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(1978) 12 SC CK 0001

Supreme Court of India

Case No: Special Reference No. 1 Of 1978

In Re: The Special Courts Bill, 1978 — APPELLANT

Vs

RESPONDENT

Date of Decision: Dec. 1, 1978

Acts Referred:

- Constitution of India, 1950 - Article 133, 134, 138, 139, 14
- Criminal Procedure Code, 1973 (CrPC) - Section 11(2), 177, 189, 2(4), 4
- Penal Code, 1860 (IPC) - Section 116, 120

Citation: AIR 1979 SC 478 : (1979) 1 SCC 380 : (1979) 2 SCR 476

Hon'ble Judges: Y. V. Chandrachud, C.J; V. R. Krishna Iyer, J; S. Murtaza Fazal Ali, J; R. S. Sarkaria, J; P. N. Shingal, J; P. N. Bhagwati, J; N. L. Untwalia, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Y.V. Chandrachud, C.J.

On August 1, 1978 the President of India made a reference to this Court under Article 143(1) of the Constitution for consideration of the question whether the "Special Courts Bill, 1978" or any of its provisions, if enacted, would be constitutionally invalid. The full text of the reference is as follows:

WHEREAS certain Commissions of Inquiry appointed by the Central Government under the Commissions of Inquiry Act, 1952 (Central Act 60 of 1952) have submitted reports which indicate that there is reason to believe that various offences have been committed by persons holding high political and public offices during the period of operation of the Proclamation of Emergency dated the 25th June, 1975, and the period immediately preceding that Proclamation;

AND WHEREAS investigations into such offences are being made in accordance with law and are likely to be completed soon;

AND WHEREAS suggestions have been made that the persons in respect of whom the investigations reveal that a prima facie case has been made out should be tried speedily in Special Courts constituted for that purpose;

AND WHEREAS a proposal has been made that legislation should be enacted for the creation of an adequate number of Special Courts for the speedy trial of such offences on the lines of the Bill, a copy whereof is annexed hereto (hereinafter referred to as the "Bill");

AND WHEREAS doubts have been expressed with regard to the constitutional validity of the Bill and its provisions;

AND WHEREAS there is likelihood of the Constitutional validity of the provisions of the Bill, if enacted, and any action taken thereunder, being challenged in courts of law involving protracted and avoidable litigation;

AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the question of law hereinafter set out is likely to arise and is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

NOW, THEREFORE, in exercise of the powers conferred upon me by Clause (1) of Article 143 of the Constitution, I, Neelam Sanjiva Reddy, President of India, hereby refer the following question to the Supreme Court of India for consideration and report thereon, namely:

Question

(1) Whether the Bill or any of the provisions thereof, if enacted, would be constitutionally invalid ?

New Delhi,

Dated: 1st day of August, 1978

PRESIDENT OF INDIA

Annexed to the order of reference is a copy of the Bill which runs thus:

THE SPECIAL COURTS BILL, 1978
A
BILL

to provide for the trial of a certain class of offences

WHEREAS Commissions of Enquiry appointed under the Commissions of Enquiry Act, 1952 have rendered reports disclosing the existence of prima facie evidence of offences committed by persons who have held high public or political offices in the country and others connected with the commission of such offences during the operation of the Proclamation of Emergency dated 25th June, 1975, and during the

preceding period commencing 27th February, 1975 when it became apparent that offenders were being screened by those whose duty it was to bring them to book;

AND WHEREAS investigations conducted by the Government through its agencies have also disclosed similar offences committed during the period aforesaid;

AND WHEREAS the offences referred to in the recitals aforesaid were committed or continued during the operation of the Promulgation of Emergency dated 25th June, 1975, during which a grave emergency was clamped on the whole country, civil liberties were withdrawn to a great extent, important fundamental rights of the people were suspended, strict censorship on the press was placed and judicial powers were crippled to a large extent;

AND WHEREAS it is the constitutional, legal and moral obligation of the State to prosecute persons involved in the said offences;

AND WHEREAS the ordinary criminal courts due to congestion of work and other reasons cannot reasonably be expected to bring those prosecutions to a speedy termination;

AND WHEREAS it is imperative for the functioning of parliamentary democracy and the institutions created by or under the Constitution of India that the commission of offences referred to in the recitals aforesaid should be judicially determined with the utmost dispatch;

AND WHEREAS it is necessary for the said purpose to create additional courts presided over by a sitting judge of a High Court in India or a person who has held office as a judge of a High Court in India;

AND WHEREAS it is expedient to make some procedural'' changes whereby avoidable delay in the final determination of the guilt or innocence of the persons to be tried is eliminated without interfering with the right to a fair trial;

BE it enacted by Parliament in the Twenty-ninth year of the Republic of India as follows:

1. (1) This Act may be called the Special Courts Act, 1978.

(2) It shall come into force at once.

2. The Central Government shall by notification create adequate number of courts to be called Special Courts.

3. A Special Court shall take cognisance of or try such cases as are instituted before it or transferred to it as hereinafter provided.

4. (1) If the Central Government is of the opinion that there is prima facie evidence of the commission of an offence alleged to have been committed during the period mentioned in the preamble by a person who held high public or political office in

India and that in accordance with the guidelines contained in the Preamble hereto the said offence ought to be dealt with under the Act, the Central Government shall make a declaration to that effect in every case in which it is of the aforesaid opinion.

(2) Such declaration shall not be called in question in any court.

5. On such declaration being made any prosecution in respect of such offence shall be instituted only in a Special Court designated by the Central Government and any prosecution in respect of such offence pending in any court in India shall stand transferred to a Special Court designated by the Central Government.

6. If at the date of the declaration in respect of any offence an appeal or revision against any judgment or order in a prosecution in respect of such offence, whether pending or disposed of, is itself pending in any court of appeal or revision, the same shall stand transferred for disposal to the Supreme. Court of India.

7. A Special Court shall be presided over by a sitting judge of a High Court in India or a person who has held office as a judge of a High Court in India and nominated by the Central Government in consultation with the Chief Justice of India.

8. A Special Court shall have jurisdiction to try any person concerned in the offence in respect of which a declaration is made u/s 4 either as principal, conspirator or abettor and all other offences and accused persons as can be jointly tried therewith at one trial in accordance with the CrPC, 1973.

9. A Special Court shall in the trial of such cases follow the procedure prescribed by the said Code for the trial of warrant cases before a Magistrate and save as otherwise provided in this Act be governed by the said Code.

10. (1) Notwithstanding anything in the said Code, an appeal shall lie as of right from any judgment or order of a Special Court to the Supreme Court of India both on fact and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any court from any judgment or order of a Special Court.

2. After receipt of the reference on August 1, a notice was issued to the Attorney General on the 2nd to appear before the Court on the 4th for taking directions in the matter. On the 4th August, upon hearing the Attorney General the Court directed, inter alia that: (1) Notice of the reference be given to the Union of India and the Advocates General of the States requiring them to submit their written briefs before September 4, 1978; (2) Notices be published in five newspapers at Bombay, New Dehli, Calcutta, Madras and Bangalore inviting all persons likely to be affected by the passage of the Bill to apply for permission to appear or intervene in the proceedings; (3) Interveners will be permitted to submit their written arguments but will not be entitled to be heard orally unless the Court considers it fit and proper to do so; (4) Parties concerned shall appear before the Court on August 21 for taking

further directions; and (5) that the hearing of the reference will commence on September 11, 1978 subject to the reasonable convenience of all concerned.

3. Notices were issued by the Registry of this Court on the 4th August itself to the Union of India and Advocates General of 22 States. The newspaper notices were published soon thereafter. By August 21, a large number of applications were received by the Court asking that the applicants should either be impleaded to the, reference as parties or in the alternative that they should be allowed to intervene in the proceedings. On August 21, the Court passed an order after hearing all the interested parties that it did not consider it necessary to implead anyone as a formal party to the reference. The Court, however, granted permission to 18 persons and 2 State Governments to intervene in the proceedings. Those eighteen are: Sarvashree V.C. Shukla, Gyani Zail Singh, Dhirendra Brahmchari, Bansi Lal, Harideo Joshi, Pranab Mukherjee, R.K. Dhawan, Jagmohan, P.S. Bhinder, Shiv Kumar Aggarwal, Surinder Singh, Dev Raj Urs, Narain Dutt Tiwari, Jagannath Misra, Ram Lal, Ram Jethmalani, C.M. Stephen and Kamlapati Tripathi. The two State Governments which were allowed to intervene are the State of Karnataka and the State of Andhra Pradesh. The applications of all others for being impleaded as parties or for intervention were rejected.

4. Written briefs were filed by the Union of India, the Advocates General, the two State Governments and the interventionists. The State of Jammu and Kashmir complained on the date of hearing that its Advocate General had taken a stand in his written brief which did not reflect the view of the State Government on the question referred to the Court by the President. Thereupon, the State of Jammu and Kashmir was permitted to file its written brief, such as it was advised, and through such advocate as it desired. The State Government filed its brief through another advocate.

5. At the commencement of the hearing of the reference on September 19, counsel appearing for some of the interventionists as also some of the Advocates General raised a preliminary objection to the maintainability of the reference contending that for various reasons which were mentioned by them in their written briefs, the reference was incompetent and invalid and therefore the Court should refuse to answer the question submitted by the President for its consideration and report. As the preliminary objection required for its appreciation and determination an understanding of the case of the Union of India, we postponed the consideration of that objection until after the arguments in support of the reference were over. Accordingly we first heard the learned Attorney General, the learned Solicitor General who appeared on behalf of the Union of India, the Advocates General who supported the reference and Shri Ram Jethmalani, one of the interventionists on all conceivable aspects of the reference. Thereafter we heard the other side on all its contentions including the preliminary objection that the reference was not maintainable. We are indebted to the learned Counsel on both sides for the able

assistance rendered by them through their written briefs and oral arguments. The written briefs facilitated a clearer perception and understanding of their respective points of view and enabled counsel, without much persuasion, to reduce their oral submissions to reasonable proportions.

6. We will dispose of the preliminary objection before taking up the other points for consideration. The preliminary objection to the maintainability of the reference is founded on a variety of reasons and circumstances which may be stated as follows:

7. Shri A.K. Sen who appears for the State of Karnataka and for Shri Dhirendra Brahmchari contends that we will be well-advised to refuse to answer the reference because it is of a hypothetical and speculative character and is also vague. The reference was made by the President on August 1, 1978 which was even before the Special Courts Bill was introduced in the Lok Sabha by a Private Member, Shri Ram Jethmalani,, on August 4, 1978. The Bill may or may not become a law and even if it is passed by both the Houses of legislature, its provisions may undergo fundamental changes during the parliamentary debate. As regards vagueness, Shri Sen contends that the President has posed a broad and omnibus question as to whether the Bill, if enacted, will be constitutionally invalid without particularising the reasons or the grounds on which it may become invalid. A law can be constitutionally invalid either for want of legislative competence or for the reason that it violates any of the fundamental rights conferred by the Constitution. Not only does the reference, according to the learned Counsel, not specify which of these two reasons may invalidate the bill if it becomes an Act, but the reference does not even mention the fundamental right or rights which are likely to be violated if the Bill is passed by the Parliament. Reliance was placed in support of these contentions on the judgment of the Privy Council in Attorney General for the Dominion of Canada v. Attorneys General for the Provinces of Ontario, Quebec and Nova Scotia [1898] A.C. 700. Attorney General for Ontario v. The Hamilton Street Railway Company and Ors. [1903] A.C. 524. Attorney General for the Province of Alberta v. Attorney General for the Dominion of Canada [1915] A.C. 363. In re The Regulation and Control of Aeronautics in Canada [1932] A.C. 54 and Attorney General for Ontario and Ors. v. Attorney General for Canada and Ors. [1947] A.C. 127. Counsel also relied on the decision of the Federal Court in the Estate Duty Bill [1944] F.C.R. 317 case and on the decisions of this Court in the references relating to 281270 ,. 272386 , , 280738 , the U.P. Legislative Assembly [1965] 1 S.C.R. 413 and the 278960 , as showing that whenever a reference is made by the President under Article 143(1) of the Constitution, a specific question or questions are referred for the opinion of this Court. Our attention was finally drawn to a judgment of the Canadian Supreme Court [1938] C.L.R 100 (S.C) in a reference made by the Governor General in Council to the Supreme Court of Canada u/s 55 of the Supreme Court Act, 1927 regarding the validity of three Bills passed by the Legislative Assembly of the Province of Alberta which were reserved for signification of the Governor-General''s pleasure.

8. The learned Advocate General for the State of Karnataka, while adopting Shri Sen''s arguments on the preliminary objection, added that we should refuse to answer the reference because the opinion of the Supreme Court was being sought as if it were a Joint Select Committee of the Parliament, a position which it is neither equipped to fill nor one which it ought to acquiesce in. It was contended that Article 143(1), in sharp contrast with Article 143(2), uses the word "may" which leaves a wide margin of discretion to this Court whether or not to answer a reference.

9. Shri Mridul who appears for Shri V.C. Shukla objected to the maintainability of the reference on the additional ground that whereas all references made by the President to the Supreme Court in the past were of institutional significance, the present one was an isolated and unique case of a reference of individual significance. Learned counsel contended that the vice of the reference lies in the President seeking the opinion of this Court on a purely political question which ought to restrain the Court from expressing its opinion.

10. Shri Frank Anthony who appears for Shri Kamlapati Tripathi leader of the opposition in the Rajya Sabha opened his argument by contending that there is no such thing as the Special Courts Bill in existence and therefore the reference is incompetent. He said in all solemnity that if anything were to happen to the mover of the Bill in terms of his physical existence the Bill will lapse and then there will be nothing for this Court to answer. It must, however, be stated in fairness to Shri Anthony that he expressed the hope that the mover of the Bill may live for a hundred years. Learned counsel drew our attention to Rule 110 of the Rules of Procedure and Conduct of Business in Lok Sabha relating to withdrawal of Bills which shows that a member in-charge of a Bill can, normally, withdraw the Bill whenever he desires to do so. Counsel expostulated that the Bill which was moved by a "public prosecutor" was influenced by oblique political motives. We have no power to "lift" the Bill from the Lok Sabha said the counsel, and consider its constitutional validity.

11. Shri M.C. Bhandare who appears for Shri Bansi Lal and others contended that we should refuse to answer the reference because the expediency which prevailed upon the President to make the reference is political and not constitutional. Counsel further urged that Article 143(1) cannot be resorted to in a manner which will lead to the virtual abrogation of Article 32 of the constitution. Counsel drew copiously on an article by Felix Frankfurter who later became a cele```brated Judge of the United States Supreme Court, which appeared in the Harvard Law Review. The author says therein that it was extremely dangerous to encourage extension of the device of advisory opinion to constitutional controversies, that the Supreme Court of America was not a House of Lords with revisory powers over legislation, that the legislature cannot be deprived of its creative function and that if the Supreme Court were called upon tender its advisory opinion on the validity of laws, it will lead to weakening of legislative and popular responsibility. After extracting a passage from James Bradley

Thayer''s ''Life of Marshall'' to the effect that references to courts dwarf the political capacity of the people and deaden its sense of moral responsibility, the learned author concludes his article thus:

It must be remembered that advisory opinions are no merely advisory opinions. They are ghosts that slay.

12. Shri Shiv Shankar who appears for the State of Andhra Pradesh and for Shri Pranab Mukherjee founded his preliminary objection on the ground that since the Parliament is seized of the Bill we should not answer the reference.

13. Shri Bobade who appears for Shri C.M. Stephen, leader of the opposition in the Lok Sabha, and for Shri Jagannath Misra contended that Article 105(3) contains a constitutional bar against our entertaining the reference since it is the power and privilege of the Parliament and not of this Court to decide whether the Bill should become an Act and whether the provisions of the Bill are unconstitutional.

14. Shri O.P. Sharma who appears for Shri Zail Singh and for Shri Harideo Joshi made a similar argument by contending that notwithstanding our opinion, the Parliament would be within its power in passing the Bill after a due discussion of its provisions and therefore we ought not to answer the reference.

15. Shri Shiv Pujan Singh appearing on behalf of Shri Jagmohan and Shri P.S. Blunder contended that the reference is incompetent because it violates Articles 107(1), 108 and 111 of the Constitution. His argument is that if we were to answer the reference, the powers and privileges of the Parliament and indeed of the President himself which are conferred by the aforesaid provisions of the Constitution shall have been curtailed or encroached upon.

16. Whenever interveners having a common interest in the subject matter of a proceeding appear through different counsel, there is, unavoidably, a certain amount of overlapping in their arguments howsoever each counsel may begin with the assurance, and quite genuinely, that he will not cover the same ground once over again. Striking a new path when so many who have preceded have already walked on the same field is easier assured than achieved though, we cannot deny that counsel before us strove to their utmost to keep to the time schedule and to throw some new light on the question whether the reference is valid and whether we should or should not answer it.

17. Analysing the various points of view converging on the preliminary objection, the following contentions emerge for our consideration: (1) That the reference is hypothetical and speculative in character; (2) that the reference is vague, general and omnibus; (3) that since the Parliament is seized of the Bill, it is its exclusive function to decide upon the constitutionality of the Bill and if we withdraw that question for our consideration and report, we will be encroaching upon the functions and privileges of the Parliament; (4) that the reference, if entertained, will

virtually supplant the beneficient and salutary provisions of Article 32 of the Constitution; (5) It is futile for us to consider the constitutionality of the Bill because whatever may be our view, it will be open to the Parliament to discuss the Bill and to pass or not to pass it, with or without amendment; (6) The reference raises a purely political question which we should refrain from answering; and (7) Considering the repercussions of the exercise of advisory jurisdiction, both expediency and propriety demand that we should return the reference unanswered. We will consider these contentions seriatim.

18. Article 143 of the Constitution under Clause (1) of which the President has made this reference to the Supreme Court reads as follows:

143(1) If at any time it appears to the President that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in the proviso to Article 131 refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

19. Article 143(1) is couched in broad terms which provide that any question of law or fact may be referred by the President for the consideration of the Supreme Court if it appears to him that such a question has arisen or is likely to arise and if the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Court upon it. Though questions of fact have not been referred to this Court in any of the six references made under Article 143(1), that article empowers the President to make a reference even on questions of fact provided the other conditions of the article are satisfied. It is not necessary that the question on which the opinion of the Supreme Court is sought must have arisen actually. It is competent to the President to make a reference under Article 143(1) at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise. The satisfaction whether the question has arisen or is likely to arise and whether it is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, is a matter essentially for the President to decide. The plain duty and function of the Supreme Court under Article 143(1) of the Constitution is to consider the question on which the President has made the reference and report to the President its opinion, provided of course the question is capable of being pronounced upon and falls within the power of the Court to decide. If, by reason of the manner" in which the question is framed or for any other appropriate reason the Court considers it not proper or possible to answer the question it would be entitled to return the reference by pointing out the impediments in answering it. The right of this Court to

decline to answer a reference does not flow merely out of the different phraseology used in Clauses (1) and (2) of Article 143, in the sense that Clause (1) provides that the Court "may" report to the President its opinion on the question referred to it, while Clause (2) provides that the Court "shall" report to the President its opinion on the question. Even in matters arising under Clause (2), though that question does not arise in this reference, the Court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered. With these preliminary observations we will consider the contentions set forth above.

20. We are unable to agree that the reference is of a hypothetical or speculative character on the ground that the Bill has yet to become an Act. It is true that the mover of the Bill may withdraw the Bill or the Bill may undergo extensive amendments of a fundamental character before it is passed, if it is passed at all. But these considerations cannot affect the validity of the reference on the score that the reference raises questions of a hypothetical or speculative nature. The assumption of every reference under Article 143 has to be the continued existence of a context or conditions on the basis of which the question of law or fact arises or is likely to arise. The political life of a nation has but few eternal verities, for which reason every aspect and facet of that life can justly be described as transient. But the possibility of a change, even of a fundamental change, cannot make the exercise of the Presidential jurisdiction under Article 143 speculative or hypothetical. The stark facts are that Parliament has before it a Bill called the Special Courts Bill, the Bill has been moved by a Private Member and that the Bill consists of ten clauses which provide for the trial of certain offences and offenders. There is no speculation about the present existence of the Bill and there is nothing hypothetical about its contents as they stand today. The Bill may undergo changes in the future but so may the Constitution itself, including Article 143, under which the President has made the reference to this Court. The former possibility cannot make the reference speculative or hypothetical any more than the latter possibility can make it so. The Special Courts Bill is there in flesh and blood for anyone to see and examine. That sustains the reference, which is founded upon the satisfaction of the President that a question as regards the constitutional validity of the Bill is likely to arise and that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of this Court upon it.

