may be possible without disobeying either. Statutes may do more than impose duties; they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other, even though the right be one which may be waived or abandoned without disobeying the statute which conferred it."

Issack, J., in the same case after referring to the "obedience" test stated:

"The inconsistency is demonstrated, not by comparison of detailed provisions, but by the mere existence of the two sets of provisions. Where the wholesale inconsistency does not occur, but the field is partly open then it is necessary to inquire further and possibly to examine and contrast particular provisions. If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful the two are to that extent inconsistent. It is plain that it may be quite possible to obey both simply by not doing what is declared by either to be unlawful and yet there is palpable inconsistency."

In "Ex parte Mclean", 43 C L R 472 , where there was conflict between the law of the state and that of the Commonwealth Section 109 was applied and it was held that the state law was invalid. Dixon, J., observed that:

"The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct of matter to

which its attention is directed. When a Federal statute discloses such intention, it is inconsistent with it for the law of the State to govern the same conduct or matter."

In "The Union Steamship Co. of New Zealand Limited v. The Commonwealth", 36 CW L R 130, the question of repugnancy was considered as to the provisions of the Navigation Act of 1912 to 1920 with the Merchant Shipping Acts 1894 to 1906 and as to what extent the provisions of the Colonial Law were repugnant to the provisions of the Parliamentary Act.

Issack, J., at page 147 observes as follows:

"The only real danger of error as to this question is in the manner of applying the test of repugnancy. What is to be avoided in the present case is meticulous inquiry whether, if all the conditions in both sets of enactments were aggregated into one agreement, they could be humanly observed or, if applied to the one discharge, the parties could comply with all. That is not the present problem. One approximating it in principle might arise in relation to other Acts or even other parts of these Acts. What we have to remember is a much broader proposition when the real nature and import of the legislation is borne in mind."

The learned Judge further states "at page 148:

"For the purpose of detecting repugnancy, if there be any, the attention of the Court is not to be concentrated on mere minute verbal expressions or individual differences of requirements."

When considering the meaning of repugnancy the learned Judge states that his understanding of the use of the word "repugnant" as used in the Colonial Laws Validity Act was to reaffirm his conclusion that repugnancy was equivalent to inconsistency or contrariety. We have therefore to consider having before us some of the principles laid down, how far the provisions of Act XXIII of 1949 are inconsistent, in the sense of repugnancy or conflict, with the provisions of Part III of the Constitution.

58. What was not there prior to the Constitution by way of recognition of the fundamental rights of citizens has been incorporated in the Constitution giving to the citizens certain rights, which did not receive statutory recognition prior to the Constitution, one of such rights being right of personal liberty and the provisions of Part III also lay down to what extent that personal liberty could be curtailed and how far and to what extent the right granted to the individual under the Constitution could be transgressed. That liberty could be interfered with by law providing for preventive detention as is laid down in the same part and it is provided that such interference by way of preventive detention should be under certain specified conditions. The conditions provide sufficient safeguards against any arbitrary exercise of the power of detention, which may be in accordance with any law enacted for the purpose. The fundamental safeguards against such reckless or arbitrary exercise by the executive of the powers of detention are

mainly in the Constitution of Advisory Board with special qualifications and their opinion being binding on the State authorising detention, the maximum period that has to be fixed by the Parliament for which period alone the detention should be made and thirdly, that even in exceptional cases under particular circumstances and in certain class or classes of cases the Parliament alone has got the power to authorise detention without the opinion of the Advisory Board, but, in any event, not exceeding the maximum period provided by the Parliament for the purpose. However sacred the fundamental right of personal liberty may be to a citizen, the larger interests of the State and the community being more paramount the framers of the Constitution envisaged a situation where, in the interests of the maintenance of public order and safety, a citizen's personal liberty may have to be curtailed and consequently introduced Article 22(4) giving constitutional recognition to detain a person if the interests of the State required. But the authors of the Constitution were not unmindful of the possible irresponsible and reckless exercise of such power and thereby provided the safeguards referred to in the Constitution itself.

