PETITIONER:
THE STATE OF WEST BENGAL

Vs.

RESPONDENT:
ANWAR ALl SARKARHABIB MOHAMED,THE STATE OF HYDERABAD, and I

DATE OF JUDGMENT:
11/01/1952

BENCH:
SASTRI, M. PATANJALI (CJ)
BENCH:
SASTRI, M. PATANJALI (CJ)
FAZAL ALI, SAIYID
MAHAJAN, MEHR CHAND
MUKHERJEA, B.K.
DAS, SUDHI RANJAN
AIYAR, N. CHANDRASEKHARA
BOSE, VIVIAN

CITATION:
1952 AIR 75 1952 SCR 284
CITATOR INFO :

D	1952 SC 123	(1,2,6)
R	1952 SC 235	(4,5,6)
F	1952 SC 324	(15)
R	1953 SC 10	(22)
D	1953 SC 156	(15)
D	1953 SC 404	(11)
R	1954 SC 362	(3)
R	1955 SC 191	(5)
RF	1955 SC 424	(11,19)
F	1956 SC 479	(14,17,18)
RF	1957 SC 397	(16,18,24,26,31,32)
F	1957 SC 503	(16,18)
R	1957 SC 877	(16)
D	1957 SC 927	(9)
F	1958 SC 232	(14)
R	1958 SC 538	(11,12)
RF	1958 SC 578	(211)
R	1959 SC 459	(49)
F	1960 SC 457	(3,14)
R	1961 SC1602	(12)
D	1962 SC1764	(7)
R	1963 SC 222	(51)
R	1963 SC 864	(13)
RF	1964 SC 370	(6)
R	1967 SC1581	(11)
RF	1967 SC1643	(14)
R	1968 SC 1	(7,11)
RF	1970 SC 494	(8)
RF	1973 SC 564	(78)
RF	1973 SC1461	(313,616)
R	1974 SC 894	(11)
RF	1974 SC1389	(251,266,271)
R	1974 SC2009	(4,7,8,9,11,13,15,26,28,29,29,
F	1974 SC2044	(3)
R	1975 SC 583	(39)
R	1975 SC2299	(344,485,681)
D	1977 SC1772	(15)
R	1978 SC 215	(68)
R	1978 SC 597	(55)
F	1978 SC 771	(42,45)

E	1979	SC 478	(64,65,66,67,69,70)
R	1980	SC 161	(10)
RF	1980	SC1382	(114,116,121)
RF	1980	SC1789	(36)
R	1981	SC1001	(8)
RF	1981	SC1829	(84,114)
RF	1981	SC2138	(24,26)
RF	1987	SC1140	(3)
D	1988	SC1531	(163)
F	1989	SC1335	(53)
R	1990	SC 40	(8)

ACT:

West Bengal Special Courts Act (X of 1950), ss. 3, 5 Constitution of India, Art. 14--Act constituting special courts and empowering State Government to refer "cases" or "offences" or "classes of cases" or "classes of offences" to such Court--Constitutional validity--Fundamental right to equality before the law and equal protection of the laws--Construction of Act--Reference to preamble--Act not classifying cases or laying down standard for classification--Intention of legislature how far material--Validity of notification under Act--Test of equality before law--Essentials of reasonable classification--Necessity for speedier trial, whether reasonable ground for discrimination.

HEADNOTE:

The West Bengal Special Courts Act (X of 1950) was entitled "An Act to provide for the speedier trial of certain offences," and the object of the Act. as declared in the preamble, was "to provide for the speedier trial of certain offences". Section 3 of the Act empowered the State Government by notification in the official gazette to constitute Special Courts, and sec. 5 provided that "A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may by general or special order in writing, direct." The Act laid down a procedure for trial before Special Courts which was different in several respects from that laid down by the Criminal Procedure Code for trial of offences generally. The respondent, who was convicted by a Special Court which tried his case under a notification issued by the Government under sec. 5, contended that the said section was unconstitutional and void inasmuch as it contravened Art. 14 of the Constitution, which provides that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

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Held, per FAZL ALl, MAHAJAN, MUKHERJEA, CHANDRASEKHARA AIYAR and BOsE JJ. (PATANJALI SASTRI C.J., dissenting)--Section 5 (1) of the West Bengal Special Courts Act, 1950, contravenes Art. 14 of the Constitution and is void inasmuch as (per FAZL ALl, MAHAJAN, MUKHERJEA, and CHANDRASEKHARA AIYAR JJ.) the procedure laid down by the Act for the trial by the Special Courts varied substantially from that laid down for the trial of offences generally by the Code of Criminal Procedure and the Act did not classify, or lay down any basis for classification, of the cases which may be directed to be tried by the Special Court, but left it to the uncontrolled discretion of the State Government to direct any case which it liked to be tried by the Special Court. DAs J.--Section 5 Il) of the Act, in so far as it

empowered the State Government to direct "offences" or "classes of offences" or "classes of cases" to be tried by a Special Court, does not confer an uncontrolled and unguided power on the State Government but by necessary implication contemplates a proper classification and is not void. That part of the section which empowered the Government to direct "cases" as distinct from "classes of cases" to be tried by a Special Court is void. PATANJALI SASTRI C.J.--Section 5 (1) of the Act is not void or unconstitutional wholly or even in part.

Per FAZL ALl, MAHAJAN, MUKHERJEA and CHANDRASEKHARA AIYAR JJ.--A rule of procedure laid down by law comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for rebel and for defence with like protection and without discrimination.

(ii) If it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, it is not incumbent upon him before he can claim relief on the basis of fundamental rights to assert and prove that, in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class ; nor would the operation of Art. 14 be excluded merely because it is proved that the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. The question of intention may arise in ascertaining whether an officer acted mala fide or not; but it cannot arise when discrimination follows or arises on the express terms of the law itself.

(iii) The language of sec. 5 (1) clearly and unambiguously vests the State Government with unrestricted discretion to direct any cases or class of cases to be tried by the Special Court, not a discretion to refer cases only when it is of opinion that a speedier trial is necessary
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(iv) Assuming that the preamble throws any light on the section, the necessity of speedier trial is too vague, uncertain and elusive a criterion to form a rational basis for discrimination.

(v) It cannot be said that an Act does not contravene the equality rule laid down by Art. 14 simply because it confers unregulated discretion on officers or administrative bodies. The true position is that if the statute itself is not discriminatory the charge of Violation of the article may be only against the official who administers it, but if the statute itself makes a discrimination without any proper or reasonable basis, it would be void for being in conflict with Art. 14.

(vi) The notification issued under the Act in the present case would also come within the definition of law and could be impeached apart from the Act if it violates Art. 14.

DAS J.--(1) Article 14 does not insist that every piece of legislation must have universal application and it does not take away from the State the power to classify persons for the purposes of legislation, but the classification must be rational, and in order to satisfy this test (i) the classification must be founded on an intelligible differentia which distinguished those that are grouped together from others, and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary

is that there must be a nexus between them. But the mere fact that the inequality has not been made with the special intention of prejudicing a particular person or persons but in the general interest of administration will not validate a law if in fact it results in inequality of treatment. Nor can the constitutionality of a statute depend on the degree of the inequality brought about by the law.

(2) Although the preamble to an Act cannot override the plain meaning of its operative parts, it may nevertheless assist in ascertaining what the true meaning or implication of a particular section is; and the part of sec. 5 (1) of the Act which relates to "offences' ', "Classes of offences" and "classes of cases", construed in the light of the preamble, does not confer an uncontrolled and unguided power on the State Government, but by necessary implication and intendment empowers the State to classify the offences or classes of offences or classes of cases, that is to say, to make a proper classification having a relation to the object of the Act as recited in the preamble; and this part of sec. 5 (1) foes not therefore contravene Art. 14.

(3) That part of sec. 5(1) which empowers the State Government to direct "cases" as distinct from "classes of cases" to be cried by the Special Court lies beyond the ambit of the object aid down by the preamble and contemplates and involves a purely arbitrary selection based on nothing more substantial

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than the whim and pleasure of the State Government without any appreciable relation to the necessity for a speedier trial and therefore offends against the provisions of Art. 14 and is void.

Bose J.--The test under Art. 14 is neither classification nor whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic as reflected in the views of fair-minded, reasonable, unbiassed men, who are not swayed by emotion or prejudice, can consider the impugned laws as reasonable, just and fair and regard them as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India to-day.

PATANJALI SASTRI C.J. (dissenting).--Section 5 (1) of the impugned Act is not void or unconstitutional wholly or even in part because: (1)The words in the enacting part of a statute must be confined to that which is the plain object and general intention of the legislature in passing the Act and the preamble affords a good clue to discover what that object was. The title and the preamble of the Act in the present case show unmistakably that the whole object and purpose of the Act was to devise machinery for the speedier trial of certain offences. The discretion intended to be exercised by the State Government must be exercised bona fide on a consideration of the special features or circumstances which call for comparatively prompt disposal of a case or cases proposed to be referred and sec. 5 (11 must be read as empowering the Government to direct the Special Court to try such offences or classes of offences or cases or classes of cases as in its judgment, require speedier trial. (2) Article 14 of the Constitution does not mean that all laws must be general in character and universal in application. The State must possess the power of distinguishing and classifying persons or things to be subjected to particular laws and in making a classification the legislature must be allowed a wide latitude of discretion and judgment. The classification is justified if it is not

palpably arbitrary but is founded on a reasonable basis having regard to the object to be attained. (3). The powers of the legislature must include the power of entrusting an administrative body With a plenary but not arbitrary discretion to be exercised so as to carry out the purpose of the Act and the mere fact that the discretion might be exercised arbitrarily by the administrative body cannot make the law itself unconstitutional. (4)The impugned Act does not in terms or by implication discriminate between persons or classes of persons nor does it purport to deny to any one equality before the law or the equal protection of the laws. (5) Even from the point of view of reasonable classification the expediency of speedier trial is not too vague or indefinite to be the basis of classification. (6) The notification of the Government in the present case referring the case to the Special Court did not contravene Art. 14 and is not void inasmuch as there is nothing
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to show that the Government was influenced by any discriminatory motive or design or acted arbitrarily, but on the other hand there are obviously special features which mark off the group of cases referred as requiring speedier disposal.

Judgment of the Calcutta High Court affirmed.

Romesh Tappar v. The Stale of Madras ([1950] S.C.R. 594), Chintaman Rao v. State of Madhya Pradesh ([1950] S.C.R. 759), Dr. Khare's Case ([1950] S.C.R. 519), Chiranjit Lal v. Union of India and Others ([1950] S.C R. 869) and Slate of Bombay v.F.N. Balsara ([1951] S.C.R. 682), explained.

Truax v. Corrigan (257 U.S. 312), Yick Wo v. Hopkins (118 U.S. 356) and other American cases on the right to equal protection of the laws considered.

JUDGMENT:

APPELLATE CIVIL JURISDICTION: Cases Nos. 297 and 298 of 1951.

Appeals under Art. 132 (1) of the Constitution from the judgment and order dated 28th August, 1951, of the High Court of Judicature at Calcutta (Harries C.J., Chakravarthi, Das, Banerjee and S.R. Das Gupta JJ.) in Civil Revision Cases Nos. 942 and 1113 of 1951. The facts of the case and the argument of Counsel appear fully in the judgment.

M.C. Setalvad, Attorney-General for India (B. Sen, with him) for the appellant in Case No. 297.

Jitendra Nath Ghose (R. P. Bagchi, with him) for the respondent in Case No. 297.

A.A. Peerbhoy and J.B. Dadachanji for Habib Mohammad (Intervener).

V. Rajaram Iyer, Advocate-General of Hyderabad (R. Ganapathy Iyer, with him) for the State of Hyderabad.

A.R. Sornanatha Iyer, Advocate-General of Mysore (K. Ramaseshayya Choudhry, with him) for the State of Mysore.
B. Sen, for the appellant in Case No. 298.

N.C. Chatterjee (S. K. Kapur, with him) for the respondent in Case No. 298.

1952. January 11. The following judgments were delivered.
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PATANJALI SASTRI C.J.--This is an appeal by the State of West Bengal from a judgment of a Full Bench of the High Court of Judicature at Calcutta quashing the conviction of the respondent by the Special Court established under sec-

tion 3 of the West Bengal Special Courts Ordinance, 1949, (Ordinance No. 3 of 1949) which was replaced in March, 1950, by the West Bengal Special Courts Act, 1950, (West Bengal Act X of 1950) (hereinafter referred to as "the Act").

The respondent and 49 other persons were charged with various offences alleged to have been committed by them in the course of their raid as an armed gang on a certain factory known as the Jessop Factory at Dum Dum, and they were convicted and sentenced to varying terms of imprisonment by the Special Court to which the case was sent for trial by the Governor of West Bengal by a notification dated 26th January, 1950, in exercise of the powers conferred by section 5 (1) of the Act. Thereupon the respondent applied to the High Court under article 226 of the Constitution for the issue of a writ of certiorari quashing the conviction and sentence on the ground that the Special Court had no jurisdiction to try the case inasmuch as section 5 (1), under which it was sent to that Court for trial, was unconstitutional and void under article 13 (2)as it denied to the respondent the equal protection of the laws enjoined by article 14. The High Court by a Full Bench consisting of the Chief Justice and four other Judges quashed the conviction and directed the trial of the respondent and the other accused persons according to law. Hence the appeal.

The Act is intituled "An Act to provide for the speedier trial of certain offences ", and the preamble declares that "it is expedient to provide for the speedier trial of certain offences ". Section 3 empowers the State Government by notification in the official gazette to constitute Special Courts, and section 4 provides for the appointment of special judges to preside over such courts. Section 5, whose constitutionality is impugned, runs thus:

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"5(1) A Special Court shall try such offences or classes of cases, as the classes of offences or cases State Government may by general or special order in writing, direct.

(2) No.direction shall be made under sub-section (1) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any court but, save as aforesaid, such direction may be made in respect of an offence, whether such' offence was committed before or after the commencement of this Act."

Sections 6 to 15 prescribe the special procedure which the court has to follow in the trial of the cases referred to it. The main features of such procedure which mark a departure from the established procedure for criminal trials under the Code of Criminal Procedure are the elimination of the committal procedure in sessions cases and the substitution of the procedure laid down in the Code for trial of warrant cases by the Magistrate, trial without jury or assessors, restriction of the court's power in granting adjournments, special powers to deal with refractory accused and dispensation of de novo trial on transfer of a case from one special court to another. While some of these departures from the normal procedure might, in practice, operate in some respects to the disadvantage of persons tried before the Special Court, it cannot be said that they derogate from the essential requirements of a fair and impartial trial, so as to give rise, from their very nature, to an inference of a discriminatory design. In other words, it cannot be said that the special procedure provided in the Act is, on its face, calculated to prejudice the fair trial of persons subjected to it. The departure in each case is plainly calculated to shorten the trial and thus

to attain the declared objective of the statute.