21. Three references were made in the past under our Constitution, in regard to a contemplated legislation and not in regard to a measure which had already become an Act. In the Estate Duty Case (supra), the Governor General had made a reference to the Federal Court u/s 213(1) of the Government of India Act 1935 which corresponds to Article 143(1) of the Constitution, except that under the former provision the power of the Governor General to make a reference to the Federal Court was limited to questions of law. Sir Patrick Spens, C.J., delivering the majority opinion observed that the fact that the questions referred related to future

legislation could not by itself be regarded as a valid objection to the reference, particularly because Section 213 empowered the Governor General to make a reference even when questions of law were "likely to arise". The learned Chief Justice added that instances were brought to the notice of the Court in which references had been made under the corresponding provision in the Canadian Supreme Court Act when the matter was at the stage of a bill. In the Kerala Education Bill case, (supra) a reference was made by the President under Article 143(1) of the Constitution regarding the validity of the provisions of a bill which was passed by the State Legislative Assembly but which had not become an Act since the Governor had reserved the bill for the consideration of the President. Das, C.J., who spoke for the majority (Venkatarama Aiyar J. dissented on another point relating to the validity of Clause 20 of the bill), referred approvingly to the view expressed by Sir Patrick Spens C.J. in the Estate Duty Bill case (supra) and adopted his reasoning that the fact that reference was made at the stage of the bill was no impediment to the consideration by the Court of the questions referred to it for its opinion. In the Sea Customs Act Bill, (supra) it was proposed to amend Sub-section (2) of Section 20 of the Sea Customs Act, 1878 and Sub-section (1A) of Section 3 of the Central Excises and Salt Act, 1944. The question referred by the President for the opinion of this Court under Article 143(1) was whether the proposed amendments will be inconsistent with the provisions of Article 289 of the Constitution.

22. In Canada, the Governor-General in Council referred a question to the Supreme Court of Canada u/s 55 of the Supreme Court Act, 1927 for considering the validity of a Bill which provided for abolition of appeals to the Privy Council and for vesting exclusive ultimate jurisdiction in the Supreme Court of Canada. Notwithstanding the fact that the bill was pending consideration before the Canadian Parliament when the reference was made, the Supreme Court of Canada entertained and answered the reference. In appeal, the Privy Council confirmed the majority judgment of the Supreme Court of Canada on merits of the reference. Neither the Canadian Supreme Court nor the Privy Council considered that the circumstance that the reference related to a bill and not to an Act affected the validity of the reference. The judgment of the Privy Council is reported in Attorney-General for Ontario and Ors. v. Attorney-General for Canada and Ors. [1947] A.C. 127.

23. There is another Canadian case which may be referred to as the Three Bills Case [1938] C.L.R 100 which is similar to the 281270 , case. Three bills which were passed by the Legislative Assembly of the province of Alberta were reserved by the Lieutenant Governor for the signification of the Governor General''s pleasure. Doubts having arisen as to whether the legislature of the province of Alberta had legislative jurisdiction to enact the provisions of the bills, the Governor-General in Council made a reference to the Supreme Court of Canada on the question whether the bills were intra vires of the legislature of the province of Alberta. The fact that the Bills had not yet become Acts was not treated by the Canadian Supreme Court as affecting the validity of the reference.

24. We will discuss in due course some of the other decisions cited by the interventionists who raised the preliminary objection to the maintainability of the reference. But we are unable to hold, for reasons aforesaid, that the reference is hypothetical or speculative in character and must, therefore, be returned unanswered.

25. The second objection to the maintainability of the reference is that it is vague, general and of an omnibus nature. The question referred by the President to this Court is:

Whether the Bill or any of the provisions thereof, if enacted, would be constitutionally invalid ?

It is true that the reference does not specify with particularity the ground or grounds on which the Bill or any of its provisions may be open to attack under the Constitution. It does not mention whether any doubt is entertained regarding the legislative competence of the Parliament to enact the Bill or whether it is apprehended that the Bill, if enacted, will violate any of the fundamental rights and if so, which particular fundamental right or rights. A reference in such broad and general terms is difficult to answer because it gives no indication of the specific point or points on which the opinion of the Court is sought. It is not proper or desirable that this Court should be called upon to embark upon a roving inquiry into the constitutionality of a Bill or an Act. Such a course virtually necessitates the adoption of a process of elimination with regard to all reasonably conceivable challenges under the Constitution. It is not expected of us while answering a reference under Article 143 to sit up and discover, article by article, which provision of the Constitution is most likely to be invoked for assailing the validity of the Bill if it becomes a law. The Court should not be driven to imagine a challenge and save it or slay it on hypothetical considerations. As observed in Hamilton Street Railway Company [1903] A.C. 524 speculative opinions on hypothetical questions are worthless and it is contrary to principle, inconvenient and inexedient that opinions should be given upon such questions at all.

26. We were, at one stage of the arguments, so much exercised over the undefined breadth of the reference that we were considering seriously whether in the circumstances it was not advisable to return the reference unanswered. But the written briefs filed by the parties and the oral arguments advanced before us have, by their fullness and ability, helped to narrow down the legal controversies surrounding the Bill and to crystallise the issues which arise for our consideration. We propose to limit our opinion to the points specifically raised before us. It will be convenient to indicate at this stage what those points are.

27. The first point raised before us is whether Parliament had the legislative competence to enact the provisions contained in the Special Courts Bill. The second point raised before us is whether the Bill or any of its provisions violate the rights

guaranteed by Articles 14 and 21 of the Constitution. We propose to limit our opinion to these points.

28. Relying upon the judgments of the Privy Council in Dominion of Canada [1898] A.C. 700and Regulation and Control of Aeronautics, [1932] A.C. 54, 66 it was argued that the reference seeks the opinion of this Court on an abstract question and therefore we should decline to answer it. We are not disposed to agree with the submission that the question referred for our opinion, though wide and general, is in any sense abstract. The question which is referred to us is as regards the constitutionality of the Bill or of any of its provisions. To the extent to which our opinion is sought on the constitutional validity of the Bill it is impossible to say that the question referred to us is of an abstract nature. In the former of the two cases cited above, the Privy Council found it inconvenient to determine in the reference proceedings as to what exactly fell within the ambit of the expression "public harbour". It therefore characterised the question in regard thereto as abstract. It was impossible, in the circumstances before the Privy Council, to attempt an exhaustive definition of the expression "public harbour" which would be applicable to all cases, since it was thought that such a definition was likely to prove "misleading and dangerous". In the latter case, the Privy Council appreciated the difficulty which the court must experience in endeavouring to answer questions of the kind which were framed for the opinion of the Supreme Court of Canada but all the same, the questions were answered since they were not of a kind which it was not possible to answer satisfactorily.

29. We hope that in future, whenever a reference is made to this Court under Article 143 of the Constitution, care will be taken to frame specific questions for the opinion of the Court. Fortunately, it has been possible in the instant reference to consider specific question as being comprehended within the terms of the reference but the risk that a vague and general reference may be returned unanswered is real and ought to engage the attention of those whose duty it is to frame the reference. Were the Bill not as short as it is, it would have been difficult to infuse into the reference the comprehension of the two points mentioned by us above and which we propose to decide. A long Bill would have presented to us a rambling task in the absence of reference on specific points, rendering it impossible to formulate succinctly the nature of constitutional challenge to the provisions of the Bill.

30. The third contention betrays a total lack of awareness of the scheme of division of powers under our Constitution. The first limb of the argument under this head is" that since the Parliament is seized of the Bill, it is its exclusive function to decide upon the constitutionality of the provisions of the Bill. There are a few people here as elsewhere who, contending against the powers of judicial review of legislation, argue that it is the legislature which possesses and ought to possess the right to interpret the Constitution and that the legislative interpretation should not be open to attack in courts of law. But we are concerned not with fanciful theories based on

personal predilections but with the scheme of our Constitution and the philosophy underlying it. Our federal or quasi-federal Constitution provides by a copious written instrument for the setting up of a judiciary at the Union and State levels. Article 124, which occurs in Chapter IV of the Constitution called "The Union Judiciary", provides for the establishment of the Supreme Court of India. Its powers and functions are defined in Article 32(2), Article 129, Articles 131 to 140 and in Article 143 of the Constitution. Likewise, Article 214 provides subject to Article 231, for the establishment of a High Court for each State. Article 226 confers powers on the High Courts to issue certain writs while Article 227 confers upon them the power of superintendence over all courts subordinate to their appellate jurisdiction. These provisions show that the power of reviewing the constitutional validity of legislations is vested in the Supreme Court and the High Courts and in no other body. The British Parliament, being supreme, no question can arise in England as regards the validity of laws passed by it. The position under our Constitution is fundamentally different because, the validity of laws passed by the Indian Legislatures has to be tested having regard to the scheme of distribution of legislative powers and on the anvil of other constitutional limitations like those contained in Article 13 of our Constitution. The right of the Indian judiciary to pronounce a legislation void if it conflicts with the Constitution is not merely a tacit assumption but is an express avowal of our Constitution. The principle is firmly and wisely embedded in our Constitution that the policy of law and the expediency of passing it are matters for the legislature to decide while, interpretation of laws and questions regarding their validity fall within the exclusive advisory or adjudicatory functions of Courts. The function of courts in that behalf is not "The Great Usurpation" as some American critics of the power of judicial review called it after the American Supreme Court rendered its decision in Dred-Scott 15 Lawyers'' Edition 691 in 1856. Rather, the true nature of that function is what President Lincoln described it:

We believe as much as Judge Douglas (perhaps more) in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions when fully settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution, but we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.

31. The second limb of the contention is that if we withdraw the question of validity of the Bill for our consideration while the Bill is pending consideration before the Parliament, we will be encroaching upon the functions and privileges, of the Parliament. In the first place, in dealing with the reference we are not withdrawing any matter from the seizing of the Parliament, much less "lifting" the Bill from the Lok Sabha, as was argued by one of the counsel. The President has made a

reference to this Court in exercise of the powers conferred upon him by Article 143(1) and we are under a constitutional obligation to consider the reference and report thereon to the President as best as we may. Secondly, it is difficult to appreciate which particular function or privilege of the Parliament is wittingly or unwittingly, encroached upon by our consideration of the constitutional validity of the Bill. As we have just said, the question whether the provisions of the Bill suffer from any constitutional invalidity falls within the legitimate domain of the courts to decide. Parliament can undoubtedly discuss and debate that question while the Bill is on the anvil but the ultimate decision on the validity of a law has to be of the court and not of the Parliament. Therefore, we will not be encroaching upon any parliamentary privilege if we pronounce upon the validity of the Bill. We must also mention, that though it was argued that the privileges of the Parliament are being encroached upon, none of the counsel was able to specify which particular parliamentary privilege was involved in our consideration of the reference. May''s Parliamentary Practice was not even mentioned. Article 105(3) of the Constitution on which a passing reliance was placed provides that the powers, privileges and immunities of each House of Parliament and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of the Constitution. In the absence of any text or authority showing what are the privileges of the British Parliament in regard to the kind of matter before us, it is impossible to hold that there is a violation of the Parliament''s privileges. We also see no substance in the argument that there is any violation of the Parliament''s powers under Articles 107(1), 108 and 111 of the Constitution.

32. The reference then is said to be a virtual abrogation of Article 32 of the Constitution, an argument which we find to be equally untenable. Article 32(1) confers a fundamental right on all persons to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. That Tight is available to persons whose fundamental rights are encroached upon. In the proceeding before us the question is whether the bill which is pending before the Parliament contains provisions which are open to a constitutional challenge. If we hold that the Bill is valid, the Parliament may proceed with it and, we suppose, that if we hold that the Bill is invalid, the Parliament will not spend any time over passing a constitutionally invalid Bill The proceeding under Article 32(1) being of an entirely different nature from the proceeding contemplated by Article 143(1) of the Constitution, there is neither supplanting nor abrogation of Article 32, if we pronounce upon the question referred to us by the President.

33. Learned counsel for the interveners who oppose the reference urged as one of the planks of attack on the reference that it is futile for us to consider the constitutional validity of the Bill because whatever view we may take, it will still be open to the Parliament to discuss the Bill and to pass or not to pass it as it pleases.

This argument proceeds upon an unrealistic basis, its assumption being that the Parliament will not act in a fair and proper manner. True, that nothing that we say in this opinion can deter the Parliament from proceeding with the Bill or dropping it. That is because, no court will issue a writ or order restraining the Parliament from proceeding with the consideration of a bill pending before it. But we cannot assume, what seems to us to be unfair to that august body, that even if we hold that the Bill is unconstitutional, the Parliament will proceed to pass it without removing the defects from which it is shown to suffer. Since the constitutionality of the Bill is a matter which falls within the exclusive domain of the courts, we trust that the Parliament will not fail to take notice of the court''s decision.

34. We are also not disposed to accept the submission that the reference raises a purely political question. The policy of the Bill and the motive of the mover may be to ensure a speedy trial of person holding high public or political offices who are alleged to have committed certain crimes relating to the period of emergency. The President, however, has not asked us to advise him as to the desirability of passing the Bill or the soundness of the policy underlying it. Whether special courts should be established or not, whether political offenders should be prosecuted or not and whether for their trial a speedy remedy should be provided or not, are all matters which may be said to be of a political nature since they concern the wisdom and policy underlying the Bill. But the question whether the Bill or any of its provisions are constitutionally invalid is not a question of political nature which we should restrain ourselves from answering. The question referred by the President for our opinion raises purely legal and constitutional issues which is our right and function to decide.

35. The last submission which requires consideration, the 7th, is that considering the repercussions of the exercise of advisory jurisdiction we should, in the interest of expediency and propriety, refuse to answer the reference. The dissenting opinion of Zafrulla Khan, 3. in Estate Duty Bill [1944] F.C.R. 317, 322 contains as scotching a criticism of reference jurisdiction as can possibly be imagined. The learned Judge has referred to the history of advisory jurisdiction, the laws of various countries which provide for advisory jurisdiction, the approach of the courts of those countries to matters concerning advisory jurisdiction, the opinion of eminent writers like Prof. Felix Frankfurter (who later became a judge of the American Supreme Court) and Prof. Carleton Kemp Allen, and to various decisions of the Privy Council and the House of Lords. In short, every possible criticism which can be made against the exercise of advisory jurisdiction has been noticed and made by Zafrulla Khan J. in his dissenting opinion. But, after referring to texts and authorities, the learned Judge observed that in spite of all that the British Parliament had before it, it thought it wise to incorporate Section 213 in the Government of India Act, 1935. Eventually, the learned Judge held that if the proposal was cast in a form which does not give rise to difficulties, the court might find it possible to pronounce upon it and added that one precaution which might be taken in that behalf was to attach to the reference a

draft of the bill which was proposed to be placed before the legislature. Since the bill on which the Governor-General had made the reference to the Federal Court was a fiscal measure, the learned Judge thought that attaching a copy of the bill to the reference was indispensable and in the absence of the bill, it was not possible to answer the reference. The ultimate conclusion to which the learned Judge came was that in the State of the material made available to the court, no useful purpose could be served by attempting to answer the questions referred to the court.

36. We have pointed out during the course of our discussion of the various facets of the preliminary objection that since the question referred for our opinion by the President raises a purely constitutional issue and since it is possible to limit the consideration of the reference to the two points mentioned by us, it is neither difficult nor inexpedient to answer the reference. The difficulty pointed out by Zafrulla Khan J. in Estate Duty Bill [1944] F.C.R. 317, 322 has been removed in this reference by supplying to us a copy of the Special Courts Bill which is annexed to the reference. It is no answer then that the Bill might eventually emerge from the legislature in a shape very different from that in which it has been considered by us. As observed by Zafrulla Khan J., (page 343) in such a case, the opinion of the court will always be read with reference to the proposal placed before it and there will be no danger of its being read with reference to the form which the legislation finally takes. We will only add that the Constituent Assembly having thought fit to enact Article 143 of the Constitution, it is not for us to refuse to answer the reference on the ground that it is generally inexpedient to exercise the advisory jurisdiction. The argument relating to the inexpediency of advisory jurisdiction was known to the eminent architects of the Constitution and must be deemed to have been considered and rejected by them. The difficulty of answering a reference in a given case by reason of the defective frame of questions, insufficiency of data or the like is quite another matter which, as we have indicated, presents no insurmountable difficulty in this reference.

37. We do not consider it necessary to discuss the American decisions like Baker v. Carr 7 L.Ed., 2d, 663 and Powell v. McCormack 23 L.Ed., 2d, 491 which were cited in support of the argument that the Court ought not to answer hypothetical questions. We have already disposed of that contention by pointing out that there is nothing hypothetical or speculative about the reference made by the President in this case. But apart from that, the American decisions have no application because of three main considerations: The American Constitution does not contain any provision under which the President can make a reference to the American Supreme Court for obtaining its opinion. Secondly, there is a rigid separation of powers under the American Constitution; and thirdly, article III, Section 2(1) of the American Constitution provides that the judicial power of the United States which, by Section 1 of that article is vested in the Supreme Court, shall extend to all "cases" and "to controversies to which the United States shall be a party;-to controversies between two or more States-between a State and citizens of another State-between citizens

of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects". In matters arising under the advisory jurisdiction where there is no lis property so called, there is neither a "case" nor a "controversy" between party and party. That is why the American Supreme Court has taken the view that "The rule that the United States Supreme Court lacks appellate jurisdiction to consider the merits of a moot case is a branch of the constitutional command that the judicial power extends only to cases or controversies; a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." 23 L.Ed., 2d, 491,493.

38. That disposes of the preliminary objection to the maintainability of the reference. For reasons above mentioned, we over-rule that objection and proceed to answer the reference, limiting our opinion to the two points mentioned earlier.

39. Out of the two principal questions which we propose to consider in this reference, the first pertains to the legislative competence of the Parliament to enact certain provisions of the Bill. The main argument on legislative competence was made by Shri Shiv Shankar who appears on behalf of the State of Andhra Pradesh. Since the contentions of the other counsel on that question only highlight different facets of that argument it will be enough to set out and deal with the main argument.

40. The attack on Parliament''s power to legislate on matters contained in the Bill raises three issues: (1) Has the Parliament legislative competence to provide for the creation of Special Courts as enacted by Clause 2 of the Bill ? (2) Has the Parliament legislative competence to confer appellate powers on the Supreme Court from judgments and orders of Special Courts as provided in Clause 10(1) of the Bill ? and (3) Is it competent to the Parliament to confer jurisdiction on the Supreme Court to entertain and decide appeals and revisions pending before any other court on the date of declaration, as provided in Clause 6 of the Bill ?

41. To recapitulate briefly, Clause 2 of the Bill provides that the Central Government shall by notification create adequate number of courts to be called Special Courts. Clause 10(1) of the Bill provides that notwithstanding anything contained in the CrPC, 1973 an appeal shall lie as of right from any judgment or order of the Special Court to the Supreme Court both on fact and on law. By Clause 6 of the Bill, if at the date of the declaration in respect of any offence, an appeal or revision against any judgment or order in a prosecution in respect of such offence is itself pending in any court of appeal or revision, the same shall stand transferred for disposal to the Supreme Court.

