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Criticism of Apex Court Decisions vs. Contempt of Court

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1. Introduction:

It is often said that the decisions of the Apex Court, meaning the higher Courts of the Country, or the activities of the higher Courts of the Country may be constructively criticized with bona-fide good faith. However, expressing opinion and making criticism about decisions or proceedings of the Supreme Court and the activities or conduct of the judges of the Supreme Court has a risk of becoming victim of the extraordinary power of Contempt of Court historically exercised by the Higher Courts of different Countries. At the same time, this exercise of extra-ordinary power of Contempt of Court may have the possibility of infringing some basic human rights of Citizens which are recognized by different international instruments as well as the provisions of the Constitution of a country. Freedom of expression is protected internationally by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which provides:

> *Everyone shall have the right to hold opinions without interference.*
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> *Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

On the other hand, Article 14(2) of the ICCPR declares that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Some other international Covenants and instruments like the European Convention of Human Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights have also declared such rights of freedom of expression as well as rights of individuals to be presumed innocent until proved guilty according to law.

As against above, we may examine first the context of freedom of expression in our country from national perspective as against the restrictions which may be imposed on such freedom either by the Constitution or by the law made under the Constitution.

2. Freedom of expression vs. restrictions:

Like Article 19 of the Indian Constitution, Article 39(2) of our Constitution has guaranteed the freedom of speech and expression of every citizen and freedom of press as fundamental rights guaranteed by the Constitution under Part-III of the same. This means, in accordance with Article 26 of the Constitution, all existing laws inconsistent with the

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provisions of such rights become void to the extent of such inconsistency. Not only that, Article 26(2) of the Constitution has imposed an obligation on the State not to make any law inconsistent with any provisions of fundamental rights guaranteed under Part-III which contains, amongst others, freedom of speech, expression and freedom of press. While the Constitution has recognized such right, sub-article (2) of Article 39 itself has restricted the said freedom by providing that the said rights are guaranteed only subject to any reasonable restrictions imposed by law in the interest of:

Security of the State
Friendly relations with foreign States
Public order, decency or morality
In relation of Contempt of Court, defamation or incitement of an offence.

Therefore, sub-article (2) of Article 19 itself has restricted such freedom of citizen or press in relation to, amongst others, Contempt of Court.

3. What is Contempt of Court?

Now the question arises, what is meant by the term 'Contempt of Court'. It is an extra-ordinary power to be exercised by the higher courts of a country, which are regarded as Courts of Records. Court of Records has some basic features, namely -

It's judgements, orders, decrees and all that are filed by parties to litigations are to be preserved forever for eternal record. Our Constitution also imposes no fetters upon this attribute of a court of record;

It has the inherent and plenary power to determine questions about its own jurisdiction, unless barred or restricted by the Constitution. Our Constitution imposes no fetters upon this attribute of a court of record, except those provisions of the Constitution that contain as express bar of jurisdiction of any court;

In has the inherent and plenary power to punish for its contempt summarily. It is here that our Constitution makes an inroad. This inherent and plenary power of a court of record is reiterated by making an inclusive provision mentioning this power exclusively. The power to punish for its contempt is preserved, but "the power" "to make an order for the investigation of or punishment for any contempt of itself" is "subject to law". The express mention of the subject matters of this inherent power appears to be the limitation on the law-making power of the Parliament in relation to contempt of court.

(See the Bangladesh Law Commission Report dated June 09, 2005 on Contempt of Court Act, 1926)

Thus, Article 108 of our Constitution provides:

> *"The Supreme Court shall be a court of record and shall have all the powers of such a court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself."*

Though our Constitution as well as Contempt of Court Act, 1926 have not provided any definition of the term Contempt of Court, the Contempt of Court Act 2013, which has recently been declared ultra-vires the Constitution by the High Court Division, has tried to define the same by dividing the term 'Contempt of Court' into two sub- divisions, namely Civil Contempt and Criminal Contempt. Civil Contempt has been defined by the said Act as willful disobedience of judgment, decree, direction, order, writ etc of the

