

# CASE COMMENTS

## BHARAT KUMAR v. STATE OF KERALA: A CRITICAL REVIEW

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### INTRODUCTION

*Bandhs* are a legitimate form of political protest against governmental inaction, or studied silence, or refusal to concede even the just demands of people. Though *bandhs* have derived their origins from 'hartals' called by Mahatma Gandhi to protest against any act or legislation of an alien government, today they are being used frequently by political parties to meet political ends, and often take a violent turn with large scale loss of life and property. In this context, the judgment of the Kerala High Court that *bandhs* are unconstitutional, consequently upheld by the Supreme Court, assumes great importance.

### A BRIEF SUMMARY OF FACTS

The petitioners in this case were two private citizens and the various chambers of commerce in the State of Kerala. The State of Kerala, the Director General of Police and five registered All India political parties were impleaded as respondents. It was contended that *bandhs* should be declared unconstitutional as they violate Articles 19 and 21 of the Constitution and that they also contravene the Directive Principles of State Policy and the Fundamental Duties enumerated in the Constitution. The petitioners further prayed that the calling for and holding of *bandhs* should be declared an offence under the Indian Penal Code.

The Kerala High Court held that the calling for a *bandh* by any association, organisation or political party and its enforcement, is illegal and unconstitutional. The court also took the view that the organisations which call for such *bandhs* and enforce them are liable to compensate the Government, the public and private citizens for the loss suffered by them due to the resulting destruction of private and public property.<sup>1</sup> On appeal, the Supreme Court upheld the decision of the High Court, merely stating that the reasoning of the High Court was sound, and that no interference of their part was necessary.<sup>2</sup>

### WHAT THE COURT SAID

The Court, by declaring that *bandhs* violate fundamental rights and are hence unconstitutional, has apparently accepted the argument that fundamental rights are enforceable not only against the 'State', but also against private citizens.

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1 *Bharat Kumar v. State of Kerala*, 1997 (2) KLT 287 (FB).

2 *The Communist Party of India (M) v. Bharat Kumar and others* (unreported); The decision was given by a three judge bench presided by the Chief Justice of India.

This is in direct contravention of the Supreme Court ruling in *State of West Bengal v. Subodh Gopal Bose*,<sup>3</sup> where the Court declared that the Fundamental Rights guaranteed in Part III of the Constitution serve as protection only against State action.<sup>4</sup> It was the contention of the petitioners that a *bandh* called for and enforced by a political party violates their Fundamental Rights enshrined under Articles 19 and 21.<sup>5</sup> It is submitted that the High Court, by upholding the contention of the petitioners, has ignored past decisions of the Supreme Court which have held that the rights guaranteed under Part III of the Constitution are available only against 'state action'.<sup>6</sup> Since political parties, which consist of private citizens, are not 'state' for the purposes of Article 12,<sup>7</sup> their actions do not constitute 'State Action' for the purposes of Part III of the Constitution and thereby, cannot violate the Fundamental Rights of citizens enshrined in the same.

The Court, in arriving at its decision, made a fundamentally flawed assumption that all *bandhs* imply a threat to all citizens, that any failure on their part to honour the call would result in damage to life or property.<sup>8</sup> The Court has passed a blanket ban on all *bandhs*, disregarding the fact that *bandhs* are

3 AIR 1956 SC 108.

4 From a plain reading of Part III of the Constitution, particularly with reference to Article 12, which defines 'State', it is evident that the Fundamental Rights are protection only from 'State' action, following the development of the concept in the context of royal absolutism, where protection from State excesses was required. The Constitution of India governs the relationship between State and civil society, and the Fundamental Rights enshrined are to ensure that the State, meant to protect and uphold the rights of the citizens, does not violate them itself. In case of violation of rights by a private individual, the course of action lies under the ordinary law of the land - civil, criminal and tort.