Harries C.J. who delivered the leading judgment, which Das and Banerjee JJ. concurred, applied the test of what may be called "reasonable classification" and held that, although the need for a speedier trial than what is possible under the procedure prescribed

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by the Code of Criminal Procedure might form the basis of a reasonable classification and section 5 (1) could not be regarded as discriminatory in so far as it authorises the State Government to direct that certain offences or classes of offences or classes of cases should be tried by a special court, the provision was discriminatory and violative of article 14 of the Constitution in so far as it purported to vest in the State Government an absolute and arbitrary power to refer to a special court for trial "any cases ", which must include an individual case, "whether the duration of such a case is likely to be long or not ". The learned Chief Justice rejected the argument that the word "cases" in the sub-section should, in view of the title and preamble of the Act. be construed as meaning cases requiring speedier trial." He found it" impossible to cut down the plain meaning of the word 'cases' as used in the section". He realised that "the powers under the sub-section could be so exercised as not to involve discrimination, but they also could, in my view, be exercised in a manner involving discrimination. When an Act gives power which may and can offend against a provision or provisions of the Constitution such an Act is ultra vires though it could be administered so as not to offend against the Constitution", and he relied in support of this view on certain observations in the judgment of the majority in the Crossroads case(1).

Chakravartti and Das JJ. delivered separate judgments agreeing with the conclusion of the Chief Justice, Das Gupta J,, however, going further and holding that section 5 (1) was unconstitutional in its entirety inasmuch as "the classification sought to be made on the expediency of speedier trial is not a well-defined classification. It is too indefinite and there can hardly be any definite objective test to determine it."

Before considering whether section 5(1) infringes, to any and what extent, the constitutional prohibition under article 14, it is necessary to ascertain the true scope and intendment of the impugned provision. It

(1) [1950] S C.R. 594. 603.

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purports to provide for the matters to be tried by a special court and does not, in form, seek to define the kind or class of offences or cases which the State Government is empowered under the Act to assign to such a court for trial. In other words, the purpose of section 5 (1) is to define the jurisdiction of a special court appointed under the Act and not the scope of the power conferred on the State Government to refer cases to such court. As the very object of the Act was to provide for speedier trials by instituting a system of special courts with a simplified and shortened procedure, it is reasonable to conclude that, so far as the legislature was concerned, its intention was that courts constituted under the Act and applying such procedure should deal only with cases requiring speedier trial and that, accordingly, the State Government should refer to such courts only cases of that description. The principle of construction applicable here is perhaps nowhere better stated than by Lord Tenterden C.J. in Halton v. Cove(1): "It is very true, as was argued for the plaintiff, that the

enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many cases go beyond it. Yet, on a sound construction of every Act of Parliament, I take it the words of the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the Act, and that the preamble affords a good clue to discover what that object was". The same view was expressed by Holmes J. in an American case, Carroll v. Greenwich Insc. Co. (2). "The object of the law, we assume, until the lower Court shall decide otherwise, is single-to keep up competition--and the general language is to be restricted by the specific provisions and to the particular end." The title and the preamble as well as the other specific provisions of the Act here in question show unmistakably that the whole object and purpose of the legislation was to devise machinery for "speedier trial of certain offences", (which must mean trial of cases involving the commission of certain

(1) (1830) I B. & Ad. 538, 558. (2) 199 U.S. 401.

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offences as there can, of course, be no trial of offences in the abstract) and the general expressions used in providing for the power to set that machinery in operation must be restricted to that end in accordance with the intention of the legislature; for, a literal construction of the general language would impute to the legislature an intention to confer an arbitrary power of reference which would be inconsistent not only with the declared object of the statute but also with the constitutional prohibition against discrimination, which the legislature must be taken to have been aware of when it deliberately re-enacted the provisions of the old Ordinance. The discretion vested in the State Government in selecting cases for reference to a special court may not be subject to judicial review and may, in that sense, be absolute, but that is very different from saying that it was intended to be arbitrary. Its exercise must involve bona fide consideration of special features or circumstances which call for a comparatively prompt disposal of the case or cases proposed to be referred. In other words, section 5 (1) must, in my opinion, be read as empowering the State Government to direct a special court to try such offences or classes of offences or cases or classes of cases as, in its judgment, require speedier trial.

The question next arises as to whether the provision, thus understood, violates the prohibition under article 14 of the Constitution. The first part of the article, which appears to have been adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India and thus enshrines what American Judges regard as the "basic principle of republicanism" [cf. Ward v. Flood (1)]. The second part which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination or favouritism, or as an American Judge put it "it is a

(1) 17 Am. Rep.405.

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pledge of the protection of equal laws" [Yick Wo v. Hopkins (1)], that is, Jaws that operate alike on all persons under like circumstances. And as the prohibition under the article is directed against the State, which is defined in article 12 as including not only the legislatures but also the Governments in the country, article 14 secures all persons

within the territories of India against arbitrary laws as well as arbitrary application of laws. This is further made clear by defining "law" in article 13 (which renders void any law which takes away or abridges the rights conferred by Part III) as including, among other things, any "order" or "notification", so that even executive orders or notifications must not infringe article 14. This trilogy of articles thus ensures non-discrimination in State action both in the legislative and the administrative spheres in the democratic republic of India. This, however, cannot mean that all laws must be general in character and universal in application. As pointed out in Chiranjit Lal's case(2) and in numerous American decisions dealing with the equal protection clause of the 14th Amendment, the State in the exercise of its governmental power must of necessity make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws. But classification necessarily implies discrimination between persons classified and those who are not members of that class. "It is the essence of a classification" said Mr. Justice Brewer in Atchison, Topeka & Santa Fe R. Co. v. Matthews (3), "that upon the class are cast duties and burdens different from those resting upon the general public. Indeed the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines this matter of constitutionality". Commenting on this observation in his dissenting opinion in Connoly v. Union Sewer Pipe Co. (4) (which later prevailed in Tigner v.

(1).118 U.S. 356, 369. (3) 174 U.S. 96, 106.
(2) [1950] S.C.R. 869. (4) 184 U.S. 540. 566, 567, 568.

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Texas(1)) Mr. Justice McKenna posed a problem and proceeded to answer it. "It seems like a contradiction to say that a law having equality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears..... Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and, in making it, a legislature must be allowed a wide latitude of discretion and judgment..... Classification based on those relations need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore it has been repeatedly declared that classification is justified if it is not palpably arbitrary". (italics mine.)

Thus, the general language of article 14, as of its American counterpart, has been greatly qualified by the recognition of the State's regulative power to make laws operating differently on different classes of persons in the governance of its subjects, with the result that the principle of equality of civil rights and of equal protection of the laws is only given effect to as a safeguard against arbitrary State action. It follows that in adjudging a given law as discriminatory and unconstitutional two aspects have to be considered. First, it has to be seen whether it observes equality between all the persons on whom it is to operate. An affirmative finding on the point may not, however, be decisive of the issue. If the impugned legislation is a special law applicable only to a certain class of persons, the court must further enquire whether the classification is founded on a reasonable basis having regard to

the object to be attained, or is arbitrary. Thus, the reasonableness of classification comes into question only in those cases where special legislation affecting a class of persons is challenged as discriminatory. But there are other types of legislation such as, for instance, the Land Acquisition Act, which do not rest on classification, and no question of reasonable classification could fairly arise in respect of such
(1) 310 U.S. 141,
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enactments. Nor, obviously, could it arise when executive orders or notifications directed against individual citizens are assailed as discriminatory.

It is interesting to find that the trend of recent decisions in America has been to lean strongly toward sustaining State action both in the legislative and in the administrative spheres against attacks based on hostile discrimination. Classifications condemned as discriminatory have been subsequently upheld as being within the powers of the legislature. In Tigner v. Texas (1), the majority view in Connolly's case(2) holding that an Illinois anti-trust law, which made certain forbidden acts criminal if done by merchants and manufacturers but declared them to be civil wrongs if done by farmers and stockmen, was "manifestly a denial of the equal protection of the laws ") was considered to be no-longer "controlling ". While in Gulf, Colorado & Santa Fe R. Co. v. Ellis (3) a Texas statute imposing an attorney's fee in addition to costs upon railway corporations which unsuccessfully defended actions for damages for stock killed or injured by their train was struck down as discriminatory because such corporations could not recover any such fee if their defence was successful, a similar provision in a Kansas statute in respect of an action against railroad companies for damages by fire caused by operating the rail-road was upheld as not discriminatory in Atchison, Topeka & Santa Fe R. Co v. Matthews (4), the earlier case being distinguished on some ground which Harlon J. in his dissenting opinion confessed he was not "astute enough to perceive". And the latest decision in Kotch v. Pilot Comm'rs(5) marks, perhaps, the farthest swing of the pendulum. A Louisiana pilotage law authorised the appointment of State pilots only upon certification by a State Board of river pilot commissioners who were themselves State Pilots. Among the prescribed qualifications was apprenticeship under a State pilot for a certain period. By admitting only their relatives and friends

(1) 310 U.S. 141. (4) 174 U.S. 96.
(2) 184 U.S. 540. (5) 330 U.S. 552,
(3) 165 U.S. 666.

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to apprenticeship, the members of the board made it impossible, with occasional exceptions, for others to be appointed as State pilots. Upholding the constitutionality of the law as well as the manner in which it was administered, the Court said: "The constitutional command for a State to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the 14th Amendment. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be."

These decisions seem, to my mind, to reveal a change of approach marked by an increasing respect for the State's

regulatory power in dealing with equal protection claims and underline the futility of wordy formulation of so called "tests" in solving problems presented by concrete cases.

Great reliance was placed on behalf of the respondent upon the decision in Truax v. Corrigan(1) and Yick Wo v. Hopkins(2). In the former case it was held by a majority of 5:4 that a law which denied the remedy of injunction in a dispute between employer and his ex-employees was a denial of the equal protection of laws, aS such a remedy was allowed in all other cases. But it is to be noted that the minority, which included Holmes and Brandeis JJ., expressed the opinion that it was within the power of the State to make such differentiation and the law was perfectly constitutional. The legislation was obviously applicable to a class of persons and the decision was an instance where the classification was held to be arbitrary and is not of much assistance to the respondent. In the other case a San Francisco Ordinance, which prohibited the carrying on of a laundry business within the limits of the City without having first obtained the consent of

(1) 257 U.S. 312. (2) 118 U.S. 356.

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the Board of Supervisors unless it was located in a building constructed of brick or stone, was held discriminatory and unconstitutional. The undisputed facts disclosed in the record were that out of 320 laundries in San Francisco about 310 were constructed of wood, and about 240 of the 320 were owned and conducted by subjects of China. The petitioner, a chairman, and about 200 of his countrymen applied to the Board of Supervisors to continue their clotheswashing business in wooden buildings which they had been occupying for many years, but in all cases licence was refused, whereas not a single one of the petitions presented by 80 persons who were not subjects of China had been refused. Dealing with these facts the court observed: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as to practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Italics mine). It is to be noted that the law was "administered", i.e., not merely applied in a few stray cases, but regularly and systematically applied, making a hostile discrimination against a particular class of persons on grounds of race and colour. Such systematic discriminatory administration in practice of the ordinance though impartial on its face, was, evidently, taken to give rise to the inference that it was designed to be so administered. That is how the decision has been explained in later cases. For instance, in Atchison Topeka & Santa Fe R. Co. v. Matthews"(1) it was said "In that case (Yick Wo's case (2)) a municipal ordinance of San Francisco designed to prevent the Chinese from carrying on the laundry business was adjudged void. This Court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco and saw under the guise of regulation an arbitrary classification was intended and accomplished" (Italics raine).

(1) 174 U.S. 96, 105. (2) 118 U.S. 356.

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That is to say, the ordinance was what the Privy Council called a "colourable legislative expedient" which, under the "guise or pretence" of doing what is constitutionally per-

missible, "in substance and purpose seeks to effect discrimination": Morgan Proprietary Ltd. v. Deputy Commissioner of Taxation for New South Wales (1). Thus explained, the Yick Wo case is no authority for the view that the vesting in a public authority of a discretion which is liable to abuse by arbitrary exercise contrary to its intendment is a sufficient ground for condemning a statute as discriminatory and unconstitutional.

On the other hand, there is ample authority in the American decisions for the view that the necessarily large powers vested in a legislature must include the power of entrusting to an administrative body a plenary but not arbitrary discretion to be exercised so as to carry out the purpose of an enactment. In Engel v. O' Malley (2) a New York statute prohibiting individuals or partnerships to engage in the business of receiving deposits of money without a licence from the controller "who may approve or disapprove the application for a licence in his discretion" was sustained as constitutional. In answer to the argument that the controller might refuse a licence on his arbitrary whim, Holmes J. said: "We should suppose that in each case the controller was expected to act for cause. But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it unnecessary to consider; for the power of the state to make the pursuit of a calling dependent upon obtaining a licence is well established where safety seems to require it."

In New York ex rel. Lieberman v. Van De Carr(3) a provision in the Sanitary Code of the City of New York vested discretion in Local Health Boards to grant or withhold licences for carrying on milk business in the City. Upholding the constitutionality of the

(1) [1940] A.C. 838, 858. (3) 199 U.S. 552.
(2) 219 U.S. 128.

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provision, Day J. observed after referring to certain prior decisions :--

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the 14th Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorise the interference of a Federal Court."

And Holmes J. added that, although it did not appear from the statute that the action of the Board of Health was intended to be subject to judicial revision as to its reasonableness, he agreed that it was not hit at by the 14th Amendment.