42. Shri Shiv Shanker''s argument runs thus:

(a) Articles 124 to 147 which occur in Chapter IV, Part V of the Constitution, called "The Union Judiciary" contain an exhaustive enumeration of the class of matters over which the Supreme Court possesses or may be empowered to exercise

jurisdiction. Article 131 confers original jurisdiction on the Supreme Court in certain matters, Articles 132, 133 and 134 confer appellate powers upon it in civil, criminal and other proceedings, Article 135 saves its jurisdiction and powers, until Parliament by law otherwise provides, with respect to any matter to which the provisions of Articles 133 and 134 do not apply if jurisdiction end powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law, Article 136 empowers it to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in India other than a court or tribunal constituted by or under any law relating to the Armed Forces, Article 137 confers upon it the power to review any judgment pronounced or order made by it, Article 139A confers upon it the power in certain circumstances to withdraw cases pending before the High Court for its own decision, Article 142(2) confers upon it the power, inter alia, in regard to investigation or punishment of any contempt of itself and finally, Article 143 confers upon it advisory jurisdiction in matters mentioned therein. The jurisdiction of the Supreme Court, whether appellate or of any other kind, cannot be extended to matters other than those expressly enumerated in these articles. Clause 10 of the Bill which confers appellate power on the Supreme Court from judgments and orders of Special Courts is therefore unconstitutional. Chapter IV, Part V, empowers, the Parliament by various articles to pass laws for the purpose of conferring further jurisdiction on the Supreme Court, in addition to that conferred upon it expressly by the other provisions of that Chapter. For example, Article 133(3) provides that notwithstanding anything contained in the article, no appeal shall lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court (in a civil proceeding), unless Parliament by law otherwise provides. The Parliament thus is given the power to pass a law providing that, in civil proceedings, an appeal shall lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court. Article 134(2) empowers the Parliament to confer by law on the Supreme Court any "further powers" than those conferred by Clause 1 of the article, to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court subject to such conditions and limitations as may be specified in such law. By Article 138(1), the Supreme Court shall have such further Jurisdiction and powers with respect to any of the matters in the union List as Parliament may by law confer. By Article 138(2), the Supreme Court can exercise such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court. Article 139 empowers the Parliament by law to confer on the Supreme Court power to issue directions, orders or writs for any purposes other than those mentioned in Article 32(2). Under Article 140, Parliament may make a law for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of the Constitution as may appear to be necessary or

desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under the Constitution. These provisions being exhaustive of the cases and circumstances in which additional powers or jurisdiction may be conferred on the Supreme Court, Parliament has no competence to pass a law conferring upon the Supreme Court appellate powers against the judgments and orders of Special Courts, which is a matter neither envisaged nor covered by any of the aforesaid provisions of Chapter IV. Clause 10 of the Bill is therefore beyond the legislative power of the Parliament to enact.

(c) Though Parliament has the power, and exclusively, to legislate on matters enumerated in List I, that power, as provided in Article 245(1), is "subject to the provisions of" the Constitution. Accordingly, the power of Parliament to legislate on matters mentioned, for example, in entry 77 of List I (Constitution, organisation, jurisdiction and powers of the Supreme Court...), entry 95 (jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List I...), and entry 97 (any other matter not enumerated in List II or List III...) has to be exercised consistently with and subject to the other provisions of the Constitution. The law made by the Parliament by virtue of its power to legislate on matters enumerated in Lists I and III will not be valid, if it contravenes any other provision of the Constitution, apart from the provisions of Part III on Fundamental Rights.

(d) Considering the width of the provisions contained in Article 136(1), it might have been open to the Parliament to provide that the Supreme Court may, in its discretion, grant special leave to appeal from any judgment or order of the Special Court. But since, the outer limits of the Supreme Court''s powers are exhaustively dealt with in that article and in the other articles which occur in Chapter IV, Part V of the Constitution, Parliament cannot confer upon any person the right to file an appeal to the Supreme Court from judgments or orders of Special Courts.

(e) By parity of reasoning, the provision contained in Clause 6 of the Bill for the transfer of pending appeals and revisions to the Supreme Court is ultra vires the provisions of Chapter IV, Part V of the Constitution. The constitutional scheme contained exhaustively in Chapter IV does not contemplate the exercise of revisional jurisdiction by the Supreme Court and therefore, the conferment of that jurisdiction by Clause 6 is beyond the Parliament''s competence. If revisions transferred to the Supreme Court are considered as falling within the special jurisdiction of the Supreme Court under Article 136(1), Clause 6 of the Bill will offend against the provisions of that article because the pre-requisite for the exercise of the jurisdiction under that article is the grant of special leave by the Supreme Court.

43. The main plank of the reply of the learned Attorney General and the learned Solicitor General in answer to these contentions is that the provisions of Chapter IV, Part V of the Constitution are not exhaustive of the class of matters in which the Supreme Court possesses jurisdiction or in which the Parliament, by law, can confer jurisdiction upon it. The provisions of Chapter IV, it is argued, cannot Override the

power conferred by the Constitution on the Parliament to legislate on matters which fall within Lists I and III of the Seventh Schedule. That is to say, Chapter I of Part XI of the Constitution which deals with ''Distribution of Legislative Powers'' must be permitted to have its full sway and nothing containing in Chapter IV, Part V can be construed as derogating from that power. No implications can arise from the provisions of that Chapter so as to nullify the legislative competence of the Parliament to legislate on matters which fall within the Union, and the Concurrent Lists. Therefore, it is argued Parliament''s power to enlarge the jurisdiction of the Supreme Court, quantitatively and qualitatively, is unquestionable so long as the law creating or conferring that jurisdiction is with respect to matters enumerated in List I or List III. Learned counsel rely on the provisions of Article 138(1) and Article 246(1) and on entries 77 and 97 of List I for sustaining the Parliament''s power to enact Clauses 6 and 10(1) of the Bill. As regards the power to enact Clause 2, reliance is placed on entry 11A of List III as supporting Parliament''s competence to provide for the creation of Special Courts.

44. The challenge to the legislative competence of Parliament to provide for the creation of Special Courts is devoid of substance. Entry 11A of the Concurrent List relates to "Administration of justice; Constitution and organisation of all courts, except the Supreme Court and the High Court.'' By virtue of Article 246(2), Parliament has clearly the power to make laws with respect to the Constitution and organisation, that is to say, the creation and setting up of Special Courts. Clause 2 of the Bill is therefore within the competence of the Parliament to enact.

45. The field of legislation covered by entry 11A of List III was originally a part of entry 3 of List II. By Section 57(b)(iii) of the 42nd Amendment Act, 1976 which came into force on January 3, 1977 that part was omitted from entry 3, List II and by Clause (c) of Section 57, it was inserted into list III as item 11A. This transposition has led to the argument that the particular amendment introduced by Section 57(b)(iii) and (c), is invalid since it destroys a basic feature of the Constitution as originally enacted, namely, federalism. We are unable to appreciate how the conferment of concurrent power on the Parliament, in place of the exclusive power of the States, with respect to the Constitution and organisation of certain courts affects the principle of federalism in the form in which our Constitution has accepted and adopted it. But assuming for the sake of argument that vesting of such power in the States was a basic feature of the Constitution, we have to take the Constitution as we find it for the purposes of this reference. The plainest implication of the question referred to us by the President is whether, on the basis of the existing constitutional provisions, the Bill or any of its provisions, if enacted, would be invalid. We cannot, therefore, entertain any argument in this proceeding that a constitutional provision introduced by an amendment of the Constitution is invalid.

46. Having seen that the Parliament has legislative competence to create Special Courts, the next branch of the argument which falls for consideration is whether it is

competent to the Parliament to confer appellate jurisdiction on the Supreme Court so as to enable or require it to hear appeals from judgments and orders of Special Courts. The argument, put in another form, is that it is not competent to the Parliament to confer upon a litigant the right of filing an appeal to the Supreme Court from the judgment or order of a Special Court. The provision for appeal, it is contended, might at the highest have been made subject to the pre-condition of the grant of special leave to appeal by the Supreme Court, as under Article 136 of the Constitution.

47. The very foundation of this argument is fallacious. The argument rests on the plea that the provisions of Chapter IV, Part V of the Constitution are exhaustive and therefore, no more and no greater jurisdiction can be conferred on the Supreme Court than the provisions of that Chapter authorise or warrant. It is impossible to accede to the contention that any such implications can arise out of the provisions of Chapter IV. The contention if accepted, will result in the virtual abrogation of the legislative power conferred on the Parliament by Article 246(1) and (2) of the Constitution. Such a construction which renders illusory or nugatory other important provisions of the Constitution must be avoided, especially when it seeks its justification from a mere implication arising out of the fasciculus of articles contained in Chapter IV. The Constitution does not provide that notwithstanding anything contained in Article 246(1) and (2), the Parliament shall have no power or competence to enlarge the jurisdiction of the Supreme Court, quantitatively or qualitatively, except in accordance with and to the extent to which it is permissible to it to do so under any of the provisions of Chapter IV Part V. The provisions of that Chapter must therefore be read in harmony and conjunction with the other provisions of the Constitution and not in derogation thereof.

48. A pertinent question was posed by Shri Shiv Shanker or this aspect of the matter. He asked: If Parliament is to be conceded the power to enlarge the jurisdiction of the Supreme Court in the manner impugned herein, what was the object and purpose behind provisions like those contained in Articles 133(3), 134(2), 138(1), 138(2), 139 and Article 140? What these articles empower the Parliament to do could with equal competence and validity have been done by the Parliament in the exercise of its powers under Article 246(1) and (2). The reason why, according to the learned Counsel, the framers of the Constitution thought it necessary to incorporate special provisions in the Constitution empowering or enabling the Parliament to pass laws in respect of the Supreme Court''s jurisdiction was to limit its powers in that behalf to specific matters and circumstances mentioned expressly in those special provisions. In other words, the contention is that specific provisions of the Constitution under which the jurisdiction of the Supreme Court can be enlarged must override the general provisions under which Parliament can pass laws in respect of matters enumerated in Lists I and III of the Seventh Schedule.

49. We consider it impossible to accept the argument that the conferment of power to pass laws on specific matters limits the Parliament''s power to pass laws to those matters only and takes away its power to pass laws on matters which are otherwise within its legislative competence. The language of Article 246(1) and (2) is clear and explicit and admits of no doubt or difficulty. It must, therefore, be given its due effect. In the first place, therefore, no implications can be read into the provisions of Chapter IV, Part V of the Constitution which their language does not warrant; and secondly, the attempt has to be to harmonize the various provisions of the Constitution and not to treat any part of it as otiose or superfluous. Some amount of repetitiveness or overlapping is inevitable in a Constitution like ours which unlike the American Constitution, is drawn elaborately and runs into minute details. There is, therefore, all the greater reason why, while construing our constitution, care must be taken to see that powers conferred by its different provisions are permitted their full play and any one provision is not, by construction, treated as nullifying the existence and effect of another. Indeed, if it be correct that the specific powers conferred by some of the articles in Chapter IV, Part V are exhaustive of matters in which Parliament can confer jurisdiction on the Supreme Court, it was wholly inappropriate and unnecessary to provide by Article 138(1) that the Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer. This article is relied upon heavily as showing that if, even without it, it was competent to the Parliament by virtue of its power under Article 246(1) and (2) to enlarge the Supreme Court''s jurisdiction, no purpose could be served and nothing gained by enacting that article. The answer to this contention is twofold as indicated above. Besides, the object of Article 138(1) is to further enlarge the Parliament''s power to confer jurisdiction on the Supreme Court even in matters already dealt with specifically in Chapter IV, Part V. For example Article 136(2) provides that nothing in Clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. But by virtue of Article 138(1) read with entry 2 and entry 93 of List I, it may be competent to the Parliament to remove the fetter on the Supreme Court''s jurisdiction to grant special leave and extend that jurisdiction to the judgment, determination; sentence or order passed or made by any court or tribunal constituted by are under any law relating to the Armed Forces. Likewise, acting under Article 138(1), the Parliament may enlarge the original jurisdiction conferred upon the Supreme Court by Article 131. Even assuming that Article 138(1) may not have been intended to achieve any purpose as aforesaid, its object could at least be to empower the Parliament to confer any special kind of jurisdiction and powers on the Supreme Court with respect to a matter in the Union List. If the argument regarding the exhaustiveness of the provisions contained in Chapter IV, Part V were correct, by parity of reasoning, it will be in competent to the Parliament to pass a law in respect of matters mentioned in entry 72 of Lisa I (Election...to the offices of President and Vice-President...), by reason of the fact that Article 71 of the Constitution empowers

the Parliament specifically to regulate by law any matter relating to or connected with the election of a President or Vice-President, including the grounds on which such election may be questioned. Article 71, as indeed many other articles, shows that there are overlapping provisions in our Constitution. The Parliament, therefore, has the competence to pass laws in respect of matters enumerated in Lists I and III notwithstanding the fact that by such laws, the jurisdiction of the Supreme Court is enlarged in a manner not contemplated by or beyond what is contemplated by the various articles in Chapter IV, Part V. Preventive detention, for example, is the subject matter of entry 3 in List III. As contended by Shri Ram Jethmalani, it is competent to the Parliament to legislate upon that topic by virtue of its powers under Article 246(2) and also to provide by virtue of its powers under Article 246(1) read with entry 77 of List I that an appeal shall lie to the Supreme Court from an order of detention passed under a law of preventive detention.

50. What now remains to be seen is whether there is any entry in List I or List III of the Seventh Schedule which covers the subject matter of the jurisdiction of the Supreme Court so that Parliament can have the competence to pass a law with respect to that matter. This question hardly presents any difficulty. Entry 77 of List I reads thus:

Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

51. Once the argument regarding the exhaustiveness of the provisions of Chapter IV of Part V is rejected, Parliament clearly has the competence to provide by Clause 10(1) of the Bill that notwithstanding anything contained in the CrPC, 1973 an appeal shall lie as of right from any judgment or order of a Special Court to the Supreme Court both on fact and on law. A law which confers additional powers on the Supreme Court by enlarging its jurisdiction is evidently a law with respect to the ""jurisdiction and powers" of that court.

52. Entry 77 of List I presents, as contended by the learned Attorney General, a striking contrast with entry 95 of List I, entry 65 of List II and entry 46 of List III. The operation of the three last-mentioned entries is expressly limited by a qualifying clause, which limits the field of legislation to the matters mentioned in the particular list in which the entry appears. Entry 95 of List I relates to jurisdiction and powers of all courts, except the Supreme Court, "with respect to any of the matters in this List". Entry 65 of List II relates to jurisdiction and powers of all courts, except the Supreme Court, "with respect to any of the matters in this List". Entry 46 of List III relates to jurisdiction and powers of all courts, except the Supreme Court, "with respect to any of the matters in this List". A reference may also be made in passing to Article 323B to which Shri Ram Jethmalani drew our attention, which provides that the appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences "with respect to all or any of the matters

specified in Clause (2) with respect to which such Legislature has power to make laws". Entry 77 of List I stands out in its uniqueness amongst cognate entries in the legislative Lists by its wide and unqualified language. The field of legislation covered by it is not circumscribed by the qualification, "with respect to any of the matters in this List", that is, List 5. This contrast emphasises that the power of the Parliament to legislate with respect to a matter contained in entry 77, which, in the instant case, is "jurisdiction and powers of the Supreme Court" can be exercised without reference to any of the matters contained in List I or in any other List. There can be no justification, to revert to the argument already disposed of by us, for curtailing the amplitude of the Parliament''s power in relation to the subject matter of entry 77 by reason of anything contained in Chapter IV, Part V.

53. The problem is of a twin variety and has two interlaced facets. If there is power in the Parliament to establish a new court, as undoubtedly there is by virtue of Article 246(2) read with entry 11A of List III, it would be strange that the Parliament should not possess the wholesome power to provide for an appeal to the Supreme Court from the decision of that Court. Loopholes and lacunae can conceivably exist in any law or Constitution but, as pointed out by us above, our Constitution has not only provided for the power to create new Courts but, it has taken care to confer upon the Parliament the power to provide that an appeal shall lie from the decision of such court directly to the Supreme Court. In the exercise of its power to establish a new Court, Parliament may by reasons of exigency consider it necessary to create a Court which does not conform to an established pattern in the hierarchy of existing courts. The status of the newly created Court may by such by reason of its composition or the nature of matters which may come before it that an appeal can justly be provided from its judgments and orders to the Supreme Court only. That explains the justification for the amplitude of the legislative field covered by entry 77, List I.

54. It must follow as a logical corollary that Parliament also possesses the legislative competence to provide by Clause 6 of the Bill that if at the date of the declaration in respect of any offence, an appeal or revision against any judgment or order in a prosecution in respect of such offence is pending in any court of appeal or revision, the same shall stand transferred to the Supreme Court. The provision contained in Clause 6 falls squarely within the field of legislation delineated by entry 77 of List I. The subject-matter of Clause 6 is the jurisdiction and powers of the Supreme Court. Entry 2 of List III, "Criminal procedure, including all matters included in the CrPC at the commencement of this Constitution" will also take care of Clause 6. Indeed, that entry, giving to it the widest possible meaning, may even support the provision in Clause 10(1).

55. In view of our conclusion that Parliament has the legislative competence to enact Clauses 6 and 10(1) of the Bill, it is unnecessary to consider the argument of the learned Solicitor General that, everything else failing, Parliament would have the

competence to legislate upon the jurisdiction and powers of the Supreme Court by virtue of Article 248(1) read with entry 97 of List I. The residuary power of legislation can be resorted to only if any particular matter, on which it is proposed to legislate, is not enumerated in the Concurrent or State List.

56. To sum up, we are of the opinion that Clauses 2, 6 and 10(1) of the Bill are within the legislative competence of the Parliament. That is to say, Parliament has the competence to provide for the creation of Special Courts as Clause 2 of the Bill provides, to empower the Supreme Court to dispose of pending appeals and revisions as provided for by Clause 6 of the Bill and to confer jurisdiction on the Supreme Court by providing, as is done by Clause 10(1), that an appeal shall lie as of right from any judgment or order of a Special Court to the Supreme Court both on fact and on law.

57. Though the Parliament''s legislative competence to create Special Courts, for the purpose in the instant case of trying criminal cases, cannot be denied for reasons set out above, it is necessary to advert to an offshoot of the argument to the effect that, in any event, Parliament has no power to create a court outside the hierarchy of Courts recognized by the Constitution. It was suggested during the course of arguments on the question of legislative competence that the Constitution contains a complete code of judicial system which provides for the Supreme Court at the apex and for the High Courts, the District Courts and subordinate courts next in order of priority. Article 124 provides that there shall be a Supreme Court of India, Article 214 that there shall be a High Court for each State, Article 231(1) that Parliament may by law establish a common High Court for two or more States or for two or more States and a union territory while Chapter VI of Part VI of the Constitution provides by Articles 233 & 234, for the District Courts and courts subordinate thereto. To complete the picture; Article 236(a) defines a "district judge" to include the judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge. Finally, Article 237 empowers the Governor to apply the provisions of chapter VI and any rules made thereunder to any class or classes of magistrates. The Constitution having provided so completely and copiously for a hierarchy of Courts, it is urged that it is impermissible to the Parliament to create a court or a class of courts which does not fall within or fit in that scheme. An important limb of this argument which requires serious consideration is that the creation of a trial court which is not subject to the control and superintendence of the High Court is detrimental to the Constitutional concept of judicial independence, particularly when the Bill empowers the Central Government by Clause 5 to designate the Special Court in which a prosecution shall be instituted or to which a pending prosecution shall be transferred.

58. We are unable to accept this argument. What is important in the first place is to inquire whether the Parliament has legislative competence to create Special Courts. If it has, the next question is whether there is anything in the Constitution which limits that power to the setting up of yet another Court of the same kind and designation provided for in the Constitution''s hierarchical system of courts. We see nothing in the Constitution which will justify the imposition of such a limitation on the Parliament''s power to create Special Courts. Indeed, the argument partakes of the same character as the one that no greater or different powers can be conferred on the Supreme Court than are to be found or provided for in chapter IV, part V of the Constitution. The implications of the Constitution ought not to be stretched so far and wide as to negate the exercise of powers which have been expressly and advisedly conferred on the Parliament. The words of entry 11A of the Concurrent List which relates to "Administration of Jutice; Constitution and organisation of all courts, except the Supreme Court and the High Court" are sufficiently wide in their amplitude to enable the Parliament not merely to set up Courts of the same kind and designation as are referred to in the provisions noticed above but to constitute and organize, that is to say, create new or Special Courts, subject to the limitation mentioned in the entry as regards the Supreme Court and the High Courts.

59. It is true that the Special Courts created by the Bill will not have the Constitutional status which High Courts have because such courts are not High Courts as envisaged by the Constitution. Indeed, there can but be one High Court only for each State, though two or more States or two or more States and a union territory can have a common High Court. It is also true to say that the Special Courts are not District Courts within the meaning of Article 235, with the result that the control over them will not be vested in any High Court. But we do not accept that by reason of these considerations, the creation of Special Courts is calculated to damage or destroy the constitutional safeguards of judicial independence. Our reasons for this view will become clearer after we deal with the questions arising under Articles 14 and 21 but suffice it to say at this stage that the provision in Clause 10(1) of the Bill for an appeal to the Supreme Court from every judgment and order of a Special Court and the provision for transfer of a case from one Special Court to another (which the Bill does not contain but without which, as we will show, the Bill will be invalid) are or will be enough to ensure the independence of Special Courts. Coupled with that will be the consideration, as we will in course of our judgment point out that only sitting judges of the High Courts shall have to be appointed to the Special Courts. A sitting judge of the High Court, though appointed to the Special Court, will carry with him his constitutional status, rights, privileges and obligations. There is no reason to apprehend that the mere change of venue will affect his sense of independence or lay him open to the influence of the executive. One may also not be unmindful of the benign presence of Article 226 of the Constitution which may in appropriate cases be invoked to ensure justice.

