



## AN OVERVIEW AND CRITICAL ANALYSIS OF THE LEGAL FRAMEWORK REGULATING BANDH, HARTAL AND SIMILAR PROTESTS IN INDIA\*

### Introduction

Bandhs, Hartals, agitations and civil disobedience are frequent in India as they are considered as a popular method of expressing dissent, attracting the government's attention to certain demands of an organization or community and at times force the government to give in to the demands put forward . Protest is an integral part of a democratic system as protest is directly linked to expression of dissent or dissatisfaction against the State or any other entity. Problems arise when this right infringes rights of other citizens who want to go ahead with their normal routine. The law needs to strike a balance between protecting right of protest as well as rights of citizens who want normal life and activities to continue notwithstanding bandhs and similar protests.

### Is conducting a bandh, hartal, or similar protests a fundamental right?

The terms 'bandh' and 'hartal' are often used interchangeably while referring to a protest. bandh is a Hindi word which translates to 'shutdown' or 'close'. There exists an element of force and coercion in case of a bandh. Hartals on the other hand is a peaceful way of protest which involves voluntary cessation of work and closure of shops and commercial establishments as a mark of protest. 'Strike' means a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment;

Strike is associated with industrial disputes and is governed by labour laws such as the Industrial Dispute Act,1947. The law on strikes and lockouts are well defined in form of statutes, subordinate legislations and judicial precedents. This paper focuses on the other methods of protests which do not have well defined laws regulating them .

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Hartal has its roots in the era of India's struggle for independence. It was a popular method of civil disobedience which was advocated by Mahatma Gandhi. Courts too have recognized that hartal in the truest sense of the term is peaceful and completely voluntary. This definitely falls within the category of peaceful protests as Article 19 1 (a) of the Constitution of India, 1950 gives citizens the right to freedom of speech and expression. Peaceful demonstrations too are legal and is enshrined under Article 19 (1) (b) of the Constitution of India, 1950 . The Supreme Court of India held in the case *Ram Bahadur Rai vs The State Of Bihar & Ors* <sup>1</sup>, that peaceful protests and freedom to voice out contrary opinions are wholesome weapons in a democracy and such a right can be taken away only for a constitutional purpose such as public order.

A bandh however is not in the same league as a hartal or peaceful demonstration. There is an element of force, fear and coercion which instils fear in the minds of citizens. Public order and law and order is threatened as well. Courts have not only held that causing a bandh is not a fundamental right but is in fact unconstitutional.

### **Constitutionality of Bandh:**

Bandh and protests of like nature have resulted in loss of lives, irreparable harm to public property, economic loss, etc. Kerala has witnessed numerous such bandhs and violent protests which had severe effects on the economy and public order. In the year 1994, two private citizens and various chambers of commerce in the state of Kerala filed Original Petitions before the Kerala High Court seeking a relief of declaration that bandhs be declared as unconstitutional and illegal. The respondents impleaded were the state, Director General of Police, five registered political parties and also the National Organization for Consumer Education and research. The Original Petitions were disposed off together in the year 1997 in a common judgement titled *Bharath Kumar K. Palicha v. State of Kerala*<sup>2</sup>. The petitioners contended that bandhs violate fundamental rights of the citizens especially with regard to right to freedom since workers are prevented from going to their workplace, traders are prevented from running their business, citizens are prevented from accessing medical facilities in case of emergencies, etc. It was also contended that a bandh though masqueraded as peaceful instils fear in the citizens and the probability of violence deters citizens from carrying out their normal activities. The Communist Party of India in its counter affidavit contended that a bandh was a spontaneous reaction towards a problem and it was the fundamental right of a political party under Article 19 (1)(a) and 19 (1)(b) of the Constitution of India to call for a bandh. The Party also stated that a call for a bandh did not imply violence and destruction of property. The State in its response stated that observance of bandh cannot be labelled as illegal

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<sup>1</sup> *Ram Bahadur Rai vs The State Of Bihar & Ors*, A.I.R 1975 SC 223.

