

(1950) 11 AP CK 0001
In the Andhra Pradesh High Court

Abdur Rahim and Others

APPELLANT

Vs

Joseph A. Pinto and Others

RESPONDENT

Date of Decision : 13-11-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 12, 13, 132, 134, 14
Criminal Procedure Code, 1898 (CrPC) — Section 193, 2

Citation : (1951) CriLJ 1333

Hon'ble Judges : Naik, C.J.;Sripatrao, J;M.A. Ansari, J

Bench : Full Bench

Judgement

Naik, C.J.—I have carefully read through the two judgments of my learned colleagues, Shripatrao and Ansari JJ. I do not feel the necessity of writing a separate elaborate judgment. They have dealt with all the points arising in the cases thoroughly and exhaustively. I entirely agree with the decisions given by them in their separate but concurrent judgments.

2. I also hold with them that the guarantee of equality before the law or the equal protection of the laws, contained in Article 14 of our Constitution means substantial equality of treatment under the laws. Equal treatment does not necessarily mean identical treatment. In fact, identical treatment in unequal circumstances amounts to inequality. In other words, in different circumstances the variation in legal procedure is not only permissible but necessary. Equal protection of laws does not mean protection by identical laws. Sometimes, it is necessary to abridge the ordinary procedure in the interests of justice itself. Of course, no abridgment of legal procedure which curtails the essential safeguards can be permitted. A detailed procedure in normal times and in ordinary cases may become harmful in abnormal times, or in extraordinary and special cases. One of the reasons for appointing a Special Tribunal consisting of three Sessions Judges instead of one is to obviate the chances of error by the abridgment of the normal procedure.

3. It is not always possible to anticipate and enumerate all the circumstances under which a case may be declared fit and proper to be tried by the Special Tribunal instead of by the ordinary Court. It may not be convenient nor advisable for the State to specify them. No fundamental right of an accused is violated in merely leaving the choice of forum to the discretion of proper authorities. Perhaps the better policy would be to state in detail the grounds of the classification but the Courts are concerned with question of law and not with the policy of the Legislature. They have only to see that the fundamental rights under the Constitution are protected.

4. A provision to be declared unconstitutional must be offensive to the provisions of fundamental rights contained in Part III of the Constitution. Procedure is not a vested right, though there are some fundamental provisions even in procedural matters and they have to be insisted upon. It is not for the Court to insist on an elaborate procedure if in the opinion of the legislative authority, the circumstances demand an abridged one, as long as the same substantial protections are given by both of them. The revisional and appellate powers of the High Court are always there to see whether the procedure adopted has affected any party prejudicially.

5. The Regulation under discussion was enacted in abnormal times and to meet an abnormal situation. The advent of the Constitution and the fundamental rights guaranteed therein have, however, entitled the petitioners to take objection to certain of its provisions, My learned colleagues have carefully considered all the objections urged on behalf of the petitioners and have shown which provisions of the Regulation offend Article 14 of the Constitution and have, therefore, to be deleted.

6. I may mention that some portions of the Regulation now being deleted, were, as a matter of fact, not acted upon by the Special Tribunal and it was following a procedure in accordance with our judgment; for example, in spite of the Regulation doing away with the necessity of taking down the evidence at length and permitting only a memorandum of the substance of what each witness said, this particular Tribunal has been recording the evidence of witnesses in full. Similarly, in spite of the Regulation enjoining the adoption of the procedure prescribed for summary trial and permitting the procedure prescribed for the trial of warrant cases by Magistrates, for reasons to be recorded by it, this Tribunal had adopted only the latter procedure in the cases tried by it.

7. In addition to these two main facilities, now by our judgment, the petitioners will have the right of applying for transfer on adequate grounds. The provision confirmation of sentence under the Criminal P.C., has also been restored by us. Further the accused can approach this Court for revision of any order passed by the Tribunal under the powers of revision given to this Court by the Hyderabad Criminal Procedure Code, as well as under the general supervisory jurisdiction given by Article 227 of the Constitution.

8. I may also mention that when some of the decisions by other Special Tribunals came up in appeal, this Court has consistently ordered a retrial when it found the record of the evidence too scanty to form any definite opinion or when it found that an adequate opportunity was not afforded to the accused to prepare his defence.

9. The Constitution has deliberately given equality before the law and the equal protection of the laws to all persona ; therefore the petitioners have a right under Article 13(1) to insist on the deletion of those provisions which offend the Constitution.

10. I have already said that I do not wish to repeat what has been so ably and elaborately dealt with by my learned colleagues in their concurrent judgments. I will rest content by merely giving in a few words what portions of the Regulation should be deleted and why and how even after these deletions the Regulation stands and is workable.

11. There is nothing in the preamble which offends the Constitution. Section 1 deals with short title, commencement and extent of the Regulation. Sections 2 and 3 deal with constitution and jurisdiction of the Special Tribunals. So they remain in force. By Sub-section (1), Section 4, it is provided that a Special Tribunal may take cognizance without the accused being committed to it for trial. The learned Counsel for the petitioners has vigorously opposed this provision and has contended that the committal proceedings are a great safeguard and their omission is unjust and, in any case, offends the Constitutional guarantee of equality. I agree with my learned colleagues that the omission of committal proceedings, does not amount to a denial of equality within the meaning of Act. 14 of the Constitution.

12. The portions which offend the Constitution are the whole of Sub-section (2) of Section 4, which permits only memoranda of evidence to be taken down in oases of very serious nature, which is against the spirit and the letter of the law, as laid down in chap, XXI, Hyderabad Criminal P.C. and should, therefore, be deleted.

13. The first portion of Sub-section (2-A.)of Section 4, permits the Special Tribunal to take down the evidence at length, notwithstanding Sub-section (2). This part will also go because it is unnecessary in view of the relation of Sub-section (2).

14. The whole of Sub-section (4) of Section 4 which permits the Special Tribunal to proceed with sessions cases in spite of a change in its members is also deleted because it is against the principle enunciated by authoritative decisions that in Sessions oases only those judges can give the judgment who have had the opportunity of hearing the whole evidence. It is an important safeguard and should not be denied to any person accused of offences triable by Sessions Court and certainly it offends the Constitutional guarantee.

15. There is nothing in Sub-sections (5), (5A) and (6) of Section 4, which, to my mind, offends the Constitution. Therefore, they all remain as they are.

16. Sub-section (7) of Section 4 enjoins the Special Tribunal to follow the procedure proscribed for summary trial which, in view of my opinion given above, cannot be permitted and the only procedure left is the one that is prescribed for the trial of warrant cases by Magistrates. According to the Criminal Procedure Code there are three procedures: summary, warrant and sessions. The sessions procedure cannot be followed because there are no committal proceedings in these cases and the summary procedure is declared void by us. Therefore, the only procedure left is the warrant procedure, which by the deletion of the words mentioned in judgments of my colleagues and for reasons assigned by them, remains intact. There is nothing in Sections 5 and 6 which offends the Constitution.

17. The latter portion of Sub-section (2), Section 7, has to be deleted because it puts restriction on the right of appeal and the power of revision from any order or sentence passed by the Special Tribunal and also it does away with the necessity of the submission of the case for confirmation to any authority. This portion with sub Article (2-a), has to go because the valuable rights of appeal and powers of revision and confirmation are denied to the accused.

18. Similarly, Sub-section (3) of Section 7, has also to go because under Article 161 of the Constitution, the powers of suspension, revision and reduction of sentences are given to the Governors (or Rajpramukhs.) The Military Governor and the Chief Minister do not come under that designation.

19. I think there is nothing objectionable in the rest of the Regulation, which therefore, remains.

20. The result; of all those deletions will be that like any other accused in sessions cases, an accused tried by the Special Tribunal shall now have the right of full recording of evidence as a matter of usual procedure and of fresh recording of evidence with the change of a member of the Special Tribunal. Further, his trial will be conducted according to the procedure laid down for warrant cases, which is substantially the same as sessions case procedure except the omission of the committal proceedings. The accused before the Special Tribunal will further have the right of appeal and of transfer like any other accused and the right of confirmation, if the sentence be death or imprisonment for 10 years or more. The accused will also have the right of approaching the High Court for revising any order passed by the Tribunal under its ordinary powers of revision and its general supervisory jurisdiction under Article 237 of the Constitution.

21. Thus, the only difference between trial by the Special Tribunal and a trial by the ordinary Courts is the doing away of the committal proceedings in sessions cases by the former. As has been shown by my learned colleagues and by me, committal proceedings do not affect any fundamental right. One of the reasons

for the appointment of a Special Tribunal is the speedy disposal of cases where delay is dangerous. The real trial in a sessions case begins when the case is committed to the Sessions and the committal proceedings are meant to save the time of the Courts and to stop previous cases being sent up. It is obvious that under the Regulation only those cases which have been specially scrutinised by the authorities and directed by the Chief Minister can be tried by Special Tribunals, so there cannot be any question of vexatious or baseless cases coming before the Tribunal. The committal proceedings alone in such cases may take months and years, which may under all principles of justice have to be avoided.

22. Therefore, in my opinion, after the deletion of the provisions mentioned above, the trial by a Tribunal under the Regulation is substantially the same as that under ordinary Criminal P.C. and the Regulation as it stands now after the deletions mentioned above, is neither void nor unworkable.

23. I need not dilate on the grounds mentioned in the judgments of my colleagues regarding the objection raised on behalf of the petitioners that the orders of the Military Governor and the Chief Minister, do not comply with the provisions of Sections 1, 2 and 3 of the Regulation, inasmuch as the Military Governor had not signed the order but had merely written "can issue" under the order signed by the Deputy Home Secretary and that the Chief Minister in his order making over the case to the Special Tribunal had not given particulars of the several offences, which he had directed the Special Tribunal to try. I agree with my colleagues and hold that there has been sufficient compliance with these sections.

24. In the result, the application for the writ of prohibition must fail and is dismissed.

25. As regards the applications for the writ of Habeas Corpus, it is admitted that the petitioners are in Jail at present under the orders of the Tribunal and the orders for their detention under the Preventive Detention Act have already been revoked by the Government. As the Regulation appointing the Tribunal is valid and the order directing trial of the applicants is legal, the remand of the petitioners by the Tribunal is also valid and the applications for the writ of the Habeas Corpus are also, therefore, dismissed.

26. A copy of our judgment be sent to the Special Tribunal for conducting the trial of the petitioners according to the provisions of the Regulation declared legal and valid by us.

27. This judgment will cover all the connected applications.

28. Leaves to appeal to the Supreme Court both under Articles 132 and 134 of the Constitution is given as prayed for by the counsel for the petitioners.

Sripatrao, J.

29.A. Rahim and six others have submitted a joint petition for the issue of a writ

of prohibition under Art 226 of the Constitution of India against Joseph Pinto, Mir Ahmed Ali Khan and Jagannatha Rao, Members of the Special Tribunal, and the State of Hyderabad.

30. The main allegations in the petition are that on 8-4-1950 Mr. Vellodi, the Chief Minister of Hyderabad State, made an order under S 3 of the Special Tribunals Regulation, No. v 5. of 1358 Fasli, directing that the Special Tribunal No. IV should try certain offences committed by the petitioners and the other accused specified in the charge sheet to be filed against them by the Superintendent of Police, C. I. D., that on 10-4-1950, the said Superintendent of Police C. I, D. filed a charge-sheet against the petitioners and th9 other accused in the Court of the said Special Tribunal, and that since that date the petitioners have been brought before the said Tribunal which has passed some preliminary orders and unless restrained the petitioners will be tried by the said Tribunal. The positioners allege that in view of Article 14 of the Constitution, the Special Tribunals Regulation is void and ultra vires because it contains provisions for regulating criminal trials in Hyderabad State which differ from those contained in the Hyderabad Criminal Procedure Code. The Regulation denies to the petitioners the benefit of certain protective provisions contained in the Hyderabad Criminal P.C. The Special Tribunals Regulation purports to empower the Chief Minister to make a special order directing that a Special Tribunal shall try any offence or any class of offences and when such an order is made against any person, that person is thereby deprived of the equal protection of laws enjoyed by other persons whose alleged offences are tried under the provisions of the Hyderabad Criminal P.C. It is further alleged that by reason of the provisions of Article 14 of the Constitution the provisions of Section 3 of the said Regulation are void, that the order made by the Chief Minister dated 8-4 1950 does not comply with the requirements of Section 3 of the Regulation that the charge-sheet tiled by the Superintendent of Police does not specify with reasonable particularity the offences to be tried by the Special Tribunal and that order published in the Jareeda bearing no. 84 dated 14th Farwardi 1353 Fasli extending the said Regulation to the whole of Hyderabad State is not legal under the provisions of S 1 of the said Regulation. During the course of arguments certain other allegations were also made and certain objections raised. The Advocate General on behalf of the respondents denied the validity of the allegations.