60. Equally important as the Parliament''s legislative competence, to enact these provisions and of greater social significance is the question whether the Bill violates the guarantee of equality contained in Article 14 of the Constitution. That article provides:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

61. Several objections, from sublime to not so-sublime, have been taken against the provisions of the Bill in the context of Article 14. But, broadly, that challenge is directed against the validity of the classification which the Bill makes and the lack of relationship between the basis of that classification and the object of the Bill. The Bill, it is further contended, creates administrative tribunals for trying offences which is against the basic tenet of the guarantee of equality. The Bill leaves it open to the executive to discriminate between persons situated similarly by picking and choosing some of them for being tried by the Special Courts, leaving others to be tried by the regular hierarchy of courts. The procedure prescribed by the Bill for trial before the Special Courts is alleged to be onerous in comparison with the procedure which ordinary courts generally adopt, subjecting thereby a class of persons, left to be chosen by the executive with an evil eye, to hostile and unfavourable treatment. The Bill, it is contended, furnishes no guidance for making the declaration u/s 4(1) for deciding who and for what reasons should be tent up for trial to the Special Courts and such guidelines as it purports to lay down are vague and indefinite.

62. These arguments are met by the learned Attorney General, the learned Solicitor General, the various Advocates General and Shri Ram Jethmalani by pointing out that the Bill is not by any manner an instance of class legislation; that it provides for making a classification with reference to the nature of the offences, the public position occupied by the offenders and the extraordinary period during which the offences are alleged to have been committed; that the provisions of the Bill and the recitals of the preamble provide sufficient and definite guidance for making the requisite declaration for deciding who should be sent up for trial to the Special Courts; that, in the context, the Bill does not vest arbitrary or uncanalised power in the Government to pick and choose persons for being tried by Special Courts, that the procedure prescribed by the Bill for trial before the Special Courts, far from being more onerous than the ordinary procedure, is in certain important respects more beneficial to the accused; and since, in any event, the procedure of the Special Courts is not more onerous than the ordinary procedure, the provisions of the Bill involve no discrimination violative of Article 14.

63. A brief resume of the decisions of this Court bearing on laws which provided for the creation of special courts will facilitate a clearer perception of the true position and a better appreciation of the points for and against the Bill. The written brief of the Union Government contains a pithy account of Special Courts, from which it would appear that such courts were set up during the British regime on a number of

occasions, more especially under what may broadly be termed as Security laws like the Rowlatt Act, 1919, the Bengal Provincial Law (Amendment) Act, 1925, the Sholapur Martial Law Ordinance 1930, the Bengal Criminal Law (Amendment) Acts, 1930 and 1932, the Bihar Maintenance of Public Order Act, the Bombay Public Safety Measures Act, 1947, the C.P. and Berar Public Safety Act and the U.P. Maintenance of Public Order Act. These laws were draconian in nature and were characterised by a denial of the substance of a fair trial to those who had the misfortune to fall within the sweep of the truncated procedure prescribed by them. They provided a summary procedure for deprivation of the right to life and liberty without affording to the aggrieved person the opportunity to carry an appeal to the High Court for a dispassionate examination of his contentions. Special Courts were set up under these laws mostly to suppress the freedom movement in India. They were not set up purportedly to save a democracy in peril. Therefore, they inevitably acquired a sinister significance and odour.

64. After the advent of independence and the enactment of our Constitution, Special Courts were set up under various laws to deal with threats to public order and to prevent corruption amongst public servants. In the years following upon the inauguration of the Constitution in 1950, this Court had to consider the validity of laws under which various State Governments were empowered by the State Legislatures to set up Special Courts for the trial of such offences or classes of offences or cases or classes of cases as the State Governments may by general or special order in writing direct. The earliest case, after the Constitution came into force, which refers to the setting up of special Tribunals is 258353 , in which the Military Governor of Hyderabad, by virtue of the powers delegated to him by the Nizam, constituted Special Tribunals which consisted of three members appointed by him for trying offences referred to them by the Governor by a general or special order. But the decision in that case turned on the question whether the judgment of the Hyderabad High Court which was pronounced before January 26, 1950 and which had acquired a finality could be reopened before the Supreme Court under the provisions of the Constitution. That question was answered in the negative and no argument arose or was made regarding the violation of Article 14.

65. The contention that the special procedure prescribed for trial before Special Courts violated the guarantee of equality conferred by Article 14 was raised specifically and was considered by this Court in 281215 ,, 281023 , 281187 , 279451 ,, 279539 , , 284058 ,, 284087 ,and 284431 , The procedure prescribed by the various laws in these cases was, almost without exception, held to be discriminatory, about which no serious dispute could reasonably be raised. Since the special procedure was more harsh and onerous than the ordinary procedure prescribed for the trial of offences, the further question which this Court was required to consider was whether the classification permissible under the particular laws was valid. If the classification was valid, persons who were grouped together and who were distinguished from others who were left out of the group on an intelligible

differentia could legitimately be tried by a different procedure, even if it was more onerous, provided the differentia had a rational relation to the object sought to be achieved by the statute in question.

66. In Anwar Ali Sarkar (supra) it was held by the majority that Section 5(1) of the West Bengal Special Courts Act, 1950 was wholly void since it conferred arbitrary powers on the Government to classify offences or cases at its pleasure and the Act did not lay down any policy or guidelines for the exercise by the Government of its discretion to classify cases or offences. It may be mentioned that the Act was a verbatim copy of the Ordinance which was framed before the Constitution had come into force and as observed by Fazal Ali J. (page 308), Article 14 could not have been present to the minds of those framed the Ordnance. As regards the reference in the preamble to the necessity for speedier trial of offences, it was held that even if the words of the preamble were read into Section 5(1), the expression "speedier trial" was too vague, uncertain and elusive to afford a basis for rational classification. Das J. held the section to be partially void in so far as it empowered the Government to direct "cases" as distinguished from "classes of cases" to be tried by a Special Court. According to the learned Judge, the provision for speedier trial of certain offences was the object of the Act which was a distinct thing from the intelligible differentia which had to be the basis for the classification. The differentia and the object being different elements, the object by itself could not be the basis for classification of offences or cases. "Speedier trial" was indeed desirable in the disposal of all cases or classes of offences or classes of cases. Patanjali Sastri C.J. in his dissenting judgment upheld the validity of the entire section on the view that it was impossible to say that the State Government had acted arbitrarily or with a discriminatory intention in referring the cases to the Special Court since there were special features which marked off the particular group of cases as requiring speedier disposal than was possible under the ordinary procedure.

67. Kathi Raning Rawat (supra) was decided by the same bench as Anwar Ali Sarkar. The two cases were heard partly together but the former was adjourned to enable the State Government to file an affidavit explaining the circumstances which led to the passing of the particular Ordinance. Section 11 of the Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949 which was impugned in Kathi Raning Rawat (supra) was similar to Section 5(1) of the West Bengal Special Courts Act, 1950. It referred to four distinct categories, namely, "offences", "classes of offences", "cases" and "classes of cases" and empowered the State Government to direct any one or more of these categories to be tried by the Special Court constituted under the Ordinance. It was held by the majority that the preamble to the Ordinance which referred to "the need to provide for public safety, maintenance of public order and the preservation of peace and tranquillity in the State of Saurashtra" together with the affidavit filed by the State Government explaining the circumstances under which the impugned order was passed, afforded a basis for distinguishing the case from Anwar Ali Sarkar,(supra) since it was clear that the

Government had sufficient guidance for classifying offences, classes of offences or classes of cases for being tried by the Special Procedure. Therefore, according to the majority, Section 11 of the Ordinance in so far as it authorized the State Government to direct offences, classes of offences or classes of cases to be tried by the Special Court was not violative of Article 14 and the notification which was issued under that part of the Ordinance was not invalid or ultra vires Mukherjee J. and Das J, who delivered two out of the four majority judgments pointed out the distinction between the notification issued in Anwar Ali Sarkar (supra) and that issued in Kathi Ratting Rawat (supra) (see pages 454-455 and page 470). Whereas, the former was issued under that part of Section 5(1) of the West Bengal Special Courts Act which authorized the State Government to direct particular "cases" to be tried by the Special Court, the latter was issued under that part of Section 11 of the Saurashtra Ordinance which authorized the State Government to direct "offences", "classes of offences", or "classes of cases" to be tried by the Special Court.

68. In Lachmandas Ahuja,(supra) a Bank dacoity case was referred for trial to a Special Judge by the Bombay Government u/s 12 of the Bombay Public Safety Measures Act, 1947 which was precisely in the same terms as Section 5(1) of the West Bengal Act and Section 11 of the Saurashtra Ordinance. The question was squarely covered by the ratio of the decisions in Anwar Ali Sarkar and Kathi Raning Rawat (supra) by the application of which the majority held that, on a parity of reasoning, Section 12 was unconstitutional to the extent to which it authorized the Government to direct particular "cases" to be tried by a Special Judge. Patanjali Sastri C.J. did not differ from the majority on this aspect of the matter. He held that, granting that the particular part of Section 12 was discriminatory in view of the decision in Anwar Ali Sarkar,(supra) the trial which had already started could not be vitiated by the Constitution coming into force subsequently. Indeed, the learned Attorney General who appeared for the State of Bombay did not controvert the legal position regarding the invalidity of the relevant part of Section 12.

69. IN Syed Qasim Razvi, Habeeb Mohamed and Rao Shiv Bahadur Singh, (supra) the trials had commenced prior to the date when the Constitution came into force. It was held by the majority in the first of these cases and by a unanimous Court in the other two, that Article 13 of the Constitution had no retrospective effect, that a pre Constitution law must be held to be valid for all past transactions and therefore, the Special Tribunal or Special Court had validly taken cognizance of the cases before them. What remained of the trial after the Constitution came into force was held not to deviate from the normal standard in material respects so as to amount to a denial of the equal protection of laws within the meaning of Article 14.

70. In Kedar Nath Bajoria (supra) the case of the appellant and two others was allotted by the State Government to the Special Court which was constituted by the Government u/s 3 of the West Bengal Criminal Law Amendment Act, 1949. The trial commenced on January 3, 1950 and nine prosecution witnesses were examined in

chief before January 26 when the Constitution came into force. The order of conviction was recorded by the Special Court on August 29, 1950 under Sections 120B and 420 of the Penal Code and Section 5(2) of the Preventive Corruption Act, 1947. The appellants'' contention that Section 4 of the Act under which the State Government had allotted their case to the Special Court violated Article 14 by the application of the ratio in Anwar Ali Sarkar (supra) was rejected by the majority, Bose J. dissenting, on the ground that having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and its provisions, the classification of the offences for the trial of which the Special Court was set up and a special procedure was laid down could not be said to be unreasonable or arbitrary. In coming to this conclusion, the Court relied on what was described as "well known" that during the post-war period, several undertakings which were established for distribution and control of essential supplies gave special opportunities to unscrupulous persons in public services, who were put in charge of such undertakings, to enrich themselves by corrupt practices. Viewed against that background, the Court considered that offences mentioned in the Schedule to the Act were common and widely prevalent during the particular period and it was in order to place an effective check upon those offences that the impugned legislation was thought necessary. Such a legislation, according to the majority, under which Special Courts were established to deal with special types of cases under a shortened and simplified procedure, was based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained. It was contended on behalf of the appellants that the Act conferred an unfettered discretion on the State Government to choose any particular case of an individual accused and send it for trial to the Special Court. This argument was rejected on the ground that it was competent to the legislature to leave it to an administrative authority to apply a law selectively to persons or things within a defined group by indicating the underlying policy and purpose in accordance with which and in fulfilment of which the administrative authority was expected to select the persons or things to be brought within the operation of the law. The mere circumstance, according to the majority, that the State Government was not compellable to allot all cases of offences set out in the Schedule to Special Judges but was vested with a discretion in the matter and could choose some cases only for trial before the Special Court did not offend against Article 14.

71. In Asgarali Nazarali Singaporawalla, (Supra) the Criminal Law Amendment Act, 1952 enacted by the Parliament came into force whilst the appellant along with others was being tried before the Presidency Magistrate, Bombay, for offences u/s 161 read with Section 116, etc. of the Penal Code. The Act provided for the trial of offences of bribery and corruption by the Special Judges and for the transfer of all pending trials to such Judges. The Presidency Magistrate continued the trial despite the passing of the Act and acquitted the appellants. It was held by this Court unanimously that the Act did not violate Article 14 since the offences of bribery and

corruption by public servants could appropriately be classified in one group or category. The classification which was founded on an intelligible differentia was held to bear a rational relationship with the object of the Act which was, to provide for speedier trial of certain offences. An argument was pressed upon this Court which was based on the observations of Mahajan J. and Mukherjea J. in Anwar Ali Sarkar (Supra) at pages 314 and 328 respectively, that the speedier trial of offences could not afford a reasonable basis for classification. That argument apparently did not find favour with the Court which said (page 691) that the particular observations of the learned Judges in Anwgr Ali Sarkar might, standing by themselves, lend support to the argument but the principle underlying those observations was not held to be conclusive by this Court in Kedar Nath Bajoria. (Supra)

72. This analysis will be incomplete without reference to a recent decision of this Court in 280464 , . In that case two parallel procedures, one under Chapter VA of the Bombay Municipal Corporation Act, 1888 and the other under the Bombay Government Premises (''Eviction) Act, 1955, were available for eviction of persons from public premises. The constitutional validity of the relevant provisions of the two Acts was challenged on the ground that they contravened Article 14, since the procedure prescribed by the two Acts was more drastic and prejudicial than the ordinary procedure of a civil suit and it was left to the arbitrary and unfettered discretion of the authorities to adopt such special procedure against some and the ordinary remedy of civil suit against others. It was held by this Court that where a statute providing for more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure without affording any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. However, a provision for appeal could cure the defect and if from the preamble and the surrounding circumstances as well as the provisions of the statutes themselves, explained and amplified by affidavits, necessary guidelines could be spelt out, the statute will not be hit by Article 14. On the merits of the procedure prescribed by the two Acts it was held by the Court that it was not so harsh or unconscionable as to justify the conclusion that a discrimination would result if resort to them is had in some cases and to the ordinary procedure of civil courts in others. By a separate but concurring judgment two of us, namely, Bhagwati, J. and V.R. Krishna Iyer J. held that it was inevitable that when a special procedure is prescribed for a defined class of persons, such as occupiers of municipal or government premises, discretion which is guided and controlled by the underlying policy and purpose of the legislation has necessarily to be vested in the administrative authority to select occupiers of municipal or government premises for bringing them within the operation of the special procedure. The learned Judges further observed that minor differences between the special procedure and the ordinary procedure is not sufficient for invoking the inhibition of the equality clause and that it cannot be assumed that merely because one procedure provides the forum of a regular court while the other provides for

the forum of an administrative tribunal, the latter is necessarily more drastic and onerous than the former. Therefore, said the learned Judges, whenever a special machinery is devised by the legislature entrusting the power of determination of disputes to an authority set up by the legislature in substitution of regular courts of law, one should not react adversely against the establishment of such an authority merely because of a certain predilection for the prevailing system of administration of justice by courts of law. In the context of the need for speedy and expeditious recovery of public premises for utilisation for important public uses, where dilatoriness of the procedure may defeat the very object of recovery, the special procedure prescribed by the two Acts was held not to be really and substantially more drastic and prejudicial than the ordinary procedure of a civil court. The special procedure prescribed by the two Acts, it was observed, was not so substantially and qualitatively disparate as to attract the vice of discrimination.

73. There are numerous cases which deal with different facets of problems arising under Article 14 and which set out principles applicable to questions which commonly arise under that article. Among those may be mentioned the decisions in 278950 ,, 282331 , , 280580 , 280492 ,, 279565 ,and 279240 ,But, as observed by Mathew J. in the last mentioned case, "it would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of equality before the law has been applied". We have, therefore, confined our attention to those cases only in which special tribunals or courts were set up or Special Judges were appointed for trying offences or classes of offences or cases or classes of cases. The survey which we have made of those cases may be sufficient to give a fair idea of the principles which ought to be followed in determining the validity of classification in such cases and the reasonableness of special procedure prescribed for the trial of offenders alleged to constitute a separate or distinct class.

74. As long back as in 1960, it was said by this Court in Kangsari Haldar (Supra) that the prepositions applicable to cases arising under Article 14 "have been repeated so many times during the past few years that they now sound almost platitdinous". What was considered to be platitudinous some 18 years ago has, in the natural course of events, become even more platitudinous today, especially in view of the avalanche of cases which have flooded this Court. Many a learned Judge of this Court has said that it is not in the formulation of principles under Article 14 but in their application to concrete cases that difficulties generally arise. But, considering that we are sitting in a larger Bench than some which decided similar cases under Article 14, and in view of the peculiar importance of the questions arising in this reference, though the questions themselves are not without a precedent, we propose, though undoubtedly at the cost of some repetition, to state the prepositions which emerge from the judgments of this Court in so far as they are relevant to the decision of the points which arise for our consideration. Those propositions may be stated thus:

1. The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favourtism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

2. The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

3. The Constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

4. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

5. By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

6. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

8. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

9. If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

10. Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

11. Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

12. Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

13. A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.

75. By the application of these tests, the conclusion is irresistible that the classification provided for by the Special Courts Bill is valid and no objection can be taken against it. Since the Bill provides for trial before a Special Court of a class of offences and a class of offenders only, the primary question which arises for consideration is whether the Bill postulates a rational basis for classification of whether the classification envisaged by it is arbitrary and artificial. By Clause 5 of the Bill, only those offences can be tried by the Special Courts in respect of which the Central Government has made a declaration under Clause 4(1). That declaration can be made by the Central Government only if it is of the opinion that there is prima facie evidence of the commission of an offence, during the period mentioned m the preamble, by a person who held a high public or political office in India and that, in accordance with the guidelines contained in the preamble to the Bill, the said offence ought to be dealt with under the Act. The classification which Section 4(1) thus makes is both of offences and offenders, the former in relation to the period mentioned in the preamble, that is to say, from February 27, 1975 until the expiry of the proclamation of emergency dated June 25, 1975 and in relation to the objective mentioned in the sixth paragraph of the Preamble that it is imperative for the functioning of parliamentary democracy and the institutions created by or under the Constitution of India that the commission of such offences should be judicially determined with the utmost dispatch; and the latter in relation to their status, that is to say, in relation to the high public or political office held by them in India. It is only if both of these factors co-exist that the prosecution in respect of the offences committed by the particular offenders can be instituted in the Special Court.

76. The promulgation of emergency is not and cannot be a matter of normal occurrence in a nation''s life and indeed a proclamation of emergency cannot but be claimed to have been necessitated by an extra-ordinary situation. Article 352 of the Constitution under which the emergency was declared in June, 1975 occurs in Chapter XVIII called "Emergency Provisions". That article empowers the President to issue a proclamation if he is satisfied that a "grave emergency" exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance. Under Article 358, while a proclamation of emergency is in operation, the State can make a law or take any

executive action even if it violates the provisions of Article 19. That is a consequence which ensues ipso facto on the declaration of an emergency. The declaration of emergency on June 25, 1975, was followed by an order passed by the President on June 27 under Article 359, suspending the enforcement of the right to move any court for the enforcement of fundamental rights conferred by Articles 14, 21 and 22 of the Constitution.

77. During the period of emergency, several laws of far-reaching consequence were passed by the Parliament and various notifications and orders were issued by or under the authority of the Central Government, affecting the rights and liberties of the people. They are: The Defence of Indian (Amendment) Act, 1975; The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1975; The Maintenance of Internal Security (Amendment) Act, 1975; The Election Laws (Amendment) Act, 1975; The Constitution (Thirty-eighth and Thirty-ninth Amendment) Acts, 1975; The Maintenance of Internal Security (Amendment) Act, 1976; The Maintenance of Internal Security (Second Amendment) Act, 1976; The Press Counsil (Repeal) Act, 1976; The Prevention of Publication of Objectionable Matter Act, 1976; Parliamentary Proceedings (Protection of Publication) Repeal Act, 1976; The Constitution (Forty-Second Amendment) Act, 1976; The Representation of the People (Amendment) Ordinance, 1977; The Disputed Elections (Prime Minister and Speaker) Ordinance, 1977; and, the Presidential and Vice-Presidential Elections (Amendment) Ordinance, 1977. After the declaration of emergency, various regulatory measures were taken with a view to imposing press censorship. The orders and directions in that behalf are dated June 26, July 5, July 6, July 13 and August 5, 1975. On January 8, 1976, a Presidential Order was issued under Article 359(1) suspending the right to move any court for the enforcement of the fundamental rights conferred by Article 19 of the Constitution. These and other measures taken during the period of emergency have been summarised by one of us, Fazal Ali, J. in the 291057 ,thus:
(1) A grave emergency was clamped in the whole country;

(2) Civil liberties were withdrawn to a great extent;

(3) Important fundamental rights of the people were suspended;

(4) Strict censorship on the press was placed; and

(5) The judicial powers were crippled to a large extent.

