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Contempt of Court: In Search of a 'Law'

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Abstract

The seriousness and frequency in the recent attention of the Supreme Court of Bangladesh on its Contempt Jurisdiction has drawn a substantial public gaze. Here, the overall instability in the body politic over contentious constitutional and political issues has not left the judiciary untouched. Faced with the problems of choosing between what is right and what is easy, the highest judiciary of Bangladesh had unavoidably and unintentionally to be engaged in a bit of political discourse and hence became subject to both bona fide criticisms and motivated attacks from the vested quarters. Therefore, on many occasion the Supreme Court ventured the path of punishing its contempt and paved the way for a heated debate on this.

The problems that the age old Contempt Act 1926 poses today are primarily two-fold. Firstly, this Act leaving an undefined offence of contempt with a maximum but nominal punishment creates an unwelcome vacuum, uncertainty and inadequacy in contempt jurisprudence. Secondly, the reactionary approach of 'enforcing' obedience through contempt power taken by the colonial judges has had a subtle but permanent impression in the mind set-up of the present day courts and judges. While the rest her South Asian neighbors have introduced important changes in contempt laws, the Bangladeshi jurisprudence on the Contempt of Court unfortunately still lives in the era of 1926. Though a Bill on Contempt of Court was tabled in the Parliament in 2006 it was not ultimately passed. A 2008 Ordinance made by the Military backed Caretaker Government was rejected outright by the Supreme Court. Therefore, we need a 'Law' capable of handling the problems of the 21st century with an approach suitable to the genius of the time.

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1. Introduction

Article 39 of the Constitution is the guarantee of citizens' right to express themselves and criticize their governance. However, expressions exceeding the limits prescribed either under the law of defamation or of Contempt of Court or any other constitutional limitations would not be immune from liability. Of all these limits, the one regarding Contempt of Courts draws the most attention. The firmly established principle of common law in this regard is that no person has any right to flout the mandate of law or the authority of the Court under the cloak of freedom of thought and conscience or freedom of speech and expression or the freedom of the press.[1] And if one fails in his duty to refrain from committing contempt, he would be inviting trouble and the law would take its own course.[2] Yet a note of caution is that this power must be exercised very sparingly and only in the case of extreme necessity.[3] While the judges must guard their position zealously, they should not be touchy about it.[4] A quote from Lord Denning accommodates the proposition demonstrably:

> *(This) is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.*
> *Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism nor do we resent it. For there is something far more important at stake. It is no less than the freedom of speech itself.*
> *It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair, even outspoken comment on matters of public interest.*
> *Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken and our decisions erroneous, whether they are subject to appeal or not. All we ask is that those who criticize us will remember that, from the nature or our office, we cannot reply to those criticisms. We cannot enter into public controversy, still less political controversy. We must rely on our conduct itself to be its vindication.*[5]

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[1] *Md Riazuddin Khan* v. *Mahmudur Rahman,* Contempt Petition No 5 of 2010, p 78-79; The 111-page full text judgment is available at http://www.supremecourt.gov.bd/

[2] *Bangladesh Supreme Court Bar Association represented by Md Saidur Rahman* v. *Shah Azizur Rahman MP* 52 DLR (2000) 159, Para 5 & 6.

[3] *State* v. *Moazzem Hossain* 35 DLR (HCD) (1983) 266, Para 26

[4] *Ibid*, Para 36

[5] Per Lord Denning in *Regina* vs *Commissioner of Police of the Metropolis* (1968) 2 QB, 150 at 154

The question of restraint comes from three issues of vital importance. The first one, the Natural Justice issue, places the exercise of Contempt of Court jurisdiction in a bit controversial position. Here the Court acts on a triple action role - the prosecutor, the adjudicator and sometimes the legislator, when explaining and expanding the common law norms of contempt in absence of a concrete legislation. The second one, the ever increasing influence of Judicial Accountability notion, makes many a people believe that side by side with the 'duty' to respect, a 'right' to criticize the judiciary on the part of the citizenry should be inferred. Therefore, the Judges themselves have started to believe that 'no amount of law can save this institution (the court) or protect the judges, unless they do themselves.[6] Thirdly, the fluidity in the concepts of contempt coupled with the age-old legislation, *i.e.,* The Contempt of Court Act 1926 calls for a rejuvenation through legislative initiatives. What could readily be read as contemptuous in 1900 or 1912 or 1926 is not so easily read now in the context of expanding constitutional rights guaranteed as fundamental to human existence.[7]

In this paper I would present a short picture of the existing judge made, statutory and subordinate laws relating to contempt of courts in Bangladesh. The possible roadblocks that the High Court Division has put through *The Contempt of Court Ordinance Case of 2008* on the way to the proposed rejuvenation are also addressed. Thereafter attention is paid to the emerging trends of contempt laws of Britain and also of our neighboring South Asian Countries. Thereafter I shall try to chalk out the guiding principles of the proposed Contempt Law for Bangladesh.

1. Why need a 'Law'?

The origin of Contempt jurisdiction traces back its history to the monarchic rule of England where contempt was an offence more or less direct against the Sovereign and its authority. In the much celebrated judgment of *R* v. *Almon*, Wilmot J. observed that this power of the courts was for vindicating their authority, and it was coeval with their foundation and institution and was a necessary incident to a court of justice.[8] It was probably the first judgment in the legal history that marked the judicial

[6] *State* v. *Chief Editor Manabjamin and another* 57 DLR (2005) 359, Para 358
[7] *Ibid*, Para 39; See Also - Justice Latifur Rahman, *Accountability of Judges* 51 DLR (Journal) 1999, pp 65-67 at 67
[8] *R v. Almon* (1765),Wilm.249, at p. 254

interpretation of the contempt power in its true essence. In 1883 the Privy Council held that the Chartered High Courts of Calcutta, Bombay and Madras had summary jurisdiction to commit for the contempt for scandalizing them or their Judges.[9] In the subcontinent, the law of contempt received statutory recognition in the form of Contempt of Court Act, 1926.

The problems that the Contempt Act 1926 poses today are primarily two-fold. Firstly, this Act leaving an undefined offence of contempt with a maximum but nominal punishment creates an unwelcome vacuum, uncertainty and inadequacy in contempt jurisprudence and thereby necessitates an important task of devising a comprehensive list of contemptuous activities and omissions and pinpointing context specific punishments. Secondly, the reactionary approach of 'enforcing' obedience through contempt power taken by the Colonial judges has had a subtle but permanent impression in the mind set-up of the present day courts and judges. Hence, the revolutionary changes taking place in the characteristics of the modern statehood, as is already indicated in the introductory paragraphs, hardly matches the age-old contempt ideas.

Therefore, India repealed the 1926 Act and replaced it by the Contempt of Court Act, 1952. However, the scope of the 1952 Act, like the 1926 Act, was not wide enough to define as to what constitute contempt of the court, apart from many other flaws in provisions of the Act. The 1952 Act was repealed and replaced by the Contempt of Court Act, 1971. Even though a definition was introduced by the Contempt of Court Act, 1971 (vide Section 2), there was no definition of what constitutes scandalizing the court or what prejudices, or interferes with the course of justice. Hence lot many people claimed that the offence of scandalizing the court was a mercurial jurisdiction in which there was no rules and no constraints.[10] They were a bit correct in saying that there should be certainty in the law, and not uncertainty. So the 1971 Act was scrutinized by a Committee under the Chairmanship of H.N. Sanyal, the then additional Solicitor General of India. A resultant amendment was introduced in the Indian Contempt of Courts Act 1971 in 2006.

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[9] *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court of Bengal* (1883) 10 Ind. App 171

[10] Rajeev Dhavan, *Contempt of Court and the Press*, Indian Law Institute, Press Council of India, 1982, pp. 99-100.