Court and criminal contempt has been defined as any publication, whether by words, spoken or written or by signs or otherwise, of any matter or doing of any other acts which scandalizes or tends to scandalize the Court or lowers or tends to lower the authority of Court or which prejudices or tends to interfere with the due course of any judicial proceedings or which interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any manner. Thus, definitions are too wide. Anything done or said which tend to defy the Courts order or scandalizes the Court or its proceedings or undermines the authority and dignity of the Court in the eye of general public may be regarded as a contemptuous act and has a possibility of being subjected to punishment by the higher Courts, which is Supreme Court in our Country. According to Article 108 of our Constitution, the power to punish for Contempt of Court is interest in a Court of Record as recognized by our Constitution and as such no other law is required to confer such power on the Supreme Court. Not only that, no other law can curtail that power of the Supreme Court without amending the Constitution itself, which attempt may risk the disturbance of the basic structure of the Constitution.

4. History of Contempt:

This extra ordinary power of Contempt of law, as enjoyed by the Courts of Records in this country and our sub-continent, has its source in English Law. Historically, in England, the judges and legislators were regarded as the representatives of the King and it was believed that the king was exercising the power of the God as God's representative. Therefore, any contempt or insult of the representative of the King, namely the judges and legislators, were regarded as insult and contempt of the king. The said position is well described by the comment made by Kautilya in the following words:

> *"Any person who insults the king, betrays the King's council, makes evil attempts against the King…shall have his tongue cut off."*

Thus, the English law of contempt, which itself was not very well defined, came to be introduced in our subcontinent in a yet more haphazard manner. As stated by Sanyal Committee of India in its report on Contempt of Court in February, 1963, the earliest courts of records in this sub-continent were probably the Court of Mayor and Corporation of Madras established under the East India Companies Charter of 1687. The Admiralty Court established under the royal charter of 1683 was also regarded as Court of Records. In Calcutta, the Mayor's Court was succeeded by the Supreme Court established under a charter granted in 1774 in pursuance of the Regulating Act of 1773. In Madras and Bombay, the Mayors Court continued till 1797 when they were superseded by Recorder's Court. However, the Recorders Courts at Madras was abolished by the Government of India Act, 1800, and a Supreme Court was established in its place by Charter in 1801. Likewise, a Supreme Court was established in Bombay in place of the Recorder's Court. The Recorder's Court and the Supreme Court had the same power for punishing for contempt like the superior courts in England. This Courts of Records had the inherent power of punishing and taking cognizance for any offence of contempt of Court.

Interesting for us, the said Sanyal Committee reported that a particularly bad instance in which a Calcutta newspaper made unwarranted and prejudicial comments on certain proceedings pending in the Court of a magistrate at Khulna, triggered the process of enactment of law for the first time in this subcontinent through Contempt of Court Act,

1926 giving thereby the power to the High Court of Adjudicator to punish for Contempt of itself and the Courts subordinate to it. In the said legislating process, when the bill was referred to the Select Committee, it omitted the definition of the term Contempt of Court on the ground that the case law on the subject would form an adequate guide. At the same time, the said Act excluded the cases of contempt against subordinate Courts which were punishable under ordinary law, were excluded from the purview of the High Court's contempt power.

5. Bangladesh Background:

Though India has enacted Contempt of Court Act, 1952 and the present Contempt of Court Act, 1971, making thereby huge changes and also introducing thereby the concept of civil contempt and criminal contempt, Bangladesh continued to follow the provisions under the Contempt of Court Act, 1926 until the enactment of the Contempt of Court Act, 2013. Apparently, Bangladesh Legislature has more or less tried to follow the structure and scheme of the Contempt of Court Act, 1971 of India, like introduction of the concept of innocent publication, constructive and neutral publication of news and introduction of self-defense in a proceeding of contempt thereby keeping the self defenses under the ordinary laws within the scope of contempt proceedings. However, our legislature has made a big departure by introducing some new provisions by which the government officials of the republic have been given a very special status. Some acts and omissions on the part of such government officials have been kept beyond the mischief of the offence of Contempt of Court as well as they have been given the privilege of defending their contempt charges with the fund of the State. Basically, for this discriminatory treatment as well as curtailment of the contempt power of the Supreme Court, the High Court Division has declared the said Contempt of Court Act, 2013 as ultra-vires the Constitution. The case is now pending before the Appellate Division in a Civil Miscellaneous Petition for Leave to Appeal as the judgment of the High Court Division is yet to be released.