The third clause of the Preamble to the Bill contains a precise re-production of these five factOrs.

78. On May 28, 1977, the Government of India, in its Ministry of Home Affairs, issued a Notification u/s 3 of the Commission of Inquiry Act, 1952 appointing Shri J.C. Shah, a retired Chief Justice of the Supreme Court, as a Commission of Inquiry for enquiring into "several aspects of allegations of abuse of authority, excesses and

malpractices committed and action taken or purported to be taken in the wake of the Emergency proclaimed on the 25th June, 1975 under Article 352 of the Constitution". The Commission has submitted its report in two parts dated March 11 and April 26, 1978, which contains its findings on what is generally called the ''excesses'' alleged to have been committed during the period of emergency by persons holding high public or political offices in India and by others in association or collaboration with them or with their connivance. A few other Commissions were also appointed for the same purpose. The first recital of the preamble to the Bill refers to the reports rendered by these Commissions of Inquiry disclosing the existence of prima facie evidence of offences committed by persons who held high public or political offices in the country and other connected with them during the operation of the emergency dated June 25, 1975 and the preceding period commending on February 27, 1975.

79. We will deal with the relevance of the latter date in due course, but the facts and circumstances which we have narrated above leave no doubt that offences alleged to have been committed during the period of emergency constitute a class by themselves and so do the persons who are alleged to have utilised the high public or political offices held by them as a cover or opportunity for the purpose of committing those offences. We are not concerned with the truth or otherwise of the allegations, the narrow question before us being whether, in the first instance, the classification is based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out. The answer to that question can be one and one only, namely that offences alleged to have been committed during the emergency by persons holding high public or political offices in India stand in a class apart. The cover of emergency, so it is alleged, provided a unique opportunity to the holders of such offices to subvert the rule of law and perpetrate political crimes on the society. Others left out of that group had neither the means nor the opportunity to do so, since they lacked the authority which comes from official position. Thus, persons who are singled out by the Bill for trial before Special Courts possess common characteristics and those who fall outside that group do not possess them.

80. This is not to say that persons who fall outside the group cannot ever commit or might not ever have committed crimes of great magnitude by exploiting their public offices. But those crimes, if at all, are of a basically different kind and have generally a different motivation. In the first place, no advantage can be taken of the suppression of human freedoms when the emergency is not in operation. The suppression of people''s liberties facilitates easy commission of crimes. Public criticism is a potent deterrent to misbehavior and when that is suppressed, there is no fear of detection. Secondly, crimes which are alleged to have been committed during extraordinary periods like the period of emergency are oblique in their design and selective in their object. They are generally designed to capture and perpetuate political power; and they are broadly directed against political

opponents. The holder of a high public office who, in normal times, takes a bribe has no greater purposes in doing so than to enrich himself. That, unquestionably, deserves the highest condemnation and there is no reason why such crimes should not also be tried speedily in the interest of public decency and morals. But those crimes are not woven out of the warp and woof of political motivations. Equal laws have to be applied to all in the same situation and legislature is free to recognise the degree of harm or evil. Parliamentary democracy will see its halcyon days in India when law will provide for a speedy trial of all offenders who misuse the public offices held by them. Purity in public life is a desired goal at all times and in all situations, emergency or no emergency. But, we cannot sit as a super legislature and strike down the instant classification on the ground of under-inclusion on the score that those others are left untouched, so long as there is no violation of constitutional restraints. In this context, it cannot be over-emphasized that:

If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms.

81. (See West Coast Hotel Company v. Parrish) 300 U.S. 379, 400.

82. The next point which must be considered is whether the classification bears a rational nexus with the object which the Bill seeks to achieve. The object of the Bill is to ensure a speedy trial of the offences and offenders who, as we have pointed out, constitute a single and special class. The close relationship between the basis of the classification and the object of the Bill is clear from the very face, of the Bill. As stated in the 5th paragraph of the Bill''s preamble, ordinary criminal courts, due to congestion of work, cannot reasonably be expected to bring the prosecutions contemplated by the Bill to a speedy termination. The congestion in Courts, the mounting arrears and the easy and unconcerned dilatoriness which characterise the routine trials in our Courts are well-known facts of contemporary life. They are too glaring to permit of disputation. Seminars and symposiums are anxiously occupied in finding ways and means to solve what seems to be an intractable and frustrating problem. The Bill, therefore, justifiably provides for a method whereby prosecutions falling within its scope may be terminated speedily. It is no answer that speedier trial is a universal requirement of every trial.

83. The recital of the 6th paragraph of the preamble shows the true nexus between the basis of classification under Clause 4(1) and the object of the Bill. That paragraph says that it is imperative for the functioning of the Parliamentary democracy and the institutions created by or under the Constitution of India that the commission of offences referred to in the preamble should be judicially determined with the utmost dispatch. If it be true, and we have to assume it to be true, that offences were committed by persons holding high public or political offices in India under cover of the declaration of emergency and in the name of democracy, there can be

no doubt that the trial of such persons must be concluded with the utmost dispatch in the interest of the functioning of democracy in our country and the institutions created by our Constitution. Longer these trials will tarry, assuming the charges to be justified, greater will be the impediments in fostering democracy, which is not a plant of easy growth. If prosecutions which the Bill envisages are allowed to have their normal, leisurely span of anything between 5 to 10 years, no fruitful purpose will be served by launching them. Speedy termination of prosecutions under the Bill is the heart and soul of the Bill.

84. Thus, both the tests are fulfilled in the instant case, namely, that (1) the classification is founded on an intelligible differentia which distinguishes those which are grouped together from others who are left out and (2) the said differentia has a rational relation with the object sought to be achieved by the Bill, namely, speedy termination of prosecutions initiated in pursuance of the declaration made under Clause 4(1) of the Bill.

85. If the classification is valid and its basis bears a reasonable relationship with the object of the. Bill, no grievance can be entertained under Article 14 that the procedure prescribed by the Bill for the trial of offences which fall within its terms is harsher or more onerous as compared with the procedure which governs ordinary trials. Classification necessarily entails the subjection of those who fall within it to a different set of rules and procedure, which may conceivably be more disadvantageous than the procedure which generally applies to ordinary trials. In almost all of the decisions bearing on the question which arise for our consideration and which we have reviewed, the special procedure prescribed by the particular laws was distinctly and indisputably more onerous than the procedure which would have otherwise governed the trials. But once a classification is upheld by the application of the dual test, subjection to harsher treatment or disadvantageous procedure loses its relevance, the reason being that for the purposes of Article 14, unequals cannot complain of unequal treatment. One of the propositions formulated by us in the course of our judgment, namely, proposition No. 11 is to the effect that "Classification necessarily implies discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality". It is, therefore, unnecessary to catalogue, while we are on Article 14, the various points of difference between the procedure prescribed by the Bill and the ordinary procedure in order to find whether the former is more disadvantageous than the latter. We will only add that some of the provisions of the Bill, to which we will presently turn, cast upon the accused arraigned before the Special Court certain disadvantages as compared with the accused who are put up for trial before the ordinary courts, even as some other provisions give to them certain advantages which are denied to others.

86. It ought to be mentioned that there is no scope for the argument in the instant case that the Bill leaves it to the arbitrary and uncanalised discretion of the Central Government to pick and choose persons for trial before the Special Courts and leaves the rest to be tried by the ordinary procedure in the regular courts. Were it so, it would have become necessary to examine, in the context of Article 14, whether the procedure prescribed by the Bills is more onerous than the procedure which governs ordinary trials. But under the Bill, the Government is felt with no choice or alternative in the matter of forum of trial since, if the conditions of Clause 4(1) are satisfied, the prosecution has to be instituted in the Special Court. By that clause, if the Central Government is of the opinion that there is prima facie evidence of the commission of an offence during the period mentioned in the preamble by a person who held public or political office in India and that in accordance with the guidelines contained in the preamble the said offence ought to be dealt with under the Act, the Central Government shall make a declaration to that effect in every case in which it is of the aforesaid opinion. Thus, formation of the requisite opinion casts on the Government on obligation to make the declaration in every case, without exception, in which the opinion is formed. Upon the making of the declaration, another consequence follows compulsively under Clause 5. That clause provides that on a declaration being made under Clause 4(1), any prosecution in respect of the particular offence shall be instituted only in the Special Court. Not only is there no scope for initiating prosecutions before an ordinary court in matters which fall within the scope of Clause 4(1), but Clause 5 goes a step further and provides that even pending prosecutions in respect of the offences specified in Clause 4(1) shall stand transferred to the Special Court. Clause 6, which is an extension of the same concept, provides that if on the date of the declaration in respect of any offence, an appeal or revision against any judgment or order in a prosecution in respect of such offence, whether pending or disposed of, is itself pending in any court of appeal or revision, the same shall stand transferred for disposal to the Supreme Court. The Bill, in short, excludes the existence of two parallel jurisdictions in the same field and ensures effectively that all offences which fall within its scope shall be tried by the Special Court only and by no other court or tribunal.

87. That leaves one more point for consideration for the purposes of Article 14 which, though last, is not the least in point of importance. That point pertains to the relevance of the date mentioned in the preamble, namely, February 27, 1975. The reasons constituting the justification for the Bill are contained in the eight paragraphs of its preamble out of which paragraph one is relevant for the present purpose. It says that certain Commissions of Enquiry were appointed under the Commissions of Enquiry Act, 1952 which had rendered reports disclosing the existence of prima facie evidence of offences committed by persons who had held high public or political offices in the country and by others connected with the commission of such offences, during the operation of the Proclamation of Emergency dated 25th June,, 1975 "and during the preceding period commencing

27th February, 1975 when it became apparent that offenders were being screened by those whose duty it was to bring them to book".

88. While explaining this recital, it was urged by the learned Solicitor General and Shri Ram Jethmalani that a clear trend to protect excesses and illegalities became apparent on the particular date. Reliance was placed in support of that contention on a pair of questions and answers exchanged on the floor of the House between a member of the Lok Sabha and the then Prime Minister. According to the Lok Sabha Debates (5th Series, Vol. 48, page 258, dated February 27, 1975), this is what transpired between the two:

Shri Janeshwar Mishra (Allahabad): What about Maruti ? Shrimati Indira Gandhi: There is no corruption in Maruti. Since the hon. Member has raised it, I can say that every question that has been asked has been replied to; nothing wrong has been done; no special favour should be, or has been, given because it is concerned with the Prime Minister''s son.

What I was saying is that we are just as anxious as anybody else to remove corruption. I do not want to go into the details. I have earlier spoken about the stage by stage actions we have taken. I have said it in public meetings and I have discussed it with leaders. But today there seems to be a very selective type of campaign or accusation. Corruption will not go in this way. If the real intention is to remove corruption, then it must be an honest way of dealing with it at every level....

Shri Shyamnandan Mishra: A certificate of honesty should come from you? Shrimati Indira Gandhi; Not at all.

89. The claim that the tendency to protect the excesses and illegalities became apparent because of these answers or that the particular answers created a new awareness that offenders were being screened by those whose duty it was to bring them to book is too naive for our acceptance. Even assuming that there is any credible basis for the same, the grouping together of persons who are alleged to have committed offences during the period of emergency with others who are alleged to have engaged themselves in screening certain offenders prior to the declaration of emergency is tantamount to clubbing together, in the same class, persons who do not possess common qualities or ?characteristics. It is unquestionably reasonable for the legislature to think that the suppression of human liberties during the period of ?emergency furnished an opportunity to persons holding high public or political offices to commit crimes of grave magnitude which were calculated to destroy democratic values. The premise that the suspension, especially, of preferred freedoms engineers callous defiance of laws and the Constitution is easy to understand. That is why offences alleged to have been committed during the period of emergency can be treated as sui generis. The same cannot, however, be said of activities, even assuming that they are unlawful, which preceded the declaration of emergency. Those doings were open to public

criticism and were unprotected by the veil of emergency. It is true that one ought not to insist on abstract symmetry or delusive exactness in the matter of classification. Therefore, eschewing a doctrinaire approach, one should test the validity of a classification by broad considerations, particularly when the charge is one of under-inclusiveness. The Government, as it is said must be permitted a little free play in the joints since, there is no mathematical formula for determining why those who are left out of a class should not be included within it. But persons possessing widely differing characteristics, in the context of their situation in relation to the period of their activities, cannot by any reasonable criterion be herded in the same class. The ante-dating of the emergency, as it were, from June 25 to February 27, 1975 is wholly unscientific and proceeds from irrational considerations arising out of a supposed discovery in the matter of screening of offenders. The inclusion of offences and offenders in relation to the period from February 27 to June 25, 1975 in the same class as those whose alleged unlawful activities covered the period of emergency is too artificial to be sustained.

90. While justifying the extended classification, counsel drew our attention to certain findings of the Shah Commission of Enquiry (Vol. I, items 8, pages 59 to 64) on the alleged misuse of power by the then Prime Minister prior to the declaration of emergency. Those findings, according to us, are beside the point for the present purpose. The question before us is not whether anyone, high or low, committed any excess of power before the declaration of emergency. The question is whether, those who are alleged to have committed offences prior to the emergency can be put in the same class as persons who are alleged to have committed offences during the period of emergency. The answer to that question has to be in the negative.

91. We are accordingly of the view that the classification provided for by Clause 4(1) of the Bill is valid to the limited extent to which the Central Government is empowered to make the declaration in respect of offences alleged to have been committed during the period of emergency, by persons holding high public or political offices. The classification is invalid in so far as it covers offences committed by such persons between February 27 and June 25, 1975. No declaration can therefore be made by the Central Government in regard to those offences and offenders under the present classification.

92. That disposes of the question as regard the validity of the classification provided for by Clause 4(1) of the Bill. Those who are wrongly included in the classification can have nothing more to say because they cannot be tried by the Special Courts. As regards those who are rightly grouped together, we have already indicated that since the classification is valid, it is unnecessary for the purposes of Article 14 to consider whether the procedure prescribed by the Bill is more onerous than the ordinary procedure. That observation, it shall have been noticed, is expressly limited to the purposes of Article 14. The reason for so limiting it is that the assumption underlying the judgment of the majority in 282068 ,that certain articles; of the

Constitution exclusively deal with specific matters no longer holds the field A.K. Gopalan (supra) was in that respect expressly over-ruled by the majority in 282049 ,, known generally as the Bank Nationalisation case. In 272145 ,, it was held by a seven Judge Bench that the law of preventive detention has to meet the challenge not only of Articles 21 and 22 but also of Article 19(1)(d). In 277828 , it was observed by one of us, Bhagwati, J. that the law must be now taken to be well-settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19, would have to meet the challenge of that article. The view, which was accepted by the majority, is that the rights dealt with in different articles contained in Part III of the Constitution do not represent separate streams of rights but are parts of an integrated constitutional scheme. It is thus beyond the pale of controversy now, that the various articles in part III of the Constitution cannot be treated as mutually exclusive.

93. Upon that view, it is not sufficient to say that since the classification is valid, it is not necessary to consider whether the procedure prescribed by the Bill is more onerous, than the ordinary procedure. The onerousness of the special procedure would be irrelevant in considerations arising under Article 14, for the reason that the classification is valid (to the extent indicated). But the Bill has got to meet the challenge of other provisions of the Constitution also, in so far as any particular provision is attracted. The theory that articles conferring fundamental rights are mutually exclusive and that any particular article in part III constitutes a self-contained code having been discarded, it becomes necessary to examine whether the procedure prescribed by the Bill is violative of any other provision of the Constitution.

94. Article 21 is the only other provision of the Constitution which is apposite in this context. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. In 277828 , , it was held by the majority that the procedure contemplated by Article 21 must be "light and just and fair and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied". It is therefore imperative to examine whether the procedure prescribed by the Bill is just and fair or is in any respect arbitrary or oppressive.

95. An infinite variety of grievances has been made against the provisions of the Bill. Some of them are so unsubstantial that we consider it unnecessary to catalogue them. We will refer to a few of them only as a sample of the many that were made. It is urged that a person put up for trial before the Special Court is denied the benefit of Section 439 of the CrPC, under which a High Court or a Court of Sessions may release an accused on bail; that it is permissible to the Government under the provisions of the Bill to choose a situs of trial which is inconvenient to the accused,

denying thereby to him the benefit of Section 177 of the Code; that the Bill virtually abolishes the court''s supervisory jurisdiction over the investigation conducted by the police; that the accused is denied the right of trial before courts with limited powers of punishment; that the warrant procedure prescribed by the Bill for the trial of offences is, in the circumstances, needlessly cumbersome; that there is no provision for confirming the sentence of death, if any is passed, by the Special Court, that the Bill confers the right of appeal in every case, as much on the State as on the accused and thereby enlarges the rights of the State and imposes uncalled for burden on the accused; that whereas the CrPC requires the State to obtain the leave of the court before filing an appeal against an order of acquittal, the Bill imposes no such pre-condition, and so on and so forth.

96. We have given our anxious consideration to these and similar other grievances and apprehensions but we see no substance in them, except to the extent to be indicated later. By Clause 9 of the Bill, an accused put up for trial before the Special Court has to be tried by the procedure prescribed by the Code for the trial of warrant cases before a magistrate. The trial, save as otherwise prescribed has to be governed by the said Code. In Syed Qasim Razvi (supra) it was held by this Court that the warrant procedure is in no sense prejudicial to the interest of an accused. As regards bail, it is open to the accused to ask for it and in appropriate cases, the Special Court would be justified in enlarging him on bail. As regards the situs of trial, it is unfair to make an assumption of mala fides and say that an inconvenient forum will be chosen deliberately. Besides, the provisions of chapter XIII of the Code containing Section 177 to 189, which deal with "Jurisdiction of the criminal courts in Inquiries and Trials", are not excluded by the Bill. Those provisions will govern the question as to the situs of trial. The grievance regarding absence of provision for the confirmation of death sentence is unreal because under Clause 10(1), every accused has a right of appeal to this Court. There is no reason to suppose that this right is in any sense narrower than the right of an accused to ask the High Court to examine the correctness of the death sentence imposed by the Sessions Court. In so far as the other grievances are concerned, they are too trivial to justify the charge that the procedure prescribed by the Bill is unjust or unfair. In fact most of the other grievances in this category were made on behalf of the accused in Syed Qasim Razi and Habeeb Mohamed (supra) but they were rejected by this Court. Every variation in procedure is not to be assumed to be unjust and indeed as observed by this Court in Rao Shiv Bahadur Singh (supra) which was followed in 272091 , a person accused of the commission of an offence has no vested right to be tried by a particular court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. In 277189 ,., one of us, Krishna Iyer J., said that no party to a criminal trial has a vested right in slow motion justice. This has to be constantly kept in mind without, of course, overlooking the Constitutional inhibitions.

97. Though this is so, the provisions of the Bill appear to us to be unfair and unjust in three important respects. In the first place, there is no provision in the Bill for the transfer of cases from one Special Court to another. The manner in which a Judge conducts himself may disclose a bias, in which case the interest of justice would require that the trial of the case ought to be withdrawn from him. There are other cases in which a Judge may not in fact be biased and yet the accused may entertain a reasonable apprehension on account of attendant circumstances that he will not get a fair trial. It is of the utmost importance that justice must not only be done but must be seen to be done. To compel an accused to submit to the jurisdiction of a Court which, in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of natural justice and a denial of fair play. There are yet other cases in which expediency or convenience may require the transfer of a case, even if no bias is involved. The absence of provision for transfer of trials in appropriate cases may undermine the very confidence of the people in the Special Courts as an institution set up for dispensing justice.