Pakistan, on the other hand, introduced the Contempt of Courts Act 1976 repealing the 1926 Act. This again was replaced by the Contempt of Courts Ordinance 1998. Now the Contempt of Courts Ordinance 2003 regulates the field. The Nepalese Parliament has introduced a Bill on Contempt of Court in 2010.[11] The Srilankan Bar Association has come forward with a Draft Contempt of Courts Act in 2011.[12] Even the United Kingdom, the mother land of our common law heritage, has adopted the Contempt of Courts Act of 1981.

While the rest move forward, the Bangladeshi jurisprudence on the Contempt of Court unfortunately still lives in the era of 1926. Though a Bill on Contempt of Court was tabled in the Parliament in 2006 it was not ultimately passed. A 2008 Ordinance made by the Military backed Caretaker Government was rejected outright by the Supreme Court. Therefore, we need a 'Law' capable of handling the problems of the 21st century with an approach suitable to the genius of the time.

2. The Law of Contempt as it exists in Bangladesh

2.1. The behaviors that are Contemptuous in the eyes of the Courts

In Bangladesh, the law on contempt has been based on the precedents established by the Judiciary and the legislature never thought of introducing any statute in this regard. The usual incidents of contempt of court enlisted by the series of judicial decisions are as follows:

a. Scandalizing the Court; [13]
b. A publication relating to the merits of a dispute pending before a Court;[14]
c. Breach of undertaking given to the Court (*e.g.,* civil disobedience towards the court);[15]

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[11] A short review of the *Bill of Contempt of Court Act, 2067 (2011)* is available at: http://www.bipinadhikari.com.np/Archives/Speeches/20120119_contempt_of_court_bill_NCF.html

[12] The Draft Act was prepared by Dr J de Almeida Guneratne, P.C. and Kishali Pinto-Jayawardena, an attorney-at-law. Former Chief Justice of Srilanka GPS de Silva and former Supreme Court judge MDH Fernando were involved in finalizing clauses of the Contempt of Court Draft Act. Visit: http://www.lawandsocietytrust.org/

[13] *Supra Note* 1, p. 71; See also: Md. Fazlur Rahman, *The Contempt of Courts Act: Perspective and Expectation,* 55 DLR Journal 13 at p. 16

[14] *Md. Faiz* v. *Ekramul Haque Bulbul* 57 DLR (2005) 670, p. 677

[15] Mahmudul Islam, *Constitutional Law of Bangladesh*, 2nd Edition, Mullick Brothers, Dhaka

d. Prejudicing mankind against a party well before his cause is heard;[16]
e. Intimidating a lawyer;[17]
f. Attempting to influence a judicial officer regarding a case;[18]
g. Attempting to bring the administration of justice into disrespect or conduct or action causing obstruction or interference with the course of justice;[19]
h. Making imputations touching the impartiality and integrity of a Judge or making sarcastic remarks about his judicial competence;[20] and
i. Sometimes even attack on a retired judge;[21] etc.

2.2. Contempts and punishments recognized by the Penal Code

The sole law regulating the field, the Contempt Act 1926, does not define the offence of Contempt nor does it prescribe any definite procedure to be followed in a contempt matter. It is preached that this omission was deliberate; the reason behind it being maintaining the elastic character of the law, to enable courts to cover a wide field of application.[22] Section 3 of the 1926 Act prescribes punishment for a contempt of court which is

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(2003), p 657

[16] *Supra Note* 1, p. 60

[17] *Ratan Lal* v. *Sriln Lal Pandey* AIR 1952 33(1)

[18] *Supra Note* 6

[19] *Saleem Ullah* v. *The State* 44 DLR (AD) 309

[20] *Supra Note* 14, Para 45

[21] In *Court on its own motion* v. *M.K. Tayal and Ors*, the main arguments advanced by the accused in this case was that the attack in the press was focused on the ex-Chief Justice of India and therefore, the comment could not be termed as denigrating the authority of the Supreme Court. But the Delhi High Court rejected this argument saying: "The Supreme Court sits in divisions and every order is of a Bench. Therefore, by imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfill the ulterior design. The publications in the garb of scandalizing a retired Chief Justice of India have, in fact, attacked the very institution which, according to us, is nothing short of contempt (Para 5)." (Full text Judgment available at: http://courtnic.nic.in/dhcorder/dhcqrydisp_j.asp?pn= 3531&yr=2007; Last Visited: December, 2011)

[22] 12th Report on the Indian Contempt of Courts (Amendment) Bill, 2004 (Para 5), Indian Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, (Sudarsana Nachiappan, Chairman, 2005); Available at http://rajyasabha.nic.in/book2/reports/personnel/12threport.htm, Last Visited: June 26, 2008

imprisonment of maximum six months, or fine of maximum two thousands taka, or both. However, a short list of contempt offences arising particularly out of the abuse of, defaults in, judicial process and punishment prescribed there for, may be deduced from various provisions of the Penal Code 1860:

a. Intentional insult or interruption of any public servant sitting in any stage of a judicial proceeding is punishable with simple imprisonment of six months, or with fine which may extend to one thousand taka, or with both.[23]
b. Intentional omission to produce or deliver up any document[24] or information,[25] which a person is legally bound to produce or deliver up to a court of justice, is punishable with simple imprisonment for maximum six months, or with maximum fine of one thousand taka, or with both.
c. Refusal of a person to bind himself by an oath or affirmation to state the truth to a competent public servant is punishable with simple imprisonment for maximum six months, or with maximum fine of one thousand taka, or with both.[26]
d. Refusal to answer any question demanded of a person touching a subject on which he is legally bound to state the truth is punishable with simple imprisonment for maximum six months or with maximum fine of one thousand taka, or with both.[27]
e. Refusal to answer any question or to produce a document or thing before a Criminal Court may be punished with simple imprisonment for any term not exceeding seven days. In case of persistent refusal, the delinquent may be dealt with according to the provisions of Section 480 or Section 482 of the Code of Criminal Procedure. Such delinquency shown towards the High Court Division would attract the punishment prescribed in 1926 Contempt Act.[28]
f. Refusal to sign any statement required by a public servant legally competent to require that, is punishable with simple

[23] The Penal Code 1860 (Act No. XLV of 1860), Section 228
[24] *Ibid*, Section 175
[25] *Ibid,* Section 176
[26] *Ibid,* Section 178
[27] *Ibid,* Section 179
[28] The Code of Criminal Procedure 1898, Section 485

imprisonment of maximum three months, or with fine of maximum five hundred taka, or with both.[29]

g. Giving false or fabricated evidence intending to cause any person to be convicted of an offence which is punishable with imprisonment for life or seven years or upwards, is punishable with the same punishment as prescribed for that very offence.[30]
h. Neglect or refusal to attend before a Criminal Court without just excuse may attract fine not exceeding Taka two hundred and fifty.[31]

2.3. Persons likely to come within the Contempt Net

The administration of justice being an all-encompassing phenomenon of state life, the contempt net of the judiciary may reach as long as the 'hand of law' itself could reach. Therefore, a layman litigant as well as the chief political executive stands on the same footing of obligation towards the institutional stature of the judiciary, though the liability resulting from their fault may vary. Following is the short account of the institutional actors who are likely to come within the contempt hassle not because of their stake and interest as an individual rather because of the unscrupulous derailment in discharging the functions attached to their very office. Keeping in mind the frictions of authority that a contempt law creates in the State, special focus on these groups of stakeholders seems even more worthy.