59. But if we see the provisions of Madras Act XXIII of 1949, the three essential safeguards referred to are not found. The detention could be for any length of time by virtue of the period of six months being extended from time to time u/s 4 (2) of the Act. Whereas Advisory Boards with special qualifications and which are independent bodies are expected to be constituted under the Constitution, the Advisory Councils under the Act in question may be formed at the sweet will of the Government and the members constituting the Council may possess any qualifications or no qualifications at all, and while the opinion of the Board is binding on the authority detaining in the one case, the Advisory Council's opinion under Act XXIII of 1949 is only advisory since the Provincial Government "may" confirm, modify or cancel the order after considering the report of the Advisory Council but is not bound to do so. While the Parliament is enjoined to fix a maximum period, such maximum period of detention being applicable to any case of detention, the Madras Act XXIII of 1949 provides no such period. If the provisions of Madras Act XXIII of 1949 relating to preventive detention are read as a whole, a person can be detained for any length of time, the only condition being that such detention, after the expiry of the date of confirmation, should be reviewed for every six months. The result is that the Madras Act XXIII of 1949 contemplates and empowers the Government to detain a person indefinitely for any length of time. I am unable to see how it can be said that there is no inconsistency or repugnancy in the Madras Act XXIII of 1949 with that of the fundamental right of the personal liberty and the definite limitations made on that liberty by specific provisions defining and limiting such liberty by preventive detention under reasonable conditions. When the real nature and import of what is laid down under Part III of the Constitution is carefully considered, it cannot be ignored that the citizen was given fundamental right of personal liberty, unhampered or unchecked except according to law and that right of personal liberty could be fettered and only to a limited extent, in so far as preventive

detention is concerned, for a definite period, under sufficient safeguards. That valuable right is completely wiped out if Madras Act XXIII of 1949 could be said to remain in the Statute Book, in the sense it completely and effectively erases the provision relating to declaration of the fundamental right of liberty in Part III of the Constitution by authorising indefinite detention, denying what was conceded and recognised under the Constitution. It cannot therefore be said that the provisions of this Act could be said to coexist, without offending the provisions of Part III of the Constitution.

60. It is however contended by the learned Advocate-General that the entire enactment could not be said to be inconsistent with the provisions of Part III of the Constitution, that is, so far as the consistent provisions are concerned, which are not repugnant to the provisions of Part III of the Constitution, they could be given effect to and that under Article XXIII of 1949 there can be a preventive detention and if that preventive detention is directed for a period of three months, such detention could be perfectly legal and in that sense that portion of Act XXIII of 1949 relating to preventive detention, namely, Section 2, Clause (1), can remain in the statute book and be considered as law in force not inconsistent with the provisions of Part III of the Constitution. It is no doubt correct to contend that if the entire provisions relating to preventive detention in Act XXIII of 1949 do not conflict with the provisions of Part III of the Constitution, such of the provisions as are consistent and do not take away the fundamental rights as are declared in Part III, can certainly be treated as not being inconsistent within the meaning of Article 13, Clause (1); but it must be shown that those provisions could stand by themselves as separate entities capable of enforcement by the authorities vested with the powers. The following passage from Cooley's "Constitutional Limitations" 7th Edition at page 246 may usefully be quoted:

"It will sometimes be found that an act of the legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the Constitution, or in regard to which, the necessary conditions have been observed, must be treated as a nullity. Where the other parts of the statute must also be adjudged void because of the association must depend upon a consideration to the subject of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the Constitution or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State--The difficulty is in determining whether the good or bad parts of the statute are capable of being separated within the meaning of this rule."

The whole scheme of Madras Act XXIII of 1949 appears to me to provide and

vest power in the Provincial Government to detain a person for such period as it may think fit, provided it is of opinion that that person is acting or about to act or likely to act in any manner prejudicial to the public safety or maintenance of public order; that period may however be extended every six months, the cause of detention being examined every six months, by an advisory council appointed by the Provincial Government, whose opinion would however not be binding on it. It is therefore possible to sever from the Act any provision which could stand independently which would not take away the right of personal liberty given to the subject under the Constitution? The three relevant sections which relate to preventive detention in Act XXIII of 1949 are Sections 2, 3, and 4. Sections 3 and 4 are obviously inconsistent with the provisions of Part III of the Constitution. When the law relating to preventive detention contemplated in Article 22(4) of the Constitution is considered, there could be no valid detention for a period exceeding three months and the opinion of the advisory body is binding on the State and there is no provision for examining the case every six months and extending the duration to any length of time by a period of six months on every occasion as provided by Clauses (3) and (4). The advisory council's opinion may or may not be accepted by the Provincial Government and there is also the risk of the detention being for a longer period than three months before the report of advisory council could be confirmed by the Provincial Government and the period of six months provided by Section 4 commences only from the date of the confirmation by the Provincial Government after considering the report of the advisory council. The only section left is Section 2. Section 2 (1) states:

"The Provincial Government, if satisfied with respect to any particular person that he is acting or about to act or likely to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order:

(a) directing that he be detained."