31. There are eight other separate petitions on behalf of the same petitioners and one Hissamuddin Khan Gori praying for the issue of a writ of habeas corpus under S 226 of the Constitution and u/s 529 of the Hyderabad Criminal P.C. stating that their detention by an order dated 63 1950 issued under the Preventive Detention Act of 1950 is invalid. The Advocate. General in his reply to these petitions stated that the Preventive Detention Orders against the petitioners u/s 3 of Act IV 4. of 1950 have been cancelled, that the petitioners are being prosecuted as accused on charges under various sections of the Hyderabad Penal Code, that they are under trials and have been duly and validly remanded to jail custody, and that their custody is legal.

32. All these petitions were argued simultaneously. In view of the fact that Government have cancelled the orders of detention under the Preventive Detention Act of 1850, the main argument of the parties turn round the petition for the issue of writ of prohibition. I will, therefore, first deal with the arguments in connection with the petition for the writ of prohibition, and later on will consider the petition for the writ of habeas corpus.

33. The case was very ably and thoroughly argued by Mr. Mackenna the learned Counsel and Mr. Murtuza Khan, Advocate, for the petitioners and by Shri V. Rajaram Iyer, the Advocate-General, on behalf of the respondents and I am indebted to them for the great assistance they have rendered. The main ground of argument is that the Special Tribunals Regulation No. V 5. of 1358 Fasli is void being inconsistent with the provisions of Article 14 of the Constitution, (Part III) which guarantees the fundamental rights. In this connection, reference was also made to Article 872 of the Constitution and to various provisions of the Hyderabad Criminal P.C. Mr. Mackenna, the learned Counsel for the petitioners has argued that the Hyderabad Criminal P.C. is the general law of procedure for the trial of criminal cases and that it protects the interests of the accused in several ways. In particular it protects the accused against the risk of being put on trial against the risk of being convicted when the offence is not proved, and against the risk of undue punishment, while similar protection is not available to them under the provisions of the said Regulation. It is argued that the person who is to undergo a trial under the provisions of the said Regulation is denied the equality of law i.e., the general law of procedure prevailing in Hyderabad, and is also deprived of the protection given to him by the different sections of the Hyderabad Criminal P.C. which will, hereinafter, be called the Code. The argument in short is that all those provisions in the said Regulation which are contrary to the provisions of the Hyderabad Criminal P.C. are void in view of Article 14 of the Constitution, and as such, the whole Regulation is void. In this connection, it will be necessary to refer to the various sections of the said Regulation and examine as to how far they are repugnant to the right of equality as enunciated in Article 14 of the Constitution.

34. Article 14 of the Constitution runs thus:

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

It will be useful here to cite a portion of a Section 1 of the 14th Amendment of the United States of America, which runs as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is argued that the clause in Article 14 which enjoins that "the State shall not deny to any person equality before the law" does not find place in the 14th

Amendment of the United States of America, and to that extent our Constitution is an improvement upon the Constitution of the United States of America. It; is further alleged that the equal protection of the laws is a pledge of the protection of equal laws (30 Lawyers Edn. 220)

34a. In this connection, before entering into an examination of the various provisions of the said Regulation, we may keep in mind some salient features and principles regarding this constitutional guarantee. Speaking of the intention of the clause, Field J. observed (Francis Barbier v. Patrick Connolly, 113 U.S. 923 : 28 Lawyers Edn. 923, at p. 925, Col. 1)

that this clause undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that; all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their person and property the prevention and redress of wrongs, and the enforcement of contracts; that no impediment be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.

35. I will also shortly discuss the nature of judicial powers when a question under the Constitution is raised that a particular statute is void as being repugnant to the fundamental rights or other provisions of the Constitution, Under the circumstances, that duty is very clear. The Court's duty is to enforce the provisions of the Constitution, If, therefore, a Court finds that a statute is in accordance with the Constitution, it must pronounce it valid. If the Court finds that it is in contravention of the Constitution or transgresses the authority vested in the Legislature, the Court must pronounce it a nullity. (State v. Knight N. C. 333-315 U. S. Section 257:86 Lawyers Edn. 832). That duty in the words of Southerland J. "is one of great gravity and delicacy" Atkins v. Children's Hospital, 67 Lawyers Edn. 735 : 261 D". Section 525 and this power of the Courts to declare statutes unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness; one is that Courts are concerned only with the power to enact statutes not with the wisdom, the other is that while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only restraint upon the exercise of power by Courts is their own self-restraint. Laws may be unwise though constitutional. If a law is unconstitutional it is the duty of the Courts to declare it void. But if a law is unwise an appeal for its removal lies not to the Court but to the electorate in a democratic form of Government. In United States v. Butler 80 Lawyers Edn. 477 : 297 U. S. 1, Roberts J. also

observed:

When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the Judicial Branch of the Government has only one duty ? to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does or can do is to announce its considered judgment upon the question....This Court neither approves nor condemns any legislative policy.

36. This is also the view of our Supreme Court: vide A.K. Gopalan Vs. The State of Madras, of which my Lord the Chief Justice of India has held:

There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited either in terms or by necessary implication the general powers conferred upon the legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority....it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a . majority by ft permanent and paramount law settled by the deliberate wisdom of the nation that one can find safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment.

37. We will now examine the various sections of the said Regulation in the light of the arguments advanced by the parties. Section 1 of the said Regulation gives the short title of the Regulation and enacts that it shall come into force from the date of its publication in the Jareeda and shall extend to such areas as the Military Governor may from time to time by an order in writing direct. There was no comment made on this section from the constitutional point of view but it was argued that the Military Governor has not in writing made it applicable to the whole of the Hyderabad State. I shall discuss this question later. Section 2 of the Regulation refers to the constitution of the Special Tribunals.

38. Section 3 of the Regulation gives jurisdiction to the Special Tribunals and reads as follows:

The Military Governor may by general or special order direct that a Special Tribunal shall try any offence whether committed before or after the commencement of this Regulation or any class of offences and may by any such order direct the transfer to a Special Tribunal of any particular case from any other Special Tribunal or any other Criminal Court or direct the transfer of any particular case from a Special Tribunal to any other Criminal Court.

Mr. Mackenna, the learned Counsel for the petitioners argued that this section

gives very wide, arbitrary and unfettered powers and discretion to the Military Governor or his successor, the Chief Minister for sending any case for trial to the Special Tribunal and it is derogatory to the principle of equality before the law, inasmuch as the accused person in such a case is deprived of the benefit of the general provisions and protections given by the Hyderabad Criminal P.C. It was asserted that the Special Tribunals Regulation provides a special procedure for the trial of cases which is not quite in keeping with the provisions of the Hyderabad Criminal P.C. He further argues that once any criminal case is transferred under the direction of the Military Governor or the Chief Minister for trial to the Special Tribunal the said Regulation enjoins that "the Special Tribunal shall try" the offence. There is no discretion left to the Special Tribunal not to try the case though the Tribunal may feel that the case is not worth being tried under the Criminal Procedure Code. In this connection reference was made to Section 208, Hyderabad Criminal P, C. : 203, Indian Criminal P.C. and it was argued that this section gives a discretion to a Magistrate to dismiss a complaint if he thinks that there are no sufficient reasons for proceeding further. In our opinion the learned Advocate-General has rightly argued that the said Section 208 refers to cases filed on a complaint by the complainant, and does not refer to cases investigated by the Police. In my opinion, therefore, there is no force in this argument as we are not concerned here with any case filed by a private complainant.

39. Section 3 of the said Regulation by its very wording is meant to give jurisdiction to the Special Tribunal concerned and mentions the circumstances under which it is to take cognizance of a case referred to it for trial. The words "shall try any offence" mean that the Special Tribunal shall not refuse to take cognizance of the offence when the same is directed to it by the Chief Minister. It was contended that the legislative authority has no power in view of Article 14 of the Constitution to create or establish Special Tribunals or Special Judges. Special Judge or Magistrate, it was alleged, means any Judge who is not appointed under the provisions of the Criminal Procedure Code. The appointment; of such a Judge or Magistrate is a discrimination which infringes the said article because the case or the offence is not tried or heard by the ordinary Judge and it was argued that this objection will still hold good even if special Judges or Magistrates are created under the provisions of Criminal Procedure Code and that Special Courts may be created only on territorial basis or on some rational classification. In my opinion, it is difficult to agree fully with this contention. Section 13, Hyderabad Criminal P.C. gives power to Government to confer on any person any of the powers conferrable by the Code upon any Court created under the Code in respect to particular cases or to a particular class or classes of cases....when there is such a power in the Code itself, I do not see any reason why the Legislature should be deprived of the right to confer such a power by Special Legislation. In *Brown v. State of New Jersey*, 175 U. S. 157 (1900) it was held:

The State has full control over the procedure in its Courts both in civil and

criminal cases subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution , . , . the 11th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.

40. In *Hayes v. Missouri* 30 Lawyers Edn. 578, it was held that the 14th Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate, Discussing the said mode of classification Brewer J., observed with regard to the fact of the ease in *Brown v. State of New Jersey* 175 U. Section 172 : 44 Lawyers Edn. 119) supra:

It is true that there is no territorial distribution but in all cases in which a struck jury is ordered the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury. Either party, State or defendant may apply for a struck jury, and the matter is one which is determined by the Court in the exercise of a sound discretion. There is no mere arbitrary powers in this respect....

41. He further held the fact that in any given case the plaintiff's or defendant's petition for a struck jury was improperly exercised may perhaps present the matter for consideration on appeal, but it amounts to nothing more. The ratio decidendi of this case, it is clear, is that differences on minor procedural matters do not amount to a denial of the equal protection of laws clause and that if a discretion is wrongly exercised by the authority concerned it can be corrected when necessary. It was suggested that creating a Special Court under the said Regulation and directing it to try cases ordered to be so tried by the Chief Minister amounts to discrimination. In my opinion, if certain minimum fundamental rights regarding the fair trial of criminal cases are guaranteed to the accused it will be in consonance with Article 14 of the Constitution. Even under the Code it may be argued that the appointment of a Judge u/s 13 for the trial of particular cases offends Article 14 of the Constitution, but it is not a valid argument. If a particular Judge acts prejudicially to the accused the rights of the accused can be safeguarded by transferring the case to some other Court and the same thing can be said to be true with regard to the Special Tribunal established under the Regulation. So long as fair trial is guaranteed to the accused the creation of a Special Tribunal cannot be regarded as a disadvantage to him. The power of the Chief Minister to post a case under the Regulation for trial before the Special Tribunal cannot be regarded as arbitrary inasmuch as there is a similar power granted to him under the Code in Article 495 Section 527, Criminal P.C. The power given to the Chief Minister under the Regulation cannot be considered in any way different from the power given u/s 495 and of course if there is any valid reason for transfer, the case can be transferred by the High Court under Article 227 of the Constitution. There is therefore nothing in this section which is inconsistent with any of the provisions of Part III of the

Constitution, This section therefore is intra vires. In *Bowman v. Louis* 101 U. S. p. 22 : 25 Lawyers Edn. 989, it was held that the 14th Amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several Courts at its discretion. The restriction as to the equal protection of the laws is not violated by any diversity in the jurisdiction of the several Courts provided they are based on some reasonable classification as to subject-matter or territory or amount or finality of decision. Convenience often requires the establishment of different system of Courts for cities and for rural areas. It would be an unfortunate restriction of the powers of the State Government if it could not in its discretion provide different Courts to meet various exigencies. But such classification should be rational. From this point of view it was observed in this ruling that making the decision of a certain Court of appeal final and giving a further right of appeal with regard to the decision of another Court was permissible.

42. The learned Counsel for the petitioners argues that the provisions of the Hyderabad Criminal P.C. should be followed in all Criminal Courts or Tribunals and if there is any change or variation in procedure established bylaw before the said Special Court or Tribunal however slight it may be, it will amount to a denial of equality before the law and infringe Article 14 of the Constitution unless the special procedure adopted is applicable in general to any classification based on territorial basis or some other rational basis to the exclusion of the provisions of the Criminal P.C. In my opinion, the reasoning in the argument may not always be the only ground for the deviation from the procedure as laid down in the Code if the deviation relates to unimportant or minor matters. What we have to see under Article 14 is that the equal protection of the laws and the equality before the law is not denied to any person and that under Article 21 no person is deprived of his life or personal liberty except according to procedure established by law. The equal protection of the laws in legal proceedings and in procedural matters is secured when the laws of the State operate on all persons alike and do not subject the individual to an arbitrary exercise of powers. This guarantee does not secure to all persons the same laws and remedies. It is not the identity of laws and remedies that is guaranteed. What is necessary is that there should be no substantial or material difference between the general law and the special law. It is not every difference between the special law and the general law or between the Regulation and the Code which will amount to an inequality under Article 14. Our Constitution guarantees certain rights besides the ordinary basic rights concerning criminal trial. Article 20 provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the offence charged as an offence : nor is to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Sub-clause (2) enjoins that no person shall be prosecuted and punished for the same offence more than once ; and it is provided in Sub-clause (s) that no person accused of any offence shall be compelled to be a witness against himself. Article 21 lays down that no person

shall be deprived of his life or personal liberty except according to "procedure established by law." This article differs from the "due process" clause of the American Constitution and as laid down by their Lordships of the Supreme Court in *A.K. Gopalan Vs. The State of Madras*, the "due process" clause has no place in our constitution and "procedure established by law" means procedure as laid down in an enacted law, and prescribed by the law of the State. These words are to be taken to refer to a procedure which has a statutory origin, Article 22, Clauses 1 and 2 entitle the individual for protection against arrest and detention in certain cases. Sub Clause (1) provides that every person arrested should be informed as soon as may be of the grounds of such arrest and that he has a right to consult, and to be defended by a legal practitioner of his choice. It will thus be seen that these Articles 20, 21 & 22 are primarily concerned with penal enactments of other procedural laws under which personal safety or liberty could be taken away. This is the minimum guarantee and protection that is allowed under the Constitution to a person in criminal matters. The American Constitution guarantees in criminal cases are contained in the 5th, 6th, 8th & 14th Amendments, The aim of these constitutional safeguards is a full, fair and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the State and the life and liberty of the accused persons.