Law Makers – In contempt proceedings, the legislature has absolute immunity due to the combined operation of Articles 108 and 78(3) of the Constitution of Bangladesh.[32] However the Rules of Procedure of Parliament prohibits deliberation in the floor on any matter *sub judicce*.[33] Even if anything opposite happens only the Speaker is authorized to deal with it. He may expunge the speech from the parliamentary records,

[29] *Supra Note* 23*,* Section 180
[30] *Ibid,* Section 195
[31] *Supra Note* 28, Section 458
[32] *Ataur Rahman Khan* v. *Md. Nasim and another* 52 DLR 16: "Article 108 makes the Contempt jurisdiction of the Supreme Court 'subject to law'. Article 78(3) confers immunity, *inter alia,* in respect of 'anything said in Parliament'. The word 'anything' is of the widest import and equivalent to 'everything' (Para 23)."
[33] The Rules of Procedure of Parliament, Rule 270

suspend the member from the Parliament,[34] but in no case the Court is to do anything.[35]

Political Executives - On the other hand, while dealing with the political executives, the Court usually seeks to avoid tension between the two vital organs of the State and ends up with a note of expectation requesting more caution and circumspection on the part of the political leadership.[36] In special circumstances the Court acknowledges an inherent right in the executive to talk on law and order situation of the country or to criticize legal and judicial system of the country in general.[37] Trying otherwise may not result in something happy for the State. The infamous 1997 tussle between the Pakistani Prime Minister Newaz

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[34] *Ibid,* Rules 14-19

[35] *Cyril Sikdar* v. *Nazmul Huda* 46 DLR 555: "The conduct of a judge in relation to the discharge of his duties cannot be legitimately be discussed in the House. Even though it is done, no remedy lies in a court of law (Para 17)." See Also: *Ch Zahur Illahi MNA* v. *Mr. Zulfikar Ali Bhutto PM* PLD 1975 (SC) 383, where Mr Bhutto, the Prime Minister of Pakistan, was arraigned under Article 204 of the Pakistani Constitution for contempt of the Court for the following statement in respect of a pending proceeding. His speech was directed against lifting of ban on a Political Party called National Awami Party (NAP): *If the Supreme Court in its wisdom or according to its own understanding gives a decision against us then it will not be my decision or that of the people but will be the decision of the Supreme Court. We will accept this decision but the responsibility for the consequence will be that of the Supreme Court. In spite of this if need be to save Pakistan we will fight in the hills, in the jungles and in the plains.* Mr. Bhutto was not found to have committed any contempt of the Court.

[36] *Re the Application of Mr. Habibul Islam Bhuiyan* 19 BLD (AD) 93 (Contempt Proceeding against Prime Minister Sheik Hasina): "The Court expected more circumspection, understanding, discretion and judgment on the part of the Prime Minister because of the high office she holds in making off-hand remarks in respect of constitutional functionaries which have been alleged to be contumacious (Para 13)." See Also: *Mainul Hosein and others* v. *Sheikh Hasina Wazed* 53 DLR 138 (Second Contempt Proceeding against Prime Minister Sheikh Hasina): "The judiciary cannot dictate how the executive head should exercise her discretion. We can only desire (Para 50)."

[37] *Mainul Hosein and others* v. *Sheikh Hasina Wazed* 53 DLR 138: "The statement of Prime Minister on law and order situation for which she is responsible should not be readily read as contumacious in the absence of clear motive (Para 52)." See Also: Ridwanul Hoque, *The Province of the Law of Contempt of Court Undermined?* The Chittagong University Journal of Law, Vol 3 (1998) pp 181-203 at p 198: An Indian Federal Minister speaking before the Bar Council of Hyderabad saying, 'Anti-social elements *i.e.,* foreign exchange violators, bride burners and a whole horde of the reactionaries have found their Heaven in the Supreme Court," was spared by the Indian Supreme Court. The Court held that it was a criticism of laws and not of Supreme Court. Again, the former Indian Premier Atal Bihari Bajhpayee was not indicted for his comment that the people had started hating their courts for its dilatory attitude and the law had become a shield in the hands of some irresponsible and unscrupulous persons.

Sharif and Chief Justice Sajjad Ali Shah bears justification for such a restraint.[38]

Judicial Officers – In fit cases, the contempt jurisdiction may be exercised even against the Judges, either of Higher or of Subordinate Courts. Usually the higher court judges are spared with a note of admonition.[39] A Subordinate Court Judge however runs a higher risk of being indicted and punished if he fails to maintain strictly within his code of conduct.[40]

The Civil Servants – Contempt Law has served as the strongest deterrent for the delinquent public servants. Public Servants interfering with the judicial business,[41] making arrogant comments on the judicial

[38] During his second stint in power Nawaz Sharif wished to rid himself of 'an awkward' Chief Justice, Syed Sajjad Ali Shah who was not ready to toe his line. Therefore, Sharif started consulting his confidantes as to how to get rid of the defiant Chief Justice. In his book, *Glimpses into the Corridors of Power* (Oxford University Press 2007), the Foreign Minister of Sharif cabinet, Gohar Ayub Khan, writes that Nawaz Sharif also wanted to summon the Chief Justice before the Privilege Committee of National Assembly (with a charge of contempt of parliament). Sharif is quoted to have even said: 'Gohar Sahib, show me the way to arrest the Chief Justice and keep him in jail for a night'. Sharif succeeded in dividing the superior court judges into two camps and Sajjad Ali Shah was finally removed by none other than his fellow judges on December 2, 1997. For More: Amir Mir, *Bitter memories of 1997 contempt case against Sharif*, The News International, Pakistan, January 20 2012, Url: http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=88497&Cat=6 (Accessed on: February 18, 2012)

[39] *Shamsuddin Ahmed* v. *Md Golam Rabbani & others* 52 DLR (AD) (1999) 68: A High Court Division Judge writing newspaper article on a matter on which he delivered judgment and which was being considered by the Appellate Division was warned by the Appellate Division for violating the judicial propriety and advised him to follow more circumspection (Para 13). See Also: *Supra Note* 6 (*State* v. *Chief Editor Manabjamin*), Para 356 where alleged contempt allegation against a retired High Court Division Judge, Justice Naimuddin Ahmed, was disposed of by the Court with a mere observation: 'Mercy is a mark of strength and not whimper of weakness. The Courts always ignore by a majestic liberalism trifling and venial offences. The dogs may bark, but the caravan will pass.'

[40] *Ashok Kumar* v. *State* 51 DLR (AD) (1999) 235: An Assistant Judge offending the Highest Court by writing a newspaper article was convicted. However after four years of conviction, the Appellate Division spared the Judge on the ground that he had already suffered enough. The Appellate Division observed: *"This case should serve as a reminder to all concerned that the Court will not hesitate to deal with members of the sub-ordinate judiciary, if he is not cautious, restrained, respectful, and deferential with regard to the highest judiciary* (p. 238)."

[41] *State* v. *Abdul Karim Sarkar* 37 DLR (1985) 26: The UNO (Upazila Nirbahi Officer) of Chilmari, Kurigram was alleged to have created undue pressures on AKM Zulfikar Ali, a Munsif Judge, and interfered with his judicial activities in a crude way. In this contempt of case Mr. Justice Mustafa Kamal observed: "The sight of an executive head lecturing a

wings even through their departmental channel,[42] showing disrespect to the judiciary[43] and making willful disregard of the judicial orders or directions have faced the contempt charges frequently.