In the light of the foregoing discussion, it seems to me difficult to hold that section 5 (1) in whole or in part is discriminatory. It does not, either in terms or by necessary implication, discriminate as between persons or classes of persons; nor does it purport to deny to any one equality before the law or the equal protection of the laws. Indeed, it does not by its own force make the special procedure provided in the Act applicable to the trial of any offence or classes of offences or classes of cases; for, it is the State Government's notification under the section that attracts the application of the procedure. Nor is that

procedure, as I have endeavoured to show, calculated to impair the chances of a fair trial of the cases to which it may be made applicable, and no discriminatory intent or design is discernible on its face, unless every departure from the normal procedure is to be regarded as involving a hostile discrimination. I have already held, as a matter of construction, that section 5 (1)vests a discretion in the State Government to refer to a special court for trial such offences or classes of offences or
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cases or classes of cases as may, in its opinion, require a speedier trial. Such discretion the State Government is expected to exercise honestly and reasonably, and the mere fact that it is not made subject to judicial review cannot mean that it was intended to be exercised in an arbitrary manner without reference to the declared object of the Act or, as Harries C.J. put it, "whether the duration of a case is likely to be long or not." In the face of all these considerations, it seems to me difficult to condemn section 5 (1) as violative of article 14. If the discretion given to the State Government should be exercised improperly or arbitrarily, the administrative action may be challenged as discriminatory, but it cannot affect the constitutionality of the law. Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. As observed by Kania C.J. in Dr. Khare's case(1), "It is improper to start with such an assumption and decide the legality of an Act on that basis. Abuse of power given by law sometimes occurs; but the validity of the law cannot be contested because of such an apprehension." On the contrary, it is to be presumed that a public authority will act honestly and reasonably in the exercise of its statutory-powers, and that the State Government in the present case will, before directing a case to be tried by a Special Court, consider whether there are special features and circumstances which might unduly protract its trial under the ordinary procedure and mark it off for speedier trial-under the Act.

But it was said that the possibility of the Act being applied in an unauthorised and arbitrary manner was sufficient to make it unconstitutional according to the decisions of this Court in Romesh Thapar v. The State of Madras(2) and Chintaman Rao v. The State of Madhya Pradesh (3). It will be recalled that this was the main

(1) [1950] S.C.R. 519, 526. (3) [1950] S.C.R. 759.
(2) [1950] S.C.R. 594.

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ground on which the learned Judges in the High Court rested their decision. With respect, those decisions have, I think, no application here. In Romesh Thapar's case the constitutionality of a provincial enactment purporting to authorise the Provincial Government to regulate the circulation of a news-sheet in the Province of Madras for the purpose of "securing the public safety or the maintenance of public order" was challenged as being inconsistent with the petitioner's fundamental right to freedom of speech and expression conferred by article 19(1)(a) of the Constitution. But the only relevant constitutional limitation on freedom of speech was that the State could make a law directed against the undermining of the security of the State or the overthrow of it, and as the impugned enactment covered a wider ground by authorising curtailment of that freedom for the purpose of securing the public safety or the maintenance of

public order, this Court held it to be wholly unconstitutional and void, observing :-

"Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent."

This passage, which was relied on by the learned Chief Justice, lends no support to the view that the mere possibility of an Act being used in a manner not contemplated by the legislature, though

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such use may not be subject to judicial review on that ground, or, in other words, the mere possibility of its abuse in practice would justify its condemnation as unconstitutional. The important distinction is that in Romesh Thapar's case, the impugned enactment, having been passed before the commencement of the Constitution, did contemplate the use to which it was actually put, but such use was outside the permissible constitutional restrictions on the freedom of speech, that is to say, the Act was not condemned on the ground of the possibility of its being abused but on the ground that even the contemplated and authorised use was outside the limits of constitutionally permissible restrictions. The same remarks apply to the other decision relied on. The observations of Kania C.J. quoted above indicate the correct approach.

Even from the point of view of reasonable classification, I can see no reason why the validity of the Act should not be sustained. As already pointed out, wide latitude must be allowed to a legislature in classifying persons and things to be brought under the operation of a special law, and such classification need not be based on an exact or scientific exclusion or inclusion. I cannot share the view of Das Gupta J. that the expediency of speedier trial is "too vague and indefinite" to be the basis of a "well defined" classification. Legislative judgment in such matters should not be canvassed by courts applying doctrinaire "definite objective tests". The Court should not insist in such cases on what Holmes J. called "delusive exactness" (Truax v. Corrigan, supra). All that the court is expected to see, in dealing with equal protection claims, is whether the law impugned is "palpably discriminatory", and, in considering such a question great weight ought to be attached to the fact that a majority of the elected representatives of the people who made the law did not think so, though that is not, of course, conclusive. They alone know the local conditions and circumstances which demanded the enactment of such a law and it must be remembered that "legislatures are ultimate guardians of the liberties and

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welfare of the people in quite as great a degree as the Courts" (per Holmes J. in Missouri K. & T.R. Co. v. Mary(1)). After all, what the Legislature of West Bengal has sought to do by passing this Act is to regulate criminal

trials within its territories by instituting a system of special courts with a shortened and simplified procedure, without impairing the requirements of a fair and impartial trial, which is to be made applicable to such cases or classes of cases as, in the opinion of the executive government, require speedier disposal. I do not think that article 14 denies to the State Legislature such regulative power. (of. Missouri v. Lewis (1)). To sustain a law as not being discriminatory is not, however, to leave the party affected by a discriminatory application of the law without a remedy, for, as we have seen, state action on the administrative side can also be challenged as a denial of equal protection and unconstitutional.

That brings us to the consideration of the validity of the notification issued in the present case. In Snowden v. Hughes (2) it was laid down that' 'the unlawful administration by State officers of a State statute fair on its face resulting in its unequal application to those who were entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person or it may only be shown by extrinsic evidence showing a discriminatory design to favour one individual or a class over another not to be inferred from the action itself. But a discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination''. No attempt has been made in the present case to prove that the State Government was influenced by any discriminatory motive or design. On the other hand, the facts appearing on the record would seem to justify the reference of the case to the special court for trial. As pointed out by Chakravartti J.

(1) 101 U.S. 22. (2) 321 U.S. I.

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"The notification by which the case of Anwar Ali Sirkar (the respondent herein) was directed to be tried by the special court did not relate merely to that case but covered five more cases in each of which the accused were several in number. In Anwar Ali's case itself, there were 49 other accused. All these cases related to the armed raid on the premises of Jessop & Co. in the course of which crimes of the utmost brutality were committed on a large scale and to incidents following the raid. There can be no question at all that the cases were of a very exceptional character and although the offences committed were technically offences defined in the Indian Penal Code, the Indian Arms Act and the High Explosives Act, it would be futile to contend that the offenders in these cases were of the same class as ordinary criminals, committing the same offences or that the acts which constituted the offences were of the ordinary types..... All these cases again have arisen out of serious disturbances which, according to the prosecution, partook of the nature of an organised revolt."

In view of these facts it seems to me impossible to say the State Government has acted arbitrarily or with a discriminatory intention in referring these cases to the Special Court, for there are obviously special features which mark of this group of cases as requiring speedier disposal than would be possible under the ordinary procedure, and the charge of discriminatory treatment must fail.

I would allow this appeal as also Appeal No. 298 of 1951 (The State of West Bengal v. Gajen Mali) which raises the same questions.

FAZL ALl J.--I have come to the conclusion that these

appeals should be dismissed, and since that is also the conclusion which has been arrived at by several of my colleagues and they have written very full and elaborate judgments in support of it, I shall only supplement what they have said by stating briefly how I view some of the crucial points arising in the case.

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There is no doubt that the West Bengal Special Courts Ordinance, 1949, which was later replaced by the impugned Act (West Bengal Special Courts Act X of 1950, to be hereinafter referred to as "the Act"), was a valid Ordinance when it was promulgated on the 17th August, 1949. The Act, which came into effect on the 15th March, 1950, is a verbatim reproduction of the earlier Ordinance, and what we have to decide is whether it is invalid because it offends against article 14 of the Constitution. In dealing with this question, the following facts have to be borne in mind:--

(1) The framers of the Act have merely copied the provisions of the Ordinance of 1949 which was promulgated when there was no provision similar to article 14 of the present Constitution.

(2) The provision of the American Constitution which corresponds to article 14 has, ever since that Constitution has been in force, greatly exercised the minds of the American Judges, who, notwithstanding their efforts to restrict its application within reasonable limits, have had to declare a number of laws and executive acts to be unconstitutional. One is also amazed at the volume of case-law which has grown round this provision, which shows the extent to which its wide language can be stretched and the large variety of situations in which it has been invoked.

(3) Article 14 is as widely worded as, if not more widely worded than, its counterpart in the American Constitution, and is bound to lead to some inconvenient results and seriously affect some pre-Constitution laws.

(4) The meaning and scope of article 14 have been elaborately explained in two earlier decisions of this Court, viz., Chiranjit Lal Chowdhury v. The Union of India and Others (1) and The State of Bombay and Another v.F.N. Balsara C), and the principles laid down in those decisions have to be kept in view in deciding the present case. One of these principles is that article 14 is designed to protect all persons placed in similar circumstances against legislative discrimination, and if the legislature takes care to

(1) [1950] S.C.R. 869. (2) [1951] S.C.R. 682.

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reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well-defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.

(5) There is nothing sacred or sacrosanct about the test of reasonable classification, but it has undoubtedly proved to be a useful basis for meeting attacks on laws and official acts on the ground of infringement of the equality principle.

(6) It follows from the two foregoing paragraphs that one of the ways in which the impugned Act can be saved is to show that it is based on a reasonable classification of the persons to whom or the offences in respect of which the procedure laid down in it is to apply, and hence it is necessary to ascertain whether it is actually based on such a classification.

With these introductory remarks, I will proceed to deal with some of the more important aspects of the case.

The first thing to be noticed is that the preamble of the Act mentions speedier trial of certain offences as its object. Now the framers of the Criminal Procedure Code (which is hereinafter referred to as "the Code") also were alive to the desirability of having a speedy trial in certain classes of cases, and with this end in view they made four different sets of provisions for the trial of four classes of cases, these being provisions relating to summary trials, trial of summons cases, trial of warrant cases and trial of cases triable by a court of session. Broadly speaking, their classification of the offences for the purpose of applying these different sets of provisions was according to the gravity of the offences, though in classifying the offences fit for summary trial the experience and power of the trying Magistrate was also taken into consideration. The net result of these provisions is that offences which are summarily triable can be more speedily tried than summons cases, summons cases can be more speedily tried than warrant cases, and warrant cases can be more speedily tried than sessions cases. The

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framers of the Code appear to have been generally of the view that the graver the offence the more elaborate should be the procedure for its trial, which was undoubtedly an understandable point of view, and no one has suggested that their classification of offences for the four different modes of trial to which reference has been made is unreasonable in any sense.

The impugned Act has completely ignored the principle of classification followed in the Code and it proceeds to lay down a new procedure without making any attempt to particularize or classify the offences or cases to which it is to apply. Indeed section 5 of the Act, which is the most vital section, baldly states that the "Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may,by general or special order in writing direct". I agree with my learned brothers that to say that the reference to speedier trial in the preamble of the Act is the basis of classification is to read into the Act something which it does not contain and to ascribe to its authors what they never intended. As I have already stated, the Act is a verbatim copy of the earlier Ordinance which was framed before the present Constitution came into force, and article 14 could not have been before the minds of those who framed it because that Article was not then in existence.

The second point to be noted is that in consequence of the Act, two procedures, one laid down in the Code and the other laid down in the Act, exist side by side in the area to which the Act applies, and hence the provisions of the Act are apt to give rise to certain anomalous results; some of which may be stated as follows :--

(1) A grave offence may be tried according to the procedure laid down in the Act, while a less grave offence may be tried according to the procedure laid down in the Code.

(2) An accused person charged with a particular offence may be tried under the Act while another accused person charged with the same offence may be tried under the Code.

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(3) Certain offences belonging to a particular group or category of offences may be tried under the Act whereas

other offences belonging to the same group or category may be tried under the Code.

Some of my learned colleagues have examined the provisions of the Act and shown that of the two procedures one laid down in the Act and the other in the Code--the latter affords greater facilities to the accused for the purpose of defending himself than the former; and once it is established that one procedure is less advantageous to the accused than the other, any person tried by a Special Court constituted under the Act, who but for the Act would have been entitled to be tried according to the more elaborate procedure of the Code, may legitimately enquire:--Why is this discrimination being made against me and why should I be tried according to a procedure which has not the same advantages as the normal procedure and which even carries with it the possibility of one's being prejudiced in one's defence ?

It was suggested that the reply to this query is that the Act itself being general and applicable to all persons and to all offences, cannot be said to discriminate in favour of or against any particular case or classes of persons or cases, and if any charge of discrimination can be levelled at all, it can be levelled only against the act of the executive authority if the Act is misused. This kind of argument however does not appear to me to solve the difficulty. The result of accepting it would be that even where discrimination is quite evident one cannot challenge the Act simply because it is couched in general terms; and one cannot also challenge the act of the executive authority whose duty it is to administer the Act, because that authority will say :--I am not to blame as I am acting under the Act. 'It is clear that if the argument were to be accepted, article 14 could be easily defeated. I think the fallacy of the argument lies in overlooking the fact that the "insidious discrimination complained of is incorporated in the Act itself", it being so drafted that whenever any
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discrimination is made such discrimination would be ultimately traceable to it. The Act itself lays down a procedure which is less advantageous to the accused than the ordinary procedure, and this fact must in all cases be the root-cause of the discrimination which may result by the application of the Act.

In the course of the arguments, it was suggested that the Act is open to criticism on two different and distinct grounds, these being--,

(1) that it involves excessive delegation of legislative authority amounting to its abdication in so far as it gives unfettered discretion to the executive, without laying down any standards or rules of guidance, to make use of the procedure laid down by it; and

(2) that it infringes article 14 of the Constitution. The first criticism which is by no means an unsubstantial one, may possibly be met by relying on the decision of this Court in Special Reference No. 1 of 1951, In re Delhi Laws Act, 1912, etc.(1), but the second criticism cannot be so easily met, since an Act which gives uncontrolled authority to discriminate cannot but be hit by article 14 and it will be no answer simply to say that the legislature having more or less the unlimited power to delegate has merely exercised that power. Curiously enough, what I regard as the weakest point of the Act (viz., its being drafted in such general terms) is said to be its main strength and merit, but I really cannot see how the generality of language which gives unlimited authority to discriminate can save the Act.

In some American cases, there is a reference to "purposeful or intentional discrimination", and it was argued that unless we can discover an evil intention or a deliberate design to mete out unequal treatment behind the Act, it cannot be impugned. It should be noted however that the words which I have put in inverted commas, have been used in a few American cases with reference only to executive action, where certain Acts were found to be innocuous but they were

(1) [1951] S.C.R. 747.

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administered by public authority with "an evil eye and an unequal hand." I suggest most respectfully that it will be extremely unsafe to lay down that unless there was evidence that discrimination was "purposeful or intentional" the equality clause would not be infringed. In my opinion, the true position is as follows :--As a general rule, if the Act is fair and good, the public authority who has to administer it will be protected. To this general rule, however, there is an exception, which comes into play when there is evidence of mala fides in the application of the Act. The basic question however still remains whether the Act itself is fair and good, which must be decided mainly with reference to the specific provisions of the Act. It should be noted that there is no reference to intention in article 14 and the gravamen of that Article is equality of treatment. In my opinion, it will be dangerous to introduce a subjective test when the Article itself lays down a clear and objective test.