43. For explaining the words "equality before the law" in Article 14 the learned Counsel for the petitioners has referred to Dicey's Law of the Constitution and argues that this idea has its origin and has been borrowed from the English Constitution and is an addition to the equal protection clause of the American Constitution. He has referred us to p. 182, Edn. 8 (The Law of the Constitution by A. V. Dicey) which runs thus:

....that no man is punishable or can he lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

Further on p. 189 Dicey states that:

....we mean....when we speak of the rule of law as a characteristic of our country not only that with us no man is above the law but (what is a different thing) that here every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary Tribunals, In England the idea of legal equality or of the universal subjection of all classes to one law administered by the ordinary Courts has been pushed to its utmost limit. With us every official from the Prime Minister down to a constable or a Collector of Taxes is under the same responsibility for every act done without legal justification as any other citizen....Dicey further states that soldiers or clergymen....are....subject to laws which do not affect the rest of the nation and are in some instances amenable to Tribunals which have no jurisdiction over their fellow countrymen....But....a soldier or clergyman does not escape thereby from the duties of an ordinary citizen.

44. Thus legal equality in England means there is no differentiation between high and low and that all classes are subject to the law of the land and that they are not exempt from their ordinary duties as citizens whatever may be their status. Mr. Mackenna has argued that in view of the principle of equality before the law only "ordinary Courts" of the land can try criminal cases and Courts created under the Regulation cannot therefore function. In my opinion, this argument is somewhat far-fetched. When Dicey refers to ordinary Courts his idea is to contrast the Courts of England with the administrative Courts of France and other continental countries created under the principle of *Droit Administratif*. *Droit Administratif* means the body of Rules which regulate the relations of the administration or of the administrative authority towards private citizens. According to the English system, every official from the Prime Minister down to a constable is responsible before the law Courts while according to the said principle of French Jurisprudence the ordinary law Courts have no concern whatever when with matters of issue between a private person and the state and such question must be determined by administrative Courts, It is clear that the Special Tribunal created under the Regulation is not an administrative Court although it is a separate question to be decided as to how far the Regulation or parts of it infringe the provisions of the Constitution, and in this context we have to look more to the equal protection clause of Article 14 than to the equality before the law clause contained in it.

45. In the light of these principles, I will farther examine the provisions of the Regulation and the arguments of the parties.

46. I now come to 3. 4 of the said Regulation and its various sub-sections. This is the Section which lays down the procedure to be followed by Special Tribunals in the trial of cases. Section 4, sub s, (1) runs as follows:

4 (1). A special Tribunal may take cognizance of offences without the accused being committed to it for trial.

It was strenuously argued on behalf of the petitioners that under the general Procedure Code of Hyderabad in every case triable by a Court of Session it has got to be committed to that Court by the Committing Magistrate who holds the preliminary enquiry at the committal stage and u/s 213, Hyderabad Criminal P. C; if the Magistrate considers the evidence of the prosecution insufficient to establish the offence he is empowered to discharge the accused, This protection, it is argued, is denied to the accused. Referring to Section 222, Hyderabad Criminal P. C , it was further argued that it is open under that section to the accused to adduce his defence evidence before the Magistrate after the charge was framed and if the Magistrate was satisfied after recording the defence that there were no sufficient reasons for committing the accused he could discharge the accused and cancel the charge It; is argued that this protection is also denied to the accused under Sub-section (1) of Section 4 of the Regulation. Reliance was placed upon Section 198, Hyderabad Criminal P.C. corresponding to Section 193, Indian Criminal P.C. and it was argued that a Sessions Court cannot take

cognizance of an offence unless the accused had been committed to it by a Magistrate duly empowered in that behalf. It was argued that the object of such a committal under the section is twofold; firstly, it secures to the person charged, a preliminary enquiry which would afford him the opportunity of being acquainted with the circumstance of the offence alleged against him and to enable him to make his defence : *Mutirakal Rama Varma v. The Queen*, 3 Mad 351; *Emperor v. Stewart*, A I. R. 1927 Sind 28 : 27 Cri. L.J. 1217 , secondly, it prevents the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence"as would justify a conviction : *Lachman v. Juala*, 5 all. 161 : 1882 A. W. N. 223, *Sheo Bux Ram v. Emperor*, 2 Cri. L.J. 534 : 9 C. W. N. 829. It is contended that too first object namely that the accused gets acquainted with the circumstances of the offence, is a definite privilege and protection given by the Code which is denied to him under Sub-section (1) of Section 4 of the Regulation. It is argued that every protection of benefit however little it may be which is given to the accused under the Criminal P.C. should be made available to petitioners in any special procedural law and if it is not done it contravenes Article 14 of the Constitution regarding the equality of the law.

47. Though it is conceded that different procedure may be adopted when there is a classification on territorial or any other rational basis, it is argued that as there is no rational or territorial basis of classification in the said Regulation, Section 4, Sub-section (1) must fall as being offensive to Article 14 of the Constitution. Section 198, Hyderabad Criminal P.C. ? Section 193, Sub-section (1), Indian Criminal P.C. reads that

except as otherwise expressly provided by this Code or by any other law no Court of Session shall take cognizant of any offence....unless the accused has been committed to it by a Magistrate....

It is clear that the section itself has made provision for deviation from the procedure laid down therein and it has empowered the Legislature to provide conditions (which are not in consonance with this section) by any other law. It is therefore clear that this is not a section of general application and if any other law empowers a Court to take a cognizance of the offence without committal proceedings it cannot be said to have contravened the provisions of the section. in fact there are provisions in the Code itself which are contrary to this section ? (vide Section 437), which empowers the Sessions Judge so order committal. It envisages a case triable by Court of Session in which the accused was improperly discharged by the inferior Court. Sections 480 and 485, Indian Criminal PC, empower the Court of Session under certain circumstances to try a case for contempt of Court though the same may not have been committed to it for trial. Hence the prohibition enjoined in Section 193, Indian Criminal P.C. : Section 198, Hyderabad Criminal P.C., is not of such a general application as to be considered one of substantial rights under Criminal Law. A reference may here also be made to Section 267A of the Hyderabad Criminal P. C; Sub-section (1) (c) of which lays

down that the Magistrate can commit a case for trial to the Court of Session without recording any evidence if he is satisfied that in view of the circumstances of the case it is a fit case to be committed and there are sufficient reasons for the same. It is therefore clear that sub.s. (1) of Section 4 of the said Regulation which empowers the Special Tribunal to take cognizance of offences without the accused being committed to it for trial cannot be considered detrimental to the fundamental rights of the accused. In my opinion this sub-section cannot be challenged in view of Article 14 of the Constitution and must therefore stand. The objection that the accused is not in a position to know the facts of his case beforehand is not substantial because when the case is tried as a warrant case under the Regulation there is enough time before the framing of the charge for the accused to get acquainted with the particulars of the case against him. Our Constitution does not include this as one of the rights guaranteed to an accused person.

48. Section 4 (I-A) runs as follows :

in respect of any trial held before a Special Tribunal . .

(i) The special Tribunal may direct that -English shall be the language of the Tribunal.

(ii) The judgment may be written in the English language.

This sub-section has not been impugned in any way and is valid and in my opinion separable. This sub. section, therefore, stands good.

49. Section 1, Sub-section (ii) runs as follows:

In trials before a Special Tribunal, it shall not be necessary to take down the evidence at length in writing but it shall cause a memorandum of the substance of what each witness deposes to be taken down in the English language and such memorandum shall be signed by a member of the Special Tribunal and shall form part of the record.

This Sub-section has been compared with Sections 286 and 287, Hyderabad Criminal P.C. Section 286 lays down that the Judge should record the evidence of the witness in writing with his own hand and it shall be read out to the witness in open Court and his signature obtained thereon. Provision is made in Section 287 for a memorandum of the evidence of the witness to be recorded by a clerk of the Court if for a sufficient reason the Judge is not himself able to write down the statement of the witness. It is argued that the provision of Sub-section (2) of S 4 of the Regulation only provides for a memorandum of the substance of what each witness deposes and it shall not be necessary to take down the evidence at length. It is, therefore, a disadvantage to the accused as it is not necessary that such a memorandum should be read out to the witness and verified by him. In our opinion, there is much force in this argument. Excepting summary trials such a provision for the recording of evidence seems to be unwarranted especially in the case of serious offences. It is often likely to work as a hardship both to the

accused and to the prosecution in cases to be dealt with at the appellate stage where the question may be raised as to the veracity of the witness or as to the contents of what a witness has actually deposed, In *Duncan v. Missouri*, 132 U. Section 377 : 38 Law. Edn. 485, the Supreme Court of the United States was considering the question of an ex post facto law. Fuller J. observed:

....the prescribing of different modes of procedure and the abolition of Courts and creation of new ones leaving untouched all the substantial protections with which the existing Law surrounds the accused persona of crime are not considered within the constitutional inhibition.

What we have got to consider is that the recording of evidence at length in a warrant case or case triable by a Court of Session is a substantial protection to the accused or not. In my opinion, it is a substantial protection and therefore it cannot be denied after the commencement of the Constitution to the accused who may be tried under the Special Tribunals Regulation. The equal protection of the laws in legal proceedings is secured when the laws of the State operate on all persons alike and do not subject the individual to an arbitrary exercise of powers of Government when its Courts are open to every one on the same terms, when it assures to every one substantially the same rules of evidence. In my opinion, therefore, Section 4, sub-3. (2) must be struck off as being repugnant to Article 14.

50. Sub-section 4 (24) runs as follows:

Nothing in Sub-section (2) shall preclude Special Tribunal from directing in respect of any trial that the evidence shall be taken down at length and where such direction is made:

(i) the evidence shall be taken down by one of the members of the Tribunal in the English language or taken down in shorthand in the English by a stenographer and transcribed by him:

(ii) the evidence so recorded or as the case may be, transcribed shall form part of the record.

In view of the principles contained in my observations regarding Sub-section (2) above, I am of the opinion that Sub-section (2A) after deleting the words "Nothing in Sub-section (2) is made," will stand, the result of which will be that the Tribunal is empowered to record the evidence in the English language. There is nothing objectionable in this sub-section. It is argued that according to the principle of severability the first few words as shown above cannot be deleted and the rest of the section made to stand because the modified law that remains will be entirely different from the intention of the framers of the Special Tribunals Regulation, What was intended to be optional by the Regulation will become a general rule. I cannot agree to the suggestion. From the section it cannot be assumed that the recording of evidence at length was not one of the purposes of the Regulation. Moreover, the Regulation becomes workable and therefore in my

opinion, the above noted portion of Sub-section (2 A) should stand.

51-53. Section 4, Sub-section (3) runs as follows:

A Special Tribunal shall not be bound to adjourn any trial for any purpose unless such adjournment is in its opinion necessary in the interests of justice.

This section has been compared to Section 275, Hyderabad Criminal P.C. and Mr. Mackenna argued that the latter section gives wider power of adjournment inasmuch as it is laid down that the Court can adjourn a case if on account of the absence of any witness or for any other reasonable ground it feels necessary in the interest of justice to adjourn the same. It is argued that even a slight change in the wordings was a disadvantage to the accused and therefore amounts to an infringement of Art. 11 of the Constitution. As I have said above, there is no substantial or material difference in these two sections and the opportunity of fair trial is guaranteed to the accused. In my opinion, this Sub-section (3) stands before the Full Bench. Mr. Mackenna did not press this argument on this sub-section.

54. Section 4, Sub-section (4) which provides,

A Special Tribunal shall not merely by reason of a change in its members, be bound to recall and re-hear any witness who has given evidence and it may act on the evidence already recorded by or produced" must in my opinion, be declared ineffective so far as trial of serious offences before a Court of Session is concerned. The underlying principle in a trial by a Court of Session is that before convicting the accused the Judge must have had full chance of hearing the witnesses and forming his opinion regarding the veracity or otherwise keeping in view their conduct, demeanour and other particulars. This is denied to an accused who is charged of having committed an offence triable by a Court of Session and is to be tried by the Special Tribunal under the Regulation.