The Provincial Government would therefore be entitled to detain a person. It may be for a period less than three months or for a period longer than three months and for any length of time. It is however contended that the fundamental right which a citizen is entitled to is that he shall not be deprived of personal liberty except for a period of three months by virtue of Articles 21 and 22(4) of the Constitution. The fundamental right is that a person shall not be deprived of his liberty, but the limitation put upon that liberty by way of preventive detention is restricted to a period not exceeding three months. From a reading of Article 22(4), it appears that a person could be detained for a period not exceeding three months under any law which may provide for preventive detention without the opinion of the advisory board the Article, viz., 22(4) laying down, that for a detention for a longer period than three months the Advisory Board's opinion shall be obtained. It is said that if a person is detained under a law providing for preventive detention for a period less than three months from the

commencement of the Constitution, that would not, in substance, transgress the provisions of the Constitution giving the right of personal liberty to the citizen. That is no doubt the logical result of reading Article 21 and Article 22(4) together. But what we have to consider is not whether or not the State is empowered to detain a person for a period of three months if certain emergencies or circumstances exist but to see and find out whether the law which was in force at the commencement of the Constitution or any particular provisions of that law, which was a law in force, was inconsistent with the provisions of Part III of the Constitution. Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the provisions in the Act, but by nature of the provisions themselves. If a particular provision in the Act, if enforced in strict accordance with the letter of the law as laid down would contravene the provisions of Part III of the Constitution, then certainly it could not be said that it is consistent, but can only be repugnant. It is the provisions in the Act that must be looked into and not the manner in which the power in pursuance of the provision is exercised.

61. The learned Advocate-General stated that by virtue of Articles 21 and 22(4) any executive authority could not issue an order of detention allowing a person to remain in detention for a period of more than three months from the commencement of the Constitution, and that the executive authority could be trusted to exercise its powers in accordance with the provisions of the Constitution. It may be, in actual performance the course of conduct suggested by the Advocate-General may be followed. There again we are confronted with the position that when there are provisions in the Act which are capable of enforcement by an executive authority in contravention of the rights that are conceded to the citizen under Part III, in such circumstances could it be said that these provisions are not repugnant or inconsistent. Nothing can prevent the executive authority if Section 2 (1) (a) is left on the statute book from detaining a person for any length of time because the section would read "the provincial government may make an order directing that a person be detained if it is satisfied that it is necessary in the interests of public safety or maintenance of public order." It will be too much to expect the executive authority invested with the exercise of the powers in pursuance of a particular enactment, like the present one, Madras Act XXIII of 1949, to examine the provisions and find out what provisions are inconsistent with the provisions of the Constitution or with any law and then decide as to what order he should issue. It would be placing undue burden on the executive authority and confronting the administrative officers with the additional work of trying to interpret the law and the Constitution. In the history of the growth of the American Constitution such interpretation by administrative officers, in cases of necessity, where their constitutional powers are not clear, as under the American constitution, have been accepted by their remaining unchallenged for a long time, and such administrative rulings have grown in the development of constitutional law of the United States. It is not however necessary to invest the executive authorities of

this infant Republic with such responsibilities, which are not part of their legitimate duties but that of the legislature.

62. On a careful scrutiny of the provisions of Sections 2, 3, 4 and 15 of Madras Act XXIII of 1949, it appears to me that they are so mutually connected and dependant upon each other that one could not be severed from another so as to make any one of the provisions independent by itself, capable of separate enforcement without offending the provisions of the constitution. They are so interrelated being a series of acts and events and form part of a scheme of legislation, complete in itself, so far as preventive detention is concerned and enacted at a time when the Constitution was not in force. It is, therefore, incomprehensible how any particular provision of this Act could be separated from the other. On a critical examination of the provisions of Act XXIII of 1949 and the provisions of Articles 21 and 22(4) of the Constitution there can be no hesitation in coming to the conclusion that Madras Act XXIII, of 1949, which was a law in force at the commencement of the Constitution is inconsistent with the provisions of Part III of the Constitution. Further, the provisions of this Act are not only inconsistent, but amount to a virtual negation of the fundamental rights which are, for the first time, granted to the Indian citizen under the new Constitution, and the citizens cannot be totally deprived of such right of personal liberty he possesses, though circumscribed by certain definite limitations, which would, however, be the result if Act XXIII of 1949 is held to be valid. For these reasons I hold that the provisions relating to preventive detention in Madras Act XXIII of 1949 are void.

