Law, Culture and Politics of Hartal

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Hartal is the extreme form of expression of protest in a democratic society, argues DR ZAHIDUL ISLAM BISWAS.

The common people of Bangladesh hold a confused perception about the legality of hartal. They generally consider hartal as legal and recognise it as a democratic right. But after experiencing devastating hartals over the years, they frequently ask a question, how such hartals can be legal, and how the destruction in the name of hartal can be a matter of right of the hartal announcers. These questions are, however, already answered clearly by the Supreme Court of Bangladesh. What is still a moot question is how the hartal as a democratic right can be observed legally without violating others’ rights. Another important question is whether the culture of hartal has outlived its purpose. This article deals with all these questions.

The question of legality of hartal, so far I am aware of, came before the Supreme Court for the first time in 1999, when a division bench of the High Court Division of the Supreme Court issued a suo moto rule seeking explanation as to why call for and enforcement of hartal would not be declared illegal and a criminal offence. After hearing the case, the High Court delivered a verdict that declared that hartal is a political and constitutional right, but violence and coercion for or against hartal is a criminal offence (Khondaker Modarresh Elahi Vs. The Government of the People’s Republic of Bangladesh, 21 BLD 352).

The High Court Division bench observed, ‘call for hartal per se is not illegal’; rather, it is a historically recognised democratic right. Indeed, ‘where an act is meant to be nothing but an expression of protest such an act cannot be said to violate the fundamental rights of the citizens. The calling for hartal, not accompanied by any threat, will be only an expression guaranteed as a fundamental right under the Constitution.’ Any political organisation, therefore, may call hartal by extending invitation to the public in general or to a particular class or group of people. However, the freedom as enunciated in the constitutional provisions cannot be construed as a license for illegal actions or incitement to violence and crime. Hence, ‘any attempt to enforce it or ensure that the hartal is observed makes the call illegal, resulting in interference with the individual right.’ At the same time, any kind of provocation, instigation, intervention and aggression by anti-hartal...
activists to foil the hartal is also unlawful.

The court after taking note of the news of violence in hartals appearing in daily newspapers summarised chapter VIII of the Penal Code, which is on the offences against public tranquility and then interpreted Section 141 of the Code by holding that according to the fifth clause of Section 141 of the Penal Code a procession or other activities of five or more persons in support of or to force hartal shall be unlawful assembly punishable under Section 143 of the Penal Code. Similarly, every assembly of five persons or more to protest or to oppose hartal shall be an unlawful assembly. Activities of the members of these assemblies shall be cognisable offence according to their behaviour under the relevant sections contained in chapter VIII of the Penal Code. The Division Bench then directed 'the Criminal Courts and the police' to act accordingly.

The verdict was appealed against, and after eight years of the appeal, the Appellate Division of the Supreme Court delivered its judgment in December 2007. The judgment has two important aspects; on the one hand, it upheld the High Court Division's decision that hartal is a political and constitutional right, on the other hand, it overturned its declaration that 'violence and coercion for or against hartal is a criminal offence' (Abdul Mannan Bhuiya and others vs the State and others, 2008 MLR). This overturn was based on a technical legal ground. As per the court's observation, an offence has already been defined in the Penal Code as to denote a thing punishable by Penal Code, and in the Code of Criminal Procedure as to mean an act or omission made punishable by any law for the time being in force. In such view of the matter, offence can be created only by a law, by an act of the Parliament and not by any legal pronouncement by any court. Hence, the High Court Division had no authority in entering into the field of making law and to declare the pro-hartal and anti-hartal activities as cognisable offence.

This observation of the Appellate Division could have raised a question in the public mind whether the Appellate Division of the Supreme Court allows violence in hartals by overturning the High Court's decision. In order to dispel any confusion in the public mind, the Appellate Division cleared its position by observing that: ' [w]e have no hesitation in holding that enforcing hartal by force leading to violence, death and damage to the life and property of the citizens is not only illegal but also liable to be detested and punished as per law of the land in existence. These are already cognizable offences under the Penal Code and other Penal laws of the land. ... and any Government worth the name will be duty bound to protect the people by bringing to book the offenders regardless of what party they belong.'

