The Daily Star

Founder-Editor : Late S. M. Ali

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Look Beyond Hartal

JUST how blunt hartal has become as a tool of political opposition in the country is borne out by the latest experience of two successive hartals we have had within a space of seven days. Both the dawn-to-afternoon countrywide hartal called by the four-party opposition alliance on August 23 to protest the killing of BNP city leader and lawyer Habibur Rahman Mondal and the dawn-to-dusk one staged on August 30 in protest against fuel price hikes have passed off in markedly relaxed manner. By past standards, more pedestrians and transports braved out on to the streets as some shops, which had invariably shuttered down on previous occasions, opened to business, if only a little half-heartedly – all propelled by the sheer compulsions of life and living. Such a peripheral throbbing of life could hardly reduce the effect of the disruption in the mainstream caused by the sheer call of hartal. Admittedly at the same time a pronounced hartal fatigue has become a fact of life.

A 'relaxed hartal' is not merely reflective of public disenchantment with frequent shutdowns it ought to also mean a few other things, like for instance, a sign of prudent avoidance of provocation and intimidation by the opposition and the ruling party in the shape of any aggressive picketing by the former and taking out of anti-hartal processions by the latter to confront each other.

But in actual fact what we have observed in case of last Wednesday's hartal is a shifting of the balance of power in the streets to AL activists. There were three incidents apparently bearing testimony to that: first, Delwar Hossain, a Jubo Dal joint secretary, according to the BNP version, was butchered by a chasing gang of youngmen with local police promptly saying that he was a drug trafficker or dealer. The suggestion is that he was a victim of business rivalry rather than political vendetta. Without any prejudice to the truth, whichever way we look at it, scores, old and new, may get settled in an anarchic situation – that happens to be the sordid reality. The second thing to note was the ransacking of the office of DCC commissioner at Ward No 53 who presumably is not a ruling party follower. Our third pointer would be to our front page photograph in the yesterday's issue of an anti-hartal procession showing a former Jubo League leader, named Liaquat, one of the three the PM wanted arrested for an alleged involvement in criminal activities in the city but who seemed at large – in the front row of the procession under some police gaze. Strange things can happen even in a relaxed hartal.

On the other hand, if the hartal becomes a tight affair with both sides taking to the streets to lord it over, all we can expect is more confrontation, violence and blood-letting with politics as a whole thrown to the gaping gutter. The bottomline here is: **whether it is a 'relaxed' hartal or an inflexible hartal resisted with equal vehemence by the ruling party, hartal as a political option is a dangerous game to play in the present atmospherics of politics in the country.**

Whilst we want the opposition to see the wisdom of not pursuing the hartal course anymore we also demand of the ruling party to give the opposition space so that they have no reason to grumble over lack of opportunity to let off their dissenting impulses.

The Gathering Storm

Let the Contempt of Court Act be there to deal with cases in the area of the first two manifestations viz. disobedience of court order and obstruction to the process of justice. But there may be a curtailment of its scope excluding the third manifestation where criticisms are also taken into cognisance as contempt. Alternatively, if the third manifestation is also to stay, the observation of Lord Atkin mentioned above may be the guide for action. Dignity of court can be safeguarded by deeds and not only by law, at least not by one that is out of sync with the time.

IN MY VIEW

Hasnat Abdul Hye

SUDDENLY contempt of court has become talk of the country. What was once a rarely or occasionally heard term in the inner sanctum of law courts has now gained wide currency like a buzzword. While most of the legal practitioners have taken up position on both sides of this newly emerged legal divide, the rest of the nation is holding its breath in great suspense and apprehension. The grave import of the gathering storm with huge potentials for escalating into a major catastrophe is not lost even on the layman. The subject, however arcane and technical, is now in the public domain and calls for discussion by the specialists and non-specialists alike to diffuse the situation and to prevent an unseemly confrontation.