55. So far as the offences to be tried by Magistrate are concerned, Section 281 of the Code empower the Magistrate, under certain circumstances, to decide the case upon evidence recorded partly by him and partly by his predecessor. This provision will be available with regard to a case triable by a Magistrate if it is directed to be tried under the Regulation by a Special Tribunal. It is argued that the deletion of Sub-section (4) in Sessions case before the Special Tribunal will be contrary to the intention of the Legislature and will violate the principle of severability. I do not agree with this contention. I will discuss later the principle regarding severability.

56. Section 4, sub.s. (5) provides for the trial of the case to be proceeded further in spite of the absence of the accused, who having once appeared has absented himself for the purpose of impeding the course of justice and certain other circumstances. There is a further enactment published in the Gazette Extraordinary dated 16-9-1950 vol. 81, No. 62, p. 627 and introduced as Sub-section (54) which empowers the Tribunal to proceed with the case, if the

accused is unable to attend the Court due to illness, etc. This Sub-section (5A) is equivalent to Section 540A, India Criminal P.C. It is argued that if similar amendments had been introduced in the Hyderabad Code the petitioners would not object as it will be an equal law for all but as it stands it offends Article 14 of the Constitution. In my opinion, there is no force in this contention. u/s 210 Magistrate is empowered under certain circumstances to dispense with the personal attendance of the accused and proceed with the case. It has been also held that even in cases in which a warrant is issued in the first instance the High Court can act according to the principle laid down in the section. Moreover, it is to a certain extent advantageous to the accused who will actually be present during trial that their case should not be adjourned unduly long because some other accused is absent. They thus get the benefit of a speedy trial which is an important principle in criminal cases. These Sub- Section (5) and (5-A) therefore will stand and are not void.

57. Sub-section (6) has not been criticised upon by the learned Counsel for petitioners and does not infringe Article 13(1) of the Constitution. It provides for the major opinion to prevail in case of difference of opinion among the members of the Tribunal. This sub-section, therefore, remains intact.

58. Section 4, Sub-section (7) is, in my opinion severable and the portion of the sub-section which will remain after separating it from the void portion will read thus:

A Special Tribunal shall, in all matters in respect to which no procedure has been proscribed by this Regulation, follow the procedure prescribed for the trial of warrant cases by Magistrates.

The original sub-section runs as follows:

A Special Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Regulation, follow the procedure prescribed for summary trials for Magistrates; but for reasons to be recorded in writing a Special Tribunal may follow the procedure prescribed for the trial of warrant cases by Magistrates.

The learned Counsel for the petitioners argued that this sub-section provides a general rule, viz., trial by the summary procedure. It also provides in exception; for reasons to be recorded in writing a Special Tribunal may follow the warrant procedure. It is argued that the second part of the section is dependent on the first. It is an exception to the general rule and is in the nature of a proviso which is always dependent on the main rule to which it is a proviso. It is argued that trial of Sessions cases in a summary manner infringes Article 14 and is therefore void and if the general rule laid down in this Sub-section regarding summary trial goes the second part of the sub-section which is an exception must also go. It is argued that if the sub-section is separated and re-worded as above it will make a provision entirely different from that intended by the maker of the Regulation. I cannot agree with his argument. In my opinion, the Sub-section provided two modes of trial so far as Sessions cases are concerned, one was the summary

procedure and the other was the warrant procedure. If the summary procedure clause is deleted and the warrant procedure clause retained, such severability cannot be said to be against the intention of the maker of the Regulation, I cannot also accept the suggestion that the warrant procedure to be followed as enumerated in this sub-section is an exception. What the law maker really thought was that where the seriousness of the offence was concerned a Special Tribunal was to follow the warrant procedure.

59. I am fortified in my opinion by the judgment of their Lordships of the Federal Court in AIR 1944 1 (Federal Court) Their Lordships held that where there were two possible constructions, one of which will make the enactment void and the other gives it same effect the latter may have to be preferred, though it may not wholly achieve the purpose of the framers. In AIR 1939 74 (Federal Court) the Federal Court was considering whether the Bihar Money Lenders Act was repugnant to the existing Indian Law. It was held *inter alia* that the onus of showing repugnancy and the extent to which it is repugnant should be on the party attacking its validity; there ought to be a presumption in favour of its validity and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other. Further, if the invalid part of an Act is really separate in its operation from the other parts and the rest are not inseparably connected with it then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. Applying this test, it cannot be said that the object of the Regulation will be frustrated if in the absence of summary trial warrant procedure is to be adopted. It was suggested that such a construction will exclude summons cases being tried by a Special Tribunal. We are not concerned here with summons cases nor is it necessary for us to consider unnecessary hypothetical questions. It is doubtful whether this Regulation was meant for trial of summons cases. In AIR 1946 66 (Privy Council) their Lordships observed that if the retrospective element in an Act is declared to be *ultra vires* and it is not severable from the rest of the provisions the whole Act would have to be declared *ultra vires* and void. But if the retrospective element is severable by the deletion of words giving retrospective effect the rest of the provisions of the impugned Act may be left to operate validly. In the result, their Lordships came to the conclusion that the retrospective element in the Punjab Alienation of Land Act was severable and would be deleted to that extent and the rest of the provisions of the impugned Act may be left to operate validly. Regarding the doctrine of severability and the intention of the law-maker, the Australian cases strike a somewhat different note as compared with the American cases. In *Rex v. Common Court of Conciliation*, 11 Commonwealth Law Rep. 1, Griffith C.J., observed as follows regarding the test of severability:

I venture to doubt the accuracy of this test. What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains

from what it would be with the omitted portions forming part of it.

60. Applying this principle to the Regulation it appears to me that the purpose of the Regulation was to create a Special Tribunal for the trial of cases and also to provide summary procedure for trial and warrant procedure and Sessions procedure wherever necessary. If, as I hold, provision for the creation of a Special Tribunal and the mode of trial by the warrant procedure and Sessions procedure is retained and the summary procedure is available only for summary cases, I do not think the omission of invalid portion would make the Regulation substantially a different law. Another test in this connection is to see that if after omitting the invalid portions the remaining enactment or law is workable and that it could be retained. It should be remembered that the Regulation or any other legislation should not be interpreted in too rigid a manner. Liberal interpretation should be given as far as possible to suit altered conditions. Of course, this principle should not make the remaining parts of the statute absurd.

61. Mr. Mackenna referred to the judgment of Isaacs J. (Re 11 Commonwealth Law Rep., Supra p. 54) suggesting that the learned Judge has adopted a somewhat different view regarding the test of severability but this argument does not seem to be correct as at page 55 the learned Judge has observed that he does not see any reason to differ from the mode of approach suggested by the learned Chief Justice. Regarding the test of severability Barton J., has observed in the same ruling at p. 35 thus:

the true principle seems to me to be this, that when one leaves out of consideration any provision held invalid, there must remain, a scheme of legislation not radically different, equally consistent with itself and retaining its workable character so far as it had one dealing effectively even if not comprehensively with so much of the subject-matter as is within the legislative power.

He has further stated that if an Act embraces two subjects of legislation one of them within the power of the law maker and the other beyond it then if the invalid provisions are severable from the valid ones, the Act may be held good if the severance leaves intact a consistent, workable and effective body of provisions forming the authorised part of the subject-matter of the Act; and in such a case one should not try to find out the intention of the law-maker as to what he might have done in an event which did not happen; but one should look to the fact that within the compass of the whole Act and apart from the provisions challenged, there lies a set of enactments forming an intelligible and efficient exercise of the real power.

62. Applying the above test to the Regulation. I must ascertain the limits of the power which was meant to be exercised thereby. The purpose of the said Regulation apparently is firstly to provide Special Tribunal who could devote their whole time for the trial of only such cases as are sent to them by the Chief Minister or by the Civil Administrator of the District concerned, unfettered and

unburdened by the trial of day-to-day cases which occupy most of the time of the ordinary Courts. Thus the Special Tribunals were additional Courts, created to try and speedily dispose of cases regarding any offence or any class of offences. Another purpose was to simplify at far as possible the procedure to be adopted by the Tribunal with a view to speedy disposal of the cases

63. What we have to see is if some clauses and sections of the said Regulation become invalid in view of the Constitution as being beyond the power of the law-maker the portion of the Regulation which remains is intelligible, consistent and workable so as to carry out as far as possible the two purposes mentioned above. In my opinion after separating the parts, the invalid parts of the Regulation which are left intact are workable and consistent with the purport of the Regulation. In this ruling it was held that if two separate appellate Courts are created it would not be against the guarantee as laid down in the 14th Amendment, have already referred to this case. In my opinion this ruling has no bearing,

64. In Kishori Lal Potdar Vs. Debi Prasad Kejriwal and Another, the Full Bench of the High Court held that even if Section 1 Sub-section (3) Bihar Buildings Control Act is ultra vires it is severable from the rest of the Act and consequently it would remain in force. I therefore hold that the part of Sub-section (4) as shown above is severable and will remain in force.

65. The counsel for petitioners while citing some American cases to which I will present]; refer argued that those cases were based on the 14th Amendment of the American Constitution which dealt with the equal protection of laws and the due process clauses and the cases which deal with "due process" have no bearing because instead of "due process clause" our Constitution has in Article 21 provided for "procedure established by law". He has cited *Traux v. Corrigan* 66 Law years Edn. 254: 257 U. S. 312, in which Taft J. held that it is true that no one has a vested right in a particular rule of the common law but it is also true that the Legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guarantee of due process in the 14th Amendment is intended to preserve. Mr. Taft further held that) the due process clause requires that every man shall have the protection of his day in Court and the benefit of the general law? a law which hears before it condemns which proceeds not arbitrarily or capriciously, but upon enquiry and renders judgment only after trial so that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. It tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property which the Congress or the legislature may not withhold. I fail to see how this ruling is helpful to the petitioners so long as a required minimum of protection is guaranteed to them by the said Regulation. This ruling discusses both the due process clause and the equal protection of the laws clause. It is not necessary for me to discuss here the principles regarding classification based on territorial or

class consideration in view of the fact of the case. The next case referred to by Mr. Mackenna is *Culf, Colorado, Rly. Co. v. Ellis* 41 Lawyers Edn. 666: 165 U. S. p. 150, in which it was held that classification to relieve a law from the charge of a denial of equal protection cannot be made arbitrarily but must be based upon some difference which bears a just and proper relation to the attempted classification. In this ruling it was held that a statute imposing an attorney's fee not to exceed 10 Dollars in addition to cost upon Railway Corporations omitting to pay certain claims within a certain time which applies to no other corporations or individuals is unconstitutional as denying to the Railway Corporation the equal protection of the laws. In this ruling there was minority judgment consisting of Chief Justice and two other Judges. This ruling has no bearing as the Regulation is not based upon any classification but is meant to provide additional Courts to dispose of cases. In *Brown v. Louis* 25 Lawyers Edn. 969: 101 U. S. 22 referred to by Mr. Mackenna, it was held that the equality clause in Section 1 of the 14th Amendment viz., that which prohibits any State from denying to any person the equal protection of the laws contemplates the protection of persons, against unjust discriminations by a State; it has no reference to territorial or municipal arrangements made for different portions of a State. It was not intended to prevent a State from arranging and parceling out the jurisdiction of its several Courts as it sees fit, either as to territorial limits, subject-matter or amount, or the finality of their several judgments or decrees.

66. Section 5 of the Regulation empowers the Tribunal to order the exclusion of the public from the Court proceedings under certain circumstances, There is no similar provision in the Hyderabad Criminal P.C.. and this power given to the Special Tribunal is an additional one. It was not pressed before us that this provision was inconsistent with the Constitution. It is not therefore necessary to discuss this section in detail. In my opinion this section remains in force and is valid.

67. Section 6 of the Regulation provides that a Special Tribunal shall have all the powers conferred by the Hyderabad Criminal P.C. on a Court of Session exercising original jurisdiction. I think this section is also valid and cannot be impugned. There was no particular criticism in this respect except that a question was posed that it is unnecessary because Section 4, Sub-section (7) partly retained as above, makes provision for the trial of Sessions cases according to the mode of warrant procedure. In my opinion the procedure provided for in Section 4 Sub-section (7) as partly retained applies to warrant cases and such of the Sessions cases as would be taken cognizance of by the Special Tribunal without the accused being committed to it for trial.

68. There may be also cases which might be committed for trial to a Court of Session and they may be transferred for trial before a Special Tribunal. In such cases, Section 6 of the Regulation empowers the Tribunal to proceed with the case according to Sessions procedure. Further Section 5 gives to the Special Tribunal in Sessions cases all the powers under the Criminal Procedure Code.

This section is, therefore, valid and intra vires.