I must confess that I have been trying hard to think how the Act can be saved, and the best argument that came to my mind in support of it was this :--The Act should be held to be a good one, because it embodies all the essentials of a fair and proper trial, namely, (1) notice of the charge, (2) right to be heard and the right to test and rebut the prosecution evidence, (3) access to legal aid, and (4)trial by an impartial and experienced court. If these are the requisites, so I argued with myself, to which all accused persons are equally entitled, why should a particular procedure which ensures all those requisites not be substituted for another procedure, if such substitution is necessitated by administrative exigencies or is in public interest, even though the new procedure may be different from and less elaborate than the normal procedure. This seemed to me to be the best argument in favour of the Act but the more I thought of it the more it appeared to me that it was not a complete answer to the problem before us. In the first place, it brings in the "due process" idea of the American Constitution, which our Constitution has

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not chosen to adopt. Secondly, the Act itself does not state that public interest and administrative exigencies will provide the occasion for its application. Lastly, the discrimination involved in the application of the Act is too evident to be explained away.

The framers of the Constitution have referred to equality in the Preamble, and have devoted as many as five articles, namely, articles 14, 15, 16.17, and 18 in the Chapter on Fundamental Rights, to ensure equality in all its aspects. Some of these Articles are confined to citizens only and some can be availed of by non-citizens also; but on reading these provisions as a whole, one can see the great importance attached to the principle of equality in the Constitution. That being so, it will be wrong to whittle down the meaning of article 14, and however well-intentioned

the impugned Act may be and however reluctant one may feel to hold it invalid, it seems to me that section 5 of the Act, or at least that part of it with which alone we are concerned in this appeal, does offend against article 14 of the Constitution and is therefore unconstitutional and void. The Act is really modelled upon a pre-Constitution pattern and will have to be suitably redrafted in order to conform to the requirements of the Constitution.

MAHAJAN J.--I had the advantage of reading the judgment prepared by my brother Mukherjea and I am in respectful agreement with his opinion.

Section 5 of the West Bengal Special Courts Act is hit by article 14 of the Constitution inasmuch as it mentions no basis for the differential treatment prescribed in the Act for trial of criminals in certain cases and for certain offences. The learned AttorneyGeneral argued that the Act had grouped cases requiring speedier trial as forming a class in themselves, differentiating that class from cases not needing expedition and that it was on this basis that the special procedure prescribed in the Act was applicable.

In order to appreciate this contention, it is necessary to state shortly the scope of article 14 of the

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Constitution. It is designed to prevent any person or class of persons for being singled out as a special subject for discriminatory and hostile legislation. Democracy implies respect for the elementary rights of man, however suspect or unworthy. Equality of right is a principle of republicanism and article 14 enunciates this equality principle in the administration of justice. In its application to legal proceedings the article assures to everyone the same rules of evidence and modes of procedure. In other words, the same rule must exist for all in similar circumstances. This principle, however, does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance, in the same position.

By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves, but no one will claim that competency to contract can be made to depend upon the stature or colour of the hair. "Such a classification for such a purpose would be arbitrary and a piece of legislative despotism"(1):

(1) Vide Gulf Colorado & Santa Fe Railway Co. v. W.H. Ellis, 166 U.S. 150.

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Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a

classification of offences or of cases. As pointed out by Chakravarti J. the necessity of a speedy trial is too vague and uncertain a criterion to form the basis of a valid and reasonable classification. In the words of Das Gupta J. it is too indefinite as there can hardly be any definite objective test to determine it. In my opinion, it is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Persons concerned in offences or cases needing so-called speedier trial are entitled to inquire "Why are they being made the subject of a law which has short-circuited the normal procedure of trial; why has it grouped them in that category and why has the law deprived them of the protection and safeguards which are allowed in the case of accused tried under the procedure mentioned in the Criminal Procedure Code; what makes the legislature or the executive to think that their cases need speedier trial than those of others like them?" The only answer, that so far as I am able to see, the Act gives to these inquiries is that they are being made the subject of this special treatment because they need it in the opinion of the provincial government; in other words, because such is the choice of their prosecutor. This answer neither sounds rational nor reasonable. The only answer for withholding from such persons the protection of article 14 that could reasonably be given to these inquiries would be that "Of all other accused persons they are a class by themselves and there is a reasonable
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difference between them and those other persons who may have committed similar offences." They could be told that the law regards persons guilty of offences against the security of the State as a class in themselves. The Code of Criminal Procedure has by the process of classification prescribed different modes of procedure for trial of different offences. Minor offences can be summarily tried, while for grave and heinous offences an elaborate mode of procedure has been laid down. The present statute suggests no. reasonable basis or classification, either in respect of offences or in respect of cases. It has laid down no yardstick or measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those who are outside the purview of the Special Act. The Act has left this matter entirely to the unregulated discretion of the provincial government. It has the power to pick out a case of a person similarly situate and hand it over to the special tribunal and leave the case of the other person in the same circumstance to be tried by the procedure laid down in the Criminal Procedure Code. The State government is authorized, if it so chooses, to hand over an ordinary case of simple hurt to the special tribunal, leaving the case of dacoity with murder to be tried in the ordinary way. It is open under this Act for the provincial government to direct that a case of dacoity with firearms and accompanied by murder, where the persons killed are Europeans, be tried by the Special Court, while exactly similar cases where the persons killed are Indians may be tried under the procedure of the Code.

That the Special Act lays down substantially different rules for trial of offences and cases than laid down in the general law of the land, i.e., the Code of Criminal Procedure, cannot be seriously denied. It short-circuits that procedure in material particulars. It imposes heavier liabilities on the alleged culprits than are ordained by the Code. It deprives them of certain privileges which the Code affords them for their protection. Those singled out for treatment under the
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procedure of the Special Act are to a considerable extent prejudiced by the deprivation of the trial by the procedure prescribed under the Criminal Procedure Code. Not only does the special law deprive them of the safeguard of the committal procedure and of the trial with the help of jury or assessors, but it also deprives them of the right of a de novo trial in case of transfer and makes them liable for conviction and punishment for major offences other than those for which they may have been charged or tried. The right of the accused to call witnesses in defence has been curtailed and made dependent on the discretion of the special judge. To a certain extent the remedies to which an accused person is entitled for redress in the higher courts have been cut down. Even if it be said that the statute on the face of it is not discriminatory, it is so in its effect and operation inasmuch as it vests in the executive government unregulated official discretion and therefore has to be adjudged unconstitutional.

It was suggested that good faith and knowledge of existing conditions on the part of a legislature has to be presumed. That is so; yet to carry that presumption to the extent of always holding that there must be some undisclosed intention or reason for subjecting certain individuals to a hostile and discriminatory legislation is to make the protection clause of article 14, in the words of an American decision, a mere rope of sand, in no manner restraining State action. The protection afforded by the article is not a mere eyewash but it is a real one and unless a just cause for discrimination on the basis of a reasonable classification is put forth as a defence, the statute has to be declared unconstitutional. No just cause has been shown in the present instance. The result is that the appeals fail and are dismissed.

MUKHERJEA J.--These two appeals are directed against the judgment of a Special Bench of the Calcutta High Court dated the 28th of August, 1951, and they arise out of two petitions presented, respectively, by the respondent in the two appeals under article 226 of
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the Constitution praying for writs of certiorari to quash two criminal proceedings, one of which has ended in the trial court, resulting in conviction of the accused, while the other is still pending hearing. The questions requiring consideration in both the appeals are the same and the whole controversy centres round the point as to whether the provision of section 5(1) of the West Bengal Special Courts Act, 1950, as well as certain notifications issued under it are ultra vires the Constitution by reason of their being in conflict with article 14 of the Constitution. The material facts, which are not controverted, may be shortly stated as follows. On August 17, 1949, an Ordinance, known as the West Bengal Special Courts Ordinance, was promulgated by the Governor of West Bengal under section 88 of the Government of India Act, 1935. On 15th March, 1950, this Ordinance was superseded and replaced by the West Bengal Special Courts

Act which contained provisions almost identical with those of the Ordinance. Section 3 of the Act empowers the State Government to constitute, by notification, Special Courts of criminal jurisdiction for such areas and to sit at such places as may be notified in the notification. Section 4 provides for appointment of a Special Judge to preside over a Special Court and it mentions the qualifications which a Special Judge should possess. Section 5 (1) then lays down that a Special Court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order, in writing direct. Sections 6 to 15 set out in details the procedure which the Special Court has to follow in the trial of cases referred to it. Briefly stated, the trial is to be without any jury or assessors, and the court has to follow the procedure that is laid down for trial of warrant cases by the Magistrate under the Criminal Procedure Code. The procedure for committal in the sessions cases is omitted altogether; the court's powers of granting adjournment are restricted and special provisions are made to deal with refractory accused and also for cases which are transferred from one
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Special Court to another. The Court is expressly empowered to convict a person of an offence with which he was not charged if it transpires from the evidence adduced at the time of trial that such offence was committed by him, and it is immaterial that the offence is not a minor offence. The right of revision to the High Court has been taken away entirely, though appeals have been allowed in all cases both at the instance of the accused as well as of the State and they lie both on questions of fact and law.

On October 28, 1949, when the Ordinance was still in force, the West Bengal Government appointed Shri S.N. Guha Roy, who was then the Sessions Judge of Alipore, a Special Judge, with powers to try cases under the Ordinance. Anwar Ali Sarkar, who is the respondent in Appeal No. 297, along with 49 other persons, were the accused in what is known as Dum Dum Factory Raid case, where crimes of the utmost brutality were committed by an armed gang of men on the factory of Messrs. Jessop and Company at Dum Dum. The raid took place on February 26, 1949. The accused or most of them were arrested some time after the Ordinance was promulgated. On 25th of January, 1950, the State Government by a notification directed that the case of Anwar Ali and his 49 co-accused should be tried by Mr. S.N. Guha Roy in accordance with the provisions" of the Ordinance. A formal complaint was lodged before the Special Judge in respect of these 50 persons on April 2, 1950, that is to say, after the Special Courts Act was passed, superseding the Ordinance. The trial lasted for several months and by his judgment dated the 31st of March, 1951, the Special Judge convicted the accused under various sections of the Indian Penal Code, some of them being sentenced to transportation for life, while others were sentenced to undergo various terms of imprisonment according to the gravity of their offence. The State Government applied for enhancement of sentence with regard to some of the accused and a rule was actually issued by the High Court upon them tO show cause why they should not be sentenced
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to death. On May 1, 1951, Anwar Ali, the respondent in Appeal No. 297, presented an application before Mr. Justice Bose of the Calcutta High Court under article 226 of the Constitution and a rule was issued by the learned Judge upon

that petition calling upon the State of West Bengal to show cause why the proceedings, conviction and sentence, passed by the Special Court on the petitioner and his co-accused should not be quashed. On 21st of May following, a similar application for quashing a pending criminal trial was filed by Gajen Mali, the respondent in the other appeal, who along with 5 other persons is being tried for offences of murder and conspiracy to murder before Mr. M. Bhattacharya, another Special Judge, appointed under the West Bengal Special Courts Act. A rule was issued on this application also. Both the rules came up for hearing before Mr. Justice Bose, and as the learned Judge was of opinion that they involved questions of general constitutional importance, he referred them to the Chief Justice for decision by a larger Bench. Accordingly a Special Bench was constituted, consisting of the Chief Justice and four other Judges who heard both these cases. It was conceded during the hearing of these rules by the State Government that although in the case of Anwar Ali the notification was issued a day before the coming into force of the Constitution, the provisions of the Constitution of India, which came into force on the 26th of January, 1950, applied to his case also. On the 28th of August, 1951. the Special Bench made the rules absolute and held that section 5 (1) of the West Bengal Special Courts Act was void to the extent that it empowers the State to direct any case to be tried by the Special Court. The notifications issued under that sub-section were also held to be invalid for the same reason. It is against this decision that these two appeals have been taken to this court by the State of West Bengal.

In order to appreciate the points that have been canvassed before us, it would be convenient first of all
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to refer to the provision of article 14 of the Constitution with a view to determine the nature and scope of the guarantee that is implied in it. The article lays down that "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 is, in substance, modelled upon the equal protection clause, occurring in the Fourteenth Amendment of the American Constitution with a further addition of the rule of "equality before the law", which is an established maxim of the English Constitution. A number of American decisions have been cited before us on behalf of both parties in course of the arguments; and while a too rigid adherence to the views expressed by the Judges of the Supreme Court of America while dealing with the equal protection clause in their own Constitution may not be necessary or desirable for the purpose of determining the true meaning and scope of article 14 of the Indian Constitution, it cannot be denied that the general principles enunciated in many of these cases do afford considerable help and guidance in the matter.

It can be taken to be well settled that the principle underlying the guarantee in article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances(1). It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed(2). Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subjectmatter of the legislation their position is substantially the same. This brings in the question of clas-

sification. As there is no infringement of the equal protection rule, if the law deals alike with all of a certain class, the legislature has the undoubted right of classifying

(1) Chiranjit Lal Chowdhuri v. The Union of India [1950] S.C.R. 869.

(2)Old Dearborn Distributing Co. v. Seagram Distillers Corporation 299 U.S. 183.

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persons and placing those whose conditions are 'substantially similar under the same rule of law, while applying different rules to persons differently situated. It is said that the entire problem under the equal protection clause is one of classification or of drawing lines(1). In making the classification the legislature cannot certainly be expected to provide "abstract symmetry." It can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even "degrees of evil "(2), but the classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made; and classification made without any reasonable basis should be regarded as invalid(3). These propositions have not been controverted before us and it is not disputed also on behalf of the respondents that the presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it, to show that there has been transgression of constitutional principles.

The learned Attorney- General, appearing in support of the appeal, has put forward his contentions under two different heads. His first line of argument is that quite apart from the question of classification there has been no infringement of article 14 of the Constitution in the present case. It is said that the State has full control over procedure in courts, both in civil and criminal cases, it can effect such changes as it likes for securing due and efficient administration of justice and a legislation of the character which we have got here and which merely regulates the mode of trial in certain cases cannot come within the description of discriminatory or hostile legislation. It is further argued that the differences that have been made in the procedure for criminal trial under the West Bengal

(1) Vide Dowling: Cases on Constitutional Law, 4th edn. 1139.

(2) Vide Skinner v. Oklahoma (316 U.S. 535 at 540).

(3) Southern Railway Co. v. Greene (216 U.S, 400 at 412).