98. The second infirmity from which the procedural part of the Bill suffers is that by Clause 7, Special Courts are to be presided over either by a sitting Judge of a High Court or by a person who has held office as Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India. The provision for the appointment of a sitting High Court Judge as a Judge of the Special Court is open to no exception. In so far as the alternate source is concerned, we entertain the highest respect for retired Judges of High Courts and we are anxious that nothing said by us in our judgment should be construed as casting any aspersion on them as a class. Some of them have distinguished themselves as lawyers once again, some as members of administrative tribunal, and many of them are in demand in important walks of life. Unquestionably they occupy a position of honour and respect in society. But one cannot shut one''s eyes to the constitutional position that whereas by Article 217, a sitting Judge of a High Court enjoys security of tenure until he attains a particular age, the retired Judge will hold his office as a Judge of the Special Court during the pleasure of the Government. The pleasure doctrine is subversive of judicial independence.

99. A retired Judge presiding over a Special Court, who displays strength and independence may be frowned upon by the Government and there is nothing to prevent it from terminating his appointment as and when it likes. It is said on behalf of the Government that if the appointment has to be made in consultation with the Chief Justice of India, the termination of the appointment will also require similar consultation. We are not impressed by that submission. But, granting that the argument is valid, the process of consultation has its own limitations and they are quite well-known. The obligation to consult may not necessarily act as a check on an executive which is determined to remove an inconvenient incumbent. We are, therefore, of the opinion that Clause 7 of the Bill violates Article 21 of the Constitution to the extent that a person who has held office as a Judge of the High

Court can be appointed to preside over a Special Court, merely in consultation with the Chief Justice of India.

100. Yet another infirmity from which the procedure prescribed by the Bill suffers is that the only obligation which Clause 7 imposes on the Central Government while nominating a person to preside over the Special Court is to consult the Chief Justice of India. This is not a proper place and it is to some extent embarrassing to dwell upon the pitfalls of the consultative process though, by hearsay, one may say that as a matter of convention, it is in the rarest of rate cases that the advice tendered by the Chief Justice of India is not accepted by the Government. But the right of an accused to life and liberty cannot be made to depend upon pious expressions of hope, howsoever past experience may justify them. The assurance that conventions are seldom broken is a poor consolation to an accused whose life and honour are at stake. Indeed, one must look at the matter not so much from the point of view of the Chief Justice of India, nor indeed from the point of view of the Government, as from the point of view of the accused and the expectations and sensitivities of the society. It is of the greatest importance that in the name of fair and unpolluted justice, the procedure for appointing a Judge to the Special Court, who is to be nominated to try a special class of cases, should inspire the confidence not only of the accused but of the entire community. Administration of justice has a social dimension and the society at large has a stake in impartial and even-handed justice.
101. These, in our opinion, are the three procedural infirmities from which the Bill suffers and which are violative of Article 21 of the Constitution, in the sense that they make the procedure prescribed by the Bill unjust and unfair to the accused.

102. These points were highlighted during the course of the hearing of the reference, whereupon the learned Solicitor General filed a statement in the Court to the following effect:

1. That in the course of written submissions already filed, it has been contended on behalf of the Union of India that the procedure for trial envisaged in the Bill under Reference is more liberal and ensures a fair trial.

2. That the last recital in the Preamble to the Bill states that some procedural changes were being made whereby avoidable delay is eliminated without interfering with the right to a fair trial.

3. That in the course of arguments, certain observations were made by this hon''ble Court indicating certain changes which might ensure fairer trial and inspire greater confidence about the working of Special Courts.

4. That in the light of the proceedings in the Court, certain suggestions were communicated by the Solicitor General to the Government.

5. That after careful consideration, the Government accepts the suggestion that only a sitting Judge of the High Court would be appointed to preside over a Special Court

and that the Government also agrees that the appointment will be made with the concurrence of the Chief Justice of India.

6. That the Government also agrees to the suggestion that the Supreme Court will be specifically empowered to transfer a case from one Special Court to another notwithstanding any other provision in the Bill.

7. That the Government of India have authorised the Solicitor General to make a statement to the Court on the above lines.

Sd/- S.N. Kacker
Solictor General of India 25-9-78

103. The learned Solicitor General assured us that the Government is committed to making appropriate changes in the bill as mentioned in paragraph 5 and 6 above. Though we appreciate the response of the Government it has to be remembered that appropriate amendments shall have to be passed by the legislature. The assurance that such amendments will be proposed by the Government and the prospect that they may be passed by the legislature cannot relieve us from discharging our duty to pronounce upon the Bill as it stands to-day. So long as the Bill contains the three offending provisions which we have pointed out above, the procedure will be violative of Article 21, being unjust and unfair. The other objections are without any substance, particularly in view of the fact that the trial is to be held by no less a person than a Judge of a High Court and there is a right of appeal to this Court. These two are the outstanding, nay, the saving safeguards of the Bill.

104. There is one more provision of the Bill to which we must refer while we are on this question. Sub-clause (1) of Clause 4 provides for the making of the declaration by the Central Government while Sub-clause (2) provides that "Such declaration shall not be called in question in any court". Though the opinion which the Central Government has to form under Clause 4(1) is subjective, we have no doubt that despite the provisions of Sub-clause (2) it will be open to judicial review at least within the limits indicated by this Court in 285789 ,. It was observed in that case by one of us, Bhagwati J., while speaking for the Court, that in a Government of laws "there is nothing like unfettered discretion immune from judicial reviewability". The opinion has to be formed by the Government, to say the least, rationally and in a bonafide manner.

105. There was some discussion before us on the question as to whether the opinion rendered by this Court in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution is binding as law declared by this Court within the meaning of Article 141 of the Constitution. The question may have to be considered more fully on a future occasion but we do hope that the time which has been spent in determining the questions arising in this reference shall not have been spent in vain. In the cases of Estate Duty Bill [1944] F.C.R. 317U.P. Legislative Assembly [1965]

1 S.C.R. 413, and 279299 , the view was expressed that advisory opinions do not have the binding force of law. In Attorney-General for Ontario v. Attorney-General for Canada [1912] A.C. 571it was even said by the Privy Council that the opinions expressed by the Court in its advisory jurisdiction "will have no more effect than the opinions of the law officers". On the other hand, the High Court of Calcutta in 25206 ,and the High Court of Gujarat in Chhabildas Mehta v. The Legislative Assembly, Gujarat State (1970) II Gujarat Law Reporter 729 have taken the view that the opinion rendered by the Supreme Court under Article 143 is law declared by it within the meaning of Article 141. In The Province of Madras v. Messrs Boddu Baidanna [1942] F.C.R. 90 the Federal Court discussed the opinion rendered by it in the Central Provinces case [1959] F.C.R. 18 in the same manner as one discusses a binding judgment. We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to over-rule, if necessary the view earlier taken by it insofar as all other courts in the territory of India are concerned they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution. We would also like, to draw attention to the observations made by Ray, C.J., in St. Xaviers College (supra) that even if the opinion given in the exercise of advisory jurisdiction may not be binding, it is entitled to great weight. It would be strange that a decision given by this Court on a question of law in a dispute between two private parties should be binding on all courts in this country but the advisory opinion should bind no one at all even if as in the instant case, it is given after issuing notice to all interested parties, after hearing everyone concerned who desired to be heard, and after a full consideration of the questions raised in the reference. Almost everything that could possibly be urged in favour of and against the Bill was urged before us and to think that our opinion is an exercise in futility is deeply frustrating. While saying this, we are not unmindful of the view expressed by an eminent writer that although the advisory opinion given by the Supreme Court has high persuasive authority, it is not law declared by it within the meaning of Article 141. (See Constitutional Law of India by H.M. Seervai, 2nd Edition, Vol. II, page 1415, para 25.68).

106. We have upheld the creation of Special Courts on the touchstone of the Constitution. We have also expressed the view that appointment of sitting Judges of the High Court to the Special Courts, with the concurrence of the Chief Justice of India, will meet the requirement of Article 21. But we cannot resist the observation which was made during the course of arguments that investing the High Courts with jurisdiction to try cases under the Bill may, in the circumstance''s, afford the best solution from every point of view. The Chief Justices of High Courts will, in their discretion, assign and allocate particular cases to Judges of their Courts, as they do in the normal routine of their function. To avoid delays and to ensure speedier trial no other work may be assigned to the Judge nominated by the Chief Justice to try a case or cases under the Bill. This will obviate the nomination by the Central Government, of a particular Judge to try a particular case. Law is not the whole of life

and the propriety of an action, though not for the Court to decide, ought to be a matter of paramount consideration for those who desire to govern justly and fairly. Courts of Justice cannot afford even to risk the charge of bias and no Judge wants it to be said of him that he was specially nominated by the Government to try a particular individual. The community must retain its confidence in the judiciary, which has to decide not merely constitutional matters but a large variety of other matters in which law touches the life of common men at many points. As said by Prof Finer in "The Theory and Practice of Modern Government" (pp. 151-152). "The multitude does not minutely discriminate, and when it mistrusts for one thing it may mistrust for another though the cases are poles asunder". The deeply thoughtful observations made in this behalf by our learned Brother, Shinghal J, ought to receive the most careful consideration at the hands of the Government.

107. In conclusion, our answer to the reference is as follows:

(1) The Parliament has the legislative competence to create Special Courts and to provide that an appeal shall lie as of right from any judgment or order of a Special Court to make a declaration under Clause 4(1) of the Bill in respect to the Supreme Court. Clauses 2 and 10(1) of the Bill are, therefore, within the Parliament"s legislative competence;

(2) The classification provided for in Clause 4(1) of the Bill is valid to the extent to which the Central Government is empowered to make a declaration in respect of offences alleged to have been committed during the period of Emergency by persons who held high public or political offices in India. Persons who are alleged to have committed offence prior to the declaration of Emergency cannot validly be grouped along with those who are alleged to have committed offences during the period of Emergency. It is therefore, not competent to the Central Government to make a declaration under Clause 4(1) of the Bill in respect of persons who are alleged to have committed offences between February 27, 1975 and June 25, 1975.

(3) The procedure prescribed by the Bill for the trial of offences in respect of which a declaration can be validly made by the Central Government under Clause 4(1) of the Bill is just and fair except in regard to the following matters:

(a) the provision in Clause 7 of the Bill, under which a retired Judge of the High Court can be appointed as a Judge of the Special Court;

(b) the provision in Clause 7 under which the appointment of a Judge to the Special Court can be made by the Central Government in consultation with but without the concurrence of the Chief Justice of India; and

(c) the absence of a provision for transfer of a case from one Special Court to another.

(4) The Bill is valid and constitutional in all other respects.

V.R. Krishna Iyer, J.

108. Not a note of assonance but a stroke of emphasis is my main intent in appending this separate opinion confined to a few fundamentals. It is fair to make clear at the outset that all the legal conclusions reached by the learned Chief Justice command my concurrence but, on certain key issues, my ratiocination diverges, sounding harsher and striking harder maybe. However, the final confluence and considerable consonance cut down my coverage. The price of unanimity is not taciturnity where individual articulation may make distinctive contribution.

109. Right at the beginning, an exordial enunciation of my socio-legal perspective which has a constitutional bearing may be set out. I lend judicious assent to the boarder policy of social justice behind this Bill. As I read it, this measure is the embryonic expression of a necessitous legislative project, which, if full-fledged, will work a relentless break-through towards catching, through the compulsive criminal process, the higher inhabitants of Indian public and political decks, who have, in practice, remained ''untouchable'' and ''unapproachable'', to the rule of law. ''Operation Clean-Up'' is a ''consummation devoutly to be wished'', although naive optimism cannot obfuscate the obnoxious experience that laws made in terrorem against those who belong to the top power bloc prove in action to be paper tigers. The pathology of our public law, with its class slant, is that an unmincing ombudsman or sentinel on the qui vive with power to act against those in power, now or before, and offering legal access to the informed citizen to complain with immunity does not exist, despite all the bruited umbrage of political performers against peculations and perversions by higher echelons. Law is what law does, not what law says and the moral gap between word and deed menaces people''s faith in life and law. And then, the tragedy-democracy becomes a casualty.

110. The greatest trauma of our times, for a developing country of urgent yet tantalising imperatives, is the dismal, yet die-hard, poverty of the masses and the democratic, yet graft-riven, way of life of power-wielders. Together they blend to produce gross abuse geared to personal aggrandizement, suppression of exposure and a host of other horrendous, yet hidden, crimes by the summit executives, pro tern, the para-political manipulators and the abetting bureaucrats. And the rule of law hangs limp or barks but never bites. An anonymous poet sardonically projected the social dimension of this systemic deficiency:

The law locks up both man and woman

Who steals the goose from off the common,

But lets the greater felon loose

Who steals the common from the goose.

111. The impact of ''summit'' crimes in the Third World setting is more terrible than the Watergate syndrome as perceptive social scientists have unmasked. Corruption

and repression-cousins in such situations-hijack developmental processes. And, in the long run, lagging national progress means ebbing people''s confidence in constitutional means to social justice. And so, to track down and give short shrift to these heavy-weight criminaloids who often mislead the people by public moral weight-lifting and multipoint manifestoes is an urgent legislative mission partially undertaken by the Bill under discussion. To punish such super-offenders in top positions, sealing off legalistic escape routes and dilatory strategies and bringing them to justice with high speed and early finality, is a desideratum voiced in vain by Commissions and Committees in the past and is a dimension of the dynamics of the Rule of Law. This Bill, hopefully but partially, breaks new ground contrary to people''s resigned cynicism that all high-powered investigations, reports and recommendations end in legislative and judicative futility, that all these valiant exercises are but sound and fury signifying nothing, that ''business as usual'' is the signature time of public business, heretofore, here and hereafter. So this social justice measure has my broad assent in moral principle and in constitutional classification, subject to the serious infirmities from which it suffers as the learned Chief Justice has tersely sketched. Whether this remedy will effectively cure the malady of criminal summitry is for the future to tell.

112. All this serves as a backdrop. Let me unfold in fuller argumentation my thesis that the Bill, good so far as it goes, is bad so far as it does not go-saved though by a pragmatic exception I will presently explain. Where the proposed law excludes the pre-and post-emergency crime-doers in the higher brackets and picks out only ''Emergency'' offenders, its benign purpose perhaps becomes a crypto cover up of like criminals before and after. An ''ephemeral'' measure to meet a perennial menace is neither a logical step nor national fulfilment. The classification, if I may anticipate my conclusion, is on the brink of constitutional break-down at that point and becomes almost vulnerable to the attack of Article 14

113. The Court''s advisory opinion is sought, not on social policy but on constitutionality. Here, however, it is my very endorsement of the basic policy of the Bill, the apparent motive of the mover, the true principle of the measure and the urgent relevancy of the legislation-swifts, sure, yet fair justice to apex offenders in public and political life-that compels me to be critical of a few provisions on grounds too basic to be slurred over. I start with the assumption that an Act of this nature, with the major changes mentioned by the Chief Justice to avert collision with Article 21 and with wider coverage to come to terms with Article 14, is long overdue and, if passed into law and enforced peremptorily, may partly salvage the sunken credibility of the general community in democracy-in-action, already demoralised, since Independence, by the perversion of power for oblique purposes as evidenced by periodical parliamentary debates and many Commission Reports still gathering dust.

114. To drive home my point, a little divagation is needed. Development, in a State which directs the economy, means public expenditure on an unprecedented scale for public weal and this national necessity is sometimes covertly converted into personal opportunity by people in lofty offices vested with authority for decision-making. The realistic rule of law must reckon with the pernicious potential of guided missiles in the hands of misguided men, especially when the victim is a ''soft'' State, and must rise to meet the menace and manacle the delinquent, be he ever so high. I have said enough to justify the contention that these offenders perfectly fill the constitutional bill as a separate class which deserves speedy prosecution and final punishment by high judicial agencies if restoration of the slumping credence in the constitutional order and democratic development were to be sustained among the masses in Third World countries. The Preamble to the Bill is revelatory of this orientation and the mover of the Bill, Shri Ram Jethmalani, appearing in person, indicated as much.

115. No erudite pedantry can stand in the way of pragmatic grouping of high-placed office-holders separately, for purposes of high-speed criminal action invested with early conclusiveness and inquired into by high-level courts. The differentia of the Bill rings irresistibly sound. And failure ''to press forward such clean-up undertaking may be a blow to the rule of law and the rule of life and may deepen the crisis of democracy among the millions-the men who make our nation-who to-day are largely disenchanted. So it is time, if peaceful transformation is the constitutional scheme, to begin by pre-emptive steps of quick and conclusive exposure and conviction of criminals in towers of power-a special class of economic offenders with abettors from the Bureaucracy and Big Business, as recent Commission Reports trendily portray and portent. Such is the simple, sociological substance of the classificatory descrimen which satisfies the egalitarian conscience of Article 14. What better designs-engineering can there be than to make a quick example of master-criminals and tainted caesars with public office as protective mantle ? The fundamental dynamics of Public Power-great trust and sure accountability-rank high in a people-oriented scheme of the rule of law.

116. I hold that in this generalised version, there is a reasonable classification implicit in this legislation, but venture further that it is perilously near being under-inclusive and, therefore, unequal. For it is a truncated projection of a manifetsly wider principle that exalted offenders shall be dealt with by the criminal law with emergent speed so that the common man may know that when public power is abused for private profit or personal revenge the rule of law shall rapidly run them down and restore the faith of the people in democratic institutions through speedy justice according to law. It is in this sense that very important persons wielding large administrative powers shall, with quick despatch, be tried and punished, if guilty. Prompt trial and early punishment may be necessary in all criminal cases. But, raw realism suggests that in a decelerating situation of slow motion justice, with courts chocked by dockets, there is a special case for speedier

trial and prompter punishment where the offender sits at the top of the administrative pyramid. Leizurely justice, year after the long-drawn-out commission proceedings, hardly carries conviction when man''s memories would have forgotten the grave crimes, if any, committed and men''s confidence in the rule of law would have been wholly demolished by seeing the top brass continuing to hold such offices despite credible charges of gross crimes of misuse. The common people watch the fortunes of these favoured species when they violate the norms of the criminal law and, if they are not punished forthwith, lose faith in the system itself. The cynicism about ''equal justice under the law'' sours into ''show me the man and I will show you the law''. The democratic system must ensure that the business of power-public power-shall not be doing business.

117. The social philosphy and philosophy of law in this area emphatically require that offices of public power, especially in a country of poverty, shall not be the workshop of personal gain. The immediate correctional process is the court, not the once-in-a-few years ballot. Be you ever so high the law will watch you, catch you, convict you if guilty and that, swiftly but fairly.

118. The crucial test is ''All power is a trust'', its holders are ''accountable for its exercise'', for ''from the people, and for the people, all springs, and all must exist''. By this high and only standard the Bill must fail morally if it exempts non-Emergency criminals about whom prior Commission Reports, now asleep in official pigeon holes, bear witness and future Commission Reports (who knows ?) may, in time, testify. In this larger perspective, Emergency is not a substantial differentia and the Bill nearly recognises this by ante-dating the operation to February 27, 1975 when there was no ''Emergency''. Why ante-date if the ''emergency'' was the critical criterion ?

119. It is common knowledge that currently in our country criminal courts excel in slow-motion. The procedure is dilatory, the dockets are heavy, even the service of process is delayed and, still more exasperating, there are appeals upon appeals and revisions and supervisory jurisdictions, baffling and baulking speedy termination of prosecutions, not to speak of the contribution to delay by the Administration itself by neglect of the basic necessaries of the judicial process. Parliamentary and pre-legislative exercises spread over several years hardly did any-thing for radical simplification and streamlining of criminal procedure and virtually re-enacted, with minor mutations, the vintage Code making forensic flow too slow and liable to hold-ups built into the law. Courts are less to blame than the Code made by Parliament for dawdling and Governments are guilty of denying or delaying basic amenities for the judiciary to function smoothly. Justice is a Cinderalla in our scheme. Even so, leaving V.V.I.P. accused to be dealt with by the routinely procrastinating legal process is to surrender to interminable delays as an inevitable evil. Therefore, we should not be finical about absolute processual equality and must be creative in innovating procedures compelled by special situations.

120. But the idiom of Article 14 is unmistakeable. The power status of the alleged criminal, the nature of the alleged crime vis-a-vis public confidence and the imperative need for speedy litigative finality, are the telling factOrs. Every difference is not a differentia. ''Speedy trial'' of offences of a public nature ''committed by persons who have held high public or political offices in the country and others connected with the commission of such offences'' is the heart of the matter.

121. Let us take a close look at the ''Emergency'', the vices it bred and the nexus they have to speedier justice, substantial enough to qualify for reasonable sub-classification. Information flowing from the proceedings and reports of a bunch of high-powered judicial commissions shows that during that hushed spell, many suffered shocking treatment. In the words of the Preamble, civil liberties were withdrawn to a great extent, important fundamental rights of the people were suspended, strict censorship on the press was placed and judicial powers were curtailed to a large extent.