63. In the view that the Madras Act XXIII of 1949 is found to be void it follows that the detention made under that Act could not be said to be legal, in any event after 26-1-1950. But, however, reliance is placed on the Order of the President of the Republic dated 26-1-1950, which is as follows:

"In exercise of the powers conferred by Sub-clauses (a) and (b) of Clause (7) of Article 22 of the Constitution of India read with Article 373 thereof and of all other powers enabling him in that behalf, the President is pleased to make the following order, namely:

(1) This order may be called the Preventive Detention (Extension of Duration) Order, 1950.

(2) It shall come into force at once.

2. Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as "the Constitution") any person was, immediately, before such commencement, or is at any time thereafter, in detention in pursuance of an order made under such law, such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4) of Article 22 of the Constitution.

3. The maximum period for which any such person, as is referred to in paragraph 2, may be detained, shall, in the case of a person in detention immediately before the commencement, of the Constitution, be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement, be three months from the date of such order.

RAJENDRA PRASAD, President."

It is contended that this order would legalise the detention for a period of three months from 26-1-1950, even if it is void initially. This order is purported to have been issued by virtue of the powers conferred on the President of the Republic under Article 373 of the Constitution read with Article 22(7)(a), and (b) of the Constitution. Article 373 is as follows:

"Until provision is made by Parliament under Clause (7) of Article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in Clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President."

The President comes in here instead of the Parliament by virtue of the transitional provisions in the Constitution. Whatever the Parliament is entitled to do the President is empowered to exercise and that power is given only for a period of one year from the commencement of the Constitution. The Parliament has the power under Article 22(7), to prescribe the circumstances and the class or classes of cases in which, a person may be detained, for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4); fix the maximum period for which any person may in any class or classes be detained under any law providing for preventive detention; and lay down the procedure to be followed by an Advisory Board in an inquiry under Sub-clause (a) of Clause (4) of Article 22. The net result of the President's Order is that any person who was in detention before the commencement of the Constitution or that may be detained at any time thereafter in pursuance of an order made under any law providing for preventive detention in force, may be detained for a period longer than three months without obtaining the opinion of the Advisory Board and such maximum period in the case of persons who were in detention immediately before the commencement is three months from the commencement and in regard to others detained in pursuance of the order made after the commencement of the Constitution being three months from the date of the order. The question, however, that arises for decision in this case is, whether under Article 22(7) the Parliament has any power at all to prescribe the detention for a period longer than three months and fix a maximum period in respect of persons detained under a law in force at the commencement of the Constitution. That would depend upon what is to be understood by the words "under any law" in Clause (7), whether that could include a law in force at the commencement, or

refer only to a prospective law enacted in pursuance of Article 22(4). In Part III of the Constitution, legislation is referred to under three categories, laws in force, laws, and existing laws and the words employed in Article 22(7) are not "a law in force" or "an existing law" but only "any law." "Prima facie", it could not therefore refer to "a law in force" or "existing law" but to "a law." Article 22, if read carefully, only indicates that it was intended to apply to a prospective legislation. In so far as preventive detention is concerned it lays down the fundamental elements of safeguards which should govern, any law or legislation relating to preventive detention. Under Article 22(4), it is open to the Parliament or a State legislature, since preventive detention is in the concurrent list, to enact a law providing for preventive detention, but in any such law the safeguard of the opinion of the Advisory Board with the special qualifications mentioned in Article 22(4) to enable the detention to exceed the period of three months is made clear, and if such a law passed in those terms exists, the State however is empowered to dispense with the Advisory Board's opinion and detain a person for a period longer than three months in certain, circumstances and in specified class or classes of persons or detain a person even after the Advisory Board's opinion in favour of detention for any length of time, such length of time being particularly within the province of the Parliament to, decide. Though the language of Article 22(7) reads that the Parliament "may by law prescribe", it is clear that the Parliament shall necessarily prescribe, though not the circumstances and class or class of persons who may be detained for a period longer than three months without the Advisory Board's opinion, at any rate, the maximum period of detention to enable the State to restrict the period of detention to the maximum period that may be so fixed by the Parliament. The prescription by law made by the Parliament presupposes the existence of a law under Article 22(4) providing, for preventive detention. It is only then that the stipulation of maximum period would be required.