<sup>2</sup> *Bharath Kumar K. Palicha v. State of Kerala* ,A.I.R 1997 Ker 291.

and unconstitutional in a blanket manner. The State contended that there exists a right to peaceful protests and the authorities always take steps to prevent violence. It was further contended that in the event of untoward incidents, action is always taken against the miscreants as per the law.

Before addressing the issue of constitutionality of bandhs, the Court examined the meaning of the term 'bandh'. The Court held that bandh conveys an idea that everything is to be locked or closed. It also held that a call for bandh by an organization implies that they expect all activities to cease on the day of the bandh. While stating that a bandh is different from a peaceful hartal or strike, the Court opined that the organizations cannot justify a call for bandh by claiming that they never threatened or expressly prohibited people from carrying out their activities. The Court took the stance that the reality of a bandh cannot be ignored since experience has shown that people attempting to carry out their daily activities during a bandh are threatened or at times have been victims of violence and hence there exists a psychological fear which prevents citizens from exercising their fundamental rights and discharging fundamental duties. While addressing the issue of whether bandhs violate fundamental rights of citizens, the Court referred to certain decisions of the Supreme Court and held that there exists a fundamental right to use public roads, to access medical treatment, free locomotion and right to education at primarily level and the Court held that all these rights are violated during a bandh. With regard to the contention of the political parties that it is their fundamental right to call for a bandh under Article 19 of the Constitution of India, the Court held that there exists only the right to peaceful protest through hartals and demonstrations and not through a bandh since exercising freedoms and right has to end when it interferes with rights and freedoms of another individual. The Court also clarified that when there is absence of legislation to deal with an issue or when the State has failed to take steps to curb a problem, it is the duty of Courts to step in to protect fundamental rights of citizens. Thus taking note of the violence, violation of rights, destruction of property and losses caused to the economy, the Court declared call for bandh by any party, organization or association as illegal and unconstitutional. Directions were issued to the authorities to give effect to this declaration. The decision of the High Court was challenged in the Supreme Court in 1997<sup>3</sup> and the Apex Court held that it completely agreed with the High Court and also placed on record its satisfaction with the distinction drawn between bandh and peaceful forms of protest such as a hartal. This decision set a precedent for all Courts across India regarding constitutionality of a bandh.

### **Current legal framework and judicial rulings containing guidelines**

The State has the responsibility to ensure that bandhs and protests of like nature do not paralyse normal life. The most common offences which occur during a bandh and protests include

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<sup>3</sup> *Communist Party of India v. Bharath Kumar &ors*, A.I.R.1998 SC 184.

wrongful restraint, damage to public property, criminal intimidation , formation of unlawful assembly, hurt, grievous hurt as well as homicidal deaths. The Indian Penal Code, 1860 has recognised these offences and has also prescribed punishments for the same . The Prevention of Damage to Public Property Act, 1984 is a special legislation which deals with mischief causing harm to public property. The Act prescribes punishments varying in severity based on mode of committing mischief such as by fire and based on type of property damaged. The Act also lays down that no person who is in custody shall be released on bail or on his own bond until the prosecution has been given an opportunity to oppose the application for release.

The Code of Criminal Procedure, 1973 enlists and empowers police to take certain steps necessary to maintain public order, tranquillity, deal with unlawful assemblies and to take steps to prevent commission of cognizable offences. This is a crucial legislation which gives vast powers and discretion to the police and other authorities to deal with law and order problems associated with bandhs and similar protests. Firstly, Section 149 of the Code of Criminal Procedure, 1973 empowers a police officer to interpose to prevent commission of a cognizable offence. Section 151 of the Code of Criminal Procedure, 1973 empowers the police to arrest a person who is designing to commit a cognizable offence in order to prevent the commission of the offence. While the arrest can be made without a warrant and orders from a magistrate, this power can be exercised only when the commission of the offence cannot be otherwise prevented. Also, detention beyond the period of twenty four hours must be authorised according to the relevant provisions of the Code of Criminal Procedure, 1973. Section 152 of the Code of Criminal Procedure, 1973 empowers a police officer to interpose for the purpose of preventing harm to public property.