122. Before proceeding further, the Legislative and Judicative frontiers must be perceived with perspicacity, as set out in 283142 ,

Every differentiation is not a discrimination. But classification can be sustained only if it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly stated by the courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional. To put it differently, the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the court will be reluctant and perhaps ill-equiped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context., we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification.... A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads.

The core question, however, is what reasonable relation Emergency, as the basis of classification, has to the object of the legislation.

123. This takes us to two telling aspects which deserve careful examination, What are the special factors relied on for classification and what is the legislative goal and then-that gut issue-what is the correlation between the two ? The integral yoga of means and ends is the essence of valid classification. An excellent classification may not qualify for exemption from equality unless it is yoked to the statutory goal. This is the weak link in the Bill.

124. The Objects and Reasons are informative material guiding the court about the purpose of a legislation and the nexus of the differentia, if any, to the end in view. Nothing about Emergency period is adverted to there as a distinguishing mark. If at all, the clear clue is that all abuse of public authority by exalted public men, whatever the time of commission, shall be punished without the tedious delay which ordinarily defeats justice in the case of top echelons whose crimes affect the credentials of democratic regimes.

125. The Court in 291078 , has explained the constitutional facet of classification:

This doctrine recognises that the legislature may classify for the purpose of legislation but requires that the classification must be reasonable. It should ensure that persons or things similarly situated are all similarly treated. The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

But the question is: what does this ambiguous and crucial phrase ''similarly situated'' mean ? Where are we to look for the test of similarity of situation which determines the reasonableness of a classification ? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons or things similarly situated with respect to the purpose of the lew.

126. After having stated the general proposition the Court struck a note of warning which is the main crux of the present controversy: Ibid at 478.

The fundamental guarantee is of equal protection of the laws and the doctrine of classification is only a subsidiary rule evolved by courts to give a practical content to that guarantee by accommodating it with the practical needs of the society and it should not be allowed to submerge and drown the precious guarantee of equality. The doctrine of classification should not be carried to a point where instead of being a useful servant, it becomes a dangerous master, for otherwise, as pointed out by Chandrachud, J. in 271931 , "the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterised by different and distinct attainments."... That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law and equal protection of the laws may be replaced by the overworked methodology of classification. Our approach to the equal protection clause must, therefore, be guided by the words of caution uttered by Krishna Iyer, J. in 271931 , . "Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straight forward classification plainly promoting relevant goals can have constitutional validly. To overdo classification is to undo equality.
(emphasis added)

127. Mathew, J., in 279240 , placed the same accent from the angle of under-inclusion:

The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify.... A reasonable classification is one which includes all who are similarly situated and none who are not. The question is what does the phrase ''similarly situated'' mean ? The answer to the question is that we must look beyond the classification to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well.

(emphasis added)

128. Here, what is the similarly circumstanced class which, according to the mandate of Article 14, must be similarly treated ? Is there any substantial differentiation between corrupters of public power before and after February 27, 1975 or before and after Emergency ? Are they not ''birds of a feather'' who must ''flock together'', tried alike and receive the fruits of justice equally ? What genetic distinction justifies a dissection between bribe-taking ministers of yesterday, to-day and tomorrow so far as-and this is the water mark-exemplary immediacy and instant finality of judicial processing are concerned ?

129. The prologuic part of the Bill states that the hushed spell of the Emergency era was haunted by a hundred vampirish villainies which held vital freedoms in thraldom. Fazal Ali, J. condensed them in 291057 ,and these observations are borrowed in the Preamble to the Bill-and stated:

(2) that civil liberties were withdrawn to a great extent;

(3) that important fundamental rights of the people were suspended;

(4) that strict censorship on the press was placed; and

(5) that the judicial powers were crippled to a large extent

130. The question is not whether the tragic quadruplex of vices did exist-we must, in law, assume they did-but what is the substantial linkage between the then prevalent morbid conditions and the unavailability of normal processes of prosecuting corrupt or oppressive administrators in the criminal courts. Where magistrates and Sessions Judges forbidden from taking cognisance of cases of bribery if the accused

happened to be ministers or their collaborators ? Were criminal misuses of power by high functionaries deleted from the court''s jurisdiction ? Were witnesses banned from testifying or the police prohibited from investigating ? No. Top political power-wielders had in the past often escaped, even after judicial commissions had found a prima facie case against them. The pathology of their escape from the coils of the judicial process cannot be misdiagnosed as due only to the Emergency virus. That approach side-tracks the solution and serves to continue the sickness. For instance, secrecy and authority are the armoury of dubious and arrogant power. The right to know is a fundamental facet of free action and the Official Secrets Act is often a shield of the corrupt. Fearless investigation is a sine qua non of exposure of delinquent ''greats'' and if the investigative agencies tremble to probe or make public the felonies of high office white collar offenders in the peaks may be unruffled by the law. An independent investigative agency to be set in motion by any responsible citizen is a desideratum. These et al, are not to be ignored in the incessant din of ''Emergency Excesses''.

131. The relevancies relied on in the Preamble bearing on Emergency and its nexus to speedier trial may be analysed. Civil liberties were suppressed, press censorship was clamped down and judicial powers were curtailed. Assuming civil liberty was a casualty during the Emergency, as it was, how did it obstruct trials of super-political criminals ? If faith in democratic institutions is the victim in case there is undue delay in punishing high public and political offenders,, that holds good, regardless of Emergency. Likewise, if the Press had been suppressed during Emergency what had that to do with political criminals being brought to book by filing complaints before courts ? If judicial powers were crippled by the Proclamation and the follow-up notification, they affected the High Courts'' and Supreme Court''s jurisdictions to grant relief against preventive detention or denial of certain freedoms. What had that to do with prompt prosecution in trial courts of high political criminals-that perennial post-Independence species ? If substantial relation between the distinguishing criterion and the goal of the law be the only classificatory justification qualifying for exemption from equal treatment. Emergency does not segregate corrupt ministers and elected caesars into two categories. They are a common enemy with continuity in space and time and, for social justice to show up, must be tracked down by a permanent statute.

132. Let us view the problem slightly differently. Even if liberty had not been curtailed, press not gagged or writ jurisdiction not cut down, criminal trials and appeals and revisions would have taken their own interminable delays. It is the forensic delay that has to be axed and that has little to do with the vices of the Emergency. Such crimes were exposed by judicial commissions before, involving Chief Ministers and cabinet minister''s at both levels and no criminal action followed except now and that of a select group. It was lack of will-not Emergency-that was the villain of the piece in non-prosecution of cases revealed by several Commissions like the Commission of Enquiry appointed by the Government of Orissa in 1967 (Mr.

Justice Khanna), the Commission of Enquiry appointed by the Government of J&K in 1965 (Mr. Justice Rajagopala Ayyangar), the Mudholkar Commission against 14 ex-United Front Ministers appointed by the Government of Bihar in 1968 and the T.L. Venkatarama Aiyar Commission of Inquiry appointed by the Government of Bihar, 1970-to mention but some. We need hardly say that there is no law of limitation for criminal prosecutions. Somehow, a few manage to be above the law and the many remain below the law. How ? I hesitate to state.

133. My point is that high-powered public and political offenders are not a peculiar feature of the Emergency but has been a running stream for long and bids fare to flow on, sometimes subterraneously, sometimes gushing through a mountain gorge. Therefore, a corrupt continuity cannot be cut up without better justification.

134. Moreover, the ''human'' rights dimensions of Article 21 have a fatal effect on legislative truncation of fair procedure. The contribution of 277828 , to humanization of processual justice is substantial. I do not dilate on this aspect as the leading judgment has dealt with it.

135. The question, then, is whether there is constitutional rationale for keeping out of the reach of speedy justice non-emergency criminals in high public or political offices. Such a Bill, were it a permanent addition to the corpus juris and available as a jurisdiction for the public to compel government, if a prima facie case were made out even against a minister in office, to launch a prosecution before a sitting High Court Judge, would be a wholesome corrective to the spreading evil of corruption in power pyramids. It is apt to recall the words of Mr. Justice Khanna, Chairman of the Law Commission.

Every system of government requires that those wielding power should use it for public good and should not make it an instrument of self-seeking. All power is like a trust. Those who derive it from the people are accountable to show that it has been exercised for the people. To repeat what I said recently, abuse of authority by those in power inevitably causes mass disillusionment and results in public frustration. Nowhere is it more true than in a democratic set-up because in democracy it is the people themselves who entrust power to those whom they elect. Abuse and misuse of authority can take many forms. It can result in self-aggrandisement by the acquisition of more authority by those put in power and the use of that authority for eliminating political and personal opponents. Such abuse of authority paves way to authoritarianism and dictatorship. Power can likewise be abused by making it a source of personal enrichment. Corruption percolates and if those in power at the top turn corrupt, we would soon find that corruption and graft become ubiquitous in all spheres of administration at lower levels. Although corruption anywhere is reprehensible, developed countries can somehow afford this vice, despise it how they may because their economy is already well-developed. In the case of developing countries, corruption arrests and often retards the process of development and the nation pays a heavy price in terms of loss of moral values.

Nothing causes greater public dismay and shakes more the faith of the people in democratic process and undermines their confidence in its working than the sight of these entrusted with power by being elected to office by the people using their authority for self-aggrandisement and personal enrichment. Purity of administration has much greater significance in countries recently freed with economies in the process of development.

136. Having stated the case against the Emergency-oriented sub-classification, I still think that on constitutional principles, sanctified by decisions, it is possible to sustain or salvage this temporary measure which isolates crimes and criminals during a pernicious period from the rest who share the same sinister properties. When a salvationary alternative is available, the Court should opt for it when the attack is under Article 14, provided the assumptions of fact desiderated by the alternatives are plausible, not preposterous. The anatomy of the Emergency as X-rayed in the Preamble, is all dark shadows which, when read imaginatively, leads to situations plausible, even probable and readily presumable. Imagine, then, the ubiquitous police, acting under the inscrutable yet omnipotent powers of the MISA, seizing humans allergic to Authority and casting them into interminable incarceration in hidden prisons, without any justiciable reasons or for sheer whim ! No court to call illegality to order or halt horrendous torture or challenge high-handed unreason ! If this be a potential peril, naturally a dangerous situation develops, and unaccountable power once unsheathed, the inauguration and escalation of such abuse becomes a compulsive continuum. Constitutional tyranny is anathema to decent democracy. In that state of nervous breakdown of the people, sans speech, sans movement, sans security all of which are precariously dependent on a few psychotics in de facto power, the right to go to court and prosecute an absolutist in authority for corruption or misuse of power is illusory. If you speak up against crimes in high positions, if you complain to court about abuse of power, you may be greeted with prompt detention and secret torture, with judicial relief jettisoned and Press publicity lock-jawed. If these macabre maybes were assumed, there could be a noxious nexus between the Emergency season and the sinister crimes covered by this Bill. Maybe, these scary assumptions are exaggerated but the Enquiry Reports produced and Fazal Ali, J''s observations earlier quoted do not permit a Judge to dismiss them as imaginary. It follows that a nexus between the differentia and the object is not too recondite to be inferred.

137. To illustrate briefly may concretise clearly. If an Emergency authoritarian had a criminal ''deal'' cognisable under anti-corruption legislation and a knowledgeable citizen did file a complaint in court or a writ petition challenging as mala fide an executive action motivated by graft it was quite on the cards that his way backhome might be diverted into a hospitable lock-up or hungry detention camp or horrendous torture cell. If a man''s building was broken up by a heartless bulldozer steered by a criminal authoritarian with police fanfare how could information of criminal trespass or grave mischief be laid before the same police or case launched

before a magistrate if manacles are the consequence ? The rule of law may survive on paper but panicked into hiding where the wages of invocation of the legal process is unquestionable incarceration. You may go to court but be sure of tenancy in a penitentiary when you come out. These perilous possibilities might have been exaggerations but had some foundation, and fear folds up the book of remedies. Thus the scary scenario of ''emergency excesses'' had a nexus with non-action against persons in high against authority and escalation of corruption and repression when judicial checks on abuse had gone to sleep. When men realise that speech is iron and silence pieces of silver they become deaf and dumb, law books notwithstanding.

138. Another good reason for upholding the classification is the legality of the State''s power to pick out a hectic phase, a hyper-pathological period, a flash flood and treat that spell alone, leaving other like offensive periods well alone because of their lesser trauma. It is a question of degree and dimension. This Court in 279240 ,observed:

Mr. Justice Holmes,, in urging tolerance of under-inclusive classification, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. What, then, are the fair reasons for non-extension ? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters. Should it, by its judgment, force the legislature to choose between inaction or perfection ?

The legislature cannot be required to impose upon administrative agencies tasks which cannot be carried out or which must be carried out on a large scale at a single-stroke.

If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinnaire requirement that the legislation should be couched in all embracing terms.

139. (See West Coast Hotel Company v. Parrish) 300 U.S. 379, 400.

140. The Emergency was witness to criminal abuse of power, so says the Preamble, on a scale unheard of before or after. Therefore, this ominous period lends itself to legislative segregation and special treatment. Mr. Justice Mathew has explored the jurisprudence of selective treatment as consistent with the pragmatism of eglitarianism. The present Bill is a textbook illustration of the dictum: 279240 ,.

The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what

evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so (supra).

Administrative convenience in the collection of unpaid accumulations is a factor to be taken into account in adjudging whether the classification is reasonable. A legislation may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. Therefore, a legislature might select only one phase of one field for application or a remedy. Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582, 592.

It may be remembered that Article 14 does not require that every regulatory statute apply to all in the same business; where size is an index to the evil at which the law is directed, discriminations between the large and small are permissible, and it is also permissible for reform to take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

A legislative authority acting within its field is not bound to extend its regulation to all cases which it might possibly reach. The legislature is free to recognise degrees of harm and it may confine the restrictions to those classes of cases where the need seemed to be clearest (see Mutual Loan Co. v. Martell) 56 L.Ed. 175.

In short, the problem of legislative classification is a perennial one admitting of no doctrinnaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think (see Tigner v. Texas) 310 U.S. 141.

Once an objective is decided to be within legislative competence, however, the working out of classification has been only infrequently impeded by judicial negatives.

The Courts attitude cannot be that the state either has to regulate all businesses, or even all related businesses and in the same way, or, not at all. An effort to strike at a particular economic evil could not be hindered by the necessity of carrying in its wake a train of vexatious, trouble some and expensive regulations covering the whole range of connected or similar enterprises.

141. "All or nothing" may lead to unworkable rigidity. Principled compromises are permissible in law; where non-negotiable fundamentals are not tampered with. The Bill in question, viewed in this light, passes the constitutional test.

142. The fabric of the offences before and during the Emergency is the same, the motivation and the texture of the crime is no different. But, in my view, what validates the special legislation is the abnormality of the then conditions, the intensive phase of corrupt operations and the inexpediency of digging up old crimes. Ambica Mills (supra) is the judicial justification for the classification.

143. To sum up, the Bill hovers perilously near unconstitutionality (Article 14) in certain respects, but is surely saved by application of pragmatic principles rooted in precedents. Nevertheless, justice to social justice is best done by a permanent statute to deal firmly and promptly with super-political offenders, since these ''untouchable'' and ''unapproachable'' power wielders have become sinister yet constant companions of Development in developing countries. More remains to be done if the right to know and the right to express and expose are to be real and access to remedies available., absent which the rule of law shines in libraries, not among the people.

144. A brief reference to 280464 ,, presenting it in a light somewhat different from the approach made by the learned Chief Justice, is apposite before I wind up because there was a strand of argument that if both procedures were substantially fair and equal in their onerous process the provision was beyond constitutional cavil on the score of classificatory discrimination. This, with great respect, is specious. It is understandable that given a valid classification, the opportunity for using one or the other alternative procedures is good-a la Chaganlal Magganlal. In that case, speedy recovery of public property was the basis for grouping and, within that group, one of two alternative procedures, more or less similar in burden or facility, was held sound. Absent the initial classifiability on a rational footing related to the goal of easy ejectment, Chaganlal Magganlal (supra) would have run a different course.

145. A brief excursion into Chaganlal is desirable here. I do not read Chaganlal in such manner as to make its core redundant. That case first justified the classification on the ground that public property was a class by itself and that differentia had a rational relation to the goal of speedy recovery. Another limb of the Chaganlal ratio is that a valid classification is no passport to oppressive or arbitrary procedure. That is taken care of by holding that the prescribed special procedure is not too onerous. And thirdly, within the class picked out for special treatment there is no discrimination because both are substantially fair and similar. To understand that ruling in the sense that once the procedures are substantially equal, no question of discrimination and valid classification can arise is to make much of the discussion redundant. To hold the whole discussion relevant we have to view its three limbs holistically. So, basic fairness of procedure is necessary. A valid classification with an intelligible differentia and intelligent nexus to the object is needed. The third part of the triangle is that within the class there should be no possibility of using a more burdensome procedure for one and a substantially different one for another. Arbitrariness in this area also violates Article 14.

146. Even in our present case, assuming that the facilities under the Bill and under the ordinary Code are equally fair, could the Government have indicted one or the other in the ordinary court or the special court on the basis of drawing lots or the first letter of their names, the colour of their skins or like non-sense ? No. The wisdom of Article 14 will not tolerate such whim. Classify or perish, is the classic test

of valid exemption from inflexible equality under the Constitution.

147. Before I conclude, I must admit the force of the reasoning in Shinghal, J''s powerful plea against nominated judges. I am persuaded to the view that the sure solution to the tangled web of problems raised by the Reference, consistently with the present object of the Bill, is to make the High Court the custodian of the new jurisdiction. This suggestion cropped up even as the argument sailed along but counsel for the Union of India assured the Court that respectful consideration, not more, would be given to the tentative idea expressed from the Bench. The risk of constitutional litigation defeating the purpose of quick justice may well be the price of ignoring the considered suggestion. It is for the wisdom of Parliament to trust the High Courts or the hand-picked Judges from the High Courts and face constitutional adjudication. I say no more. There is something to ponder, for those who cherish accountable judicial autonomy, in the apprehension expressed by Shinghal, J. that subtle encroachments on independence of this instrumentality may eventuate in temporising with a fundamental value. While I am impressed with the reasoning of the learned Judge, I desist from pronouncing on the point.

148. I concur with the learned Chief Justice although I give some divergent reasons.

N.L. Untwalia J.

149. I fully concur in the opinion delivered by the learned Chief Justice except in regard to one matter, which in my view, is of a vital and fundamental nature. I, therefore, proceed to deliver my separate opinion on that question.

150. During the course of the hearing of the Reference to obviate some technical objections raised on behalf of the interveners and others four suggestion''s were given by the Court. Three were accepted in writing by the Solicitor General appearing for the Government of India which, to all intents and purposes, would mean the President. Regarding one, we were told that that was still under consideration of the Government. It appears to me that the three suggestions of the Court which were accepted were to obviate all possible challenges to the constitutional validity of the Bill on one ground or the other. The fourth one largely concerned the wisdom behind some of the provisions of the legislaion. My learned Brother Shinghal J., has recorded his separate opinion on a point in connection with which the fourth suggestion was given by the Court just in passing. I do not agree with his opinion, and I say so with great respect, in that regard. In my opinion the Bill does not suffer from any invalidity on that account. I need not deal with this point in any detail as I respectfully agree with all that has been said in the majority opinion in that respect too. In none of the earlier references answered either by the Federal Court or by this Court a precedent is to be found resembling or identical to what happened in this Special Reference. I see no harm in adopting the method of giving some suggestions from the Court which may obliterate a possible constitutional attack upon the vires of a Bill. It may not be necessary or even

advisable to adopt such a course in all References under Article 143 of the Constitution. But if in some it becomes expedient to do so,, as in my opinion in the instant tone it was so, I think, it saves a lot of public time and money to remove any technical lacuna from the Bill if the Government thinks that it can agree to do so. Of course the Bill by itself is not a law. It would be a law when passed by the Parliament. But even at the stage of the Bill when opinion of this Court is asked for, it seems to me quite appropriate in a given case to make some suggestions and, then to answer the Reference on the footing of acceptance by the Government of such of the suggestions as have been accepted. Otherwise, according to me, it is incongruous for this Court to answer the Reference as it is without taking into account the concessions made on behalf of the Government vis-a-vis the suggestions of the Court. It is manifest that all the three infirmities pointed out in the majority opinion in answer No. 3 vanish after the acceptance in writing by the Government that the three suggestions made by the Court vis-a-vis the alleged three infirmities, namely, 3(a), 3(b) and 3(c) would be removed from the Bill.