64. However it may be contended in so far as Article 22(7)(a) is concerned the Parliament is empowered under extraordinary conditions to prescribe by law that under certain circumstances and in particular class or classes of cases a person may be detained for a period longer than three months and that therefore the President is authorised under Article 373 to issue an order, as law in this part includes an order, an ordinance, etc., directing that all those who are detained under any law in force at the commencement may be detained for a maximum period of three months the whole import of Article 22(7)(a) is the dispensing with the Advisory Board's opinion required under the provisions of Sub-clause (a) of Clause (4). Such, a prescription by the Parliament under Article 22(7)(a) could only apply to a detention made in pursuance of any law under Article 22(4) and certainly cannot refer to any law in force since under the laws in force there is no condition as such to make a detention beyond three months being subject to the binding opinion of the Advisory Board. The Parliament's power, therefore, under Art 22(7)(a) and (b) could only relate to detentions made under any law enacted in pursuance and in conformity with the provisions of Article 22(4). The

Parliament cannot therefore prescribe what it is empowered to do under Article 22(7)(a) and (b) in respect of the detentions made under a law in force prior to the commencement of the Constitution.

65. It is not as if the authors of the Constitution could not have been unaware, when they were particularly considering the subject of preventive detention, for which they have made appropriate provisions under Article 22(4) in the Constitution, of the large number of detentions made in pursuance of the Public Maintenance Orders of the several States. It cannot be stated that there is no other provisions in the Constitution which could be employed to validate any invalid enactments, like the Madras Act XXIII of 1949, if it is considered to be wholly or partially invalid by reason of its being inconsistent with, or repugnant to, the provisions of the Constitution. Article 372, Clause (1) continues in force all the laws in force in the territory of India. Clause (2) of Article 372 authorises the President to make an order for the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution. The President may, by an order, make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient. Article 372(2) further states that any such adaptation or modification shall not be questioned in any Court of law. Madras Act XXIII of 1949 can come within the Explanation (1) of Article 372 as a law in force. Whatever might be the effect of an order made by the President in pursuance of Article 372(2) by modifying Madras Act XXIII of 1949, such result could not however be achieved by the President resorting to Article 373, as has been done now.

66. It is also further contended that even assuming that the President had the power under Article 373, read with Article 22(7), (a) and (b), to empower the detention of a person, detained prior to the commencement of the Constitution, for a period of three months from that date, the order itself is without jurisdiction as the President has exceeded his powers under Clause 7 (a). What Clause (7) (a) contemplates is that it is open to the Parliament, and now the President, to lay down or declare the circumstances and the class or classes of persons who may be liable to be detained for a period exceeding three months without the Advisory Board's opinion. What the order has done in this case is that no circumstances or class or classes of cases have been specified with the result that all the persons who are now being detained have been directed to be detained for a period of three months. It is not open to the Parliament, and equally to the President, to say that all persons who are detained under any preventive law enacted even under Article 22(4) could be detained for the maximum period without the Advisory Board's opinion. The Parliament and the President must lay down specifically the particular circumstances and specify the class or classes of persons who alone could be detained for a longer period than three months. Clause 7 (a) was enacted apparently to enable the Government to detain a person in certain extraordinary and emergent circumstances arising in relation to the defence of the country or the security of the State; such

circumstances and classes of persons should be defined and clarified. In this view also the President's order cannot be legally sustained.

67. The order of the President, though promulgated with the object of continuing the detention of all persons detained under the Maintenance Orders and Acts of the several States prior to the commencement of the Constitution, has failed to achieve its purpose. The order has proceeded on a clear misconception and totally erroneous view of the powers of the President under the Constitution in regard to preventive detention and the order is therefore void. The detention, of the petitioner which is illegal for other reasons does not however become validated by the President's order of 26-1-1950.

(NOTE: At the close of delivery of this judgment the counsel for the petitioner submitted that in view of the circumstance that the application has been practically allowed, the State should be directed to pay the costs of this application. The decision on this submission was given on 4-4-1950 and is reported, in In Re: M.R. Venkataraman,