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Special Courts Act, 1950, are of a minor character and there are no substantial grounds upon which discrimination could be alleged or founded. The second head of arguments advanced by the Attorney-General is that there is a classification and a justifiable classification on the basis of which differences in the procedure have been made by the West Bengal Act; and even if any unguided power has been conferred on the executive, the Act itself cannot be said to have violated the equality clause, though questions relating to proper exercise of such power or the limits of permissible delegation of authority might arise.

As regards the first point, it cannot be disputed that a competent legislature is entitled to alter the procedure in criminal trials in such way as it considers proper. Article 21 of the Constitution only guarantees that "no

person shall be deprived of his life or personal liberty except in accordance with the procedure established by law." The word "law" in the Article means a State made law(1), but it must be a valid and binding law having regard not merely to the competency of the legislature and the subject it relates to, but it must not also infringe any of the fundamental rights guaranteed under Part III of the Constitution. A rule of procedure laid down by law comes as much within the purview of article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination(2). The two cases referred to by the learned Attorney-General in this connection do not really support his contention. In Hayes v. Missouri(a) the subject-matter of complaint was a provision of the revised statutes of Missouri which allowed the State, in capital cases, fifteen peremptory challenges in cities having a population of 100,000 inhabitants in place of eight in other parts of the State. This was held to be a valid exercise of legislative discretion not

(1) Vide A.K. Gopalan v. The State of Madras [1950] S.C.R. 88.

(2) Weaver: Constitutional Law, page 407.

(3) 120 U.S. 68; 30 L. Ed. 578.

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contravening the equality clause in the Fourteenth Amendment. It was said that the power of the Legislature to prescribe the number of challenges was limited by the necessity of having impartial jury. With a view to secure that end, the legislature could take into consideration the conditions of different communities and the strength of population in a particular city; and if all the persons within particular territorial limits are given equal rights in like cases, there could not be any question of discrimination. The other case relied upon by the learned Attorney-General is the case of Brown v. The State of New Jersey(1). In this case the question was whether the provision of the State Constitution relating to struck jury in murder cases was in conflict with the equal protection clause. The grievance made was that the procedure of struck jury denies the defendant the same number of peremptory challenges as he would have had in a trial before an ordinary jury. It was held by the Supreme Court that the equal protection clause was not violated by this provision. "It is true", thus observes Mr. Justice Brewer, "that here there is no territorial distribution but in all cases in which a struck jury is ordered the same number of challenges is permitted and 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..... That in a given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration in appeal but it amounts to nothing more". Thus it was held that the procedure of struck jury did not involve any discrimination between one person and another. Each party was at liberty to apply for a struck jury if he so chose and the application could be granted by the court if it thought proper having regard to the circumstances of each individual case. The procedure would be identical in respect of all persons when it was allowed and

(1) 175 U.S. 171: 44 L. Ed. 119.

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all parties would have equal opportunities of availing themselves of this procedure if they so liked. That a judicial discretion has to be exercised on the basis of the facts of each case in the matter of granting the application for a struck jury does not really involve discrimination. These decisions, in my opinion, have no bearing on the present case.

I am not at all impressed by the argument of the learned Attorney-General that to enable the respondents to invoke the protection of article 14 of the Constitution it has got to be shown that the legislation complained of is a piece of "hostile" legislation. The expressions "discriminatory" and "hostile" are found to be used by American Judges often simultaneously and almost as synonymous expressions in connection with discussions on the equal protection clause. If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as "hostile" in the sense that it affects injuriously the interests of that person or class. Of course, if one's interests are not at all affected by a particular piece of legislation, he may have no right to complain. But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his fundamental rights, to assert and prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class. For the same reason I cannot agree with the learned Attorney-General that in cases like these, we should enquire as to what was the dominant intention of the legislature in enacting the law and that the operation of article 14 would be excluded if it is proved that the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. When. discrimination is alleged against officials in carrying
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out the law, a question of intention may be material in ascertaining whether the officer acted mala fide or not(1); but no question of intention can arise when discrimination follows or arises on the express terms of the law itself.

I agree with the Attorney-General that if the differences are not material, there may not be any discrimination in the proper sense of the word and minor deviations from the general standard might not amount to denial of equal rights. I find it difficult however, to hold that the difference in the procedure that has been introduced by the West Bengal Special Courts Act is of a minor or unsubstantial character which has not prejudiced the interests of the accused.

The first difference is that made in section 6 of the Act which lays down that the Special Court may take cognizance of an offence without the accused being committed to it for trial, and that in trying the accused it has to follow the procedure for trial of warrant cases by Magistrates. It is urged by the Attorney-General that the elimination of the committal proceedings is a matter of no importance and that the warrant procedure, which the Special Court has got to follow, affords a scope for a preliminary examination of the evidence against the accused before a charge is framed.' It cannot be denied that there is a difference between the two proceedings. In a warrant case the entire proceeding is before the same Magistrate and the

same officer who frames the charge hears the case finally. In a sessions case, on the other hand, the trial is actually before another Judge, who was not connected with the earlier proceeding. It is also clear that after the committal and before the sessions judge actually hears the case, there is generally a large interval of time which gives the accused ample opportunity of preparing his defence, he being acquainted beforehand with the entire evidence that the prosecution wants to adduce against him. He cannot have the same advantage in a warrant case even ii an adjournment is granted by the Magistrate after the charge is

(1) sunday Lake Iron Company v. wakefield (247 U.S. 350.)

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framed. Be that as it may, this is not the only matter upon which the normal procedure has been departed from in the Special Courts Act. One of the most important departures is that the trial by the Special Court is without the aid of jury or assessors. The trial by jury is undoubtedly one of the most valuable rights which the accused can have. It is true that the trial by jury is not guaranteed by the Constitution and section 269(1) of the Criminal Procedure Code empowers the State Government to direct that the trial of all offences or any particular class of offences before any sessions court shall be by jury in any district; and it may revoke or alter such orders. There is nothing wrong therefore if the State discontinues trial by jury in any district with regard to all or any particular class of offences; but as has been pointed out by Mr. Justice Chakravarti of the Calcutta High Court, it cannot revoke jury trial in respect of a particular case or a particular accused while in respect of other cases involving the same offences the order still remains. Amongst other important changes, reference may be made to the provision of section 13 of the Act which empowers the Special Court to convict an accused of any offence if the commission of such offence is proved during trial, although he was not charged with the same or could be charged with it in the manner contemplated by section 236 of the Criminal Procedure Code, nor was it a minor offence within the meaning of section 238 of the Code. Under section a50 of the Criminal Procedure Code, when a case after being heard in part goes for disposal before another Magistrate, the accused has the right to demand, before the second Magistrate commences the proceedings, that the witnesses already examined should be re-examined and re-heard. This right has been taken away from the accused in cases where a case is transferred from one Special Court to another under the provision of section 7 of the Special Courts Act. Further the right of revision to the High Court does not exist at all under the new procedure, although the rights under the Constitution of India are retained.

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It has been pointed out and quite correctly by one of the learned Counsel for respondents that an application for bail cannot be made before the High Court on behalf of an accused after the Special Court has refused bail. These and other provisions of the Act make it clear that the rights of the accused have been curtailed in a substantial manner by the impugned legislation; and if the rights are curtailed only in certain cases and not in others, even though the circumstances in the latter cases are the same, a question of discrimination may certainly arise. The first line of argument adopted by the learned Attorney-General cannot, therefore, be accepted.

I now come to the other head of arguments put forward by him and the principal point for our consideration is whether

the apparent discriminations that have been made in the Act can be justified on the basis of a reasonable classification. Section 5(1) of the West Bengal Special Courts Act lays down that

"A Special Court shall try such offences or classes offences or cases or classes of cases as the State Government may, by general or special order in writing direct."

The learned Attorney-General urges that the principle of classification upon which the differences have been made between cases and offences triable by the Special Court and those by ordinary courts is indicated in the preamble to the Act which runs as follows:

"Whereas it is expedient to provide for the speedier trial of certain offences".

What is said is, that the preamble is to be read as a part of section 5(1) and the proper interpretation to be put upon the sub-section is that those cases and offences which in the opinion of the State Government would require speedier trial could be assigned by it to the Special Court. In my opinion, this contention cannot be accepted for more reasons than one. In the first place, I agree with the learned Chief Justice of the Calcutta High Court that the express provision of an enactment, if it is clear and unambiguous, cannot be

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curtailed or extended with the aid of the preamble to the Act. It is only when the object or meaning of the enactment is not clear that recourse can be had to the preamble to explain it (1). In the case before us the language of section 5(1) is perfectly clear and free from any ambiguity. It vests an unrestricted discretion in the State Government to direct any cases or classes of cases to be tried by the Special Court in accordance with the procedure laid down in the Act. It is not stated that it is only when speedier trial is necessary that the discretion should be exercised. In the second place, assuming that the preamble throws any light upon the interpretation of the section, I am definitely of opinion that the necessity of a speedier trial is too vague, uncertain and elusive a criterion to form a rational basis for the discriminations made. The necessity for speedier trial may be the object which the legislature had in view or it may be the occasion for making the enactment. In a sense quick disposal is a thing which is desirable in all legal proceedings. The word used here is "speedier" which is a comparative term and as there may be degrees of speediness, the word undoubtedly introduces an uncertain and variable element. But the question is: how is this necessity of speedier trial to be determined ? Not by reference to the nature of the offences or the circumstances under which or the area in which they are committed, nor even by reference to any peculiarities or antecedents of the offenders themselves, but the selection is left to the absolute and unfettered discretion of the executive government with nothing in the law to guide or control its action. This is not a reasonable classification at all but an arbitrary selection. A line is drawn artificially between two classes of cases. On one side of the line are grouped those cases which the State Government chooses to assign to the Special Court; on the other side stand the rest which the State Government does not think fit and proper to touch. It has been observed in many cases by the Supreme Court of America that the fact that some

(1) See Craies on Statute Law, 4th edn., 184.

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sort of classification has been attempted at will not re-

lieve a statute from the reach of the equality clause. "It must appear not only that a classification has been made but also that it is based upon some reasonable ground--some difference which bears a just and proper relation to the attempted classification"(1). The question in each case would be whether the characteristics of the class are such as to provide a rational justification for the differences introduced ? Judged by this test, the answer in the present case should be in the negative; for the difference in the treatment rests here solely on arbitrary selection by the State Government. It is true that the presumption should always be that the legislature understands and correctly appreciates the needs of its own people and that its discriminations are based on adequate grounds (2); but as was said by Mr. Justice Brewer in Gulf Colorado etc. Company v. Ellis (3), "to carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clauses of the Fourteenth Amendment a mere rope of sand."

A point was made by the Attorney-General in course of his arguments that the equality rule is not violated simply because a statute confers unregulated discretion on officers or on administrative agencies. In such cases it may be possible to attack the legislation on the ground of improper delegation of authority or the acts of the officers may be challenged on the ground of wrongful or mala fide exercise of powers; but no question of infringement of article 14 of the Constitution could possibly arise. We were referred to a number of authorities on this point but I do not think that the authorities really support the proposition of law in the way it is formulated. In the well known case of Yick Wo v. Hopkins (4), the question was, whether the provision of a certain ordinance of the City and County of San

(1) Gulf Colorado etc. Go. v. Ellis (165 U.S. 150).
(2) Middleton v. Texas Power & Light Co. (249 U.S. 152).
(3) 165 U.S. 150. (4) 118 U.S. 356.

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Francisco was invalid by reason of its being in conflict with the equal protection clause. The order in question laid down that it would be unlawful for any person to engage in laundry business within the corporate limits "without having first obtained the consent of the Board of Supervisors except the same to be located in a building constructed either of brick or stone." The question was answered in the affirmative. It was pointed out by Matthews, J., who delivered the opinion of the court, that the ordinance in question did not merely prescribe a rule and condition for the regulation of the laundry business. It allowed without restriction the use for such purposes of building of brick or stone, but as to wooden buildings constituting nearly all those in previous use, it divided the owners or occupiers into two classes, not having respect to their personal character and qualifications of the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which were those who were permitted to pursue their industry by the mere will and consent of the supervisors and on the other those from whom that consent was withheld at their will and pleasure. This sort of committing to the unrestrained will of a public officer the power to deprive a citizen of his right to carry on lawful business was' held to constitute an invasion of the Fourteenth Amendment. The learned Judge

pointed out in course of his judgment that there are cases where discretion is lodged by law in public officers or bodies to grant or withhold licences to keep taverns or places for sale of spirituous liquor and the like. But all these cases stood on a different footing altogether. The same view was reiterated in Crowley v. Christensen(1) which related to an ordinance regulating the issue of licences to sell liquors. It appears to be an accepted doctrine of American courts that the purpose of the equal protection clause is to secure every person within the States against arbitrary discrimination, whether occasioned by the express terms of the statute or by their

(1) 137 U.S. 86.

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improper application through duly constituted agents. This was clearly laid down in Sunday Lake Iron Cornparty v. Wakefield (1). In this case the complaint was against a. taxing officer, who was alleged to have assessed the plaintiff's properties at their full value, while all other persons in the county were assessed at not more than one-third of the worth of their properties. It was held that the equal protection clause could be availed of against the taxing officer; but if he was found to have acted bona fide and the discrimination was the result of a mere error of judgment on his part, the action would fail. The position, therefore, is that when the statute is not itself discriminatory and the charge of violation of equal protection is only against the official, who is entrusted with the duty of carrying it into operation, the equal protection clause could be availed of in such cases; but the officer would have a good defence if he could prove bona fides. But when the statute itself makes a discrimination without any proper or reasonable basis, the statute would be invalidated for being in conflict with the equal protection clause, and the question as to how it is actually worked out may not necessarily be a material fact for consideration. As I have said already, in the present case the discrimination arises on the terms of the Act itself. The fact that it gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory.

It may be noted in this connection that in the present case the High Court has' held the provision of section 5 (1) of the West Bengal Special Courts Act to be ultra vires the Constitution only so far as it allows the State Government to direct any case to be tried by the Special Court. In the opinion of the learned Chief Justice, if the State Government had directed certain offences or classes of offences committed within the

(1) 247 U.S. 350.