151. I would, however, like to add without elaborately dealing with the point that as regards the merits of the said infirmities I agree that 3(c), namely, that the absence of a provision for transfer of a case from one Special Court to another, makes the procedure unjust or arbitrary. But as at present advised, I do not agree that the alleged infirmities 3(a) and (b) make the procedure unjust or arbitrary. I have grave doubts whether it is so on that account. Any way, in my opinion, there is no question of the procedure being unjust or arbitrary in respect of any of the three infirmities (a), (b) and (c) enumerated in answer 3 in view of the acceptance by the Government of India of the suggestions emanating from the Court during the course of the hearing of the Reference. I see no difficulty in holding that the Reference stands amended in view of those concessions and we are now required to answer the amended Reference which means the Reference as if the Bill as proposed incorporates the three concessions made by the Government. Thus the procedure prescribed in the Bill, undoubtedly, becomes just and fair and no longer remains arbitrary in any sense.

P.N. Shinghal J.

152. I had the advantage of going through the judgment of my Lord the Chief Justice and I concur with the conclusion arrived at by him in regard to the maintenance of the reference, the legislative competence of the Parliament and the arguments which were raised with reference to Article 14 of the Constitution. I also agree that the Bill suffers from the three defects mentioned at (a) to (c) of Sub-paragraph (3) of the concluding paragraph of my Lord''s judgment. It however appears to me that the question whether the Bill or any of its provisions is otherwise unconstitutional, is equally within the scope of the question under reference and requires consideration in the light of the other arguments which have been advanced before us. In fact I am of the opinion that, for reasons which follow, Clauses 5 and 7 of the Bill are, in

any case, constitutionally invalid even if the three offending provisions pointed out by the Chief Justice are amended on the lines stated by learned Solicitor General.

153. A reference to the Statement of Objects and Reasons of the Bill shows that it is meant to create "additional courts" which will "exclusively deal" with the class of offences mentioned in it. While justifying the necessity for the creation of such Special Courts, it has been stated that the "court calendars" are "congested" and "powerful accused" are capable of causing much delay in the disposal of cases and that it was necessary that the true character of the persons who had held high political or public offices in the Country and had committed offences "must be known to the electorate as early as possible if democratic institutions are to survive and political life is to remain clean." The Preamble of the Bill does not refer to the capacity of the "powerful accused" to cause much delay in the disposal of cases, but refers to "congestion of work" and recites that there were "other reasons" for which it could not be reasonably expected that the prosecutions of the persons who had held high public or political offices would be brought to a "speedy termination." It is therefore obvious that if the "ordinary criminal courts" were not congested with work, they would have been allowed to try the cases with "some procedural changes" referred to in the eighth recital of the Preamble. There is no reference to "procedural changes" in the Statement of Objects and Reasons, and they did not form the basis of that Statement. In any case the reason for excluding the ordinary criminal courts from trying the class of offences referred to in the Bill within their respective jurisdiction, in accordance with the provisions of Section 177 of the CrPC, 1973, is congestion of work and not their inferior status or incapacity to deal with those cases. The object of the Bill would therefore have been served by the creation of additional courts of the same category as the "ordinary criminal courts" and the making of any procedural changes which may have been considered necessary in that context to exclude avoidable delay in the trials.

154. There would have been nothing unusual if such additional courts had been created to save the ordinary congested criminal courts from the burden of more work and to bring the contemplated prosecutions to speedy termination. That was permissible under the existing law and it would not have been necessary to introduce the present Bill in Parliament. And even if some "procedural changes" were considered necessary, they could have been worked out within that frame work and incorporated in a different Bill for that limited purpose.

155. But that has not been considered satisfactory, and the Bill provides for the creation of "Special Courts." Clauses 2 and 7 which bear on the point under consideration, read as follows.-

2. The Central Government shall by notification create adequate number of courts to be called Special Courts.

7. A Special Court shall be presided over by a sitting judge of a High Court in India or a person who has held office as a judge of a High Court in India and nominated by the Central Government in consultation with the Chief Justice of India.

The Special Courts envisaged in the Bill are therefore courts the like of which has not been provided in the CrPC or any other law, and are in fact unknown to the criminal law of the Country. The question is whether our Constitution envisages the creation of such Courts.

156. Part V of the Constitution deals with "The Union", while Chapter I thereof deals with "The Executive", Chapter II deals with "Parliament" and Chapter IV deals with "The Union Judiciary". Article 124(1) provides that there "shall be a Supreme Court of India", which shall have original, appellate and other jurisdiction and powers provided in the subsequent articles, in addition to the power to issue directions or orders or writs mentioned in Article 32. Article 141 specifically provides that the law declared by the Supreme Court shall be binding on all courts within the Country, and Article 144 makes it clear that all authorities, civil and judicial shall act in aid of the Supreme Court. That Court is therefore the supreme "Union Judiciary" under the Scheme of the Constitution, and Chapter IV of Part V of the Constitution provides all that is necessary for that purpose.

157. Part VI deals with the States. Chapter II thereof deals with "The Executive", Chapter III with "The State Legislature" and Chapter V with "The High Courts in the States." Article 214 provides that there shall be "a High Court for each State", so that it is not permissible to have two or more High Courts in any state although it is permissible to establish a common High Court for two or more States (Article 231). The High Court of a State has thus been assured an unparalleled position in the State or States for which it has been established. Article 225 provides for the jurisdiction of, the law administered in any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court. Article 226 deals with the power of the High Court "throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any government, within those territories directions, orders or writs for the purposes mentioned in Clause (1). Article 227 vests the power of superintendence in every High Court over all courts subject to its appellate jurisdiction. Power of withdrawing cases to itself has also been given to the High Court in the circumstances mentioned in Article 228. The High Court has thus been vested with all the necessary jurisdiction and powers to stand out as the repository of all judicial authority within the State, and it is not contemplated by the Constitution that any civil or criminal court in the State should be outside its control.

158. Then comes Chapter VI which deals with "Subordinate Courts" in the States. Article 233 provides for the appointment of district judges and Article 234 for the recruitment of persons other than district judges to the State Judicial Service. Article 235 vests the control over all district courts and courts subordinate thereto, in the

High Court. The Constitution thus contemplates that all civil and criminal courts in a State, other than, the High Court, shall be no other than the subordinate courts over which the High Court shall exercise the fullest superintendence and control, and that the presiding officers of those courts (other than the magistrates referred to in Article 237) shall be under the control of the High Court and of no other authority. That is in fact necessary to ensure the independence of every court dealing with civil and criminal matters. It may be permissible to create or establish civil and criminal courts in a State with designations other than those expressed in Article 236, namely, those covered by the expression "district judge", or by any existing designation in the Codes of Civil and Criminal Procedure, but that is far from saying that it is permissible to establish a hierarchy of courts other than that envisaged in the Constitution.

159. The Constitution has thus made ample and effective provision for the establishment of a strong, independent and impartial judicial administration in the Country, with the necessary complement of civil and criminal courts. It is not permissible for Parliament or a State Legislature to ignore or bypass that Scheme of the Constitution by providing for the establishment of a civil or criminal court parallel to a High Court in a State, or by way of an additional or extra or a second High Court, or a court other than a court subordinate to the High Court. Any such attempt would be unconstitutional and will strike at the independence of the judiciary which has so nobly been enshrined in the Constitution and so carefully nursed over the years.

160. There is another reason for this view. Articles 233 and 235 provide for the appointment of district judges and other judicial officers in the States. The provisions of these articles have been interpreted by this Court in a number of cases including 287491 , , 280468 , , 283079 ,, 272439 , 258224 ,, 279979 , , 280007 , , 292506 ,, 293567 ,and 291829 ,. It has been declared in these decisions that it is the High Court which is the sole custodian of the control over the State Judiciary. That is in fact the life blood of an independent judicial administration, and the very foundation of any real judicial edifice. For if it were permissible to appoint officers other than those under the control or subordination of the High Court to be presiding officers of civil and criminal courts, or in other words, if it were permissible to appoint as judges or magistrates persons outside the control of the High Court, and answerable to the State Executive, that will amount to serious encroachment on a sphere exclusively reserved for the High Court under the constitutional scheme, for the laudable and cherished goal of providing an independent judiciary. It may be that Executive Magistrates and District Magistrates do not belong to the judicial service of a State, but their courts are "inferior", and are amenable to the appellate or revisional jurisdiction of the Courts of Session and the High Court. Even as it is, the existence of such courts of Executive Magistrates has not been viewed with favour in the Constitution, and Article 50 specifically directs that the State shall take steps to separate the judiciary from the executive in the public services of the State.

Then there is Article 237 which provides that the Governor may by public notification direct that the "foregoing" provisions of Chapter VI (which deal with the subordinate courts) and any rules made thereunder shall apply in relation to any class or classes of magistrates (i.e. Executive Magistrates) in a State as they apply in relation to persons appointed to the judicial service of the State. It is therefore quite clear that the Constitution has not considered the existence or continuance of those magistrates who are outside the control of the High Court to be desirable, and their continuance cannot be said to be a matter of credit for those concerned. It is beyond any doubt or controversy that the Constitution does not permit the establishment of a criminal court, of the status of a court presided over by a "district judge" as defined in Article 235, which is not subordinate to the High Court, and, as has been shown, it does not permit the establishment of a court similar to the High Court or a court parallel to the High Court.

161. It has been argued that Section 6 of the CrPC permits the Constitution of criminal courts other than the High Courts and courts of the classes mentioned in the section. Attention has also been invited to Section 6 of the Criminal Law Amendment Act, 1952, for showing that Special Judges can be appointed as and when necessary. But both these provisions do not justify the argument that Special Courts of the nature contemplated in the Bill can be created under the Scheme of the Constitution. What Section 6 of the CrPC states is that besides the High Court and "the courts constituted under any law, other than this Code", there shall be, in every State, the classes of criminal courts mentioned in it, namely, the Courts of Session, Judicial Magistrates first class and, in any Metropolitan area, Metropolitan Magistrates, Judicial Magistrates of the second class, and Executive Magistrates. So all that the section states is that the five classes of criminal courts stated in it shall be in addition to the High Courts and courts that may be constituted under any other law, and it cannot be said with any justification that it provides for the Constitution of courts parallel to or on the same footing as the High Courts, or of criminal courts which are not subordinate to the High Courts. On the other hand Sub-section (1) of Section 4 of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in it. And Sub-section (2) provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the "same provisions", subject only to any enactment for the time being in force regulating this manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. But that is correlated to Clause (4) of Section 2 which defines "offence" to mean any act or omission made punishable by any law for the time being in force including any act in respect of which a complaint may be made u/s 20 of the Cattle-trespass Act. Section 6 of the Code does not therefore justify the creation of Special Courts of the nature contemplated in the Bill, and the argument to the contrary is quite untenable.

162. A reference to Section 6 of the Criminal Law Amendment Act, 1952, is equally futile. While that section provides for the appointment of special Judges for the trial of some offences, Section 9 specifically provides that the High Court may exercise, so far as they may be applicable, all the powers conferred by Chapters XXXI and XXXII of the CrPC, 1898, on a High Court "as if the court of the special Judge were a Court of Session trying cases without a jury within the local limits of the jurisdiction of the High Court." The special Judges appointed u/s 6 are therefore subordinate to the High Court and fit in the scheme of the independence of judicial courts and officers contained in the Constitution.

163. An attempt has also been made to justify the provision in the Bill for the creation of Special Courts by a reference to Part XIV A of the Constitution which provides for the establishment of Administrative Tribunals. But such tribunals are not meant for the trial of offences referred to in the Indian Penal Code, and may well be said to be quasi-judicial.

164. It will thus appear that the Special Courts contemplated by Clause 2 of the Bill will not be on the same footing as the High Courts, and will, to say the least, be lesser or inferior courts.

165. Clause 7 of the Bill however provides that a Special Court shall be presided over by a "sitting judge" of a High Court" and in examining it I have presumed that the Bill will be so amended as to exclude the nomination of "a person who has held office as a judge of a High Court" as the presiding judge of a Special Court. It will not, however, be permissible or proper to appoint a "sitting" Judge of a High Court to preside over a Special Court which is lesser or inferior to the High Court. In all probability, "sitting" judges of High Courts will refuse to serve as presiding judges of the Special Courts, and there is no provision in the Constitution under which they can be compelled, or ordered against their will, to serve there. That eventuality will make the provisions of the Bill unworkable-even if it were assumed for the sake of argument that they are otherwise valid and constitutional. At any rate, the possibility that the "sitting" High Court judges may not agree to serve as presiding Judges of the Special Courts is real, and their very refusal will embarass the judicial administration and lower the prestige of the judiciary for Clause 7 of the Bill provides for the nomination of the presiding judge of a Special Court in consultation with (or with the concurrence of ?) the Chief Justice of India. This is also a factor which should caution those concerned with the Bill and its enactment, that it is not only unconstitutional but is not likely to work well and may not serve the avowed purpose of discharging their "commitment to the Rule of Law" to which reference has been made in the Statement of Objects and Reasons of the Bill.

166. There is another reason for this view. Equality before the law, or, speaking in terms of the present controversy, equality in criminal justice, is the universal goal of all democratic forms of government, for no one can ever deny that all persons charged with crime must, in law, stand on the same footing at the Bar of justice.

Such an equality should be assured not only between one accused and another but also between the prosecution and the accused. This is not a mere "rights explosion" but, as will appear, it is what our Constitution has carefully, assuredly and fully provided for every citizen of the Country. Article 21 of the Constitution is, by itself, enough to bring this out.

167. The article provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. I am here avoiding any reference to Article 14 of the Constitution because that is not necessary when the scope and the meaning of Article 21 have been defined by this Court in a number of decisions including 277828 , . It will be enough for me to refer to the following opinion of Chandrachud J., as he then was,-

But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by law which curtails or takes away the personal'' liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Court-room trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with.

168. Bhagwati J., undertook a detailed examination of the meaning and content of "personal liberty" in Article 21. He has taken the view that the expression is of the "widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man." While examining the procedure prescribed by the Passports Act, 1967, he has expressed his views and the views of the other Judges as follows,-

Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements ? Obviously, procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in A.K. Gopalan''s case in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazal Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willis'' book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law." Mahajan, J., also

observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings." But apart altogether from these observations in A.K. Gopalan''s case, which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

169. In order to fulfil the guarantee of Article 21, the procedure prescribed by law for the trial of a criminal case has therefore to be fair, just and reasonable, and not fanciful oppressive or arbitrary.

170. Clauses 5, 7 and 8 of the Bill, however, provide as follows,-

5. On such declaration being made any prosecution in respect of such offence shall be instituted only in a Special Court designated by the Central Government and any prosecution in respect of such offence pending in any court in India shall stand transferred to a Special Court designated by the Central Government.

7. A Special Court shall be presided over by a sitting judge of a High Court in India or a person who has held office as a judge of a High Court in India and nominated by the Central Government in consultation with the Chief Justice of India.

8. A Special Court shall have jurisdiction to try any person concerned in the offence in respect of which a declaration is made u/s 4 either as principal, conspirator or abettor and all other offences and accused persons as can be jointly tried therewith at one trial in accordance with the CrPC, 1973.

Taken together, the clauses provide for the trial of the accused only by Special Courts to be presided over by a judge nominated by the Central Government and Clauses 4, 5 and 7 vest the power of designating the Special Court in which an accused is to be tried exclusively in that government. Speaking in practical terms, the Bill thus enables the Central Government to decide which of its nominated judges shall try which accused or, in other words, which of the accused will be tried by which of its nominated judges. It has in fact been stated at the Bar by Mr. Jethamalani that most of the Special Courts envisaged in the Bill will be located in Delhi. So if several courts are created by the Central Government in Delhi, and they are all presided over by judges nominated by the Central Government, the power of nominating the judge for any particular case triable in Delhi shall vest in the Central Government. As will appear, such a procedure cannot be said to be fair, just and reasonable within the meaning of Article 21 and amounts to serious transgression on the independence of the Judiciary.

171. Reference has already been made to the scheme provided in the Constitution for the creation of the civil and criminal judicial courts and the independence of the judges and the magistrates presiding over those courts. So far as the Supreme

Court and the High Courts are concerned, the question of the Central or the State Governments nominating the judge who shall deal with a particular case does not and cannot arise. As regards the subordinate courts, Section 9(2) of the CrPC provides that every Court of Session shall be presided over by a Judge to be appointed by the High Court, and Section 11(2) makes a similar provision regarding Judicial Magistrates. The same care has been taken in regard to the appointment of Chief Judicial Magistrates, Additional Chief Judicial Magistrates and Sub-divisional Judicial Magistrates, and the conferring of powers on Special Judicial Magistrates. It is not therefore permissible for the Executive to appoint a particular judge or magistrate to preside at the trial of a particular accused under the CrPC. That is fair, just and reasonable and relieves the accused of any possible oppression.

172. It has to be appreciated that the problem is of much greater significance in the case of trials before the Special Courts envisaged in the Bill. As is obvious, a trial by the fiat of a successor government, however justified, is noticed with an amount of scepticism. If one may be permitted to say so, a "successor trial," broadly speaking, seeks to hit the adversary a second time after his initial discomfiture and displacement from power or authority and in the case of an accused who has held a high political status, it may have the effect of destroying his political future. It is, by the very nature of things, difficult to disabuse the mind of such an accused of the lurking suspicion that the trial is motivated by political considerations and will not be just and fair, or to convince him that it will ultimately lead, to justice. It should therefore be the effort of those ordering the trial to do nothing that may, even remotely, justify such a suspicion. They should in fact do all they can to convince every one concerned including the accused, that they had the best of intentions in ordering the trial and had provided a fair and straight-forward procedure, and the cleanest of judges, for the trial, in an open and fearless manner. That will not only foreclose avoidable criticism but uphold the majesty of the Rule of Law in its true sense.

173. Moreover, if the result of the trial has to carry conviction with the people as a whole, and is meant to acquaint them with the "true character" of the persons who have committed the offences for the survival of the democratic institutions and cleanliness of the political life, as professed in the Statement of Objects and Reasons of the Bill, it is in the interest of those making the declaration referred to in Clause 4 of the Bill to convince everyone, including the accused, that the trial is not spectacular in purpose and does not expose those facing it to a risk greater than that taken by any other accused at an ordinary trial, under the ordinary law. That kind of assurance, that there is no prearranged result, and that the accused have nothing to fear from the presiding judge of the Court, is the basic requirement of a "successor trial". Human dignity is a concept enshrined in the Preamble of our Constitution and runs through all that it provides. It is therefore necessary that this treasure should be the priceless possession and the solid hope of all our fellow citizens including those who have to face trials for the offences charged against

them.

174. But the clauses of the Bill referred to above are in derogation of the majesty of the judicial edifice so gloriously and assuredly built up by the Constitution, and is a serious inroad on the independence of the judiciary.

175. Reference in this connection may be made to Liyanage and Ors. v. Regina [1966] 1 All E.R. 650. In that case, the appellants were not tried by a judge and jury in accordance with the normal procedure, but by three judges of the Supreme Court of Ceylon nominated by the Minister of Justice. A preliminary objection was taken that the nomination and the section under which it was made were ultra vires the Constitution. The three judges of the Supreme Court unanimously upheld the objection on the ground that the power of nomination conferred on the Minister was an interference with the exercise by the judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment or was in derogation thereof, and was a power which had till then been "invariably exercised by the judicature as being part of the exercise of the judicial power of the State, and could not be reposed in any one outside the judicature." The law was ''amended thereafter, and it was made permissible for the Chief Justice to nominate the three judges. But the Privy Council, on appeal against conviction after the amended provision had taken effect, upheld the conclusion of the Supreme Court in principle, and held that the power of the judicature could not be "usurped or infringed" by the executive or the legislature. The Privy Council examined the other objectionable provisions of the amended Act and held that they were invalid. Those provisions are not relevant for purposes of the present case, but I cannot help extracting the following note of caution struck by their Lordships,-
what is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances; and thus judicial power may be eroded.

An attempt like the one made in the present Bill to usurp an important judicial power and vest it in the executive, is a serious inroad on the independence of the judiciary and is fraught with serious consequences. It has therefore necessarily to be put down at the very inception for it may otherwise give rise to a prospect too gruesome to envisage and too dangerous to be allowed to have the sanction of law.

176. My answer to the question referred by the President will therefore be that apart from the three defects pointed out by my Lord the Chief Justice, Clauses 5 and 7 of the Bill are constitutionally invalid, and I would report my opinion accordingly.