The Press - Most vulnerable segment of the society on the face of a contempt charge is the community of the journalists, columnists of print media and discussants of talk shows in electronic media. To them, even disclosure of truth is not available as a defence. Here the Court sees not whether it is true but whether it leads or provokes someone to disrespect, or shakes someone's confidence on, the courts of law.[44] The defence of good faith in believing a fact to be true is also discouraged.[45] The rigor of law, however, slackens when apology is tendered unconditionally and the accused leaves himself completely at the mercy of the court. Usually such an unconditional apology and submission to the good grace of the Court is accepted.[46] Yet occasionally the Court may decline to subscribe to the '*slap-say-sorry-and-forget* school of

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member of the judiciary in the open court and creating hindrances in smooth functioning is too much to be allowed with impunity… the executive arms of the government will not be allowed to attack and deface the honour, dignity and independence of the judicial organ of the state. If they are so allowed, then in no time, the remaining civilized fabrics of our society will collapse. The arms of law are long enough to reach at contemner who acts in contumacious disregard of the dignity of a court of law. (Quoted in Ridwanul Hoque, *Supra Note* 27 p. 192)

[42] *Abdul Haque, Deputy Commissioner* v. *District Judgeship* 51 DLR (AD) (1999) 15

[43] *Government of Bangladesh* v. *Shuhudul Haque* (Criminal Miscellaneous *Suo Moto* Rule Nos. 7742 & 12166 of 2003): Shahudul Haque, the then Inspector General of Bangladesh Police, described an spot trial of contempt charge by an Honorable Judge of the High Court Division to be with the object of harassing and humiliating the police and to destabilize the state of law and order situation in the country. He was fined with Tk. 1000 in default of which to suffer 2 months imprisonment and consequently became disqualified to continue in Public Service. The Full Text Judgment is printed in Dr. Belal Hussain Joy, *Constitutional History of Bangladesh comments on contemporary political crisis and leading case laws*, Law Book Company, 2008, p 621.

[44] *Supra Note* 1, p. 5-6; Per SAN Mominur Rahman J.

[45] *Re S.K. Sundaram* 2001 CrLJ 2932: A Bench of the Indian Supreme Court held that implication of "good faith" in criminal jurisprudence is totally different from saying that the person concerned has honestly believed the truth of what is said. Citing Section 52 of the Indian Penal Code, the Bench held that the solitary item included within the purview of the expression 'good faith' is what is done with "due care and attention". Thus the Bench held that before a person proposes to make an imputation on another, the author must first make an enquiry into the factum of the imputation. The enquiry expected of him is of such a depth as a reasonable and prudent man would make with the genuine intention of knowing the real truth (Quoted in V. Venkatesan*, Truth as a Defence: How effective Is the amendment of the Contempt of Courts Act?*, Indian Journal of Constitutional Law, Volume 4, pp 164-178 at p. 171**)**

[46] *Shahidul Islam* v. *Mahbubul Alam & others* 19 BLD (HCD) 601

thought in administration of contempt jurisprudence'.[47] Hence a mere paper apology and expression of sorrow coming from the pen not from the heart will surely not be accepted.

2.4. The procedure to deal with a contempt allegation

As is seen above, the Contempt of Court Act 1926 failing to prescribe any particular procedure to be followed in a contempt matter, the provisions of the Code of Criminal Procedure 1898 and the Rules of the both Divisions of the Supreme Court should hold the field of procedural law. There being no gross question of propriety in the procedural filed, the following is an attempt just to inform the readers of the procedural law of contempt as it prevails in Bangladesh.

Sections 480-487 of the Code of Criminal Procedure 1898 chalk out the procedure to be followed in cases of contempt committed on the face of the Court. In dealing with the alleged contempt of any court sub-ordinate to it, the High Court Division is empowered to follow the same procedure and practice and to exercise same jurisdiction, power and authority as it follows and exercises in regard to its own contempt. However where such contempt is an offence punishable under the Penal Code, the High Court Division is barred from taking cognizance of contempt of a subordinate court.[48] This however, may mean that the HCD may take cognizance of 'other kinds of contempt' of sub-ordinate Court which are not defined in the Penal Code.[49] The practice, however, is that the subordinate court concerned draws up a report concerning the alleged contempt and sends it to the High Court Division which entertains it under Section 3 of the Contempt of Court Act 1926.[50]

Interestingly, the High Court Division has not yet adopted any rules to deal with contempt of itself rather it is following the path charted by the Appellate Division. The Appellate Division, however, has framed the Appellate Division Rules, 1988 detailing the procedure for dealing with contempt of that Division. The Appellate Division may take cognizance of its contempt *suo moto* or on a petition by any person. In case of civil disobedience[51] to the Court, it takes cognizance upon application of any

[47] *Supra Note* 43*,* p. 621
[48] The Contempt of Courts Act 1926, Section 2
[49] *State* v. *Abdul Aziz* PLD 1962 (WP) 335
[50] *Supra Note* 37, Ridwanul Hoque, p. 183 See Also: *Supra Note* 19, Para 17
[51] The Appellate Division Rules 1988, Order XXVII, Rule 1: Civil Disobedience is the term I use in relation to the instances of contempt mentioned in Rule 1 such as willful

person aggrieved.[52] Cases of scandalizing the Court or bringing it to disrepute are placed before the Chief Justice or such Judge as he nominates to deal with it. The Judge concerned communicates the proceeding to the Attorney General who then comes under a duty to conduct it on the Court's behalf.[53] Where the contempt is committed on the face of the Court, the Judge may forthwith proceed with the contempt charge and award the contemner punishment under the law.[54] However unconditional apology and appeal for mercy may be considered by the Court, and in such case the Court may make such order as it thinks fit.[55]

3. The Contempt of Court Ordinance 2008

In 2008, during the hearing of a *suo moto* contempt rule,[56] the Contempt of Court Ordinance 2008 repealing the Contempt of Court Act 1926 was passed by the Military backed Caretaker Government.[57] While the respondent started arguing his case on the basis of the new Ordinance, question regarding validity of the Ordinance arose. The Court wished to judge the constitutionality of the Ordinance and referred the matter to the Chief Justice. The Chief Justice permitted the Court to decide on the issue. A rule was issued on the Ministry of Law to explain as to why the new Ordinance should not be declared *ultra vires* the Constitution. In the meantime the writ petition of M Shamsul Haque challenging the Ordinance was lodged.[58] It was taken up for consideration simultaneously with the existing rule. Ultimately the Court invalidated the new Ordinance on some substantial, as well as on some other controversial, grounds. The Supreme Court's apparent suspicion towards any law 'regulating' the contempt jurisdiction became evident in this case. Therefore, it will be logical for me to explore the arguments of the Court in some detail so that I may take due care of possible problem zones of the Law I'm searching for.

Contempt Power *may not be curtailed anyhow* - The Ordinance provided that the Supreme Court's power to investigate, prosecute and convict for the offence of its contempt would be subject to the provisions

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disobedience of any judgment, decree, direction, order, writ or other process of the Court or a breach of an undertaking given to the Court or a Judge in Chamber.