69. Section 7 is a lengthy one and it contains 3 Sub-clauses and proviso. Clause 1 of the section cannot be and has not been assailed. It provides that a Special Tribunal may pass any sentence authorized by law. Clause 2 of this section has been subjected to powerful criticism. It runs as follows:

(2) There shall be an appeal to the High Court from any sentence passed by a Special Tribunal which would have been appealable to the High Court under the Hyderabad Criminal Procedure Code if the sentence had been passed by a Court of Session. But notwithstanding the provisions of Hyderabad Criminal Procedure Code or of any other law for the time being in force or of anything having the force of law by whosoever authority made or done, there shall, save as hereinbefore provided be no appeal from any order or sentence passed by a Special Tribunal, and no Court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal or have any jurisdiction of any kind in respect of any proceedings before a Special Tribunal and no sentence of a Special Tribunal shall be subject to confirmation.

It has been conceded by Mr. Macbenna that the provisions of this sub-section which give the right of appeal to the High Court from the sentence of a Special Tribunal cannot be impugned and will, therefore, remain. A small point was raised as to the meaning of "sentence passed" and it was argued that if it means that there will be no right of appeal from the order of conviction but only a right of appeal from sentence it will be a disadvantage to the accused. In our opinion, it is not necessary to give such a restricted meaning to the word "sentence." I hold that the sub-section confers a right of appeal both in case of conviction as also in case of sentence where only the question of the quantum of the sentence may have to be considered. I accordingly decide that the portion of clause (2) beginning from "...there shall be an appeal to the High Court....if the sentence had been passed by a Court of Session" can stand and is valid.

70. The next part of the section beginning from the words "but notwithstanding....to"subject to confirmation"" has been seriously objected to and it is argued that it cannot stand. This part provides that in spite of the provisions of Criminal Procedure Code or any other law there shall be no revision or appeal or transfer of a case except an appeal as provided above against any order or sentence of a Special Tribunal. It further provides that a sentence passed by a Special Tribunal shall not be subject to confirmation. It is argued that under the provisions of the Code the accused is entitled to have the benefit of a revision in the High Court against the order of the Special Tribunal. So also in appropriate cases a right to apply for transfer is available. In my opinion, this objection should be upheld. The right of a fair trial is an important safeguard in a criminal trial and cannot be denied in accordance with the spirit of the Constitution to an accused before a Special Tribunal. The power of revision is also an important safeguard. That should also be available to the accused. In my opinion, this portion of the section up to the words "...in respect of any

proceedings before a Special Tribunal" and beginning from "but notwithstanding" should be struck off after which , the question arises as to whether the provisions of the Hyderabad Criminal Procedure Code in these respects will be available to the accused under S 5 of the Code. It is argued that under S. I of the Code (Section 2, Indian Criminal P. C), the special law in this respect contained in Regulation will not be affected by the provisions of the Code and even if these portions of the Regulation are deleted a contrary intention of the Legislative Authority being apparent the benefit of the provisions of the Code cannot be given to the accused under the provisions of severability. In my opinion, so far as this question is concerned, it loses much of its force in view of Article 227 of the Constitution which gives the High Court powers of superintendence over all Courts and Tribunals. It is argued that this power of superintendence does not give as wide powers as are embodied in Section 863, Hyderabad Criminal P.C. S.C. 364, Indian Criminal P.C. In this respect we were referred to Sham Narain Singh Vs. Basudeo Prasad Singh, in which it was held in connection with a civil case that the power of superintendence given to the High Court u/s 7, Government of India Act, 1915, was not wider than that given in Section 115, Civil P.C. This ruling does not help the petitioners. In Om Prakash Berlia and Another Vs. Unit Trust of India and Others, S.C. Beaumont C.J. has fully discussed what it meant by High Court's powers of superintendence. It was held that u/s 107, High Court has powers of superintendence over all Courts for the time being subject to its appellate jurisdiction. Article 227 of the Constitution goes further and it provides that the High Court shall have superintendence throughout the territories in relation to which it exercises its jurisdiction. The appellate exercise of jurisdiction is thus not necessary under the Constitution though in the particular case before us this High Court has appellate jurisdiction as well.

71. It was further held in the said ruling that rights of superintendence include not only superintendence on administrative points but superintendence on the judicial side too. It was held that the High Court in the exercise of such powers has a discretion to revise or set aside any conviction or order of the lower Court. In my opinion, the power of superintendence includes the right to transfer a case if necessary. In Manmathanath Kundu and Others Vs. Emperor, , the High Court of Calcutta was also inclined to the view that the power of superintendence was as wide as the power of revision under the Code. In Maganbhai Nathabhai Vs. Dinkarrao N. Desai, Rangnekar J. held that High Court has revisional jurisdiction under its powers of general superintendence u/s 107, Government of India Act. I am therefore of the opinion that Article 227 of the Constitution applies to this case-even if it be assumed that after deleting the invalid portion of this sub-section the provisions of Section 363 of the Code are held inapplicable.

72. After deleting the above portion from Section 7, Sub-section (2) the portion which validly remains in force in my opinion would read as follows: "There shall be an appeal to the High Court from any sentence passed by a Special Tribunal which would have been appealable to the High Court under the Hyderabad

Criminal Procedure Code." It has been conceded by the learned Advocate-General that portion of this sub-section which prohibits the sentence of a Special Tribunal to be made subject to confirmation can also be struck off. This portion therefore goes. Sub-section (2-A) of Section 7 must also be deleted. Sub-section (2-B) of Section 7 remains in force.

73. I now come to sub.s. (3) of Section 7. Before the Division Bench some criticism was made regarding this sub. section which provides that the Military Governor or his successor may suspend, remit, reduce or alter any sentence. But this point was not pressed before the Full Bench. Under the Constitution, the Governor or the Raj Pramukh of a State has such a power : vide Article 161 of the Constitution. As this sub-section is repugnant to the provisions of the said Article of the Constitution it cannot be upheld and must be struck off.

The proviso to this sub-section must also go. There was no criticism made on Sections 8 and 9 of the Regulation. They will therefore be retained and are in my opinion valid.

74. In conclusion, I hold that after deleting the invalid portions narrated above the other parts of the Regulation can validly remain and are intra vires.

75. Two or three more points remain to be disposed of, These points do not relate to any question involving the interpretation of the Constitution. The oases instituted against the accused before the Special Tribunal have not yet; been opened and are only at their initial stage. These points which are said to be of the nature of a preliminary objection could and should have been taken up before the lower Court, and as a rule it is not the practice of this High Court to entertain or give hearings to such points in revision unless they involve some question regarding jurisdiction and unless they have also been decided in the lower Court. But no such objection was taken on behalf of the respondent and the petitioners argued that they involve a question of jurisdiction, As these points have been fully canvassed, it is better that I should express my opinion with regard to them.

76. The first point is that the order of the Military Governor u/s 1 extending the jurisdiction of the Special Tribunal IV to the whole of the State is not in consonance with the provisions of i. 1 which lays down that the Regulation shall extend to such areas as the Military Governor may from time to time by an order in writing direct. It is contended that order No. 84 printed in the Jareeda (Gazette) does not bear the signature of the Military Governor and therefore they deny the existence of such an order,

76a. The Advocate-General produced before us ;he original order signed by the Military Governor. It runs thus:

In supersession of the Home Department Order dated 1st Forward 1358 P. and in exercise of the powers conferred by Section 1 of the Special Tribunals Regulation 1358 F, the Military Governor is pleased to direct" that the said Regulation shall

extend to the whole of Hyderabad State."

"Can issue" sd/-Murtuza Khan, Sd/ J. N. Chaudhuri. Deputy Home Secretary.

77. It is contended that the order of the Military Governor amounted to authorisation for publication in the Gazette and not to an order in writing directing the extension and application of the Regulation to the whole of Hyderabad State. It is conceded that the Military Governor has approved of the idea expressed in writing by Mr. Murtuza Khan that the Regulation should extend to the whole of Hyderabad State but it is argued that the idea is not expressed in writing. In our opinion, it is a clear case of bad drafting. Now it is a question of construction whether the document amounts to direction in writing. My opinion is that the words "can issue" signed by the Military Governor on the said paper put before him, giving a liberal interpretation, amount to an order in writing by the Military Governor extending the jurisdiction. The word "issue" signed by the Military Governor denotes consent in writing both to the idea extending jurisdiction as also the authorisation for publication. In my opinion, therefore, there is no force in this point though a simple order stating that "I, J. N. Chaudhuri, Military Governor, direct that the Regulation shall extend to the whole of Hyderabad State" sd/ J. N. Chaudhuri, Military Governor" would have been sufficient.

78. The second point raised is that the order of 8th April directing the Special Tribunal at Trimulgherry under 8, 3 of the Regulation to try the offences punishable under the various sections, and rules of the Defence of Hyderabad rules, committed by the accused mentioned in the order, is bad, because it does not give sufficient particulars regarding the offences to be tried by the Special Tribunal. It is admitted that on the 10th April the Superintendent of Police, Crime Branch, filed a charge sheet in pursuance of that order. It is contended that even that charge-sheet does not give details e.g., as to who were murdered and where; whose houses were burnt and at what places. In my opinion this objection cannot prevail. If any further details are necessary they can be elicited in the lower Court from the prosecution and there is no reason to suppose why the prosecution will not furnish them. This is a point which does not go to the root of jurisdiction. Jurisdiction has been invested with the Special Tribunal by the said order of the Chief Minister dated 8-4-1950. That order has given the full description of the names of the accused and has directed the Tribunal to try the offences punishable under various sections of the Penal law. Further reference for clarification has been made to the charge-sheet which was before the Chief Minister and which was to be filed by the Superintendent of Police, Crime Branch, C. I. D. Hence, so far as the question of vesting of jurisdiction is concerned, there is a sufficient compliance with Section 3 of the Regulation.

79. The 3rd point raised was that there is no order in existence constituting the Special Tribunal at Trimulgherry. The learned Advocate-General showed us the said order after which Mr. Mackenna did not press the point. This argument therefore also fails.

80. We have now to consider the question of the writ of habeas corpus. The orders issued against the petitioners under Act IV 4. of 1950 have been cancelled by the Government and now the petitioners are not under preventive detention but under judicial custody pending the disposal of oases referred to above against them. Their detention therefore cannot be called illegal. They are in simple detention pending the trial as ordered by the Court below. In AIR 1945 18 (Privy Council) it was held that in such cases the question to be considered is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner. In the result, their Lordships of the Federal Court declined to release the petitioner. The habeas corpus petitions therefore must in my opinion be dismissed.

81. In conclusion, I hold that the Regulation after deleting its invalid parts as shown in the foregoing passages is valid. The Regulation which is thus valid, will read as follows:

The Special Tribunals Regulation (No. 5 of 1358 F) (Received the assent of H. E. H, the Nizam on 30th day of Azoor 1358 Fasli.)

Whereas it is expedient to constitute Special Tribunals it is hereby enacted as follows:

1. Short title, commencement and extent. ? This Regulation may be called the Special Tribunals Regulation and shall come into force from the date of its publication in the Jarida and shall extend to such areas as -the Military Governor may from time to time by order in writing direct.

2. Constitution of Special Tribunals. The Military Governor may, for the whole or any part of H. E. H. the Nizam's Dominions, constitute Special Tribunals consisting of three members appointed by the Military Governor.

3. Jurisdiction of Special Tribunals.?The Military Governor may, be general or special order, direct that a Special Tribunal shall try any offence, whether committed before or after the commencement of this Regulation or any class of offences and may by any such order direct the transfer to a Special Tribunal of any particular case from any other Special Tribunal or any other Criminal Court or direct the transfer of any particular case from a Special Tribunal to any other Criminal Court.

4 Procedure of Special Tribunals. ? (1) A Special tribunal may take cognizance of offences without the .accused being committed to it for trial.

(i-A) In respect of any trial held before a Special Tribunal:

(i) the Special Tribunal may direct that English shall be the language of the Tribunal:

(ii) the judgment may be written in the English language

(2-A)(i) The evidence shall be taken down by one of the numbers of the Tribunal

in the English language or taken down in short-hand in the English by stenographer and transcribed by him:

(ii) the evidence be recorded or, as the case may be, transcribed, shall form part of the record.

(3) A Special Tribunal shall not be bound to adjourn any trial for any purpose unless such adjournment is, in its opinion necessary in the interests of justice.

(5) After an accused person has once appeared before it a Special Tribunal may try him in his absence if, in its opinion, his absence has been brought about by the accused himself for the purpose of impeding the course of justice or the behaviour of the accused in Court has been such as in the opinion of the Special Tribunal to impede the course of justice.

(5-A)(a) At any stage of a trial under this Regulation, where two or more accused are before a Special Tribunal, if the Special Tribunal is satisfied, for reasons to be recorded, that any one or more of such accused is or are capable of remaining before the Special Tribunal, the Special Tribunal may, if such accused is represented by a pleader, dispense with his attendance and proceed with such trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(b) If the accused in any such case is not represented by a pleader, or if the Special Tribunal considers his personal attendance necessary, the Special Tribunal may, if it thinks fit, and for reasons to be recorded by it, either adjourn such trial, or order that the case of such accused be taken or tried separately,

(6) In the event of any difference of opinion among the members of a Special Tribunal, the opinion of the majority shall prevail.