5 They claimed that their right to move freely through the territory of India [Art. 19(1)(d)], right to practice any profession or carry on any occupation, trade or business [Art. 19(1)(g)], as well as their right to education, right to use public roads, right to locomotion, and right to medical treatment (all protected under Article 21) were violated whenever a *bandh* is called.

6 *P.D. Shamdasani v. Central Bank of India Ltd.*, AIR 1952 SC 59; *Vidya Verma v. Shiv Narayan*, AIR 1956 SC 108.

7 The question of what constitutes 'State' for the purposes of Part IV has been extensively discussed by a Constitutional Bench in *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487. Justice Bhagwati discussed in detail the various factors relevant for determining whether a body is an agency or instrumentality of the State, and hence 'State' for the purposes of Article 12, which he summarised as follows:

- (a) If the entire share capital of the corporation is held by the government, it would go a long way towards indicating that the corporation is an agency or instrumentality of the government.
- (b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with government character.
- (c) Whether the corporation enjoys monopoly status which is State conferred or State protected.
- (d) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
- (e) If the functions of the corporation are of public importance and are closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of the government.
- (f) If a department of government is transferred to a corporation, it would be a strong factor supporting this inference of the corporation being an instrumentality or agency of the government.

8 *Bharat Kumar's case*, 1997 (2) KLT 287 (FB).



essentially an expression of discontentment and protest, and that violence is neither inherent nor always pre-planned. In failing to distinguish between justified and unjustified *bandhs*, the Court has effectively destroyed a perfectly legal method of political protest, so essential in a democratic society.

### WHAT THE COURT COULD HAVE SAID

The Supreme Court of India has on a number of occasions recognised that, if an individual is unable to enjoy his guaranteed rights as a result of State inaction, it can be considered to be a violation of the individual's Fundamental Rights.<sup>9</sup> In the present case, by pointing out that the failure of the State to take action under the relevant provisions of the Code of Criminal Procedure<sup>10</sup> and the Indian Penal Code<sup>11</sup> amounted to a violation of the citizens' Fundamental Rights, the Court would have had the jurisdiction to grant the appropriate relief. It is submitted that this justification for the declaration made by the Court would be more rational and based on sound reasoning, unlike the justification used by both the High Court and the Supreme Court, that the Fundamental Rights of the people as a whole cannot be subservient to the claim of Fundamental Rights of an individual or only a section of the people.<sup>12</sup>

### CONCLUSION

It is submitted that it is neither desirable to ban *bandhs* entirely, nor leave them entirely unregulated. The economic loss caused and the hardship suffered by the calling of a *bandh* is too great to be ignored. The Court must try to strike a balance between the freedoms guaranteed by the Constitution, and the degree of social control permissible. In its efforts to grant relief to those affected by *bandhs* however, the Court has gone too far, its judgment guided by emotion rather than by sound legal reasoning.

Drawing an analogy from the Industrial Dispute Act and its handling of strikes, differentiating between legal, illegal, justified and unjustified strikes,<sup>13</sup> the Court should have attempted to classify *bandhs* as legal or illegal, instead of imposing a blanket ban on all *bandhs*. This would allow for peaceful expressions of protest, and at the same time prevent undue hardship to the public. By declaring *all bandhs* as unconstitutional, the Court has, in effect, violated the very rights it has sought to uphold and has deprived the working class of a very strong bargaining weapon.

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9 This principle has evolved through a host of environmental pollution cases decided by the Supreme Court, one of the notable ones being *Indian Council for Environmental Legal Action v. Union of India*, AIR 1996 SC 1446.

10 See, Chapter 10: Maintenance of Public Order and Tranquillity.

11 See, Chapter 8: Of Offences against Public Tranquillity.

12 This was in response to the respondents contention that the imposition of any restriction on the right of a political party to call for a *bandh* would be a violation of the Fundamental right of the political party, protected by Articles 19(1)(a) and 19(1)(b).

13 See generally, Chapter 5 of the Act dealing with strikes and lockouts.