[52] *Ibid*, Rule 2(2)
[53] *Ibid,* Rule 7
[54] *Ibid,* Rule 11
[55] *Ibid,* Rule 12
[56] *Suo Moto* Contempt Proceeding No. 5 of 2008
[57] The Contempt of Court Ordinance 2008, Section 25
[58] *M. Shamsul Haque* v. *Bangladesh* 15 BLC (2010) (HCD) 236

of the Ordinance.[59] Though the Article 108 of the Constitution itself makes the contempt power 'subject to law,' the Court held that it gave the power unconditionally. Hence conditioning an unconditional power was *ultra vires*.[60] To further emphasize its unconditional nature, the Court interpreted the power to punish contempt as a basic feature of the Constitution which had been carried through the Government of India Act (1935), Independence of India Act (1947), the Constitution of India (1950), of Pakistan (1956, 1962) and finally that of Bangladesh (1972). Therefore it would inherently be with the Court had there been no Article 108 at all.[61] On the same ground of limiting or curtailing the power of the High Court Division under Article 108, the Court rejected the definition of contempt offered by Section 2(c) of the Ordinance.[62]

Fixing Time Table for disposal *may not be acceptable* - Section 7 of the Ordinance prescribed a time table. A contempt proceeding must initiate within 3 months of occurrence and must be disposed of within 6 months, failing which the case would stand abated.[63] All the proceedings pending at the Ordinance's coming into force must be disposed of within 2 months next.[64] The Court expressly rejected such time table on consideration that most of the contempt proceedings arise out of allegations of flouting judicial orders passed in exercise of writ jurisdiction which are mainly of continuous mandamus type. A litigant usually tries to reap the fruit without further involvement of the Court. It is only after his ultimate failure to avail the decreed remedy that he comes to the court with contempt petition. So prescribing time limit would take away from him what he has got legally and thereby violate the basic feature of the Constitution.[65] Since the Article 108 has not imposed any time limit, this provision was declared void.[66]

It appears that the reasoning advanced by the Court may not convince many. Article 108 being a constitutional provision, prescribing everything

[59] *Supra Note* 57, Section 22
[60] *Supra Note* 58, Para 44; Support for the view may be found in Indian case of *Pritamlal* v. *High Court of Madhya Pradesh* 1 SCC (1993) Supp. 529 wherein the Indian Supreme Court held that its power of contempt could not be restricted and trammeled by any ordinary legislation including the provisions of the Contempt of Courts Act.
[61] *Ibid,* Para 53
[62] *Ibid,* Para 70
[63] *Supra Note* 57, Section 7(2)
[64] *Ibid,* Section 23
[65] *Supra Note* 58, Para 60
[66] *Ibid,* Para 62

in-details, time limit say for example, is not usually expected from it. It is also not logical that anything not found in the Constitution may also not be found in a statute. Then how would the statute law supplement the constitutional law? Of course, it must be ensured that the statute does not make a constitutional guarantee obsolete. The 3 months' time limit may be unreasonably short but that must not mean that there may not be any limitation at all. The Indian and Pakistani statues usually provide a one year time for instituting the contempt proceedings,[67] though the Court clarified that the time limit has no application where the contempt is a continuing wrong[68] or that it shall not impair the contempt jurisdiction in general.[69] However, the Indian and Pakistani laws contain no time limit for disposal of the proceeding. And of course, the provision of abatement as prescribed in 2008 Contempt Ordinance is totally unheard of and not acceptable at all.

Exception Clauses *not tolerated by the Court* – Different clauses of Section 3(1) of the Ordinance provided a list of activities which may not be considered contemptuous. As per Clause (a) substantial reports, information, comments or news regarding the normal course of administration of justice would not be contemptuous. The court rejected it observing that judgment whether a report is substantial or not would lie with the Courts discretion. Clause (c) exempted the reports, information or news on the personal conduct of a judge not directly related to any judicial activity. The Court opined that news or report, even if related to the personal conduct of a judge, may defame the administration of justice or may interfere with the course of justice. Clauses (d) and (e) provided that constructive discussion on a judgment of the court may not be contemptuous. The Court, however, observed that malicious discussion would constitute so. Similar observations were made regarding the Clauses (f) and (h). Regarding clause (g), the Court observed that even substantial report on the judicial duty or activity might constitute contempt of court.[70] Ultimately the Court declared Section 3(1) as a whole to be void.[71]

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[67] The Indian Contempt of Courts Act 1971, Section 20; The Pakistani Contempt of Courts Ordinance 2003, Section 11(4)
[68] *Firm Ganpat Ram Rajkumar* v. *Kalu Ram* AIR 1989 SC 2285, Para 7
[69] *High Court of Karnataka* v. *Y.K. Subanna* 1990 CrLJ 1159 (Kar)
[70] *Supra Note* 58, Para 65
[71] *Ibid,* Para 72

A cursory look on the reasoning offered by the court against the exception clauses would crystallize the idea that the court was in principle not ready to consume any exception to its contempt jurisdiction. Hence the Court came out with one or another probability based arguments against each and every exception clause and ultimately declared the whole Section 3 void. Of course, a report may not be substantial or even a substantial report may scandalize the court. The Court is always there with its unfettered power to interpret situations on a case-to-case basis to judge whether a particular case comes within an exception clause or not. But only for that there may not be any exception at all is too much to consume. In fact, similar exception clauses are found in every sub-continental law of contempt and those were not declared to be void *en messe* as is done in Bangladesh.

An Ordinance ensuring *the servants' mastery* – The most contemptuous area of the Contempt Ordinance was too much favor shown to the bureaucrats of the State. Apparently, Section 3(3) was made to protect the public servants from the charge of contempt of court. This section empowered the government servants to refrain from enforcing the order of the court in consideration of other law, rule or practical reasons! The Court expunged this directly as the court itself passes the order in consideration of all other laws, rules or practical considerations and after the order is passed the executive officials cannot sit over the judgment of the court.[72] Again a judicial order may not be enforced if decided wrongly.[73] For obvious reasons the Court could not allow the government officers sitting to judge whether the court has decided a case rightly or wrongly.[74] Section 10(1) exempted the servants of the Republic from personal appearance before the Court. The Court rejected this on the ground of rule against discrimination and inequality. Ironically while a Magistrate of the 3rd class could summon a public servant, the High Court Division's power was curtailed by this section.[75] Section 10(3) armed a delinquent public servant with the legal support of the government attorneys in contesting a contempt charge. The Court rightly felt that such a support would destroy the purposes of Article 111 which obliged the executive to act in aid of the Supreme Court and not in defense of its contemner.[76] Section 10(5) of the Ordinance provided that

[72] *Ibid,* Para 73
[73] *Supra Note* 57, Section 3(5)
[74] *Supra Note* 58,, Para 74- 75
[75] *Ibid,* Para 77
[76] *Ibid,* Para 78

a punishment inflicted on a public servant shall abate on his retirement, dismissal or removal. The Court rejected this as well on the ground that it would run contrary to justice.[77]

Contempt convictions *may not be pardonable* - Section 11 of the Ordinance provided that the President may grant pardons, reprieves and respites and remit, suspend or commute any sentence passed upon a servant of the Republic in exercise of his power under Article 49 and Section 401 of Cr PC. The Court opined that the question of contempt arises mainly out of non-compliance with judicial orders and if section 11 is there, it will frustrate the purpose of Judicial Review under Article 102 of the Constitution. The Presidential prerogative of mercy under Article 49 is not disputed. But it should not be construed in such a way as to impair the Court's power of judicial review.[78]

Around the world, there is a dilemma regarding the scope of presidential pardon in contempt of court punishments. The US Constitution recognizes the President's power to condone offence against the State, not against the individuals.[79] The US Courts have figured out four possible cases: (i) criminal convictions, with a fine payable to the State, which being an offence against the State is considered pardonable;[80] (2) criminal convictions with a fine payable to an individual person, which is generally believed not to be pardonable, though there are opposite views as well;[81] (3) contempt commitments to enforce a decree in favor of an individual person, considered not pardonable since it is not an offence against the State;[82] and finally (4) contempt commitments to vindicate the dignity of the court. In class (4) the question squarely arises whether it is the judiciary or the executive that shall be the final judge of the manner in which a court is to preserve its dignity and enforce obedience.[83] A possible distinction might be made between cases where