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territory of West Bengal to be tried by the Special Court, the law or order could not have been impeached as discriminatory. It is to be noted that the Act itself does not mention in what classes of cases or offences such direction could be given; nor does it purport to lay down the criterion or the basis upon which the classification is to be made. It is not strictly correct to say that if certain specified offences throughout the State were directed to be tried by the Special Court, there could not be any infringement of the equality rule. It may be that in making the selection the authorities would exclude from the list of offences other offences of a cognate character in respect to

which no difference in treatment is justifiable. In such circumstances also the law or order would be offending against the equality provision in the Constitution. This is illustrated by the case of Skinner v. Oklahorna(1). There a statute of Oklahoma provided for the sterilization of certain habitual criminals, who were convicted two or more times in any State, of felonies involving moral turpitudell. The statute applied to persons guilty of larceny, which was regarded as a felony but not to embezzlement. It was held that the statute violated the equal protection clause. It is said that in cases where the law does not lay down a standard or form in accordance with which the classification is to be made, it would be the duty of the officers entrusted with the execution of the law, to make the classification in the way consonant with the principles of the Constitution (2). If that be the position, then an action might lie for annulling the acts of the officers if they are found not to be in conformity with the equality clause. Moreover, in the present case the notification by the State Government could come within the definition of law as given in article 13(3) of the Constitution and can be impeached apart from the Act if it violates article 14 of the Constitution. I do not consider it necessary to pursue this matter any further, as in my opinion even on the

(1) 316 U.S. 555.

(2) Vide Willis on Constitutional Law, Page 587.

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limited ground upon which the High Court bases its decision, these appeals are bound to fail.

DAS J.--I concur in dismissing these appeals but I am not persuaded that the whole of section 5(1) of the West Bengal Special Courts Act is invalid. As I find myself in substantial agreement with the interpretation put upon that section by the majority of the Full Bench of the Calcutta High Court and most of the reasons adopted by Harries, C.J. in support thereof, I do not feel called upon to express myself in very great detail. I propose only to note the points urged before us and shortly state my conclusions thereon.

There is no dispute that the question of the validity of section 5 of the West Bengal Special Courts Act, 1950, has to be determined in the light of the provisions of the Constitution of India which came into force on January 26, 1950. The contention of the respondents, who were petitioners before the High Court, has been and is that the whole of section 5 of the Act or, at any rate, that part of it which authorises the State government to direct particular "cases" to be tried by the Special Court offends against the guarantee of equality before the law secured by article 14. If the provision of section 5 of the Act is invalid even to the limited extent mentioned above. then also the whole proceedings before the Special Court which was directed by the State government to try these particular "cases" must necessarily have been without jurisdiction as has been held by the High Court Full Bench and these appeals would have to be dismissed.

Article 14 of our Constitution, it is well known, corresponds to the last portion of section 1 of the Fourteenth Amendment to the American Constitution except that our article 14 has also adopted the English doctrine of rule of law by the addition of the words "equality before the law." It has not, however, been urged before us that the addition of these extra words has made any substantial difference in its practical application. The meaning, scope and effect of

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article 14 of our Constitution have been discussed and laid down by this Court in the case of Chiranjit Lal Chowdhury v. The Union of India and Others (1). Although Sastri J., as he then was, and myself differed from the actual decision of the majority of the Court, there was no disagreement between us and the majority as to the principles underlying the provisions of article 14. The difference of opinion in that case was not so much on the principles to be applied as to the effect of the application of such principles. Those principles were again considered and summarised by this Court in The State of Bombay v.F.N. Balsara (2). It is now well established that while article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated for the purpose of being specially subjected to discriminating and hostile legislation, it does not insist on an "abstract symmetry" in the sense that every piece of legislation must have universal application. All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation. This classification may be on different bases. It may be geographical or according to objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article. 'The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others

(1) [1950] S.C.R. 869. (2) [1951] S.C.R. 682.

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and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained. The doctrine, as expounded by this Court in the two cases I have mentioned, leaves a considerable latitude to the Court in the matter of the application of article 14 and consequently has the merit of flexibility.

The learned Attorney-General, appearing in support of these appeals, however, contends that while a reasonable classification of the kind mentioned above may be a test of the validity of a particular piece of legislation, it may not be the only test which will cover all cases and that there may be other tests also. In answer to the query of the Court he formulates an alternative test in the following

words: If there is in fact inequality of treatment and such inequality is not made with a special intention of prejudicing any. particular person or persons but is made in the general interest of administration, there is no infringement of article 14. It is at once obvious that, according to the test thus formulated, the validity of State action, legislative or executive, is made entirely dependent on the state of mind of the authority. This test will permit even flagrantly discriminatory State action on the specious plea of good faith and of the subjective view of the executive authority as to the existence of a supposed general interest of administration. This test, if accepted, will amount to adding at the end of article 14 the words "except in good faith and in the
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general interest of administration." This is clearly not permissible for the Court to do. Further, it is obvious that the addition of these words will, in the language of Brewer, J., in Gulf, Colorado and Santa Fe Railway Co. v. W.H. Ellis(1), make the protecting clause a mere rope of sand, in no manner restraining State action. I am not, therefore, prepared to accept the proposition propounded by the learned Attorney-General, unsupported as it is by any judicial decision, as a sound test for determining the validity of State action.

The learned Attorney-General next contends, on the authority of a passage in Cooley's Constitutional Limitations, 8th Edition, Vol. 2, p. 816, that inequalities of minor importance do not render a law invalid and that the constitutional limitations must be treated as flexible enough to permit of practical application. The passage purports to be founded on the decision in Jeffrey Manufacturing Co. v. Blagg (2). A careful perusal of this decision will make it quite clear that the Court upheld the validity of the statute impugned in that case, not on the ground that the inequality was of minor importance but, on the ground that the classification of establishments according to the number of workmen employed therein was based on an intelligible distinction having a rational relation to the subject-matter of the legislation in question. That decision, therefore, does not support the proposition so widely stated in the passage apparently added by the editor to the original text of Judge Cooley. The difference brought about by a statute may be of such a trivial, unsubstantial and illusory nature that that circumstance alone may be regarded as cogent ground for holding that the statute has not discriminated at all and that no inequality has in fact been created. This aspect of the matter apart, if a statute brings about inequality in fact and in substance, it will be illogical and highly undesirable to make the constitutionality of such a statute depend on the degree of the inequality so

(1) 165 U.S. 150. (2) 235 U.S. 571; 59 L. Ed. 364.

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brought about. The adoption of such a principle will run counter to the plain language of article 14.

At one stage of his arguments the learned AttorneyGeneral just put forward an argument, which he did not press very strongly, that the Article is a protection against the inequality of substantive law only and not against that of a procedural law. I am quite definitely not prepared to countenance that argument. There is no logical basis for this distinction. A procedural law may easily inflict very great hardship on persons subjected to it, as, indeed, this very Act under consideration will presently be seen to have

obviously done.

That the Act has prescribed a procedure of trial which is materially different from that laid down in the Code of Criminal Procedure cannot be disputed. The different sections of the Act have been analysed and the important differences have been clearly indicated by the learned Chief Justice of West Bengal and need not be repeated in detail. The elimination of the committal proceedings and of trial by jury (sec. 6), the taking away of the right to a de novo trial on transfer (sec. 7), the vesting of discretion in the Special Court to refuse to summon a defence witness if it be satisfied that his evidence will not be material (sec. 8), the liability to be convicted of an offence higher than that for which the accused was sent up for trial under the Act (sec. 13), the exclusion of interference of other Courts by way of revision or transfer or under section 491 of the Code (sec. 16) are some of the glaring instances of inequality brought about by the impugned Act. The learned Attorney-General has drawn our attention to various sections of the Code of Criminal Procedure in an endeavour to establish that provisions somewhat similar to those enacted in this Act are also contained in the Code. A comparison between the language of those sections of the Code and that of the several sections of this Act mentioned above will clearly show that the Act has gone much beyond the proViSions of the Code and the Act cannot by any means

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be said to be an innocuous substitute for the procedure prescribed by the Code. The far-reaching effect of the elimination of the committal proceedings cannot possibly be ignored merely by stating that the warrant procedure under the Code in a way also involves a committal by the trial Magistrate, namely to himself, for the warrant procedure minimises the chances of the prosecution being thrown out at the preliminary stage. as may be done by the committing Magistrate, and deprives the accused person of the opportunity of knowing, well in advance of the actual trial before the Sessions Court, the case sought to be made against him and the evidence in support of it and, what is of the utmost importance, of the benefit of a trial before and the decision of a different and independent mind. The liability to be convicted of a higher offence has no parallel in the Code. It is true that the State can, under section 269 (1) of the Code, do away with trial by jury but that section, as pointed out by Chakravartti J. does not clearly contemplate elimination of that procedure only in particular cases which is precisely what the Act authorises the Government to do. On a fair reading of the Act there can be no escape from the fact that it quite definitely brings about a substantial inequality of treatment, in the matter of trial, between persons subjected to it and others who are left to be governed by the ordinary procedure laid down. in the Code. The question is whether section 5 (1) which really imposes this substantial inequality on particular persons can be saved from the operation of article 14 on the principle of rational classification of the kind permissible in law.

Section 5 (1) of the Act runs as follows":--

" A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct".

It will be noticed that the sub-section refers to four distinct categories, namely, "offences",' 'classes of offences", "cases" and "classes of cases" and empowers

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the State government to direct any one or more of these categories to be tried by the Special Court constituted under the Act. I shall first deal with the section in so far as it authorises the State government to direct "offences", "classes of offences" and "classes of cases" to be tried by a Special Court. These expressions clearly indicate, and obviously imply, a process of classification of offences or cases. Prima facie those words do not contemplate any particular offender or any particular accused in any particular case. The emphasis is on "offences", ' 'classes of offences" or "classes of cases". The classification of ' 'offences" by itself is not calculated to touch any individual as such, although it may, after the classification is made, affect all individuals who may commit the particular offence. In short, the classification implied in this part of the sub-section has no reference to, and is not directed towards the singling out of any particular person as an object of hostile State action but is concerned only with the grouping of "offences", "classes of offences" and "classes of cases" for the purpose of being tried by a Special Court. Such being the meaning and implication of this part of section 5 (1), the question arises whether the process of classification thus contemplated by the Act conforms to the requirements of reasonable classification which does not offend against the Constitution.

Learned Attorney-General claims that the impugned Act satisfies even this test of rational classification. His contention is that offences may be grouped into two classes, namely, those that require speedier trial, that is speedier than what is provided for in the Code and those that do not require a speedier trial. The Act, according to him, purports to deal only with offences of the first class. He first draws our attention to the fact that the Act is intituled "An Act to provide for the speedier trial of certain offences" and then points out that the purpose of the Act, as stated in its preamble, also is "to provide for the speedier trial of certain offences". He next refers us to the different sections of the Act and urges

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that all the procedural changes introduced by the Act are designed to accomplish the object of securing speedier trial. The Act accordingly empowers the State government to direct the offences, which, in its view, require speedier trial, to be tried by a Special Court according to the special procedure provided by it for the speedier trial of those offences. This construction of the section, he maintains, is consonant with the object of the Act as recited in the preamble and does not offend against the inhibition of article 14 of our Constitution. Learned counsel for the respondents, on the other hand, urge that there is no ambiguity whatever in the language used in the sub-section, that there is no indication in the sub-section itself of any restriction or qualification on the power of classification conferred by it on the State government and that the power thus given to the State government cannot be controlled and cut down by calling in aid the preamble of the Act, for the preamble cannot abridge or enlarge the meaning of the plain language of the sub-section. This argument was accepted by the High Court in its application to the other part of the section dealing with selection of "cases" but in judging whether this argument applies, with equal force, to that part of the section I am now considering, it must be borne in mind that, although the preamble of an Act cannot override the plain meaning of the language of its operative

parts, it may, nevertheless, assist in ascertaining what the true meaning or implication of a particular section is, for the preamble is, as it were a key to the understanding of the Act. I therefore, proceed to examine this part of section 5(1) in the light of the preamble so as to ascertain the true meaning of it.

I have already stated that this part of the sub-section contemplates a process of classification of "offences", "classes of offences" and "classes of cases". This classification must, in order that it may not infringe the constitutional prohibition, fulfil the two conditions I have mentioned. The preamble of the Act under consideration recites the expediency of providing for the speedier trial of certain

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offences. The provision for the speedier trial of certain offences is, therefore, the object of the Act. To achieve this object, offences or cases have to be classified upon the basis of some differentia which will distinguish those offences or cases from others and which will have a reasonable relation to the recited object of the Act. The differentia and the object being, as I have said, different elements, it follows that the object by itself cannot be the basis of the classification of offences or the cases, for, in the absence of any special circumstances which may distinguish one offence or one class of offences or one class of cases from another offence, or class of offences or class of cases, speedier trial is desirable in the disposal of all offences or classes of offences or classes of cases. Offences or cases cannot be classified in two categories on the basis of the preamble alone as suggested by the learned Attorney-General.

Learned counsel for the respondents then contended that as the object of the Act as recited in the preamble cannot be the basis of classification, then this part of sub-section 5 (1) gives an uncontrolled and unguided power of classification which may well be exercised by the State government capriciously or "with an evil eye and an unequal band" so as to deliberately bring about invidious discrimination between man and man, although both of them are situated in exactly the same or similar circumstances. By way of illustration it is pointed out that in the Indian Penal Code there are different chapters dealing with offences relating tO different matters, e.g., Chapter XVII which deals with offences against property, that under this generic head are set forth different species of offences against property, e.g., theft (section 378), theft in a dwelling house (section 380), theft by a servant (section 381), to take only a few examples, and that according to the language of section 5(1) of the impugned Act it will be open to the State government to direct all offences of theft in a dwelling house under section 380 to be tried by the Special Court according to the special procedure laid down in the Act leaving all offences of theft by a servant under section 381 to be dealt with in the

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ordinary Court in the usual way. In other words, if a stranger is charged with theft in a dwelling house, he may be sent up for trial before the Special Court under section 380 whereas if a servant is accused of theft in a dwelling house he may be left to be tried under the Code for an offence under section 381. The argument is that although there is no apparent reason why an offence of theft in a dwelling house by a stranger should require speedier trial any more than an offence of theft in a dwelling house by a

servant should do, the State government may nevertheless select the former offence for special and discriminatory treatment in the matter of its trial by bringing it under the Act. A little reflection will show that this argument is not sound. The part of sub-section 5(1) which I am now examining confers a power on the State government to make a classification of offences, classes of offences or classes of cases, which, as said by Chakravartti J., "means a proper classification." In order to be a proper classification so as not to offend against the Constitution it must be based on some intelligible differentia which should have a reasonable relation to the object of the Act as recited in the preamble. In the illustration taken above the two offences are only two species of the same genus, the only difference being that in the first the alleged offender is a stranger and in the latter he is a servant of the owner whose property has been stolen. Even if this difference in the circumstances of the two alleged offenders can be made the basis of a classification, there is no nexus between this difference and the object of the Act, for, in the absence of any special circumstances, there is no apparent reason why the offence of theft in a dwelling house by a stranger should require a speedier trial any more than the offence of theft by a servant should do. Such classification will be wholly arbitrary and will be liable to be hit by the principles on which the Supreme Court of the United States in Jack Skinner v. Oklahoma(1) struck down the Oklahoma Habitual Criminal Sterilisation Act which

(1) 216 US. 535; 86 L. Ed. 1655.