It all started with an interview given by the Prime Minister to BBC in which she criticised courts for giving bail to accused prisoners. She reiterated this later in a press conference. This promptly provoked the major opposition party to file a case under the Contempt of Court Act (1926) ostensibly to protect the court. The President of the Supreme Court Bar Council filed a similar case which was challenged by some of its members on procedural ground. Another group of lawyers has filed a case calling into question the validity of the case filed by the President of the Supreme Court Bar Council. Statements and counter-statement have been made and the atmosphere has become highly acrimonious and even incendiary, a situation never seen before on the legal front. The Courts have remained silent and have not taken into cognisance the alleged contemptuous remarks directly apart from receiving the cases filed on the subject. Their dignified silence has been conducive to maintaining a semblance of order in an otherwise volatile situation.

The whole matter could be laughed away as an entertaining TV sit-com involving lawyers and courts if both the protagonists were not accountable to the people through the Constitution, the government to the parliament which exercises people's sovereignty under the Constitution and the judiciary pledged to uphold the Constitution embodying the sovereignty of the people. Because of this implication, Constitution is at the heart of the matter. What is more important on a day-to-day basis, it is through a harmonious relationship and spirit of co-operation between these two organs of the State that the rule of law, enjoyment of fundamental rights and justice can be enjoyed by the people. The possibility of their working at loggerheads can only portend ill for the nation.

The point at issue is not the supremacy of one organ over another (under the Constitution they are equal in status though having different jurisdiction and inter-relationships). Nor the feud is over attempts by one to undermine the other in terms of power and authority. The crisis, perhaps blown out of proportion, boils down to this: is the judiciary above criticism by any one, high or low, and whether such criticism constitutes contempt of court.

It seems that a major part of the problem has to do with the definition of 'contempt' which is not clear, unequivocal and in keeping with the spirit of the time. "Till now neither the statute nor the jurists have been able to give definite and clear definition of contempt. The jurists and commentators have described only the various instances of contempt of court and commented upon them. The Judges have only decided whether in the applications coming before them, the specific acts of respondents come within the mischief of contempt ... The absence of a specific definition for contempt may largely be attributed to the fact that the offence has been manifesting itself in a very vast number of ways and that it covers a very wide field for the application of law by the courts." (*Law on Contempt of Court*, p 1-2)

The modern conception of contempt of court is derived from the English law and the principle of English common law is the source for all decisions in such cases in the courts of countries that were former British colonies. Even for the definition given by various jurists and Judges, reference has to be made to the Common law. No statute in England and in India, Bangladesh, Pakistan has given any definition of the term 'contempt'. As a result such definition consists only of the various manifestations of the offence of contempt as mentioned before.

The dictionary definition of contempt is 'scorn' and 'disregard'. The Oxford Dictionary has defined contempt of court as (a) the refusal to obey an order made by a court of law, (b) lack of respect for a court or a judge.

The above definitions come very close to the "various manifestations" of the offence of contempt and these are: (a) obstructions to the judicial process through endeavours to disturb the judges as to influence the Jury or to keep back, prevent the testimony of witnesses or by any other method; (b) disobedience to or neglect of the mandates or orders of the court ("and this branch of the subject possesses greater claim to attention, in as much as in many such cases it is only through the medium of process for contempt that the right of the suitor can be secured as enforced." Oswald); (c) contempt by speech or writing may be scandalising the court itself... Any act done or writing published which is calculated to bring a court or a judge into contempt or to lower his authority or to interfere with the due course of justice or the lawful process of the court is a contempt of court. (*Law on Contempt of Court*, p 6)

Regarding the first two manifestations of contempt mentioned above (the second and third are common to the dictionary definitions) there are no disagreements or controversies either in respect of their definition or over the pernicious effect they may have on the dispensation of justice. All law-abiding citizens and sensible persons believing in rule of law and justice will uphold these as articles of faith as well as matters having direct bearing on their lives. When it comes to the third manifestation i.e. spoken or written words, people may like to have the right to criticise all the organs of the state including judiciary. Much will depend on the interpretation given to such criticisms or comments. It is not easy to conclude that every comment or even criticism of the court (e.g. for delay) is tantamount to heaping scorn either on the court or on the judge. Nor can it be established or argued conclusively that a comment or criticism is meant to lower the authority of a court or to interfere with the due course of justice. There is a good deal of subjectivity involved in interpretation.

