

A Jurisprudential Analysis—Bhim Singh v. State of Jammu & Kashmir

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Cite as: (2009) PL February 7 Factual appreciation The facts of this case are quite simple, but the jurisprudential implications of the judgment remain enormous. Simply put, a member of the Legislative Assembly of the State of Jammu and Kashmir was arrested by the police. The unfortunate Mr Bhim Singh, who was so arrested, was not produced before the Magistrate for a period of four days and further was kept hidden in an undisclosed location. Needless to say, the Supreme Court eviscerated the State machinery for such flagrant violations of human rights. It is clear that the depredations visited upon Mr Bhim Singh were a result of a particular session of the Legislative Assembly where his vote may have been crucial. Since Mr Bhim Singh had later been freed, the courts were left with a dilemma as to the remedy to be provided to him. Thus, the Apex Court ordered the State to grant him compensation.

Jurisprudential questions involved There are two interesting questions which arise from the judgment. The first is the hierarchical relationship between the State and citizen. The second interesting question is whether monetary compensation is a suitable remedy for a victim of State oppression.

Early jurisprudential thought Since the flowering of jurisprudential thought, the earliest writers such as Austin¹ and even Bentham², envisaged a system of society having a "political superior". Thus the question of the State and citizen being the same was not possible. Roscoe Pound³ further reinforced this notion of a hierarchical relationship, whereby the State was the overlord and protector of all its citizens when he referred to institutional interests. Thus at this point of time when a hierarchical relationship between the State and citizen was the preponderant thought, we find that courts⁴ all over stuck to an absolute doctrine of sovereign immunity.

Evolution of the concept of State However, further on came the writings of authors such as Duguit⁵ and Olivercrona⁶, the resurgence of the social contractualists and the propositions of Joseph Raz⁷ and Oliver McCormick⁸. All these authors did argue in their unique way that the State was a manifestation of social need, thus there could never ever be any hierarchical relationship between the two. Social contractualists did try and bridge the gap between the State and citizen. From the prevailing relationship of divine right and serfdom, which existed between the two parties, it was changed into one of contract. Further on, Duguit referred to the concept of social solidarity whereby he referred to society and State as mere manifestations of social groups. Similarly, other authors have reduced the importance of the State. Simply put, the modern day view seems to be that a group of individuals form a society. Society thus needs to ensure its safety and advancement. Thus a division of labour takes place within society, out of which one of the organs, which emerges, is the organ of State. Thus on a juristic plane, the State and the citizen would always be seen through a parallel prism.

Limit of habeas corpus In the present case, the liability of the State was in question. Now the writ of habeas corpus, which is a guarantee against State arbitrariness, only provides for the freedom of the individual who has been so detained⁹. Our Constitution itself provides for this remedy against arbitrary arrest and detention. However, as we can see this remedy has a limit and that limit is of producing the detenu before the court, any further remedy cannot be sought by the detenu under the aegis of this writ. However, as can be seen, this writ does not satisfy the demands for redress and compensation, which are the natural demands of any detenu. Thus we can clearly see the evolution of jurisprudential thought here.

Rejection of superiority of State During the drafting of the Constitution, the principle of absolute sovereign immunity was in vogue¹⁰. However, to ensure a guarantee against State action, certain remedies and rights were made available to the citizens. However, these remedies did not lead to the equation of the State and citizen on the same plane. Rather they were only reflexive in nature. Thus in using a remedy against a State, the remedy would only return the situation to status quo ante, no further action was possible. Thus in the case of habeas corpus, the detenu would be returned to his original free state but no further remedy would be made possible for him.

In the present case the Court narrowed the space between the State and citizen. By ordering the State to pay compensation to the detenu, we see the weakening of the original doctrine of sovereign immunity and we see a changing conception of the State. By making the State pay compensation the Supreme Court established the following principle that the State and the citizen are on the same juristic plane. Thus the principle of compensation, which would apply to the rectification of a private wrong like trespass or negligence, would apply to a public wrong also. Thus the Court has recognised that the State is the manifestation of the social compulsion, which leads to the creation of some mechanism for governance¹¹. In the present case we can find clear underpinnings of the philosophy of Duguit and Joseph Raz as well. Thus the rejection of the notion of superiority of the State can clearly be seen here.

Payment of compensation Further, it is to be noted that the Court has recognised that the payment of compensation may be an effective tool for redressal. If we read the work of Posner¹², we realise that monetary compensation would actually be the most economical way to deal with any wrong which is perpetrated. If monetary compensation is given to any individual it serves the dual purpose of not only compensating him for the lost hours of productivity but psychologically gives a feeling of severance from the pain the person had to undergo. Thus through the

prism of society as well as the individual compensation is extremely important.

Compensation to victims is a recognised principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is now taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them. The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express constitutional provision and of judicial precedents.

Expansion of Article 32 The power given to the Supreme Court under Article 32, which itself is a fundamental right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed by the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoers for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be made readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate¹³.

Judicial discretion and American realism Thus in short the Supreme Court in this particular judgment has recognised the principle of natural rights of any citizen. Thus the role of a judge is to ultimately protect the natural rights of the citizen, which are controlled in a manner by the State.

It seems that the Court realised that the citizen retains all his rights but grants to the State only the right of interpretation. In the present case by appreciating the impact of this detention upon the detenu, it is clear that the Supreme Court has followed a model which is closely allied to American realism. In the present case by expanding the scope of the remedy of Article 32, the Court has analysed the societal need for justice and fairness in administration which can only be clearly elucidated through compensation¹⁴.

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