(7) A Special Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Regulation, follow the procedure prescribed for the trial of warrant cases by Magistrates.

5. Exclusion of public from Special Tribunals, ? In addition and without prejudice to any powers which a Special Tribunal may possess, by virtue of any law for the time being in force, order the exclusion of the public from any proceedings, if at any stage in the course of the trial of any person before a Special Tribunal application is made by the prosecution on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the public safety, that all or any portion of the public shall be excluded during any part of the hearing, the Special Tribunal may make an order to that effect, but the passing of sentence shall, in any case, take place in public.

6. Powers of Special Tribunals. ?A Special Tribunal shall have all the powers conferred by the Hyderabad Criminal Procedure Code on a Court of Session exercising original jurisdiction,

7. Sentence of Special Tribunals. ? (1) A Special Tribunal may pass any sentence authorised by law.

(2) There shall be an appeal to the High Court from any sentence passed by a Special Tribunal which would have been appealable to the High Court under the Hyderabad Criminal Procedure Code if the sentence had been passed by a Court of Session.

(2-b) Notwithstanding anything contained in any law for the time being in force....

(i) any sentence of death passed by a Special Tribunal shall be carried into execution by causing the person sentenced to be hanged by the neck until he be dead:

(ii) warrants of commitment under sentence of death, warrants of execution of a sentence of death and any other instruments issued by a Special Tribunal for which a form is provided in Schedule IV to the Hyderabad Criminal Procedure Code shall, subject to any directions which may be made by Government in this behalf, be issued in such form as the Special Tribunal thinks fit.

8. Exercise and discharge of the Military Governor's powers and Duties. ? The Military Governor may, by order, direct that in such circumstances and under such conditions, if any, as may be specified in the direction, any power or duty conferred or imposed upon him by this Regulation may be exercised or discharged by any other authority.

9. Interpretation.? The Hyderabad General Clauses Act shall apply to the interpretation of this Regulation."

82. The result of the deletions will be that an accused tried by a Special Tribunal will now have substantially the same procedure as is secured by the Hyderabad Criminal Procedure Code. Therefore, the petition for the issue of a writ of prohibition and all the petitions for the writ of habeas corpus are dismissed and the Special Tribunal is directed to proceed with the cases in the light of this judgment. Order accordingly.

83. Leave to appeal to the Supreme Court under Articles 182 and 134 is given as prayed for by the counsel for the petitioners.

M.A. Ansari J.

84. Nine applications have been referred to the Full Bench, because of the constitutional importance of the questions involved in their decision. Eight of them are for the writs of habeas corpus praying release of the applicants from detention under the Preventive Detention Act. The ninth application is for the writ of prohibition seeking to prevent seven persons from being tried by the Special Tribunal No. IV constituted under the Hyderabad Special Tribunals Regulation v 5. of 1358 Fasli. They have been filed under Article 226 of the Constitution of India. The seven persons seeking prohibition of their trial have also applied for their release from the alleged illegal detentions. The eighth application for the writ of

habeas corpus is by one Hizamuddin Ghorī, and he has not applied for the prohibition of his trial. This application does not require a separate judgment and for reasons to be mentioned presently the grounds of its decision are similar to that of the application for the writ of prohibition.

85. The several applications for the habeas corpus disclose that the applicants are detained in the Trimulghiri Jail under orders dated February and March 1960, which purport to have been issued in the exercise of the powers conferred by the Preventive Detention Act of 1950. They then recite certain facts as reasons for those orders being held illegal. At the hearing of the cases before the Division Bench the Advocate-General was directed to make the return to these applications. He filed the return and it shows that the applicants, at the dates of the filing of the applications before this Court, were kept in custody under orders of the Special Tribunal No. IV at Trimulghiri which has been directed by the Chief Minister to try them. In view of these later orders remanding the applicants to Jail, any decision on the validity of the prior orders of detention has become unnecessary. The analogy of civil proceedings where the rights of parties ordinarily have to be ascertained on the dates of their institutions cannot be invoked in habeas corpus proceedings. If at any time before the Court hears the applications valid orders authorising custody are produced the release cannot be ordered on the ground that at some prior stage there was no valid cause for the detention. The question is not whether the later orders validate the earlier detentions, but whether in the face of the later orders release can be directed. These propositions are fully covered by the case of AIR 1945 18 (Federal Court). Therefore, if the Regulation under which the Tribunal has been directed to try the applicants be held valid, the Tribunal's warrants of detention are also legal and the petitions fail. The legality of the Regulation is being challenged in the application for the writ of prohibition, and the decision in that application will necessarily cover the orders of the Tribunal. I will, therefore, deal with the prohibition application first and my judgment therein will also govern the habeas corpus applications. Further, the reasons for the decision in the prohibition petition will apply to the Hizamuddin. Ghorī's application, as he is one of the persons who are directed to be tried by the Tribunal and is detained in Jail by the Tribunal's order. The result is that the grounds of the judgment in the prohibition application will be common to all the nine applications, and no separate adjudication of any of the application is necessary. This judgment will, therefore, govern all the nine applications.

86. The antecedent facts are that on 8-4-1950 the Chief Minister of this State, has u/s 3, Special Tribunals Regulation, directed the Special Tribunal No. IV at Trimulghiri to try the offences punishable u/s 77-B, Section 83, 243, 266, 328, 330 368 read with Sections 66 and 77-B, Hyderabad Penal Code and under Rules 87, 57, 53 read with Rule 112, Defence of the Hyderabad Rules, committed by seventeen persons and specified in the charge sheet to be filed against them by the Superintendent of Police, Criminal Branch C. I. D., Hyderabad. In the order the names of the seven applicants to the writ of prohibition are numbered as- 5,

6, 7, 12, 13; 15 and 16, and Hizamuddin Ghori is also included as no. 14. On 10-4-1960, the Superintendent mentioned in the order filed against the above applicants as well as against Hizamuddin Ghori, the charge sheet alleging that they were guilty of conspiracy and large number of offences. I need not mention in this judgment the exact number of offences alleged to have been committed by these persons in the charge-sheet. They are contained in the document, a copy of which has been filed before us and are also given in para. 8 of the prohibition application.

87. The application contains four grounds for the issue of the writ. They are : (i) The Regulation authorises a form of trial different to that permitted by the Hyderabad Criminal Procedure Code for Sessions case, and which is very much disadvantageous to the accused; the form of trial is inconsistent with the right of equality before the law or the equal protection of laws contained in Article 14, of the Constitution of India, and the entire Regulation is, therefore, void under Article 13(1) of the Constitution. This is contained in para. 6 of the application, (ii) u/s 1 of the Regulation the area to which the Regulation shall extend has to be specified by an order in writing : the order of 14th Farwardi 1858 Fasli 14-2-1919² purporting in supersession of the previous order to extend the Regulation to the whole of the Hyderabad State is not an order by the Military Governor in writing and the extension of the Regulation is uncertain and non-existent. This is contained in para. 9 of the application. (iii) u/s 2 of the Regulation, the Military Governor is authorised to nominate three members constituting a Tribunal; the applicant know of no such order and the members of the Special Tribunal, who have been impleaded as opposite parties to the application cannot try the applicants. This ground is contained in para. 10 of the application (iv). u/s 8 of the Regulation, the Tribunal can only try such cases as are directed to be tried by the Chief Minister, and as the order of 8-4-1950 does not specify the number of cases to be tried by the Tribunal but specifies the offences by reference to the charge-sheet, which was nonexistent on the date the order was made, the order is vague, insufficiently complies with Section 3 of the Regulation and is void, This last ground is contained in para. 8 of the application.

88. The above grounds can be broadly classified into two groups. The first raises important questions of constitutional law relating to the Regulation being void on the ground of its being inconsistent with Article 14 of the Constitution of India, and the second relates to the insufficient compliance of particular orders with Sections 1, 2 and 3 of the Regulation on the assumption that the Regulation is still a constitutionally valid enactment. Had I been convinced of the correctness of the three latter grounds, I would not have referred the applications to the Full Bench. For in cases where particular enactments are challenged on grounds of their being unconstitutional, the American Courts have placed certain restrictions upon themselves, with which I agree. One of these is given in Cooley's Constitutional Limitations, vol. I at pp. 338.889 in the following words:

In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and dear ground upon which the Court may rest its judgment, and thereby render the constitutional questions immaterial to the case, that course will be adopted and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable.

Because my opinion in the Division Bench was against the applicants on the latter three grounds pronouncement on the first ground became inevitable and the applications were referred to the Full Bench.

89. Before dealing with the arguments relating the voidance of the Regulation it is necessary to give a brief summary of the different sections of the Regulation. Section 1 enacts that it shall come into force from the date of its publication in the Jarida and shall extend to such areas as the Military Governor may from time to time by an order in writing direct. Section 2 provides for the constitution of the Tribunal which is to consist of three members appointed by the Military "Governor. Section 8 relates to its jurisdiction and flays that the Military Governor may, by general or special order, direct that a Special Tribunal shall try any offence, whether committed before or after the commencement of the Regulation, or any class of offences and may also direct the transfer to a Special Tribunal of any particular case from any other Special Tribunal or any other criminal Courts, or direct the transfer of any particular case from a Special Tribunal to any other criminal Court. Section 8 authorises delegation of the power of the Military Governor relating to trial by the Tribunal to any other authority. The last two sections are vestitive of the jurisdiction in the Special Tribunal; but until the order is made the jurisdictions of the ordinary criminal Courts are not divested. In the territories to which the Regulation is made to extend the ordinary criminal Courts do not cease to function. Their jurisdiction to try offences according to the ordinary Criminal Procedure Code is ousted only by the order and as regards offences specifically directed to be tried by the Tribunal. These ad, hoc divestings extend under S 7, Sub-section (2) to the powers of revision, transfer, and confirmation of the High Court and that also as regards the offences made triable by the Tribunal.

90. Section 4 mainly relates to the procedure which is to be followed by the Tribunal in trial of oases. Under Sub-section (1) it can take cognizance of offences without the accused being committed to it; Sub-section (I-A) says that in such trials it may direct English to be the language and the judgment may be written in that language; Sub-section (2) provides that it shall not be necessary to take down the evidence at length, but a memorandum of the substance of what each witness deposes will suffice; but under Sub-section (2-a) the Tribunal may direct the evidence to be taken down at length, and where such direction is made the evidence shall be taken down by one of its members in the English or taken down in shorthand by a stenographer and transcribed by him; Sub-article

(4) says that the Tribunal shall not merely by reason of a change in its members be bound to recall and rehear any witness who has given evidence and can act on the evidence already recorded by it.

91. By Sub-section (3) generally the Tribunal is not bound to adjourn any trial or any purpose unless such adjournment is, in its opinion, necessary in the interests of justice; then under Sub-section (5), the trial of a case can proceed in spite of the absence of the accused, who having once appeared has absented himself for the purpose of impeding the course of justice; Sub-section (S-A) says that where there are two or more accused and any one is capable of remaining before it and is represented by a pleader his presence can be dispensed with and the case can be continued; but in case the absenting accused is not represented by a Pleader or the Tribunal considers his presence necessary it may for the reasons to be recorded either adjourn the trial or order his case to be taken up separately. Sub-section (7) is of importance and is quoted in extenso:

A Special Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Regulation, follow the procedure prescribed for summary trials for Magistrates; but for reasons to be recorded in writing a Special Tribunal may follow the procedure prescribed for the trial of warrant cases by Magistrates.

Section 5 authorises exclusion of the public from the trial; Section 6 confers all the powers, which are conferred by the Hyderabad Criminal Procedure on a Court of Session; u/s 4, Sub-section (6) in case of difference the opinion of the majority is to prevail and by Section 7, Sub-section (1) the Tribunal can pass any sentence authorised by law.

92. Section 7, Sub-section (2) provides for appeals to the Sigh Court from any sentence which would have been appealable to the High Court under the Hyderabad Criminal Procedure Code, if passed by a Court of Session; then by Section 7, Sub-section (2.A) the sentence of a Special Tribunal is defined and u/s 7, Sub-section (3) the Military Governor is authorised to suspend, remit or alter the sentence either of the Tribunal or of the High Court.