At one extreme any criticism or comment on court or judiciary can be construed to constitute contempt. The criticisms and comments at the other end of the spectrum which attack the "very foundation upon which the structure of justice rests", are so rare that courts may recall Lord Atkin's comment: "– the path of criticism is public way – the wrong-headed are permitted to err therein." (AIR p 141, 1936). In the same case Lord Atkin observed: "provided that members of the public – are genuinely exercising the right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune." As regards immunity of courts from criticism he observed in the same case, "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny – of ordinary men". While taking this liberal attitude court can of course, expect respectful, constructive, rational and realistic criticisms from whatever quarter it may come. The higher the quarter, greater of course will be the expectation of the norm.

But the best policy and attitude of the court would be to quietly listen to criticisms and comments and not to react. By this display of dignified silence its stature and prestige will go up in everyone's esteem. There is no better way to maintain dignity than to be receptive to constructive criticisms and maintain equanimity in the face of provocation. If one party falls short of the norm, the other party may be sagacious enough to ignore it or deign to take a very light view of the matter. There is so much of mutuality of interests that no adversarial relation can be thought of between the executive and the judiciary. Confrontation between the two can only immensely harm public interest.

Court's attitude to criticisms and comments and leaving them beyond the pale of the Contempt Act (1926) may change if the history of judiciary and the practice of contempt of court are recalled. In its origin all legal contempt was found to consist in an offence more or less direct against the king as the fountain-head of law and justice. Courts as the repository of regal power of justice could not brook any criticism, not to speak of any obstruction or disobedience. In colonial India the court's role, power and image were based on that old royal tradition. Just as criticising colonial government of the day was seditious, criticism of king's court was adjudged as being contemptuous. After the end of the colonial rule the function, right and privileges of all erstwhile institutions changed. Elected governments were made accountable to the people through the legislature, the press and the public were free to criticise the government including the elected representatives and all public institutions came under close scrutiny. In this seachange of democratisation judiciary could not remain in isolation for long and function as an institution sequestered from the people and cloistered within its four walls. If judicial activism is the culmination of this evolutionary change that has taken place over the years then along with indegenisation of the judiciary, exposure to criticism and comments should also be taken in the same spirit. Much of the misunderstanding and heat generated over contempt of court has arisen from this contradiction about the perception of the role of judiciary in a country which has thrown off the yoke of colonial rule and the operation of a law one aspect of which (criticism) had its origin in monarchy.

It is not, however, necessary to throw the baby with the bath water. Let the Contempt of Court Act be there to deal with cases in the area of the first two manifestations viz. disobedience of court order and obstruction to the process of justice. But there may be a curtailment of its scope excluding the third manifestation where criticisms are also taken into cognisance as contempt. Alternatively, if the third manifestation is also to stay, the observation of Lord Atkin mentioned above may be the guide for action. Dignity of court can be safeguarded by deeds and not only by law, at least not by one that is out of sync with the time.

One of the price paid for democracy is that there cannot be any sacred cow in the society. People are exercising their sovereignty directly and indirectly after many years of disenfranchisement by the elite. Accountability is increasingly in demand on all fronts. Even Caesar's wife would not be above criticism today.

Why is PM Grouchy with Judiciary?

Crosstalk

Mohammad Badrul Ahsan

NO one over the mental age of twelve needs to be told that the Prime Minister is upset with the judicial system. She doesn't like that the judiciary has no accountability for granting bails to notorious criminals, who return to society and repeat their crimes. While two wrongs don't make one right, the question is whether criticising the judiciary will make things any better or worse.

Things are bad already as three court cases have been filed against the Prime Minister for contempt of court, while tension is growing between her and the legal community. But the worse thing is how the image of the judiciary is going to emerge at the end of this escalating controversy. If the head of government sets out to sully its sanctity, can others be expected to treat it any better?

This is not to say that the Prime Minister is entirely wrong in her criticism. Yet, is she fully right to sharpen it to the point as if the judiciary is to blame for all things gone wrong? Even if we assume that criminals manage to slip through the cracks opened in the legal system by conniving lawyers and judges, don't these criminals originate and grow in the Torrid Zone outside of the courtrooms in the first place? Doesn't an attack on the judiciary amount to a ludicrous crackdown on the distribution channel of vices, while keeping their supply lines open?