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[77] *Ibid,* Para 79
[78] *Ibid,* Para 80
[79] Article II, Section 1 of the U.S. Constitution
[80] In *Osborn* v. *United States*, 91 US 474 the Court so held in light of the Presidential power "to grant reprieves and pardons for offences against the United States, except in cases of Impeachment."
[81] Series of the US judicial decisions, though not harmonious and mostly decisions of state courts, indicate that the power does not exist, because its exercise would interfere with vested rights of the individuals (*United States* v. *Thomasson*, 4 Biss (U. S. Dist. Ct.) 336).
[82] *Hendiryx* v. *Fitzpatrick,* I 9 Fed Rep. 8
[83] In *Re Nevift*, II 7 Fed. Rep. 448 (C.C.A.), reported in Harvard Law Review, Vol. 16, No. 4 (Feb., 1903), pp. 291-292, (Stable URL: http://www.jstor.org/stable/1323477), Judge

the defendant is punished for a past act and where he is punished till he complies with the order of the court. It is arguable that in the one case he has passed out of the hands of the court, and so the President or the Executive may deal with him as he pleases, whereas in the other, since he is still under the direct control of the court, he should not be pardoned. I think the High Court Division could take such a position in respect of Section 11 of the Contempt of Courts Ordinance 2008. Yet arguing from another perspective, I think it is not necessary at all to provide in a Contempt of Court law that convictions may be pardoned by the President under Article 49 of the Constitution or Section 401 of the Criminal Procedure Code. These powers exist independent of the

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Sanborn of the Circuit Court of Appeals of the Eighth Circuit, most vigorously assailed the proposition that "contempt of court are public offenses, pardonable like any other." There Judge Sanborn strongly advised that the operation of the pardoning power be excluded from all contempt cases.

In *ex rel. Rodd* v. *Verage*, (1922) 177 Wis. 295, I87 N. W. 830 *State* v. *Shumaker*, 164 N. E. 408 (Ind. 1928) reported in Virginia Law Review, Vol. 15, No. 6 (Apr., 1929), pp. 597-598, Virginia Law Review (Stable URL: http://www.jstor.org/stable/1065938), the Defendant was Superintendent of the Anti-Saloon League of Indiana. In his annual report to the trustees of that organization, he made certain statements concerning the Supreme Court of Indiana that were construed under a certain legislative enactment as a violation of the prohibition against "indirect contempt" of court. Upon trial, the defendant was found guilty and fined $250.00 and sentenced to sixty days on the state farm. The state constitution gave the governor the power to "pardon after conviction, for all offenses except treason and cases of impeachment." Another section defining all offenses in terms of crimes and misdemeanors failed to mention contempt of court. The Governor of Indiana issued a pardon to the defendant and he was released. Subsequently the Attorney General filed information denying the governor's power to pardon for contempt of court. The Court held that contempt of court is not an offense for which the governor may grant a pardon.

However, in the federal Court for the Northern District of Illinois, *United States* v. *Grossman* (1924) I F. (2d) 941, noted in 38 HARV. L. Rev. 685, it was decided negatively confirming the executive's power to pardon contempt of court offences. Later the US Supreme Court confirmed it in *Ex Parte Grossman* (1925) 45 Sup. Ct. Rep. 332, 267 U.S. 87 reported in Michigan Law Review, Vol. 24, No. 2 (Dec., 1925), pp. 189-190 (Stable URL: http://www.jstor.org/stable/1280053). The Supreme Court in the instant case based its decision upon the historical argument, interpreting the clause by reference to the common law and to British institutions as they existed when the US Constitution was framed and adopted and upon the established practice of the executive in granting pardons in this class of cases. The Supreme Court seemed to be of the opinion that the fear of the usurpation by the executive of the judicial power was unwarranted since it was unlikely that coordinate departments would seriously cripple one another by the undue use of overlapping functions. In view of the legislative tendency to increase the exercise of the restraining power of the court as a means of control of criminal conduct it would seem wise not to leave an absolute power to punish in any one officer or department, the Court inferred.

contempt law and whether they should be applied to a contempt conviction should be judged on a case by case basis.

Substantial Damage Threshold *was denied* – The gist of the substantial damage threshold is that no sentence is imposed for contempt unless the act substantially interferes with the administration of justice. Even comments on matter *sub judice* are judged to see whether there was a substantial likelihood of prejudice to the outcome of the case. This substantial interference test has been adopted by the Indian Contempt of Court (Amendment) Act 2006 as well. The newly inserted Section 13(a) to the Indian Contempt of Courts Act 1971 provides that no Court shall impose a sentence for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice. In fact a long series of sub-continental legislations have accepted the substantiality test.[84]

Likewise, **S**ection 19 of the 2008 Ordinance of Bangladesh provided that the accused may not be punished, if the usual course of justice had not been obstructed in practice by the alleged contempt. But the Court again showed its unpreparedness to accept the doctrine by holding that whether the course of justice had been obstructed or not was to be decided by the Court itself and hence declared Section 19 *ultra vires*.[85] Did Section 19 take away from the Court the power to judge whether the interference was substantial or not? It merely preached that no contempt if no substantial interference. Court is always there to judge the substantiality of interference. In fact the Supreme Court's apathy to the doctrine is established well before: "The question is not whether the comments in the article in fact obstructed or interfered with the due administration of justice but whether it is 'calculated' to obstruct and interfere with the due course of justice."[86] Therefore the Court is more akin to look into *bona fide* of the contemner rather than on the end result of his action. I think time is ripe enough to change the stance, because time favors unrestricted freedom of speech to the greatest possible

[84] The test of substantial detriment to the administration of justice is found in Section 20 of the Pakistani Contempt of Courts Ordinance of 1998, Section 18 of the Pakistani Contempt of Courts Ordinance 2003 and Section 15 of the **Bill of Contempt of Court Act, 2067 (2011) of Nepal.**

[85] *Supra Note* 58, Para 81

[86] *Supra Note* 1, p. 71

extent of toleration. 'The dogs may bark, but the caravan will pass' - to borrow words from the Court itself.[87]

4. The Guiding Principles of the Proposed 'Law'

At the outset it should be made clear that my proposal for a Law of Contempt belies on the belief that there should be no fetter on the legislative powers of Parliament, in laying down "by law" the norms and procedure to be followed by the Courts including the Supreme Court of Bangladesh. While Article 108 of the Constitution itself provides that the Supreme Court's power to punish its contempt shall be 'subject to law', the stance of the Supreme Court in *2008 Contempt of Court Ordinance Case* that the power to punish contempt is unconditional, is not convincing. Of course, a Court of Record essentially possesses the right to punish its contempt. And this power may or may not be expressly acknowledged by the constitution, yet it may not be conclusively claimed that there may not be further parliamentary legislation supplementing the Constitutional provision. A legislative effort may also not be readily claimed to 'condition' an unconditional power. The law however, must pay due attention to the dignity, stature and independence of judiciary on the one hand and maximum possible freedom of expression to ensure the highest possible extent of judicial accountability on the other hand. That is why I would like to articulate some motivating principles guiding the proposed law, including the following:

A. ***Freedom of Expression to be the overriding principle:*** The legitimate exercise of freedom of expression, information and publication shall operate as the overriding principle to which the contempt rule is a narrowly interpreted exception.[88]

B. ***Truth would be a conditional defence****:* Some argue that since truth is a complete defence to an action for libel, it should be a complete defence to contempt of court proceedings as well.[89] However, the problems of making truth a complete defence are manifold. To share the feelings of the British Philimore Committee: "A simple defence of truth would permit the malicious and irresponsible publication of some damaging episode from a judge's past, however distant, calculated to cast doubt upon his ability to

[87] *Supra Note* 6, Para 356
[88] The Draft Contempt of Courts Act, 2011 (Srilanka), Section 3
[89] H. M. Seervai, *Constitutional Law of India: A Critical Commentary*, Vol. 1, Universal Law Publishing, 3rd ed. (1991) p. 724

try a particular case or class of cases. The Committee, therefore, does not consider that truth alone should be a defence and thus recommends public benefit to be considered along with truth, if it is to be recognized as a defence."[90]

Realizing the need for doing away with the conservative approach of denying any defence of truth at all, the Indian legislature introduced through amendment[91] a new Section 13(b) in the Contempt of Courts Act 1971 which states: "The court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide." Therefore, the Court has the discretion to admit truth as a defence to contempt proceedings, as long as the discretion is guided by the twin factors of public interest, and the bona fide nature of invoking the said defence.[92]

Alternatively, the proposal of the Australian Law Reform Commission also is worthy of consideration. It has recommended that there should be a defence to the effect that the allegedly scandalizing remarks, so far as they related to questions of fact, were true, or that the person making them honestly believed them to be true and was not recklessly indifferent as to truth or falsity. Evidence showing that the accused knew of the falsity of his remarks, or was recklessly indifferent as to truth or falsity of his statement, would nullify his defence.[93]

C. ***Norms of Natural Justice must be followed:*** The contempt procedure must be fair enough to accommodate the rudimentary norms of natural justice during sentencing. A minimum sentence would be prescribed when contempt is, in fact, found.