93. The argument of the counsel for the applicants is that the Hyderabad Criminal Procedure Code provides for the establishment of the ordinary Courts for trying offences, and also prescribes procedure to be followed by them; this procedure contains elaborate provisions minimising the risks of an accused person being put on trial, of being wrongly condemned, and of being unduly punished, Against this general law, the Special Tribunal Regulation provides for the establishment of special Courts and prescribes special procedure curtailing many safeguards against wrong accusation, trial and sentence which procedure becomes operative on the uncontrolled direction of the Chief Minister, The establishment of such special Courts with special procedure is repugnant to the guarantee of equality before the law contained in Article 14 of the Constitution, and the Regulation has after 26-1 1950, become void. Further the procedure which the Tribunal is to follow creates inequality between persons who are being

tried by it and those who are tried by the ordinary Courts, thereby the fundamental right of equal protection of laws is also violated and the Regulation is void on that ground. This first ground of the attack is that because Article 14 of the Constitution says that the State shall not deny to any person equality before the law, the State is thereby precluded from establishing Special Courts with special procedure. In this connection, reliance is placed on the following passage of Dicey's Law of the Constitution (Edn. 8) at p. 183:

No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

94. The argument proceeds on the assumption that in our Constitution the phrase "equality before the law" means what the English Constitutional writers have said it means. I am reluctant to interpret any phrase in the Constitution Act by referring to books on English Constitutional law. That law is still largely unwritten and consists mostly of conventions or rules of common law, which are not helpful in interpreting a written constitution. Dicey in the above passage has in mind the common law rule of the Crown having no prerogative in England of creating new type of Court, nor of conferring a new jurisdiction on a Court already existing. That restriction has never been applied to statutory Courts. It will be a mistake to hold that by the guarantee of equality before the law, the Parliament and the State legislatures under the Constitution of India are precluded from creating new Courts. To my mind "equality before the law" means equal rights and duties of persons similarly situated. It does not mean identical rights and duties of persons in similar situations. "Equality before the law" therefore, does not guarantee identical Courts with identical procedure for all persons. Creation of a special Court with a special procedure ousting altogether the jurisdiction of ordinary Courts is forbidden; but, in the present case, it cannot be said that the jurisdiction of the ordinary Courts is so ousted. By Article 227 every special jurisdiction is now subject to the superintendence of the superior Court and the effect of the power of superintendence is that superior Courts can be approached through a different channel. The appellate power of the High Court is not taken away, the supervisory power of this Court is established and on deletion of the provision excluding the power of revision, transfer and confirmation, for which I have given reasons later in this judgment,, I do not think the Regulation establishes such a Court so as to oust altogether the jurisdiction of ordinary Courts. Thus it is not inconsistent with the fundamental guarantee of equality before the law. I will now deal with the objection relating to special procedure.

95. The argument of the learned Counsel is that as the form of procedure to be followed by the Tribunal and ordinary Courts are unequal the Regulation infringes the guarantee of equal protection of laws, it discriminates between two accused and it is on that account void. I do not propose at this stage to refer to the various sections of the Criminal Procedure Code, which have during the

argument been compared with the different sections of the Regulation to show the curtailment of the safeguards of the accused on his being tried under the Regulation. I am convinced that the procedure allowed under the Regulation is in certain respects disadvantageous to the accused. I am fortified in this view by the observations of the Chief Justice of the Federal Court in a case reported in AIR 1943 36 (Federal Court) where the Chief Justice after comparing the provisions of ordinance II 2. of 1942, which with the exception of right of appeal, contained provision similar to the Hyderabad Regulation, with that of the Criminal Procedure Code, says at p. 44 that

the position is ... that in the province of Bengal, there are now two sets of Courts, the ordinary criminal Courts fund the special criminal Courts, both working side by aide, but with fundamental differences in their procedure and very serious consequences to the prejudice of the accused flowing out of these differences?.

96. This case was reversed by the Privy Council in Emperor v. Benoari Lal Sarma AIR 1946 P.C. 48 : 46 Cri. L.J. 589, but on the ground that there was nothing at that time in the constitution to prevent passing of such an enactment. After the commencement of Constitution of India and having regard to Article 14, constitutional limitations have been imposed. In my judgment, the state of things prevailing in this State at the time of the passing of the Regulation constitutional and factual, fully justified the enactment of the Regulation. It is only after the commencement of the Constitution that the constitutional position of the sections in the Regulation relating to the special procedure has got to be examined afresh.

97. In interpreting the fundamental right of equal protection of laws contained in Article 14 considerable assistance is afforded by the authoritative text-books on the Constitution of the United States of America and also by the pronouncements of the highest judicial tribunals of that country. Section 1 of the Fourteenth Amendment of the American Constitution with necessary omission³ runs as follows :""... no State shall deny to any person within its jurisdiction the equal protection of the laws."

98. Comparing this with Article 14 : "The State shall not deny to any person the equal protection of the laws within the territory of India", two things are clear : one is the presence of the words "the equal protection of the laws" in both the provisions and the other is, having regard to the definition of State contained in Article 12, the wider scope of the limitation in our Constitution than in that of the United States. The limitation applies to the Parliament also, whereas in the United States it is confined to States Legislatures. I shall first cite some passages from test-books on the American Constitution as to the meaning of the words "the equal protection of the laws" and in view of the identity of the phrase in the two written Constitutions there can hardly be any objection in accepting them as guide in interpreting Article 14. In Willis" Constitutional Law at p. 579 the meaning and effect of the guarantee are given as follows:

The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction Mathematical nicety and perfect equality are not required. Similarity, non-identity of treatment is enough.

99. Then Weaver's Constitutional Law at p. 393 says:

The guiding principle of this guarantee is that all persona similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. It has been said that "the equal protection of the laws" is a pledge of the protection of equal laws. . . .

100. The same author at p. 407 of the book continues:

The equal protection of the laws in legal proceedings is secured when the laws of the State operate on all persons alike and do not subject the individual to an arbitrary exercise of the powers of Government?. This means that all litigants similarly situated may appeal to the Courts both for relief and for defence under like conditions and with like protection and without discrimination.

The effect of the right on procedural law has been given in Cooley's Constitutional Limitations, vol. I at pp. 551-552 thus:

So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the Courts, in existence, when its facts arose. The legislature may abolish Courts and create new ones, (may reduce the number of judges required to preside at a trial), and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.

101] So much for the constitutional writers; I shall now quote a passage from the judgment of Taft J. in the case of *Traux v. Corrigan* 257 U.S. 812 : C6 Lawyers Ed. 254 to show the importance and distinguishing characteristics of the guarantee:

But the framers and the adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They, therefore, embodied that spirit in a specific guarantee. The guarantee was aimed at undue favour, on the one hand and at hostile discrimination or the oppression of inequality, on the other, It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

102. What are its effects on procedural law is given in *Henry Duncon v. State of*

Missouri 152 U.S. 377 : 38 Lawyers Edn. 485 at p. 487, where the following passage occurs:

and due process of law and the equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the Government . , . But the prescribing of different modes of procedure and the abolition of Courts and creation of new ones leaving untouched all the substantial protection with which the existing law surrounds the person accused of crime are not considered within the Constitutional inhibition.

103. In short the American authorities establish that the right of the "equal protection of the laws" means protection of equal law, and that be. cause of that fundamental guarantee, the rights and liabilities of persons in similar circumstance must not be substantially different. I accept this as the correct interpretation of the identical words in our Article 14.

104. The Advocate. General's reply is that the Regulation does not infringe the fundamental right of equal protection of laws, as it operates equally on all persons to whom the Regulation is applied. In support of his argument among other oases he relied on V. A. Bow v. State of Madras, a recent decision of the Pall Bench of the Madras High Court, whose certified copy has been placed before us. I am of opinion that the argument cannot be accepted. If any one enactment be taken alone to find out whether it discriminates or not, then special privileges can be created by special Acts, and the persons excluded cannot be brought in for determining the inequality so created. For example, an enactment authorising sale by ex-soldiers without licence or fee of certain commodities will be perfectly valid, though by some other law licence for sales and fee of these very commodities be necessary for other persons. Moreover, the teat of protection of equal laws for persons in similar circumstances would not bo accepted as correct and persons similarly situated need not be governed by similar laws. I do not think any American case goes so far. Even in cases of educational segregations of the Negroes from the Whites such discrimination had been held valid on the ground that they provide similar facilities to persons of the different races. When the Constitution Act says, "equal protection of laws," it does not mean the equal protection under any one particular law; it means equal protection of all laws relating to the particular subject. In my opinion, therefore, the first contention of the Advocate-General regarding the validity of the Regulation fails and those sections of the Regulation which vary substantially protections given to an accused under the Criminal Procedure Code should not now stand. What are those sections, I shall deal with later.

105. The Advocate General further contends that there are five fundamental rights of an accused in a criminal trial. The rest are mere procedural, and if the fundamental rights be not taken away then the Regulation is valid. These fundamental rights, he says are: right to be heard, right to defend, light to consult, and be defended by a counsel of his choice, right to process for the

defence witness and right not to be given higher punishment. These rights are maintained under the Regulation and the other safeguards being procedural, their execution does not make the Regulation void. In my opinion, this contention also cannot prevail. The right of equal protection of laws is as much fundamental as these rights mentioned by the Advocate-General. It means that rights and liabilities, privileges, and disabilities of persons in similar situation must not be substantially unequal. The law gives to accused in trials, right of applying for revision, of confirmation, of asking for transfer, of evidence being recorded in detail and of fresh recording of depositions of witnesses with the change of the trying Judges, and taking these away from some accused amounts to inequality. It is a fundamental right that those be not withheld in the case of some, and allowed to exist in the case of others. The equal protection of the laws is itself a fundamental right, distinct from other fundamental rights. I do not wish to refer to the authorities cited by the Advocate-General in this connection. They certainly substantiate the proposition that right of appeal, the right of review, trial by jury can be varied by legislation. But those authorities do not go to the extent of saying that without territorial classification these rights can be conferred on some and taken away from the others.

106. From what has been said above, it is clear that the provisions of the Regulation substantially curtailing safeguards of an accused in Sessions trials according to the Hyderabad Criminal Procedure Code can no longer stand. I shall first deal with those which are in my opinion wholly or in part void.

107. Sub-section (2) of Section 4 should be deleted,, for it requires only memoranda of evidence; whereas under the Criminal Procedure Code a detail recording of evidence in Sessions trials is necessary. Along with this sub-section the words beginning with "nothing" and ending with "made" in Sub-section (2-A) should also be deleted for it is closely associated with Section 2 and cannot be separated. It has been urged that after the deletions Sub-section (2-a) becomes entirely different in effect. In my opinion notwithstanding the dependence of the two sub-sections, each is severable. The correct test in such cases is to see whether they deal with distinct and different things. In AIR 1939 74 (Federal Court) Sulaiman J. held Section 13. of the Impugned Act, which dealt with fixation of price severable from Section 14, which dealt with its publication, and upheld the latter. Here also the two sections deal with two forms of recording evidence, and with the necessary deletions Sub-section (2-a) because it enacts a different and distinct matter can stand. Then it is urged that the remaining portion of the sub-section will work inequality in cases where the summary procedure is allowed under the Criminal Procedure Code though the inequality be in favour of the accused persons tried under the Regulation. Having regard to Section 248, Hyderabad Criminal P.C. the summary procedure is not of general application, and is conferred on the Magistrates at the direction of the Government. Therefore, the trial, by the Tribunal, of those offences in a different manner is not inequality peculiar to trials under the Regulation.

108. Sub-section (4) of Section 1 dispenses with fresh recording of evidence in case of change of personnel of the Tribunal, whereas there are authorities" of several High Courts that in Sessions cases a Judge has no power to pass judgment on evidence recorded by his predecessor. The recording of fresh evidence is an important protection in favour of the accused in Sessions cases and it should; not be taken from him and maintained in case of others. The sub-section should be deleted. It is argued that the striking out of this provision - will create inequality in favour of the accused in warrant cases, as u/s 281, Hyderabad Criminal P.C. he has no right of insisting on recall of witnesses. I do not think any such inequality is created. After the deletion of the offending part of Sub-section (7) of Section 4 with which I shall deal later, the Tribunal will have to follow the procedure for warrant case and an accused in a warrant case because of that sub-section will not be able to insist on recording of fresh evidence. The Tribunal has also been given by Section 6 all the powers conferred by the Criminal Procedure Code on a Court of Session and the authorities have held that the Sessions Judges have no power to deliver judgments on evidence recorded by their predecessors. Consequently by deletion of Sub-section (4) of S. 1 recording of fresh evidence becomes necessary only in Sessions cases and is not rendered inevitable in warrant cases.

109. Coming to Sub-section (7) of Section 4, I am convinced that summary procedure in cases triable by Sessions Court amounts to substantial inequality. Therefore, that part of the sub-section which renders necessary the use of the summary procedure is void and must go. Moreover, where rights of appeal on fact are given this form of procedure works hardship on the accused for the appellate Court cannot have the full evidence to assist it in deciding questions of facts. Therefore, the words beginning with "follow" and ending with "may" in the sub-section should be deleted. After the necessary deletion, this section will read as follows: "A Special Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Regulation, follow the procedure prescribed for the trial of warrant cases by Magistrates."