In 1808, French philosopher Prud'hon rose to fame with his allegorical work *Crime Pursued by Vengeance and Justice*. Indeed vengeance and justice are mostly the consequence of crime, seldom its contingency. Vengeance seeks retribution for what crime violates and justice is nothing but restitution for the same thing. If condoned criminals commit their crimes again and again, it's because crime feeds on itself like a downward spiral. And that feeding frenzy is seeded in instincts, which are harvested from the catchment of chaos.

So, when criminals escape the hand of justice due to unscrupulous lawyers and judges, we are talking about the hyena's share of the lion's kill. If predicaments prepare criminals, politicians promote them and police protect them, one more link to that chain of aggravation is when courts also pardon them. How many criminals do the police never arrest due to political influence? How many criminals never reach the courtrooms because political influence and money interfere with law?

Then why should the judiciary alone get the brunt of the criticism? Why should it be excoriated in a manner as if it's a nest of notoriety, a cradle of crime? Yet, the Prime Minister is quite adamant when she does it. In a press conference after her return from a three-day visit to Malaysia, she insisted that what she said about the judiciary was the truth and that she would continue to say so. When a head of the government feels headstrong to make snide remarks about an organ of the state, it's a headlong irony of fate for a nation, which only shows its own contradictions.

It's not unheard-of in history for a head of the government to criticise an organ of the state. In 1948, Harry Truman lambasted the 80th Congress of the United States during his re-election bid. As he set out on a whistle-stop campaign across the country, he scathingly attacked the Republican Congress for the higher cost of living, for blocking low-rent housing, for failing to vote grain-storage bins. "Give 'em hell, Harry!" the crowds cried as he worked them up with his incendiary speeches. It was all part of desperate politics, Truman's last-ditch effort to win an election that was increasingly slipping into the hands of the Republican candidate Thomas E. Dewey.

What is the Prime Minister trying to gain from embarrassing the judiciary? Is she trying to drum up popular support for some reforms she intends to bring about in the judiciary? Is she trying to cover up for the embarrassment of her own administration for failing to stay the spate of crime despite the passage of her much-vaunted Public Safety Act? Or, is it simply election-time propaganda to create a new expectation in the minds of people that she will fix the judiciary once she returns to power?

Whatever may be the reason, it is not appropriate to drag the judiciary into politics either as an end or a means. Ever since Montesquieu expounded the modern division amongst legislature, executive and judiciary, the concept of separation of powers became one of the principal doctrines of modern constitutionalism. Amongst these three divisions, the judiciary is expected to be completely free from political interference for the delicate nature of its deliberations.

Of course, the Prime Minister can ask for actions against dishonest lawyers and judges. The dishonest judges can be suspended or dismissed between the Law Ministry and the President of the country. As far as the lawyers are concerned, they are the free agents of legal profession who may choose to defend their clients as they like and can have political affiliation of their choice. Still the Bar Council can suspend or debar lawyers who may be resorting to unfair means. What these mean is that if the Prime Minister feels that the judicial system has gone haywire with its functions, she should deal with the guilty individuals and not demean the institution.

Instead, the Prime Minister did something silly at the press conference. She disclosed a list of top terrorists in the city who, upon being released on bail, killed again. But blaming that on the judiciary is like blaming cheating on those who grade the examinations. After all, the merit of a case depends on police report, lawyers and witnesses. Even if judges unscrupulously release criminals who deserve to be locked up, their cases can be reopened or appealed to the higher court. More importantly, should the Prime Minister know which lawyers and judges were involved in shady dealings to give bail to criminals, she could order actions against them.

Right now the entire controversy has boiled down to one thing: whether the Prime Minister is guilty of contempt of court. An insult to the court or an interference with its judicial authority constitutes criminal contempt, and it is an insult to the court to question its integrity. In the past, outlawry, which was an act of putting a person beyond the protection of the law and other legal benefits, was invoked when someone acted in contempt of court.

When the High Court comes back on the contempt petitions in October, it isn't likely to invoke outlawry on the Prime Minister. But she has to realise that criticism isn't the same thing as ridicule. One is meant to control damage, while another is meant to damage control. If a handful of lawyers and judges are putting the people beyond the protection of law, she needs to restore that protection as their leader. And she needs to be careful when doing it lest she doesn't confuse the efficacy of an institution with its abuse by some of its functionaries.

Friday Mailbox

Negligence!