These judgments look impressive, but in reality, they make us face a complex politico-legal situation. On the one hand, the judgments declare that hartal, as a democratic right, should be observed as well as should be allowed to be observed peacefully without resorting to any illegal activities. On the other hand, they warn the callers of hartal that they cannot resort to any form of violence or violate any individual's rights in the name of hartal, and remind the government about its duty to protect the rights of people from the harm of hartal. Here is the complexity, if not a contradiction. Is it possible to observe hartal without violating some people's fundamental rights such as right to liberty, movement, work, conduct business and so on? If it is possible, then what will be the character of that hartal? Or can that situation be defined as 'hartal' at all?

There is no legal definition of hartal in Bangladesh, nor has the Supreme Court in the said judgments defined it. The Appellate Division judgment observed that 'hartal or strike per se enforced through persuasion unaccompanied by threat, intimidation, force or violence is a democratically recognised right of the citizens guaranteed under the Constitution.' This observation, however, does not help us imagine the picture of a legally recognised hartal. Indeed, in the absence of any definition of, or norms for hartal, it is tough to realise the legal or normative character of hartal, but we can certainly examine the history and culture of hartal to sketch its actual character.
Hartal is originally a Gujarati expression, which signifies closing down of shops and warehouses with the object of realising a demand. Essentially a mercantile practice, it acquired political significance in the 1920s and 1930s when Mahatma Gandhi institutionalised it by organising a series of anti-British general strikes by the name 'hartal'. After that, hartal became a way to protest throughout the Indian sub-continent. During the period between the 1920s and 1950s, there were many hartals called against the British rule. From the 1960s, political activists were increasingly organising hartal, which by then appeared to them to be a stronger political weapon. There had been hartal for days together on the eve of the Bangladesh War of Liberation. Indeed, politics of hartal had played decisive role in mobilising people on behalf of the Liberation War.

In independent Bangladesh, hartal has become a very frequently used political tool for agitations since the 1980s. In the face of recurring hartal, called mostly on the issue of legality, the regime of Hussain Mohammad Ershad (1982-1991) collapsed. After the restoration of democracy in 1991, both Awami League and the Bangladesh Nationalist Party (BNP)-led opposition have used the weapon of hartal to put pressure on the government. Thus, hartal, which once emerged to ventilate grievances to the rulers or government or to the concerned authority regarding the democratic rights and the legitimate claims, has turned into an absolute political weapon used sometimes to gain even a petty political interest.

From the history and culture of hartal, we see the actual character of hartal is that during hartal citizens are prevented from attending to their avocations and traders are prevented from keeping their shops open or from carrying out their business activities. Also, workers are prevented from attending to their duties in the factories and other manufacturing establishments leading to loss in production and subsequent loss in the national economy. Hartal, in recent years, has become violent as well, resulting in wanton acts of vandalism like destruction of government and private properties, vehicles which include private cars, engine-run three wheelers as well as rickshaws, and sometimes injuries and killings. Hence, to the citizenry, hartal is another name for 'anxiety', 'insecurity', 'uncertainty', 'threat' 'intimidation', etc. Accordingly, because of the way it is exercised, hartal, a political right, is clashing with some other fundamental rights such as right to liberty, movement, work, conduct business, etc. These individual human rights and hartal as a political right cannot coexist peacefully. Either hartal or other individual rights have to do away with the other or others.