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[90] *Report of the Committee on Contempt of Court*, (Lord Justice Phillimore, Chairman, 1974), Para 166; See Also: *The Report of the Indian National Commission to Review the Working of the Constitution*, (M.N. Venkatachaliah Chairman, 2002), Vol. 1 Para 7.4.2 which suggested the insertion of a proviso to Article 19(2) of the Indian Constitution to the effect that, 'in matters of contempt, it shall be open to the Court on satisfaction of the *bona fides* of the plea and of the requirements of public interest to permit a defence of justification by truth." Report Available at http://lawmin.nic.in/ncrwc/finalreport/v1ch7.htm (Last visited: December 26, 2011)

[91] The Indian Contempt of Courts Amendment Act 2006

[92] V. Venkatesan, '*Truth as a defence: how effective is the amendment of the contempt of courts act?*,' The Indian Journal of Constitutional Law, Volume IV (2010), pp. 164-178 at p. 168

[93] Christopher Miller, *Contempt of Court*, Oxford University Press, 3rd Edition (2000), p. 358

D. *Judicial functions to be distinguished from Administrative functions:* Though the sub-continental contempt law applies strict liability rule equally to the judicial as well as administrative actions of the courts, I propose a rational distinction between the two. The obliteration of the distinction between judicial and non-judicial action of the judiciary may result in an excessive sacrifice of freedom of speech.

Under the English contempt law there is a clear distinction between the judicial and administrative actions of the courts concerning an action under the contempt of court. Section 2 of the English Contempt of Courts Act, 1981 prescribes strict liability for scandalizing a court only if it creates a substantial risk that the course of justice will be seriously impeded or prejudiced 'in relation to certain pending proceedings' which are in active prosecution in a court. In other cases of scandalizing the court, there would be no strict liability and absence of *mens rea* would be a good defence. Even in cases of comments on judicial actions, the contemner has another special defence under Section 5 the English Contempt of Courts Act, 1981. He can plead that the publication was part of a discussion in good faith of public affairs or matter of general public interest and that any prejudice to particular legal proceedings was only incidental.

In fact, the High Court Division of Bangladesh also has accepted such a distinction in *Dr. Ahmed Hussain* v. *Shamsul Huq Chowdhury.*[94] Md. Shamsul Huq Chowdhury, the Chairman of the *Sommilito Ainjibi Somonnoy Parishad* was accused of contempt of court. He allegedly made a statement in the newspaper condemning the appointment of Justice Abdur Rouf as the Judge of the Appellate Division: *Presence of Mr. Justice Abdur Rouf, a disputed person as the CEC in the holy premises of the Supreme Court has tarnished the image of highest court in the eye of the public. His role as Chief Election Commissioner is one of ignominy and unbecoming of what he was just before his appointment as the CEC.*

Dr. Ahmed Hossain came to the Court with argument that the statement was made to lower down the image of the High Court Division and many of the sitting judges and specially one of the sitting judges. The Court held that the statement did not involve an attack on the Judge exercising his function as a judge. The solitary statement was directed to Mr.

[94] *Dr. Ahmed Hussain* v. *Shamsul Huq Chowdhury* 48 DLR 155

Justice Abdur Rouf at the time when he was functioning as the Chief Election Commissioner and not as a judge. [95] Accordingly the petition was rejected.

5. Key features of the Proposed Contempt Law

Since the precise definition of actions or omissions which do and don't constitute contempt remain the bone of contention in legislation talk, in this part I would like to formulate a comprehensive definition of contempt and also an exhaustive list of activities and omissions which may not constitute contempt. Apart from these, the punishment for various gens and species of contempt as prescribed in the Contempt Act 1926, the Code of Criminal Procedure 1898 or the Penal Code 1860 may be retained as they stand now. Procedure to be followed in a contempt charge is also elaborately prescribed in laws of Bangladesh *i.e.,* the Appellate Division Rules 1988 and the Code of Criminal Procedure 1898. Since there has been no question regarding the procedural propriety of these laws, the proposed Contempt Law may accommodate the procedure already elaborated in these laws. However for one or two trivial changes, Section 10-12 of the Indian Contempt of Courts Act 1971, Sections 7-10 of the Pakistani Contempt of Courts Act 1976, Section 13 of the Pakistani Contempt of Courts Ordinance 1998 and Sections 4, 7, 17 and 19 of the Pakistani Contempt of Courts Ordinance 2003 may be looked into. All these are more or less identical with the procedure we have in Bangladesh.

5.1. Defining the Contempt of Court

The 1926 Act not defining contempt of court has left much to the discretion of the judge or judges in interpretation of what constitutes contempt of court. Since in principle I accept that the contempt power in a democracy is only to enable the court to function effectively, and not to protect the self-esteem of an individual judge, there must be a concrete definition. Theoretically contempt may be of three types – Civil, Criminal and Judicial. Though the early legislations combine Criminal and Judicial contempt into one class, I would adopt such a classification for the purpose of determining the nature of punishment and procedure.[96] Civil Contempt consists of disobeying the court's order in a manner that an

[95] *Ibid*, Para 5

[96] Section 3 of the 1976 Pakistani Act considered it criminal contempt simply. But Section 11 of 1998 Ordinance recognized Judicial Contempt as a separate species of Criminal Contempt.

individual or a party at large is aggrieved. Criminal contempt consists of offence against the court itself and the prestige of the judiciary. Civil contempt can be remedied if the individual is satisfied but criminal contempt leaves a long lasting damage upon the image of the judiciary. Hence the satisfaction of the society as a whole is needed.

An standard definition of Civil Contempt may be as – **'Civil Contempt**' means the willful flouting or disregard of any judgment, decree, direction, order - whether interim or final, writ issued in exercise of constitutional jurisdiction or other process of the Court, or a breach of an undertaking given to the Court or a Public Servant sitting in judicial capacity.

Criminal Contempt may be defined from two perspectives - One in relation to the Court and another in relation to the Parties to a proceeding before the Court. '**Criminal Contempt in relation to the Court (Judicial Contempt)'** means the publication, whether by words - spoken or written, signs, visible representation or otherwise, of any matter or the doing of any other act whatsoever which

(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, obstructs or interferes or tends to prejudice, obstruct or interfere with, the due course of any judicial proceedings; or
(iii) disturbs the order or decorum of a Court; or
(iv) ridicules or brings the Court or a Judge in relation to his office into hatred,[97]

provided that any such publication or action results in something immediately, clearly and substantially detrimental to the administration of justice.[98]

'Criminal contempt in relation to the parties to a proceeding' includes[99]

(a) attempting to influence a witness, or proposed witness, either by intimidation or improper inducement, not to give evidence, or not to tell the truth in any legal proceeding;

[97] The item number (iv) is found in Rule 7(1) of the Appellate Division Rules 1988
[98] The proviso is inspired by the notwithstanding clause found in Section 13 of the Indian Contempt of Court Act 1971.
[99] I use 'includes' instead of 'means' in the hope that it shall keep the probability of the considering other varieties of conduct contemptuous.