In few states, certain forms of subordinate legislations such as directions issued by the Chief Secretary to District Collectors and Police regarding steps to be taken to maintain law and order during bandhs. These directions were invariably in forms of departmental guidelines to handle such situations and could not take the place of a special law which enlists offences and prescribes enhanced penalties for the offences committed. Due to the lack of an efficient legislation to back the declaration of bandh as illegal by the Supreme Court, there was no adequate deterrence. The other reasons for continuance of the menace is discussed later in the paper. When bandhs continued despite being declared as unconstitutional and illegal, few aggrieved citizens and organizations approached High Courts, seeking issuance of mandamus to police and other authorities to take steps to prevent bandhs. One such case is *Kerala Vyapari Vavasayi Ekopana Samithi v. State of Kerala* <sup>4</sup>. The petitioner approached the Kerala High Court seeking relief of

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<sup>4</sup> *Kerala Vyapari Vavasayi Ekopana Samithi v. State of Kerala*, AIR 2000 Ker 389.



declaration that stopping of plying of vehicles amounted to bandh, calling of hartal amounted to bandh as it was had the same effect, direction to newspapers and electronic media not to report calls for bandh and hartals, direction to police department for taking steps to prevent paralysis of normal life during bandh and hartals, direction to the Election Commission to cancel the registration of political parties who call for and organize bandh. While the Court refused to declare hartals unconstitutional as it was already decided by the Supreme Court earlier <sup>5</sup>, The Court took serious note of the effects of bandh and similar protests and observed :

*" Surely, indulging in destruction of public and private property and causing loss of production and holding the society to ransom in the name of staging a hartal cannot be considered to be a constitutional act based on rights conferred by the very Constitution. The expenditure to be incurred by the executive to mobilise sufficient force to meet every hartal call cannot also be ignored. No party or organisation can have a right to compel incurring of such non-productive expenditure merely because they feel like calling for a hartal. There is no such freedom in anyone guaranteed by the Constitution. We are of the view that respondents 3 and 4 cannot claim any such right and that too in a developing country like India. Nor have they a right to curtail the individual freedom of those who do not sympathise with their cause."*

The Court examined the directions issued by the Director General of Police and Chief Secretary to the subordinates , and concluded that while the implementation of directions would significantly reduce the number of bandhs and its effects, absence of will power and lack of effective and qualitative enforcement by the concerned authorities could not be ignored. The Court proceeded to issue mandamus to the police and district administration to follow the directions issued by the D.G.P and Chief Secretary. This included setting up of dedicated control rooms during bandh and hartals, special mobile strike force to deal with violence, protection to public vehicles, filing of charge sheet as soon as possible , etc. The Court also recognized the power of the Election Commission to cancel the registration of political parties which call for or organize bandh and illegal hartals, based on facts of the individual case. The Court also recognized the power of the State to sue organizations or individuals for damages for causing damage to public properties.

The State was reminded of its obligation to curb bandhs with an iron hand by the Supreme Court of India in the case *James Martin v. State of Kerala*<sup>6</sup> in the year 2003. The Court observed that:

*"The question whether bandh or hartal or strike has any legal sanctity is of little consequence in such matters. All the more so when the days are such where even law-enforcing authorities/those in power also precipitate to gain political advantage at the risk and cost of their opponents. Unless such acts are controlled with iron hands, innocent citizens are bound to suffer and they shall be the victims of the highbanded acts of some fanatics with queer notions of*

<sup>5</sup> *Communist Party of India v. Bharath Kumar &ors*, A.I.R.1998 SC 184.

<sup>6</sup> *James Martin v. State of Kerala* ,(2004) 2 SCC 203.

