Scope of Personal Liberty during Emergency—Makhan Singh Tarsikka *v.* The State of Punjab.*

This is yet another provocative decision in the field of personal liberty comparable in importance perhaps only to the case of *A. K. Gopalan* v. *The State of Madras*,[1] the first test case on personal liberty and detention. The Supreme Court has by its present ruling convincingly proved to the juristic world the pattern of judicial thinking concerning the concept of personal liberty already made known in its earliest constitutional pronouncement in *Gopalan's* case.

It may not be out of place to quote here the opinion of an eminent jurist who, while drawing a comparsion between the English and the Indian systems of law providing for the remedy of *habeas corpus* in cases of deprivation of personal liberty by preventive detention, strikes the following significant note: "But this is exactly the difference between the two systems of law: in English law in case of emergency the remedy of *habeas corpus* remains in principle available to detenus though the power of the judges to go into the grounds of detention is curtailed; in India the power of the judges in normal *habeas corpus* cases (under the Preventive Detention Act) is already cut down to an "emergency" level, while in case of proper emergency proclaimed under the provisions of Part XVIII, the writ of *habeas corpus* may be entirely suspended as in the United States."[2] This pertinent remark of the learned professor, made in the fifties, concerning the state of the law in India providing for the remedy of *habeas corpus*, anticipates a ruling such as the one laid down by the Supreme Court in the case under consideration, wherein the constitutional validity of certain provisions of the Defence of India Act and the relevant statutory Rules was challenged by *habeas corpus* petitions under s. 491(1)(b) of the Criminal Procedure Code.

Broadly speaking, one cannot help agreeing with the conclusions arrived at by the Supreme Court in this case and, more particularly, with the construction put upon Article 359 of the Constitution of India and its impact not only upon Articles 32 and 226 of the Constitution, but also upon section 491(1)(b) of the Criminal Procedure Code all of which confer upon the detenus the remedy of *habeas corpus*, so long only as the President refrains from exercising his power under Art. 359.

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* A.I.R. 1964 S.C. 381.

1. A I.R. 1950 S.C. 27.
2. C. H. Alexandrowicz, *Constitutional Developments in India*, p. 30.

One heartening feature of the majority view, *inter alia*, is the Court's refusal, for whatever reason, to be drawn into the merits of the controversy between the parties relating to the two rival constructions that may arise under Art. 359, one in favour of the grant of power to the President and the other in favour of upholding the citizens' fundamental rights. The other aspects of the judgment which merit consideration are respectively the repudiation by the Court of the theoretical nicety of the rights being kept alive despite the said exercise of power by the President vested in him under Art. 359, as well as its disallowance of the "academic declaration" sought for by one of the petitioners for invalidating the impugned Act and the relevant statutory Rules, without their seeking at the same time the consequential relief of invalidation of the detention orders due, obviously, to the disablement caused by the Presidential Order under Art. 359.

Justice Subba Rao in his dissenting judgment so construes s. 491(1)(b) of the Criminal Procedure Code as to afford the detenus who are being detained under the Defence of India Act the remedy of *habeas corpus* (denied to them under Articles 32 and 226 of the Constitution), not for the limited purpose of impeaching the detention on the ground of extrinsic, collateral acts such as fraud, mala fides and the like, nor even on the ground of the authority acting without jurisdiction or in excess of it, but for the very purpose of challenging it as amounting to an infringement of fundamental rights generally (though not for the enforcement of the petitioner's fundamental right as such), the Presidential order under Article 359 notwithstanding. The learned judge's opinion, albeit significant for its forceful logic and succinct presentation, does not commend itself to us.

However, the majority judgment too cannot escape criticism due mainly to the Court's reluctance to bring out in bold relief the true scope and operation of the concept of the freedom of person during an emergency. One is naturally disappointed that the Court failed to point out the anomaly arising out of the simultaneous existence and operation of two emergency laws, the Preventive Dentention Act and the Defence of India Act—one superimposed upon the other—, and the consequent cumulative effect of vesting in the Government by delegation, wide unguided and perhaps arbitrary discretionary powers to choose between the laws in cases of detention, which might offend not only against Art. 14 of the Constitution but also against the spirit of the cardinal constitutional doctrine of *delegatus non potest*

delegare. Be that as it may, the Supreme Court could have at least suggested that the Government would be well advised to have recourse in ordinary cases of dentention only to the Preventive Detention Act in which, we find, the incorporation of the accepted canons of procedural due process. Exceptional cases that undermine the security of the State or tend to overthrow it could be promptly and effectively dealt with under the Defence of India Act. A favourable response on the part of the Government to such a wholesome and timely advice of the Supreme Court would vindicate the true nature of our democracy whose presumptive evidence can be none other than the "rule of law", unmistakably proclaimed in our Constitution.

To conclude, it may be said that while one would unhesitatingly approve of the law laid down by the Supreme Court in this emergency case affecting the freedom of person, one cannot justifiably accept what would amount to an attempt on the part of the Supreme Court to equate the Preventive Detention Act with the Defence of India Act, inasmuch as it claimed to have acted even in *Gopalan's* case—a clear non-emergency case arising under the Preventive Detention Act—on the emergency law laid down by the House of Lords in England in the leading cases of *Liversidge* v. *Sir John Anderson*[3] and *Rex* v. *Halliday.*[4] Strange as it may seem, even the abortive Constitution (Eighteenth) Amendment Bill, recently proposed to Parliament by government with the avowed object of modifying Article 359 of the Constitution, is a sequel to (with intent to neutralise) the warning administered by the Supreme Court which, while interpreting Art. 359, adverted to the possibility of the Government running the risk of being sued for its illegal actions during emergency, once the Presidential Order under Article 359 terminated. An attempt of this kind which is so out of touch with the spirit of democracy and rule of law, solemnly enshrined in Part III of the Constitution, and so calculated to defeat the expectations of the judiciary, the protector and guarantor of fundamental rights, is not a good advertisement for the Government.

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3. [1942] A.C. 206.
4. [1917] A.C. 260.

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