Though this Act of 2013, under Section 4, has provided that innocent publication or distribution will not come under the mischief of contempt, still it remains to be decided by the Court as to what is meant by innocent publication or distribution. At the same time, when Section 5 of the said Act provides that publication of constructive news or comment as regards the merit of a judgment or decision will not be regarded as contempt, it remains to be decided by the Court itself as to what should be regarded as constructive news or constructive criticism or comment on its decision. Therefore, the basic power of Contempt of Court still remains in the Supreme Court meaning Appellate Division and High Court Division being the Courts of Records.

6. Necessity of having the power of Contempt of Court:

It has been argued by critics that, in a modern democracy, when freedom of expression is one of the basic fundamental rights recognized by the Constitution as well as international instruments, the power of contempt with the higher Courts has become out of context. In our sub-continent, critics have repeatedly referred to American Courts in that the power of Contempt of Court in America has now become obsolete on the ground that the test of determining what is contemptuous is very high. According to the American Supreme Court, the test is '*clear and present danger'* in respect of any act or omission or

publication to determine whether it is contemptuous—*"An imminent danger to the administrations of justice according to the facts and circumstances involved in the particular case"* as held in Bridges v. California, (1941) 314 US 252 (292) and Landmark v. Virginia, (1978) 435 US 429(443-44). On the other hand, the American Court's held *"Mere criticism of a Judge is not punishable, however untrue, deliberate, unfair or intemperate the criticism may be"* as because the contempt power is not for the protection of the judges but for the protection of the Court. Justice Douglas in Conway v. Johan, 331 US 367 observed— *"The danger must not be remote or even probable; it must immediately imperil. But the law of contempt is not made for the protection of Judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably, a campaign could be so managed and so aimed at the sensibilities of a particular Judge and the matter pending before him as to cross the forbidden line."* Echoing the view, of Justice Douglas, Justice Murphy of U.S. Supreme Court observed *"Silence and a steady devotion to duty are the best answers to irresponsible criticism and those Judges who feel the need for giving a more visible demonstration of their feelings, may take advantage of various laws passed for the purpose, which do not impinge upon a free press."*

But this liberal view on the power of contempt has not been fully accepted by England and countries in our sub-continent like India and Bangladesh. In particular, the superior Courts in the subcontinent have time and again used the power of Contempt of Court when the Judges have been personally attacked or criticized. Use of such power was on the ground that insult or undermining a judge of a court by itself undermines the dignity and majesty of the Court. According to them, while liberty of speech and expression are guaranteed under the Constitution, such liberty corresponds with duty and responsibility and as such puts limitation on the exercise of such liberty. They say - when it is necessary to protect freedom of speech and expression and freedom of criticism of the decisions of the Apex Court, it is also necessary to protect the majesty and dignity of the Court in the eye of the people, otherwise the confidence of the people in the justice administration system will collapse.

In our sub-continent this view was zealously expressed by the Indian Supreme Court in the highly controversial case in relation to contempt proceedings against Ms. Arundhati Roy. Arundhati Roy was a writer and social worker, against whom contempt charges were drawn up three times. The first one was when she wrote an article entitled 'The Greater Common Good' which was published in the Outlook magazine on May 24, 1999. The author had ridiculed the 'tender concern' that the Supreme Court judges had expressed in regard to the availability of children's park for the children of the tribal inhabitants who would be displaced when the height of the Sardar Sarovar Dam was increased. The author had pointed out the ground reality of the plight of the hitherto happy, simple minded tribals who had been living among nature's beautiful creations for ages and who had now, not even been allotted any land for rehabilitation. However, such thoughts of the author did not go down well with the supreme judicial authority of the country. Two judges of the Supreme Court felt that these comments made by her were prima facie a misrepresentation of the proceedings of the Court and thus constituted contempt of Court.