*democracy and freedom of speech or association. That provides for no license to take law into their own hands. Any soft or lenient approach for such offenders would be an affront to rule of law and challenge to public order and peace."*

In the year 2004, a petition in public interest was filed before the Kerala High Court<sup>7</sup> by few citizens alleging that despite Supreme Court and High Court rulings, citizens continued to suffer due to bandh and hartals. The petitioners also alleged that there was dereliction of duty on part of the State and failure to meet constitutional responsibility in not taking steps to tackle the problem as per directions of the Courts. It was also alleged that the State did not pay compensation to public who suffered losses and that the State failed to initiate proceedings to recover damages caused to public property. The Court took cognize of the effects recent bandh and hartals had on the conduct of board examinations, people travelling to hospitals, injuries sustained by policemen among other things. Apart from reaffirming the guidelines issued by the High Court in the earlier cases, the Court laid additional guidelines. This included directions to district administration and state government to seek the help of paramilitary forces and the army when it seems that the police alone cannot prevent law and order problems. The Court also directed the government to ensure that calls for hartals expressly mention that there would be no coercion or force. Other significant directions included that to initiate steps to recover damages to public property, prevent obstruction of traffic and also not to withdraw cases against offenders under political pressure.

The most significant ruling pertaining to regulation of bandh and hartals was in the case of *In Re: Destruction of public & private properties v. State of A.P. & ors*<sup>8</sup>. In this case, the Supreme Court took suo motto cognize of the large scale destruction of public and private properties during bandh, agitations and protests of like nature. The Court set up two committees to come up with guidelines to deal with the issue. One committee was headed by Justice K.T. Thomas, a retired judge of the Supreme Court and the other committee was headed by Mr. Fali S Nariman, Senior Advocate, Supreme Court of India.

The significant recommendations of the Justice Thomas committee include amendment to the Prevention of Damage to Public Property Act, 1984 to create a rebuttable presumption of guilt against offenders, amending the Act to make leaders of the party who call for direct action, guilty of abatement, videography of demonstrations and activities damaging public property, granting of bail only in cases in which the Court has reasonable grounds to presume that the accused is not guilty of the offence.

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<sup>7</sup> *George Kurian v. State of Kerala*, (1997) 2 KLT 258.

<sup>8</sup> *In Re: Destruction of public & private properties v. State of A.P. & ors*, (2009) 5 SCC 212.

The Nariman Committee report mainly pertains to imposition of liability for damages caused to public and private property. The significant recommendations of the Nariman committee include imposition of strict liability on persons who caused damage, who were part of the protest or bandh during which the damage was caused and the organizers of such a bandh or protest. The Committee suggested that the principle of *restituto in interregnum* (making whole or restoring to original position) be applied in imposition of fines by the Courts or while awarding compensation to owners of properties damaged. The Committee also suggested that aggravated damages be imposed so as to compensate the plaintiff for wounded feelings. Exemplary damages may be imposed to deter offenders from similar behaviour.

The Court accepted both the committee reports and came up with a list of guidelines. Apart from the recommendations discussed earlier, the guidelines include:

1. Organizers to meet police before the protest and give an undertaking for maintenance of peace
2. Use of knives, lathis and weapons to be prohibited.
3. The senior most police officer in the district or city to supervise the protest.
4. The police shall submit a report of event and damages caused to the State Government which shall then file a report before the High Court or Supreme Court as the case may be.
5. High Court may issue suo motu action and set up a machinery to investigate the damage caused and to award compensation.
6. A retired or sitting High Court or Supreme Court judge may be appointed as Claims Commissioner estimate damages and investigate imposition of liability. An Assessor may be appointed to assist the Claims Commissioner. They shall have power to summon video footage and other evidence to discharge their duties.
7. Absolute Liability shall be imposed once the link between the event and damage is clear.
8. Damages shall be assessed for damage to public property, private property, damage due to causing of hurt or death of persons and cost of actions taken by police and the executive to take preventive steps.
9. Exemplary damages not exceeding twice the amount of damages liable to be paid may be imposed.
10. The Claims Commissioner shall report to the High Court or Supreme Court as the case maybe.