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imposed sterilisation on a person convicted more than twice of larceny but not on one who was convicted of embezzlement on numerous occasions. That sort of classification will, therefore, not clearly be a proper classification such as the Act must be deemed to contemplate.

On the other hand, it is easy to visualise a situation when certain offences, e.g., theft in a dwelling house, by reason of the frequency of their perpetration or other attending circumstances, may legitimately call for a speedier trial and swift retribution by way of punishment to check the commission of such offences. Are we not familiar with gruesome crimes of murder, arson, loot and rape committed on a large scale during communal riots in particular localities and are they not really different from a case of a stray murder, arson, loot or rape in another district which may not be affected by any communal upheaval ? Do not the existence of the communal riot and the concomitant crimes committed on a large scale call for prompt and speedier trial in the very interest and safety of the community ? May not political murders or crimes against the State or a class of the community, e.g., women, assume such proportions as would be sufficient to constitute them into a special class of offences requiring special treatment ? Do not these special circumstances add a peculiar quality to these offences or classes of offences or classes of cases which distinguish them from stray cases of similar crimes and is it not reasonable and even necessary to arm the State with power to classify them into a separate group and deal with them promptly ? I have no doubt in my mind that the surrounding circumstances and the special features I have mentioned above will furnish a very cogent and reasonable basis of classification, for it is obvious that they do clearly distinguish these offences from similar or even same species of offences committed elsewhere and under ordinary circumstances. This differentia quite clearly has a reasona-

ble relation to the object sought to be achieved by the Act, namely, the speedier trial of certain offences. Such a classification will not be
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repugnant to the equal protection clause of our Constitution for there will be no discrimination, for whoever may commit the specified offence in the specified area in the specified circumstances will be treated alike and sent up before a Special Court for trial under the special procedure. Persons thus sent up for trial by a Special Court cannot point their fingers to the other persons who may be charged before an ordinary Court with similar or even same species of offences in a different place and in different circumstances and complain of unequal treatment, for those other persons are of a different category and are not their equals. Section 5(1), in so far as it empowers the State government to direct "offences" or "classes of offences" or "classes of cases" to be tried by a Special Court, also, by necessary implication and intendment, empowers the State government to classify the "offences" or "classes of offences" or "classes of cases ", that is to say, to make a proper classification in the sense I have explained. In my judgment, this part of the section, properly construed and understood, does not confer an uncontrolled and unguided power on the State government. On the contrary, this power is controlled by the necessity for making a proper classification which is guided by the preamble in the sense that the classification must have a rational relation to the object of the Act as recited in the preamble. It is, therefore, not an arbitary power. I, therefore, agree with Harries, C.J. that this part of section 5(1) is valid. if the State government classifies offences arbitrarily and not on any reasonable basis having a relation to the object of the Act, its action will be either an abuse of its power if it is purposeful or in excess of its powers even if it is done in good faith and in either case the resulting discrimination will encounter the challenge of the Constitution and the Court will strike down, not the law which is good, but the abuse or misuse or the unconstitutional administration of the law creating or resulting in unconstitutional discrimination.
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In the present case, however, the State government has not purported to proceed under that part of section 5(1) which I have been discussing so far. It has, on the other hand, acted under that part of the section which authorises it to direct" cases" to be tried by the Special Court, for by the notifications it has directed certain specific cases identified by their individual numbers in the records of the particular than as to be tried by the Special Court. There is ostensibly no attempt at, or pretence of, any classification on any basis whatever. The notifications simply direct certain "cases" to be tried by the Special Court and are obviously issued under that part of section 5(1) which authorises the State government to direct "cases" to be tried by the Special Court. The word "cases" has been used to signify a category distinct from "classes of cases". The idea of classification is, therefore, excluded. This 'means that this part of the sub-section empowers the State Government to pick out or select particular cases against particular persons for being sent up to the Special Court for trial. It is urged by the learned AttorneyGeneral that this selection of cases must also be made in the light of the object of the Act as expressed in its preamble, that is to say, the State government can only select those cases which,

in their view, require speedier trial. Turning to the preamble, I find that the object of the Act is "to provide for the speedier trial of certain offences" and not of a particular case or cases. In other words, this part of section 5 (1) lies beyond the ambit of the object laid down in the preamble and, therefore, the preamble can have no manner of application in the selection of "cases" as distinct from "offences", "classes of offences" or "classes of cases". I agree with Harries C.J. that the preamble cannot control this part of the sub-section where the language is plain and unambiguous. Further, as I have already explained, the object of the Act cannot, by itself, be the basis of the selection which, I repeat, must be based on some differentia distinguishing the ' 'case" from other ' 'cases" and having a relation to the
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object of the Act. It is difficult, if not impossible, to conceive of an individual "case", as distinct from a "class of cases", as a class by itself within the rule of permissible and legitimate classification. An individual case of a crime committed with gruesome atrocity or committed upon an eminent person may shock our moral sense to a greater extent but, on ultimate analysis and in the absence of special circumstances such as I have mentioned, it is not basically different from another individual case of a similar crime although committed with less vehemence or on a less eminent person. In any case, there is no particular bond connecting the circumstances of the first mentioned case with the necessity for a speedier trial. In the absence of special circumstances of the kind I have described above, one individual case, say of murder, cannot require speedier trial any more than another individual case of murder may do. It is, therefore, clear, for the foregoing reasons, that the power to direct "cases" as distinct from "classes of cases" to be tried by a Special Court contemplates and involves a purely arbitrary selection based on nothing more substantial than the whim and pleasure of State Government and without any appreciable relation to the necessity for a speedier trial. Here the law lays an unequal hand on those who have committed intrinsically the same quality of offence.]his power must inevitably result in discrimination and this discrimination is, in terms incorporated in this part of the section itself and, therefore, this part of the section itself must incur our condemnation. It is not a question of an unconstitutional administration of a statute otherwise valid on its face but here the unconstitutionality is writ large on the face of the statute itself. I, therefore, agree with the High Court that section 5(1) of the Act in so far as it empowers the State Government to direct "cases" to be tried by a Special Court offends against the provisions of article 14 and therefore the Special Court had no jurisdiction to try these "cases" of the respondents. In ray judgment, the High Court was right in quashing the conviction
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of the respondents in the one case and in prohibiting further proceedings in the other case and these appeals should be dismissed.

CHANDRASEKHARA AIYAR J.--The short question that arises for consideration in these cases is whether the whole, or any portion of the West Bengal Special Courts Act, X of 1950, is invalid as being opposed to equality before the law and the equal protection of the laws guaranteed under article 14 of the Constitution of India. The

facts which have led up to the cases have been stated in the judgments of the High Court at Calcutta and their recapitulation is unnecessary. I agree in the conclusion reached by my learned brothers that the appeals should be dismissed and I propose to indicate my views as shortly as possible on a few only of the points raised and discussed.

The preamble to the Constitution mentions one of the objects to be to secure to all its citizens equality of status and opportunity. Article 14 provides:

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

Then follow articles 15 and 16, the former prohibiting discrimination on grounds of religion, race, caste, sex, place of birth, or any of them and the latter providing for equality of opportunity in matters of public employment. Leaving aside articles 17 to 19 as irrelevant for present purposes, we proceed to articles 20, 21 and 22, which deal with prosecutions and convictions for offences and cases of preventive detention and prescribe, in rough and general outline, certain matters of procedure. Article 21 is, so to say, the key of this group or bunch and it is in these terms :-

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

There can be no doubt that as regards the cases to be sent before the Special Court or Courts, the Act
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under scrutiny has deviated in many matters of importance from the procedure prescribed by the Criminal Procedure Code for the trial of offences and that this departure has been definitely adverse to the accused. Preliminary inquiry before committal to the sessions, trial by jury or with the aid of assessors, the right of a de novo trial on transfer of a case from one Court to another, have been taken away from the accused who are to be tried by a Special Court; even graver is section 13, which provides that a person may be convicted of an offence disclosed by the evidence as having been committed by him, even though he was not charged with it and it happens to be a more serious offence. This power of the Special Court is much wider than the powers of ordinary courts. The points of prejudice against the accused which appear in the challenged Act have been pointed out in detail in the judgment of Trevor Harries C.J. They cannot all be brushed aside as variations of minor and unsubstantial importance.

The argument that changes in procedural law are not material and cannot be said to deny equality before the law or the equal protection of the laws so long as the substantive law remains unchanged or that only the fundamental rights referred to in articles 20 to 22 should be safeguarded is, on the face of it, unsound. The right to equality postulated by article 14 is as much a fundamental right as any other fundamental right dealt with in Part III of the Constitution. Procedural law may and does confer very valuable rights on a person, and their protection must be as much the object of a court's solicitude as those conferred under substantive law.

The learned Attorney-General contended that if the object of the legislation was a laudable one and had a public purpose in view, as in this case, which provided for the speedier trial of certain offences, the fact that discrimination resulted as a bye-product would not offend the provisions of article 14. His point was that if the inequal-

ity of treatment was not specifically intended to prejudice any particular person or group
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persons but was in the general interests of administration, it could not be urged that there is a denial of equality before the law. To accept this position would be to neutralize, if not to abrogate altogether, article 14. Almost every piece of legislation has got a public purpose in view and is generally intended, or said to be intended, to promote the general progress of the country and the better administration of Government.' The intention behind the legislation may be unexceptionable and the object sought to be achieved may be praiseworthy but the question which falls to be considered under article 14 is whether the legislation is discriminatory in its nature, and this has to be determined not so much by its purpose or objects but by its effects. There is scarcely any authority for the position taken up by the Attorney-General.

It is well settled that equality before the law or the equal protection of laws does not mean identity or abstract symmetry of treatment. Distinctions have to be made for different classes and groups of persons and a rational or reasonable classification is permitted, as otherwise it would be almost impossible to carry on the work of Government of any State or country. To use the felicitous language of Mr. Justice Holmes in Bain Peanut Co. v. Pinson(1) "We must remember that the machinery of government could not work if it were not allowed a little play in its joints." The law on the subject has been well stated in a passage from Willis on Constitutional Law (1936 Edition, at page 579) and an extract from the pronouncement this Court in what is known as the Prohibition Case, The State of. Bombay and Another v.F.N. Balsara(2), where my learned brother Fazl Ali J. has distilled in the form of seven principles most of the useful observations of this Court in the Sholapur Mills case, ChiranLal Chowdhury v. The Union of India and Others(3) Willis says :--

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids

(1) 282 U.S. 499 at p. 501. (3) [1950] S.C.R. 869.
(2) [1951] S.C.R. 682.

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class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. "It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed." "The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

The seven principles formulated by Fazl Ali J. are as

follows :--

"1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

3. The principle of equality does not mean that every law must have universal application for all
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persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

4. The principle does not take away from the State the power of classifying persons for legitimate purposes.

5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

6. If a law deals equally with members of a welldefined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

After these citations, it is really unnecessary to refer to or discuss in detail most of the American decisions cited at the Bar. Their number is legion and it is possible to alight on decisions in support of propositions, apparently even conflicting, if we divorce them from the context of the particular facts and circumstances and ignore the setting or the background in which they were delivered. With great respect, I fail to see why we should allow ourselves to be unduly weighted-down or over-encumbered in this manner. To say this is not to shut out illumining light from any quarter; it is merely to utter a note of caution that we need not stray far into distant fields and try to clutch at something which may not after all be very helpful. What we have to find out is whether the statute now m question before us offends to any extent the equal protection of the laws guaranteed by our written Constitution. Whether the classification, ii any, is reasonable or arbitrary, or is substantial or unreal, has to be adjudicated upon by
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the courts and the decision must turn more on one's commonsense than on over-refined legal distinctions or subtleties.

The Attorney-General argued that if the principle of classification has to be applied as a necessary test, there is a classification in the impugned Act as it says that it is intended to provide for the speedier trial of certain offences; and in the opinion of the legislature certain offences may require more expeditious trial than other offences and this was a good enough classification. But as speedy administration of justice, especially in the field of the law of crimes, is a necessary characteristic of every civilised Government, there is not much point in stating that there is a class of offences that require such speedy

trial. Of course, there may be certain offences whose trial requires priority over the rest and quick progress, owing to their frequent occurrence, grave danger to public peace or tranquillity, and any other special features that may be prevalent at a particular time in a specified area. And when it is intended to provide that they should be tried more speedily than other offences, requiring in certain respects a departure from the procedure prescribed for the general class of offences, it is but reasonable to expect the legislature to indicate the basis for any such classification. If the Act does not state what exactly are the offences which in its opinion need a speedier trial and why it is so considered, a mere statement in general words of the object sought to be achieved, as we find in this case, is of no avail because the classification, if any, is illusive or evasive. The policy or idea behind the classification should at least be adumbrated, if not stated, so that the court which has to decide on the constitutionality might be seized of something on which it could base its view about the propriety of the enactment from the standpoint of discrimination or equal protection. Any arbitrary division or ridge will render the equal protection clause moribund or lifeless.

Apart from the absence of any reasonable or rational classification we have in this case the additional feature
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of a carte blanche being given to the State Government to send any offences or cases for trial by a Special Court. Section 5, sub-clause (1), of the impugned Act is in these terms :--

" A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct."

If the scope or the' meaning of the Act is doubtful, the preamble can be referred to for ascertaining its extent and purpose. But where the operative parts of the Act are clear and there is no ambiguity, the preamble cannot be allowed to control the express provisions. On the terms of section 5, it would be perfectly open to the State Government to send before the Special Court any case, whatever its nature, whether it has arisen out of a particular incident or relates to a crime of normal occurrence, whether the offence involved is grave or simple, whether it needs more expeditious trial or not. Thus, we have before us an enactment which does not make any reasonable classification and which confers on the executive an uncontrolled and unguided power of discrimination.

The question whether there is any proper classification where no standard is set up by the enactment to control executive action has arisen for consideration before the American courts and has been differently answered. Willis says at page 586 :-

"Is it proper classification to put in one class those who get the consent of a board or of an official and into another class those who do not, where no standard is set up to control the action of the board or official ? Some cases answer. this question in the affirmative, while other cases answer it in the negative. Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power, but only by its arbitrary exercise by those upon whom it is conferred."

The case cited in support of this view, Plymouth Coal Co. v. Pennsylvania(1), is really on authority for

(1) 232 U.S. 532.