Sir, The rows of corpse of the victims of recent fire at the garments factory at Banani is a stark reminder of the hard fact that those who use cheap labour to amass huge wealth do not care a fig for the safety of the poor employees.

The universal labour laws and even the domestic laws of every country impose hard penalty on those who disregard safety precautions at mills and factories. But in our country such is not applicable otherwise incidents like this would not have occurred year after year. Regarding this sad incident, hope the authorities concerned compensates the victims' families duly and judicial inquiry also be carried out to find out the real cause of the disaster.

Al-Haj S. M. Khalid Chowdhury
Dhaka

Talk about irony !

Sir, What an irony— Begum Khaleda Zia has gone to see Mr H M Ershad after the sentence of imprisonment for five years and a fine of about taka five and a half crores regarding the Janata Tower Case. However, the fact remains that the case, in which Ershad got this conviction, was originally instituted during Khaleda Zia's tenure!

A Distressed Observer
Chittagong

Regular transfer of posting

Sir, The government is to be commended to enforce an existing rule of regular transfer of officials, to maintain change of atmosphere, prevent staleness in administration and discourage the creation of unhealthy coteries, which are not in public interest.

During the British reign, transfer of officials at regular intervals (within three years) was enforced strictly, for good governance. An officer was not allowed to settle under one local condition for longer periods, as it undermined efficiency, encouraged groupings and created avenues for undesirable local influences and personal interests or gain.

However nowadays, lucrative postings are sought through unfair means (including bribery). It is an open secret that stations of postings are grouped unofficially as Class I posting, Class II and Class III; and there are penal stations where bad and unwanted officers are dumped, as a sort of punishment.

Nowadays corrupt practices have come out into the open, and the CBAs have been politically spoiled, unwittingly. Such political erosion of established institutions should be resisted by all citizens, and the right public pressure should manifest to ensure transparency in governance.

Transfers from lucrative posts would naturally be resisted by vested groups unless the government takes a firm stand, supported by the public. A management and administrative clean-up operation is required in the Chittagong port area, as a lot of indirect sabotaging is going on there in the name of virtual 'rights'.

The Prime Minister has to be firm; but political consensus is necessary, which the 'powerful' politicians cannot provide for public service. Once the right type of politics is practiced, the rest of the sectors could be tamed. The ball is in the court of the politicians, not the service holders.

A Mawaz
Dhaka

Uncivilised

Sir, I draw the attention of the authority concerned to a malpractice started in recent days by some profit-sharks who tend to ignore health and convenience of public at large. A real estate developer in Green Road, (across the road from Dhanmondi P.S.) has installed a brick-crusher near the under-construction apartment block. The gadget, a crude imperfectly developed one, is powered by a diesel engine and produces high sound, which surpasses any other noise of the neighborhood. The same contraption is used by another developer in road no 7 near Mirpur Road. This has replaced the practice of chipping the bricks manually near the brickfields, which are mostly situated away from thickly inhabited localities.

There is a notice nearby which specifies the decibel acceptable in the residential area. City Corporation should have learnt by now that mere posting a notice is absolutely useless, (where profiteers do not care for public decency) and the cost of preparing the notice board is wastage of public money, unless the same is implemented at the pain of punishment.

MAH
Dhaka

The Look-East Policy

Sir, The Japanese Prime Minister's recent tour of some South Asian countries brings into focus a subtle change of shift of foreign policy in some countries, to look East (Japan and East Asian developed countries) rather than to the West (Europe and the USA). Japan is also receptive to India-Japan cooperation in the IT sector (Bangalore address). Japan is weak in English, and the resource persons in the Saarc region can help spread the Japanese logo.

The Japanese economy is heavily based on trade with the Western industrialised nations; and there is hardly any R&D for the underdeveloped and developing countries, in spite of the big market of a couple of billion consumers and HR material.

The social interest is superseded by the business interest. The close of the twentieth century revealed that the growth rate was rising in Asia and falling in the West and North-West; meaning a continental shift in the development trend. The engine of growth is charging in South Asia with an open market of a billion consumers.