The truth is that, in strict legal sense, no political hartal in the history was legal. The political hartal because of its nature cannot be entirely legal, because no demand of a political hartal can be the demand of a hundred percent of the population. Therefore, political hartal always violates some legal and constitutional rights of the people from opposite camp. In fact, the common people think the issue of hartal less as a matter of law, but more as a matter of politics. When hartal is called upon for a greater public interest, it does not raise any question of fundamental rights of the citizens or economic loss of the nation, because the majority of the public then spontaneously abstain from exercising some of their rights and voluntarily suffer financial or others losses to make the hartal successful. For example, the hartals called for against the British or the then Pakistani rule in East Pakistan (Bangladesh) were to meet the 'political demand', which was actually the overwhelming public demand of the society or community. Even after Independence, hartals called against President Ershad’s autocratic rule were often claimed as public-spirited hartals. Those hartals too were illegal in the strict legal sense, because they violated many rights of the people who supported the parties in power. But those hartals were never seen as illegal, since they were supported by overwhelming population. Even the minority population, who were not in support of the hartals, had accepted them, or at least they had not taken any legal action against the hartals.

The question of legality or illegality of hartal frequently enters into public discourse nowadays
because of two main reasons. First, different political parties take resort to hartal to meet their petty political demands which occasionally correspond to the demands of the majority of the population. Therefore, the other members of the community or the parties opposing the hartal usually raise the question of their fundamental rights being violated and financial loss suffered by the observance of hartal. Second, a good portion of the citizenry thinks that hartal has outlived its purpose with the restoration of democracy in the country in 1991. According to them, when there is a parliamentary democracy, a constitution, free media, right to free speech, and above all, a live parliament, there can be no argument for resorting to hartal. Hence comes the question of a ban on hartal. Some recently conducted research and opinion polls reveal that the majority of the public interviewed opined that hartal should be banned (UNDP Bangladesh, Beyond Hartals (2005), The Daily Star, 17 December 2006).

The people opposing a ban on hartal are not less in number. They think that banning hartal means curtailment of a very crucial democratic right, and it will not bring any good result for the nation in the long run. There is a strong probability that it will help turn a democratically elected government to an autocratic one. In the long run, democracy will be at threat. They argue that before establishing a sustainable democratic culture including tolerance and accountability and an independent judiciary in the country, any attempt to ban hartal will be suicidal for the nation.

It is understandable that, in the present context, hartal is the outcome of the present undemocratic political culture in the country. Though it is claimed that parliamentary democracy has been restored in the country in 1991, a sound democratic political culture is yet to develop. The parliament is yet to be the most important place for debate on the issues of national concerns and interests. Still the democratic culture of tolerance and accountability is poorly practised, if not absent. The judiciary is yet to attain a firm public confidence and a complete independence from the executive.

The political history of the last two decades shows that both the Awami League (AL) and the BNP-led oppositions have boycotted parliament with the excuse that they are not being allowed to speak in the parliament, and their notices are not being heeded, and so on. How much the excuses are justified is debatable. However, many people believe that none of the major political parties really wanted to make the best use of the parliament to speak for the people, or to mitigate their political differences. Even when these parties are out of parliament, both as the government and the opposition, they have shunned the democratic norms and behaviour. Whenever the opposition, be it AL-led or BNP-led, has called any procession, public meeting, or sit-in programme to protest against any government action or inaction, the government, no matter whether it is the AL-led or the BNP-led, has been unnecessarily reactive. In the name of maintaining law and order or public order, the government, no matter whether it is the AL-led or BNP-led, has been unnecessarily reactive. The government, showing its highest level of intolerance, tried to prevent hartals with all possible forces and actions, resulting in violent and destructive hartals. As per law, both hartals called by opposition for such reasons and anti-hartal activities by governments are illegal.

No doubt, we cannot afford such harmful, violent and destructive hartal. At the same time, we cannot defy the argument of the people who think banning hartal will be detrimental to the democratic process itself in the long run. Therefore, what we have to do is realise that hartal is the extreme form of expression of protest in a democratic society and it should not be resorted to unless all other democratic forms of expression of protest become ineffective.

What is a genuine cause for the welfare and greater interest of the people, what is a failure of the government to respond to the people's demand, whether the grievances raised by the opposition are justified, are political questions, to which no one expects all agreed upon answers. But what is most important in the present context is to strive for the development of a democratic culture in the country. Undemocratic political culture invites hartal, and no law and nothing but only enculturation of democratic political culture can liberate the nation from destructive hartals.

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