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any such position. In that case, the statute provided that it was "obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, of such width that, taken in connection with the pillar to be left by the adjoining property owner, will be a sufficient barrier for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water; such width of pillar to be determined by the engineers of the adjoining property owners together with the inspector of the district in which the mine is situated." When the Inspector of Mines wrote to the plaintiff company, Plymouth Coal Co., asking their engineer to meet him so that they can meet the engineer of the neighbouring coal company to decide about the thickness of the barrier pillar to be left unmined between the two adjoining coal properties, the plaintiff company declined to co-operate. Thereupon the Inspector filed a bill of complaint against the plaintiff company for a preliminary and a perpetual injunction from working its mines--without leaving a barrier pillar of the dimensions he thought necessary. The plaintiff company urged that the Act upon which the bill was based "was confiscatory, unconstitutional, and void". The bill of complaint succeeded but it was provided in the final order that it was without prejudice to the Plymouth Coal Co.'s right to get dissolution or modification of the injunction. The matter came up on appeal to the Supreme Court. The legislative Act was challenged by the Plymouth Coal Co. on the grounds that the method of fixing the width of the barrier pillar indicated in the Act was crude, uncertain and unjust, that there was uncertainty and want of uniformity in the membership of the statutory tribunal, that there was no provision of notice to the parties interested, that the procedure to be followed was not prescribed, and that there was noright of appeal. All these objections were negatived. The Court observed on the main contention that "it was competent for the legislature to lay

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down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule." This case is no authority for the position that the mere conferment of naked or uncontrolled power is no violation of the due process or c equality clauses. it is true that the power to deal with a particular situation within the general rule prescribed by the enactment may be conferred on an administrative body or even on a single individual but this entrustment or delegation is subject to the condition that the statute must itself be a valid one, as not being opposed to the 5th or 14th Amendment of the American Constitution, corresponding to articles 14 and 22 of our Constitution.

Discrimination may not appear in the statute itself but may be evident in the administration of the law. If an uncontrolled or unguided power is conferred without any reasonable and proper standards or limits being laid down in the enactment, the statute itself may be challenged and not merely the particular administrative act. Citing the case of Sunday Lake Iron Co. v. Wakefield, Rogers v. Alabama and Concordia Fire Ins. Co. v. Illinois, Prof. Weaver says at page 404 of his compendious book on Constitutional Law under the heading of ' DISCRIMINATION IN THE ADMiNiSTRATION OF THE LAWS':--

"Discrimination may exist in the administration of the laws and it is the purpose of the equal protection clause to secure all the inhabitants of the state from intentional and arbitrary discrimination arising in their improper or prejudiced execution, as well as by the express terms of the law itself. The validity or invalidity of a statute often depends on how it is construed and applied. It may be valid when given a particular application and invalid when given another."

A difficulty was suggested and discussed in the course of the arguments in case article 14 was to receive a very wide interpretation. Under article 12 of the
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Constitution, even a local authority comes within the definition of "the State" and section 13 provides in sub-clause (3) that "'law' includes any ordinance, order, bye-law, rule, regulation, notification..... " Therefore any ordinance or notification issued by a local authority acting under the powers conferred on it by a statute might be challenged as discriminatory and if this is permitted, the work of administration might be paralysed altogether. This, no doubt, is a possible result but the difficulty envisaged is by no means insurmountable. If the statute or the enactment makes a reasonable or rational classification and if the power conferred by the statute on a local authority is exercised to the prejudice of a person visa vis other persons similarly situated, two answers would be possible. One is that there was no discrimination at all in the exercise of the power. The second is that the power was exercised in good faith within the limitations imposed by the Act and for the achievement of the objects the enactment had in view and that the person who alleges that he has been discriminated against will have to establish mala fides in the sense that the step was taken intentionally for the purpose of injuring him; in other words, it was a hostile act directed against him. If the legislation itself is open to attack on the ground of discrimination, the question of any act done by a local or other authority under the power or powers vested in it will not arise. If the Act itself is invalid on the ground that it is ultra vires, the notification, ordinance, or rule falls to the ground with it, but if the Act remains, the validity of the notification or order etc., when impugned, may have to be considered independently.

There may be cases where individual acts of state officials are questioned and not the legislation itself. As regards such cases, Willoughby states at page 1932 of his Volume III on the Constitution of the United States :--

"It is, however, to be observed in this connection, that the prohibitions apply to the acts of State officials even when they are done in pursuance of some
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State legislative direction, for, while no constitutional objection may be made to any law of the State, it has been held that its officials may exercise their public authority in such a discriminatory or arbitrary manner as to bring them within the scope of the prohibitions of the Fourteenth Amendment. This, it will be remembered, was one of the grounds upon which, in Yick Wo v. Hopkins (118 U.S. 356) it was held that due process of law had been denied. In Tarrance v. Florida (188 U.S. 519) the administration of a State law and not the law itself was challenged and the court said: 'Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law.'"

There is only one other point that I would like to deal

with. Trevor Harries C.J. has taken the view that section 5 of the Act would have been unexceptionable had it only provided for the trial by a Special Court of certain offences or classes of offences or certain classes of cases and that in his opinion the discrimination arose by the provision for the trial of cases, as distinguished from classes of cases. It is rather difficult, however, to appreciate this distinction. If the statute makes no classification at all, or if the classification purported to be made is not reasonable or rational but is arbitrary and illusory, as in this case, Section 5 would be void as contravening article. 14. It is no doubt true that totally different considerations might arise if specified offences or groups of offences in a particular area or arising out of a particular event or incident were to be,tried by a Special Court but this is not the case here. I am unable to see how if the Act merely provided that certain "classes of cases" as distinguished from "cases" should be tried by a Special Court, the attack against discrimination could be avoided, as even then the test of rationality or reasonableness would still remain to be satisfied. If the Act does not enunciate any principle on the basis of which the State Government could select offences or classes of offences or cases or classes of cases and the State Government is left free to make
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any arbitrary selection according to their will and pleasure then the Act is void. On this point, I would invite special attention to the view taken by Mr. Justice Das Gupta in the following passage of his Judgment:--

"The Act lays down no principle on which selection of "classes of offences" or "classes of cases" should be made by the State Government. The State Government may even arbitrarily determine the classes of cases to be tried by the Special Court and if it does so its action will be well within its powers conferred by the Act. The Act indicates no basis whatsoever on which such classification should be made. I am of opinion that the whole Act is ultra vires the Constitution and deletion of the word "cases" from section 5 would not save the rest of the Act from being invalid."

Bose J.--We are concerned here with article 14 of the Constitution and in particular with the words "equality before the law" and "equal protection of the law." Now I yield to none in my insistence that plain unambiguous words in a statute, or in the Constitution, must having regard to the context, be interpreted according to their ordinary meaning and be given full effect. But that predicates a position where the words are plain and unambiguous. I am clear that that is not the case here.

Take first the words "equality before the law". It is to be observed that equality in the abstract is not guaranteed but only equality before the law. That at once leads to the question, what is the law, and whether "the law" does not draw distinctions between man and man and make for inequalities in the sense of differentiation? One has only to look to the differing personal laws which are applied daily to see that it does; to trusts and foundations from which only one particular race or community may benefit, to places of worship from which all but members of particular faith are excluded, to cemeteries and towers of silence which none but the faithful may use, to the
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laws of property, marriage and divorce. All that is part and parcel of the law of the land and equality before it in any literal sense is impossible unless these laws are swept

away, but that is not what the Constitution says, for these very laws are preserved and along with equality before the law is also guaranteed the right to the practice of one's faith.

Then, again, what does "equality" mean? All men are not alike. Some are rich and some are poor. Some by the mere accident of birth inherit riches, others are born to poverty. There are differences in social standing and economic status. High sounding phrases cannot alter such fundamental facts. It is therefore impossible to apply rules of abstract equality to conditions which predicate in equality from the start; and yet the words have meaning though in my judgment their true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formula which have their essence in mere form. They constitute a frame-work of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready-made generalisations like classification. I have no doubt those tests serve as a rough and ready guide in some cases but they are not the only tests, nor are they the true tests on a final analysis.

What, after all, is classification? It is merely a systematic arrangement of things into groups or classes, usually in accordance with some definite scheme. But the scheme can be anything and the laws which are laid down to govern the grouping must necessarily be arbitrarily selected; also granted the right to select, the classification can be as broadbased as one pleases, or it can be broken down and down until finally just one solitary unit is divided off from the rest. Even those

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who propound this theory are driven to making qualifications. Thus, it is not enough merely to classify but the classification must not be 'discriminatory', it must not amount to 'hostile action', there must be 'reasonable grounds for distinction', it must be 'rational' and there must be no 'substantial discrimination'. But what then becomes of the classification? and who are to be the judges of the reasonableness and the substantiality or otherwise of the discrimination? And, much more important, whose standards of reasonableness are to be applied? --the judges'?--the government's?--or that of the mythical ordinary reasonable man of law which is no single man but a composite of many men whose reasonableness can be measured and gauged even though he can neither be seen nor heard nor felt? With the utmost respect I cannot see how these vague generalisations serve to clarify the position. To my mind they do not carry us one whit beyond the original words and are no more satisfactory than saying that all men are equal before the law and that all shall be equally treated and be given equal protection. The problem is not solved by substituting one generalisation for another.

To say that the law shall not be discriminatory carries us nowhere for unless the law is discriminatory the question cannot arise. The whole problem is to pick out from among the laws which make for differentiation the ones which do not offend article 14 and separate them from those which do. It is true the word can also be used in the sense of showing favouritism, but in so far as it means that, it suffers from the same defect as the 'hostile action' test. We are then

compelled to import into the question the element of motive and delve into the minds of those who make the differentiation or pass the discriminatory law and thus at once substitute a subjective test for an objective analysis.

I would always be slow to impute want of good faith in these cases. I have no doubt that the motive, except in rare cases, is beyond reproach and were it not for the fact that the Constitution demands

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equality of treatment these laws would, in my opinion, be valid. But that apart. What material have we for delving into the mind of a legislature? It is useless to say that a man shall be judged by his acts, for acts of this kind can spring from good motives as well as bad, and in the absence of other material the presumption must be overwhelmingly in favour of the former.

I can conceive of cases where there is the utmost good faith and where the classification is scientific and rational and yet which would offend this law. Let us take an imaginary case in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub-standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a judge is called upon to crystallise a vague generality like article 14 into a concrete concept. Even in England, where Parliament is supreme, that is inevitable, for, as Dicey tells us in his Law of the Constitution,

"Parliament is the supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no

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less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments."

This, however, does not mean that judges are to determine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a a narrow margin within which judges, who are human, will always be influenced by subjective factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the

legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it fails to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it.

I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The common law of England grew up in that way. It was gradually added to as each concrete case arose and a decision was given ad hoc on the facts of that particular case. It is true the judges who thus contributed to its growth were not importing personal predilections into the result and merely stated what was the law applicable to that particular ease. But though they did not purport to make the law and merely applied

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what according to them, had always been the law handed down by custom and tradition, they nevertheless had to draw for their material on a nebulous mass of undefined rules which, though they existed in fact and left a vague awareness in man's minds, nevertheless were neither clearly definable, nor even necessarily identifiable, until crystallised into concrete existence by a judicial decision; nor indeed is it necessary to travel as far afield. Much of the existing Hindu law has grown up in that way from instance to instance, the threads being gathered now from the rishis, now from custom, now from tradition. In the same way, the laws of liberty, of freedom and of protection under the Constitution will also slowly assume recognisable shape as decision is added to decision. They cannot, in my judgment, be enunciated in static form by hidebound rules and arbitrarily applied standards or tests.

I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-boundas in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide t, he present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these "laws" which have been called in question offend a still greater law before which even they must bow?

Doing that, what is the history of these provisions ? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few

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pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel

forms of procedure set forth in Ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection on the Judges and the Courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary Courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, article 14 is but a reflex of this mood.

What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiassed views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in article 14 does not mean the "legal precepts which are actually recognised and applied in the tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise, them." (Dean Pound in 34 Harvard Law Review 449 at 452). I grant that this means that the same things will be viewed differently at different times. What is
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considered right and proper in a given set of circumstances will be considered improper in another age and vice versa. But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.

This is no new or startling doctrine. It is just what happened in the cases of blasphemy and sedition in England. Lord Sumner has explained this in Bowman's case(1) and the Federal Court in Niharendu Dutt Majumdar's case(2) and so did Puranik J. and I in the Nagpur High Court in Bhagwati Charan Shukla's case(3).

Coming now to the concrete cases with which we have to deal here. I am far from suggesting that the departures made from the procedure prescribed by the Criminal Procedure Code are bad or undesirable in themselves. Some may be good in the sense that they will better promote the ends of justice and would thus form welcome additions to the law of the land. But I am not here to consider that. That is no part of a Judge's province. What I have to determine is whether the differentiation made offends what I may call the social conscience of a sovereign democratic republic. That is not a question which can be answered in the abstract. but, viewed in the background of our history. I am of opinion that it does. It is not that these laws are necessarily bad in themselves. It is the differentiation which matters; the singling out of cases or groups of cases, or even of offences or classes of offences, of a kind fraught with the most serious consequences to the individuals concerned, for special, and what some would regard as peculiar, treatment.

It may be that justice would be fully done by following

the new procedure. It may even be that it would be more truly done. But it would not be satisfactorily done, satisfactory that is to say, not from

(1) [1917] A.C. 406 at 454, 466 and 467.
(2) [1942] F.C.R. 32 at 42. (3) I.L.R. 1946 Nag. 865 at 878 and 879.

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the point of view of the governments who prosecute, but satisfactory in the view of the ordinary reasonable man, the man in the street. It is not enough that justice should be done. Justice must also be seen to be done and a sense of satisfaction and confidence in it engendered. That cannot be when Ramchandra is tried by one procedure and Sakharam, similarly placed, facing equally serious charges, also answering for his life and liberty, 'by another which differs radically from the first.

The law of the Constitution is not only for those who govern or for the theorist, but also for the bulk of the people, for the common man for whose benefit and pride and safeguard the Constitution has also been written. Unless and until these fundamental provisions are altered by the constituent processes of Parliament they must be interpreted in a sense which the common man, not versed in the niceties of grammar and dialectical logic, can understand and appreciate so that he may have faith and confidence and unshaken trust in that which has been enacted for his benefit and protection.

Tested in the light of these considerations, I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of article 14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, or whether it is an experiment in speedier trials made for the good

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of society at large. It matters not how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable unbiassed and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today ? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.

Appeals dismissed.

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JUDIS