The Supreme Court also suggested that the PDPP Act, 1984 be amended to ensure that Courts record 'special reasons' while reducing the sentence below the minimum term prescribed.

### **Problems in the current framework and critical analysis**

The Supreme Court guidelines based on the committee reports is definitely well a significant step towards dealing with offenders in a firm manner. It is with regard to imposition of tortious liability, calculation of damages and constitution of a machinery to award the damages that these guidelines play a crucial role in absence of a law dealing with the same. However, the guidelines pertaining to precautionary measures and steps to be taken by police are not novel. These principles were already embodied in the state Police Acts of states as well as directions issued by the D.G.P.s and Chief Secretaries of the states. The High Courts too had issued such directions earlier. This suggests that either implementation of the guidelines was not ensured or that the guidelines themselves are inefficient. In my view, the problem lies in non implementation of the guidelines mainly because of callous attitude of the police towards the problem. The police usually swing into action only once violence is reported. Rather than using significant might to prevent happening of untoward incidents, the police tend to deploy forces in huge numbers and seek additional help only once the situation goes out of their control. While normalcy is restored usually within a day or two, damage to properties and injury to persons can happen in a very small span of time. The police and other authorities must take steps to instil confidence in the public that those person who want to go ahead with their daily routine may do so without fear of being attacked or restrained. Mere assurance is not sufficient as the ground reality might be harsh enough to deter people from discharging their duties. Thus, police must ensure that buses are not damaged, traffic is not blocked and no shops are forcibly shut. When these steps are combined with continued assurance to people of safety, will normal life not get paralysed. It is about winning confidence of people to an extent that it exceeds the fear instilled by the organizers of bandh and such protests.

Prosecution and high rate conviction after arrests is vital for deterrence. Poor probability after conviction defeats even stringent laws. The poor conviction rate can be attributed to lack of evidence due to poor investigation as well as withdrawal of prosecution in numerous cases. Firstly, videographing of the protests and bandh can significantly reduce the problem of lack of evidence. The law of evidence has evolved and such evidence is of immense value in convicting the accused. Leaders of organizations which call for and conduct bandh need to be charged with abatement of offences when there is a link between their act of calling for a bandh and the crimes committed thereafter. However, there has to be safeguards to ensure that innocent leaders are not framed merely by virtue of being one of the leaders of the party. Thus, it is detailed investigation alone which can result in ascertaining of guilt of the leaders. Withdrawal of prosecution is a common



tendency which is usually practiced in case of bandh and protests for a political cause. Section 321 of the Code of Criminal Procedure, 1973 empowers the prosecutor to withdraw prosecution against the accused with consent of the Court. In certain cases, where damage to property of central government is involved etc, prosecutor has to obtain permission of the Central Government. While the prosecutor is expected to act as an officer of the Court while discharging his duties and not give in to demands of political pressure, it is evident that prosecutors seek to withdraw prosecution on the behest of politicians and at times the government. The power of the courts under Section 321 of the Code is supervisory and it is not mandatory for the courts to record details in an elaborate manner for granting consent.. Realising the need to explain the true spirit of Section 321 of the Code, the Supreme Court held in the case *Bairam Muralidhar v. State of A.P.*<sup>9</sup> that while giving consent under Section 321 of the Code ought not act mechanically and give consent on mere asking and the Court should consider if withdrawal was in good faith, would serve public interest and collective justice to State and society would be done. It also held that, the public prosecutor cannot act like a post office on behalf of the government. In many cases, the weak evidence and low possibility of conviction results in successful withdrawal of prosecution. Thus, genuine interest to pursue cases backed with evidence obtained from thorough investigation paves the way for successful prosecution.