The Japanese PM's recent tour might be an indicator of recognition of corrective measures necessary in a comparatively neglected area. So long the accent was on the macro projects, and the cumulative benefit of micro projects were ignored, but the continued recession in Japan has forced the foreign policy to be reviewed, for Japan to take a closer look at the potentially big Asian market on the basis of long-term planning. Japan has many products, technologies and services to offer to the third world; and the Asian markets can no longer be ignored.

The Look-East philosophy has to be nurtured and monitored carefully by the Asean members, as Asians helping the Asians looks like an attractive prospect.

There is one snag in the policy making; the migration of human resources due to economic disparity has to be addressed seriously, positively and practically. Human brotherhood is a bondage and a leveler. The physical barriers will sort out automatically, once the mental barriers are re-adjusted and the gaps in the GDP/GNP are reduced.

A Citizen
Dhaka

Views expressed in this column are the writers' own. The Editor may or may not subscribe to those views. The Editor reserves the right to decide which letters should be published.

Supplementary Report of Hamoodur Rahman Commission: Some Relevant Extracts

Seventh instalment

The commission had recommended that trial by court martial be held against six senior army officers for their debacles in warfare. In our last two instalments we covered four of them and now figure Brig Mohammad Hayat and Brig Mohammad Asla Niazi for their planning and operational lapses in Jessore, Laksam and Comilla areas.

Continued from yesterday

Professional Responsibilities of Certain Senior army Commanders

5. **Brig Mohammad Hayat**, former Commander, 107 Brigade, 9 Division

(i) That as Commander 107 Bde, he displayed neglect in not formulating a sound plan for the defence of the fortress of Jessore;

(ii) That while launching counter attack at Gharibpur he neglected to obtain full information about the enemy strength, and did not himself command this important Brigade counter attack, in consequence whereof he lost seven tanks, his men suffered heavy casualties, and the defence of Jessore fortress was seriously jeopardised;

(iii) That on a report that enemy tanks had broken through the defences of Jessore he, without even verifying the same, shamefully abandoned the fortress of Jessore without a fight on the 6th of December 1971, delivering intact to the enemy all supplies and ammunition dumps stocked in the fortress, and without issuing any orders to his unit in contact with the enemy, who had to fight their own way during the following night;

(iv) That after abandoning Jessore without contact with the enemy, he withdrew to Khulna in wilful and intentional violation of the clear orders of G.Q.C. 9 Division to withdraw to Magura in the event of a forced withdrawal for Jessore, thus making it impossible for the Divisional Commander to give battle to the enemy across the Madhumati River.

6. **Brig. Mohammad Asla Niazi**, former Commander, 53 Brigade, 39 ad-hoc Division

(i) That as Commander 53 Bde, he displayed culpable lack of initiative, determination and planning ability in that he failed to prepared defences of Mudafarganj as ordered by the G.O.C. 39 (Ad-hoc) Division on the 4th of December 1971, with the result that the place was occupied by the enemy on or about the 6th of December 1971, thus seriously endangering the line of communication between Tripura and Chandpur where the Divisional Headquarters was located;

(ii) That he showed culpable lack of courage, planning ability and determination in failing to eject the enemy fro Mudafarganj as ordered by the GOC on the 6th of December 1971, with the result that contingents of 23 Punjab and elements of 21 A.K. surrendered to an Indian unit on the 11th of December 1971 in highly adverse circumstances, without water or food and the ammunition having been nearly exhausted;

(iii) That he shamefully abandoned the Fortress of Laksham on or about the 9th of December 1971, which it was his duty to defend;

(iv) That he displayed wilful neglect in failing to properly organise ex-filtration of his troops for the fortress at Laksha to Comilla on the 9th of December 1971, with the result that out of a strength of about 4000 men only about 500 or so, including the Brigade Commander himself and C.O. 39 Baluch with approximately 400 men surrendered to the enemy when he was barely three miles outside Comilla, and as a consequence 53 Bde and all its battalions thus disintegrated;

(v) That he wilfully acted in callous disregard of military ethics in abandoning at Laksham 124 sick and wounded with two Medical Officers who were deliberately not informed about the proposed vacation of the fortress; and

(vi) That while vacating the fortress of Laksham he wilfully and intentionally abandoned all heavy weapons, stocks of ammunition and supplies for the use of the enemy, without implementing the denial plan;

The eighth instalment appears tomorrow