(b) intimidating or attempting to intimidate or offering an improper inducement to a lawyer or a party involved, in order to secure a favorable verdict in any legal proceedings.[100]

5.2. Actions or Conduct not constituting Contempt

The curious position of an Act of Parliament aiming at codifying the law of contempt is that here people concentrate more on the 'behaviors which may not be contemptuous' than on the 'behaviors which could constitute a contempt.' Hence, we almost always see a non exhaustive 'Exemption Clause' following a comprehensive but narrowly articulated 'Definition Clause'. This becomes more prominent a consideration for a democratic society wishing to build its collective life in an environment of accountability and public participation in the affairs of the state. A free society built upon freedom of thought, opinion, expression and tolerance requires more breathing spaces for the citizenry than it could be contemplated by a colonial and regulatory legislation like the Contempt of Court of Act 1926. Hence, I propose to enlist in the new Contempt of Court Act the following acts or omissions to be considered not contemptuous:

(i) Acts or speeches protected by Parliamentary Immunity;[101]

(ii) Fair comments about the general working of Courts made in good faith, in public interest and in temperate language;

(iii) Fair comments on the merits of a decision of a Court made, after the pendency of the proceeding,[102] in good faith and in

[100] This clause is inspired by Section 5 of the Pakistani Contempt of Courts Ordinance 1998

[101] The Constitution of the Peoples republic of Bangladesh, Article 78(3)

[102] A combined reading of the Explanation to Section 3 and Section 5 of The Indian Contempt of Court Act 1971, Section 2(b) of the Pakistani Contempt of Court Act 1976 and Section 2(f) of the Pakistani Ordinance of 1998 gives an explanation regarding the pendency of a judicial proceeding. A matter shall be deemed *sub judice* from the time when a Court has come to be seized of the matter in judicial capacity, till such time as the appellate, revisional or review proceedings in respect of the matter have come to an end or the period of limitation for filing such proceedings has expired without any such proceedings having been initiated provided that the pendency of an execution application shall not detract from the finality of the proceedings. A civil case shall be seized judicially when it is instituted by the filing of a plaint or otherwise. A criminal case shall be seized judicially when the charge-sheet or challan is filed, or when the court issues summons or warrant.

temperate language without impugning the integrity or impartiality of the Judge;[103]

(iv) The publication of any matter, amounting to a Contempt of Court by reason of its being published during the pendency of some judicial proceedings, by a person who had no reasonable ground for believing that such judicial proceedings were pending at the time of the publication of the matter; [104]

(v) A serious discussion of substantive issues of public importance without intent to influence a legal proceeding which may incidentally be pending;[105]

(vi) Publishing the text or a fair and accurate summary of the whole, or any part, of an order made by a court sitting in chambers or in camera, unless the court has expressly prohibited the publication thereof on grounds of public policy, or for reasons connected with public order or the security of the State, or on the ground that it contains information relating to a secret process, discovery or invention, or in exercise of any power vested in it;[106]

(vii) The distribution of a publication, containing matter amounting to contempt of Court, by a person who had no reasonable ground for believing that the publication contained, or was likely to contain, any such matter;

(viii) A true averment made in good faith and in temperate language for initiation of action or in the course of disciplinary proceedings against a Judge, before his administrative superior, the Supreme Judicial Council, the Chief Justice of Bangladesh or the President for being forwarded to the Supreme Judicial Council;[107]

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[103] The Pakistani Contempt of Courts Ordinance 1998, Section 10 and The Contempt of Courts Act 1976, Section 3

[104] *Ibid,* Section 16

[105] *Ibid,* Section 20

[106] Drafted after a combined reading of Section 3 of 1976 Pakistani Act, Section 7 of the 1998 Pakistani Ordinance, Section 4 and 7(2) of the Indian Contempt of Court Act 1971 and Section 4(1) of the British Contempt of Court Act 1981

[107] This clause is inspired by Section 6 of the Indian Contempt of Court Act 1971 and Section 8 of 1998 Pakistani Ordinance. The later however exempted the averments made to the executive authorities as well. I refrain from doing this considering it detrimental to the independence of the Judiciary.

(ix) Observations made in a judicial capacity, such as, those by a higher Court on an appeal or revision or application for transfer of a case, or by a Judge or Court in judicial proceedings against another Judge, or in the course of official business, including those in connection with a disciplinary inquiry or in an inspection note or a character roll or confidential report;

(x) A true statement made in good faith respecting the conduct of a Judge in a matter not connected with the performance of his judicial functions.[108]

(xi) An academic critique of a judgment in a case of public importance shall not constitute contempt notwithstanding the fact that an appeal maybe pending if: (i) it is phrased in temperate language; (ii) it is not made by or on behalf of a party, or by an advocate appearing in the case; and (iii) does not pertain to a pending criminal case.

5.3. Definition or Exemption - Which one should be exhaustive?

The 1998 Pakistani Ordinance made the definition of contempt exhaustive by providing: "Save as, and to the extent expressly provided in this Ordinance, no act or statement of any person shall constitute contempt of court or be punishable therefor."[109] The Contempt of Courts Ordinance of Bangladesh of 2008 followed the path of the Pakistan. Since the High Court Division straightly rejected the exhaustiveness, in answer to the dilemma of exhaustiveness, I would like to take the Indian strategy. Section 9 of the Indian Contempt of Court Act 1971, on the other hand, speaks for an implied exhaustiveness. Rather than terming the Act to be exhaustive, it says: "Nothing contained in this Act shall be construed as implying that any disobedience, breach, publication or other act is punishable as contempt of court which would not be so punishable apart from this Act." While Section 9 circumscribes the definition, Section 8 of the Indian Contempt of Court Act 1971 enlarges the exemptions: "Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt of court has ceased to be available merely by reason of the provisions of this Act."

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[108] This clause is inspired by Section 19 of 1998 Pakistani Ordinance and Section 3 of the 1976 Act. As stated earlier, Section 2 of the British Contempt of Courts Act also acknowledges such classification.

[109] Section 22 of the Contempt of Courts Ordinance 1998 (Pakistan)

6. Concluding Remarks

The context clearly suggests that a new Contempt of Court Act is necessary for Bangladesh which will help remove the doubts existing in the mind of the people regarding offences that constitute contempt of court.[110] The Contempt of Court Bill 2006 tried to release the Public Servants from the risk of losing his job for contempt convictions.[111] The 2008 Ordinance went a step further by granting the Public Servants a sort of mastery over the Judiciary. For reasons understandable both the efforts went in vain and ultimately we remain in 1926. No soul searching effort was made by the legislature to address the fundamental problem of balancing a free and open society against a dignified last docket of hope, *i.e.,* the Judiciary. Therefore, we need a Law striking a delicate balance between the high esteem of the Highest Court and the peoples' highest possible right of Free Expression. The principles elaborated above may come to aid to those whose duty it is to think upon it.

[110] Md. Abdul Latif, *Need for a comprehensive law on contempt*, The Daily Star, August 24, 2010

[111] The Contempt of Court Bill 2006; Sections 2 and 3. See: Law on Contempt of Court: An Overview, The Daily Star, Law and Our Rights, July 22, 2006; Online: http://www.thedailystar.net/law/2006/07/04/analysis.htm