The absence of a special legislation in states to deal with the problem of bandh and similiar protests is a drawback. Guidelines laid down by Supreme Court of India and High Courts definitely give a sense of direction and fill the gap to a certain extent but it cannot serve as substitute for a law. The Supreme Court has laid down guidelines in absence of a statute in a few cases earlier as well. Significant cases include *Vineet Narain v. Union of India*<sup>10</sup>, *Lakshmi Kant Pandey v. Union of India*<sup>11</sup> and *Vishaka v. State of Rajasthan*<sup>12</sup>. These guidelines are meant to serve as temporary framework of law until the legislature comes up with a law. In the case *Union of India v. Association for Democratic Reforms*<sup>13</sup>, the Supreme Court observed that:

*"It is not possible for this court to give any directions for amending the Act or statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily issue directions on the said subject to fill the vacuum or void until the suitable law is enacted"*

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<sup>9</sup> *Bairam Muralidhar v. State of A.P.*, (2014)10 SCC 380.

<sup>10</sup> *Vineet Narain v. Union of India* , (1998) 1 SCC 226.

<sup>11</sup> *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244.

<sup>12</sup> *Vishaka v. State of Rajasthan* (1997) ,6 SCC 241.

<sup>13</sup> *Union of India v. Association for Democratic Reforms* ,(2002) 5 SCC 294.

Judiciary has limited expertise in framing of laws and has access to limited resources and facilities for consultation, drafting, etc . The legislature has the necessary resources and legitimacy for enacting laws . The ground reality and needs of the situation are better assessed by the legislature and its auxiliary units. It can also consult the executive and ascertain the capacity and resources to enforce certain laws once enacted. Thus, the legislature ought to come up with laws or amend existing ones to meet challenges and also give adequate consideration to views of Courts on these matters.

When directions or guidelines laid down by the Court are not followed by the police and other authorities repeatedly , citizens are forced to approach the Courts to take necessary steps against the authorities. It creates a burden on the Courts to look into these matters and consider imposing sanctions, etc. If the guidelines are given statutory recognition or a standard operating procedure is developed, it is feasible for departmental action to be initiated against erring officials.

### **Recent developments and Conclusion**

The Kerala Government has come up with a draft bill called the Kerala Regulation of Hartal Bill, 2015. It criminalises enforcement of hartals by force, threat of injury, etc. Organizers are required to obtain permission from the authorities and inform the public three days in advance. Organisers are required to deposit an amount as security for payment of compensation for damage caused to property and injuries sustained. Bail can be obtained by the accused only after depositing an amount equal to the value of damaged property as assessed temporarily. If the police fails to help the public in exercising their legal rights during such hartals, it would be treated as dereliction of duty and can also be punished with fine extending upto Rupees Ten Thousand. The Government is also empowered to make rules for effective implementation of the provisions.

The Central Government has come up with the draft Prevention of Damage Public Property( Amendment) Bill, 2015. It incorporates the guidelines suggested by the Justice Thomas Committee Report and the Nariman Committee Report. Significant features include rebuttable presumption against the accused, mandatory videographing of protests and bandh and also provision for booking office bearers of organizations conducting bandh and Hartal for abatement of mischief. Fines can extend up to the market value of the properties damaged.

It is a positive sign that the Central Government has decided to take steps to implement the measures suggested by the Justice Thomas Committee and Nariman Committee. The State legislatures need to come up with legislations to tackle law and order problems caused by bandh and hartals in the states. Apart from legislations, the need of the hour is for the police and other authorities to take active interest in maintaining law and order and preventing paralysis of normal

life during bandh and hartals . Reforms in the police and modernisation is required to help the police restore normal life in case of violence. This included better communication facilities, adequate protection for personnel in form of riot gear, vehicles for patrolling.etc . The coordination between the police and prosecution department is also vital to secure conviction. Adequate resources need to be provided to the police department for filing of charge sheets as early as possible and the number of prosecutors need to be increased to prevent inefficiency due to workload. The government must not adopt a lenient stance on offenders due to political reasons. Lastly at no point should examinations be called off, bus services stopped ,etc merely because of hartals and bandh. This degrades the morale of the public and also encourages such methods of protests to coerce the government to give in to the demands.