110. The learned Counsel for the applicants has urged several reasons against legality of such part deletions. He argued that the permission to follow warrant procedure was in the nature of proviso and a proviso cannot be made the general rule, I do not agree with his contentions. The sub-section allows the Tribunal the forms of procedure, and the choice of the latter is made dependent on recording of reasons. It contains two exclusive and distinct provisions, with a power of selection. There is nothing to prevent the Tribunal from following the latter in every Sessions case tried by it. Each provision is severable, complete and the form of its inclusion in one section is of no importance. In AIR 1946 66 (Privy Council) a section relating to retrospective and prospective operation of an Act was made constitutional by deleting three words. In that case the question was whether the Punjab Alienation of Land Act was constitutional as regards its retrospective application and the Privy Council holding its retrospective operation ultra vires deleted words "either before or" from Sub-section (1) of the Act. 13-

A and held the rest of the section valid. In my judgment, therefore, the deletion of the words mentioned above in Sub-section (7) is correct, and the part relating to summary procedure being distinct and severable from the legal portion which deals with a different form of procedure, the latter can stand alone. The deletion also does not make the operation of the sub-section radically different.

111. The next offending provisions of the Regulation are those which take away the power of transfer, revision and confirmation of this Court. These are contained in words beginning with "But" and ending with "whatsoever" in Sub-section (2) partly by subs. (2-A) of Section 7. The exclusion of certain proceedings of the Tribunal from the interference of the High Court is no longer permissible, for under Article 227 of the Constitution the High Court, now, has supervisory powers over all Courts and Tribunals within the State, and this authorises supervision of judicial matters also. In *Balkrishna Hari v. Emperor* AIR 1933 Bom. 1 : 84 Cri. L.J. 199 S.B., that Court dealing with similar provision of Section 107, Government of India Act, 1915, held that this supervisory power cover judicial matters. Therefore, the proceedings of the Tribunals are no longer immune from interference from this Court. But apart from it, I am of opinion, that the taking away of the general power of revision contained in the Criminal Procedure Code amounts to substantial inequality and cannot be allowed to stand. Then, as regards the power of transfer, the Chief Justice of the Federal Court in the case already referred to at page 48 observes that the real hardship to the accused if it arises out of the choice of forum can be remedied by suitable order u/s 526. This shows what safeguard an accused enjoys under the power of transfer. In my judgment, it is a substantial one and taking it away from a limited class of accused does infringe the fundamental right of equal protection of laws. Therefore, the provision excluding the power of transfer should be deleted. As regards the exclusion of power of confirmation of sentences, by Section 6 of the Regulation the Tribunal is authorised to use all powers of the Sessions Court and u/s 302, Hyderabad Criminal P.C. a sentence of death, life imprisonment or rigorous imprisonment up to ten years by Sessions Court are subject to the confirmation by the High Court. Taking it away makes such sentences of the Tribunal immediately effective, and thereby inequality is created. In ordinary Sessions cases till the confirmation is made the accused is treated as an under-trial. Without filing any appeal when such a sentence is given he can have the decision of the original Court examined on merits. It is a substantial protection against erroneous conviction, and its exclusion amounts to substantial curtailment, which is no longer constitutionally permissible. The result is that words in Sub-section (2) of Section 7, beginning with "But" and ending with "whatsoever" must be deleted. The provisions of Sub-section (2-A) of Section 7, are inextricably woven with exclusion of power of confirmation and finality of Tribunal's sentences and whole of it must be deleted along with the unconstitutional part of Sub-section (3). Sub-section (a) of Section 7 has also become unconstitutional for it is contrary to Article 161 of the Constitution.

112. I will now refer to certain objections urged on behalf of the petitioners

against the tests of severability and of substantial equality followed by me. The argument is that the Court has no power to insert fresh provision, it is to see whether the law after striking out can operate effectively and legally, and further after the offending part is struck out, it has to ascertain whether the Legislature would have enacted the remaining part. In support of the last contention reliance is placed on the following passage of Cooley's Constitutional Limitations (8th Edn.) Vol. 1 at page 362:

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

113. I have great hesitation in accepting the intention of the Legislature as the correct test; of severability. It has not been accepted by the Australian Courts. In *Ex parte Why brow & Co.*, 11 commonwealth Law Rep. 1, Griffith C.J., at p, 27 observes:

What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the Statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it.

114. Barton J., at p. 85, points out that the first rule of construction is that the intention of the Legislature must be gathered from the terms it has used and not from conjecture; there must remain a scheme of legislation not radically different, equally consistent with itself and retaining its workable character, and dealing effectively with so much of the subject-matter as is within the power. O'Connor J., at p. 45, concur in it. The above observations of Griffith C.J., have been quoted by Sulaiman J., in AIR 1939 74 (Federal Court) . It has also been quoted by the Patna High Court in two cases reported in *Bhutnath Ghosh and Others Vs. Province of Bihar and Others*, and *Bhutnath Ghosh and Others Vs. Province of Bihar and Others*, . No Indian case has been cited where Cooley's test has been adopted. In my judgment, therefore, the correct test of severability is to ascertain whether after the invalid portions of the Regulation are deleted a different law is created. Had a different law been created, and the remaining sections of the Regulation operated in a radically different way I would not have hesitated in deciding against its continuance. The effects of the remaining sections of the Regulation are not such and, therefore, they must remain.

115. The other objection is that unconstitutional inequality, however small, cannot stand and the test of its being substantial is not correct, In my opinion,

minor inequality is not constitutional inequality. I shall now cite certain passages from the authoritative American text books that minor inequality is not covered by the guarantee of the equal protection of the laws. Cooley's Constitutional Limitations (8th Edn) Vol. II at pp. 816-817 says : "Inequalities of minor importance do not render a law invalid." Willis' Constitutional Law at p. 517 mentions:

Changes in the conduct of trials and the rules of evidence are not prohibited. The distinction is not between substantive and adjective law but between substantial and unsubstantial changes.

These two authorities amply support the view I have taken that every variation of procedure is not inconsistent with equality before the law or the equal protection of the laws. Only those are void which substantially vary the safeguards of the accused.

116. I shall now deal with the arguments of the learned Counsel of the accused regarding the remaining sections of the Regulation which according to him creates inequality ; but with which I do not agree. As regards Section 3, he has urged that by it the Tribunal must try the cases which have been directed to be tried by it and has not the option which are given to Magistrates u/s 195, Hyderabad Criminal P.C. I do not think the words "shall try" in the section refer to the powers of Tribunal when dealing with charge-sheets : they relate to its jurisdiction. In this connection, I draw a distinction between vesting of jurisdiction and invoking of jurisdiction. The jurisdiction of the Tribunal is invoked when the charge sheet is filed. It has then all the powers, under Criminal Procedure Code, of dealing with warrants and sessions cases. If it were to exercise those powers incorrectly the supervisory power of the High Court under Article 227 of the Constitution is there to correct it, Section 3 of the Regulation, therefore, does not offend the guarantee of the equal protection of the laws. It is then argued that by use of "any" in the section an inequality is likely to be created, were the Chief Minister to direct trial of summons cases by the Tribunal, they would be then tried as warrant cases. No such order has been produced before us. I will not anticipate a question of constitutional law in advance of the necessity of deciding it, and my decision must not be broader than is required by the precise facts of the applications. All the petitioners are charged with offences triable by Sessions Courts and any observation about what would be the position if summons cases were directed to be tried is entirely unnecessary. This section, therefore, stands.

117. The learned Counsel then referred us to Sub-section (1) of Section 4 and said that whereas under criminal Procedure Code a Court of Session could only take cognizance of offence by committal, under the Sub-section such committal was rendered unnecessary. In this connection he relied on *Mutirakal Varma v. The Queen*, 3 Mad. 351, to show that the object of the requirements of the committal before trial is to secure to a person charged with grave offences, a preliminary enquiry which would afford him the opportunity of becoming

acquainted with the circumstances of the offence imputed to him and enable him to make his defence. If I were contrasting this Sub-section with the relevant section of the Indian Criminal Procedure Code I would have formed a different conclusion. But by Section 267-A, Sub-section (1), Clause (c), Hyderabad Criminal P.C. a case can be committed to Sessions with only some evidence. If a Magistrate is to act under this sub-section it cannot be said that such enquiry affords to an accused an opportunity of becoming acquainted with the full circumstances of the offence imputed to him. Therefore, a trial without any committal does not amount to substantial variation of the procedure under which committal can be with some evidence. It is then urged that a committal can always be challenged on legal points. But so can a charge when framed in warrant cases. Under Sub-section (7) of Section 4, the Tribunal is now bound to follow the procedure for warrant cases ; and I do not see how this form of trial differs substantially from Sessions trial. No objection is taken to Sub-sections (1-A), (8) and (6) of Section 4 as well as to Section 6 and Sub-section (1) of Section 7. I need not express any opinion about them. As regards Sub-sections (5) and (5 a) of Section 4, it has been urged that u/s 284, Hyderabad Criminal P.C. evidence can be recorded only in the presence of the accused whereas before the Tribunal evidence can be taken in his absence. All the applicants are before the Tribunal and I have already said that I cannot decide a question of constitutional law broader than facts of the case before me require. Section 5. a only applies if the accused is represented by a pleader and I do not think this provision can be contrasted with Section 284, Hyderabad Criminal P.C., where evidence can be taken in the absence of an accused if his personal attendance is dispensed with. There is no substantial variation in the subjection.

118. The result of my judgment is that sub.s (2), a part of Sub-section (2-a), Sub-section (4), certain portions of Sub-section (7) of Section 4 as well as certain parts of Sub-sections (2), (2.a) and (8) of Section 7 are deleted. The remaining sections of the Regulation, which are given in detail in the judgment of my brother Shripat Rao J., and which I need not repeat here, operate effectively, legally and not in a radically different way. Therefore, they must stand. Persons now being tried under the Regulation will have the right of evidence being recorded fully, with the change of a member of a Tribunal they will be entitled in Sessions case to recording of evidence, during the trial they will enjoy on adequate ground the right of asking for transfer, in addition, they will have the right which ordinary accused enjoys of invoking powers of revision, and supervision and the safeguard of confirmation. I hold that with these rights the trial before the Tribunal is substantially similar to that of an accused tried under the Criminal Procedure Code by ordinary Courts and there is no inequality between the two forms of trials. The Regulation after these deletions does not create inequality. Therefore, the argument relating to the entire inconsistency of the Regulation with Article 14 of the Constitution fails.

119. As regards the three other grounds, the one about the absence of the order appointing members of the Tribunal has not been urged seriously. The Advocate-

General in para, 6 of his reply to the application has stated that the Special Tribunal No. IV consisting of the opposite parties 1, 2 and a was validly constituted by the Home Department notfn. No. 53 dated 26-6-1949 and issued under the order in writing of the Military Governor which has been duly signed and authenticated by the Deputy Home Secretary in accordance with E. 18 of the Rules of Business of the Hyderabad. I do not think after this there is any force in the third ground for asking stay of the trial due to non-compliance with Section 2 of the Regulation.

120. I shall now come to the two remaining grounds relating to the non-compliance with Sections 1 and 3 of the Regulation. The order of the Military Governor extending the Regulation to the whole territory of the Hyderabad State has been produced before us. The learned Counsel for the applicants has argued that the words "can issue" on the order in the handwriting and with the signature of the Military Governor amount to authorisation for publication and not to a written direction extending the Regulation to the whole of Hyderabad territory. Now the words used in the section are "shall extend to such areas as the Military Governor may by order in writing direct. "No particular form for the direction is required. The Deputy Judicial Secretary signed and placed the order before the Military Governor and on it he wrote "can issue." It is really a question of construction whether the whole document amounts to the direction for extension. I am of opinion that having regard to the form in which the matter was put before the Military Governor the order "can issue" bearing his signature amounts to such a direction. The word "issue" denotes direction for extension as well as authorisation for publication and is sufficient compliance with the statutory requirement of Section 1. Therefore, this ground fails.

121. As regards the fourth ground that the order of 8-4-1950, is bad because it does not give the details of the cases, I am of opinion that this cannot be accepted. Section 3 of the Regulation is vestitive and jurisdiction to try infringements of particular offences can be conferred by mere enumeration of offences. There is a distinction between conferring jurisdiction and invoking jurisdiction, For example, the appellate jurisdiction is vested in this Court by Sub-section (2) of Section 7 and is invoked by memorandum of appeal. Just as rules regarding memoranda of appeals are not of jurisdiction, so rules relating to charge-sheet are not of jurisdiction. The schedule to the Criminal Procedure Code indicates jurisdiction of ordinary criminal Courts by reference to particular sections of Penal Code. I see no reasons why an order u/s 3 of the Regulation cannot confer ad hoc jurisdiction by a like reference. I have no doubt that details of particular offences shall be supplied to the applicants to enable them to raise proper defence; but in an application for writ of prohibition matters not relating to jurisdiction can hardly be gone into. The application for the writ of prohibition is, therefore, dismissed.

122. The Tribunal, directed to try offences under the Regulation, for reasons mentioned above, is a Court of competent jurisdiction and the orders of

detections passed by the Tribunal are, therefore, legal, They furnish sufficient grounds of dismissing the habeas corpus applications. These eight applications are, therefore, dismissed. A copy of my judgment be sent to the Tribunal to act according to the sections and parts of the sections that are held legal.

123. Leave to appeal to the Supreme Court is granted under Articles 182 and 134.