In the subsequent contempt case against Arundhati Roy, it was observed by the Court that the right to freedom of speech and expression is being used as a cover by the offenders, who are guilty of contempt of Court. Finally, when the judgment on the Narmada Dam was passed, the Narmada Bachao Andolan staged a drama in front the Supreme Court. A group of lawyers filed a FIR against some activists of the Andolan including Arundhati Roy alleging that they had shouted slogans against the Supreme Court and had hence committed contempt of Court. The Court then issued notice asking why they should not be punished. Arundhati Roy denied that she had committed any contempt and asserted that she had a right to criticize the judiciary and its decisions in exercise of freedom of speech guaranteed by the Constitution. When this case was heard, it was revealed that the petitioners who filed the contempt case were frivolous, and the contempt petition suffered from various procedural flaws. Though on that ground the contempt petition was about to fall, the Court took suo motu notice of some contemptuous statements contained in Arundhati Roy's affidavit and issued a fresh notice upon her. Arundhati Roy pointed out in her affidavit that there seemed to be an inconsistency in the approach of the Court to the urgency of the contempt proceedings in comparison to other serious issues. What Arundhati Roy wanted to say in the affidavit is that, the Courts had shown disquieting interest in issuing contempt notice on her while the Court had some more important other jobs to do. She also observed that *'such a response of the Court indicated a disquieting inclination on the part of the Court to silence criticism and muzzle dissent; to harass and intimidate those who disagree with it'.* On such statement of Arundhati Roy, the Court found her guilty and convicted her. The basic anxiety of the Court was that, while freedom expression is the life blood of democracy, the impartiality, the dignity and majesty of the Court has to be preserved and cannot be destructed in the name of freedom expression. There has to be a balance between the two necessities of the State. Though the Courts approach in Arundhati Roy's case has been seriously criticized by some jurists, the Courts in the subcontinent have so far preserved such right of the Court to protect in from being scandalized or belittled in the eyes of the people.

7. Bangladesh Scenario:

The Supreme Court in our country has also expressed the same anxiety time and again when its proceedings or the conducts of the judges have been ridiculed by the media or press. It has to be borne in mind that, the power to punish for contempt of Court by a Court of Record like Supreme Court is in it and this power cannot be determined or circumscribed by any Act of Parliament without amending the said Article 108. However, as stated above, any attempt to amend the said Article and to delimit the power of the Supreme Court in respect of contempt of Court has every possibility of destructing the basic structure of the Constitution as that will directly impact upon the independence of judiciary. This position has been declared by the High Court Division while it declared the Contempt of Court Act, 2013 as ultra vires the Constitution.

Supreme Court's anxiety to preserve its dignity and majesty in the eye of the people has time and again been reflected in so many decisions. The much talked about of them is the contempt case of Shahudul Haque, Inspector General of Police, which was decided by the Appellate Division in 2004 upon an appeal by Mr. Haque who was convicted and sentenced by the High Court Division for contempt of court [See 58 DLR (AD) – 150]. Some Traffic Sergeants stopped the car of a High Court Judge carrying Supreme Court Flag. They stopped it to pave the way for a vehicle of a superior officer of police. The

said sergeants while saluted the vehicle caring the said superior officer, it ignored the flag of Supreme Court. The Judge sitting in the vehicle reacted sharply and asked the reason. They replied - "Bjl¡ q¡CL¡VÑl fa¡L¡ ®pm¤V Lla h¡dÉ eCz" Then they left the scene without answering the quarries of the judge concerned about their particulars. Consequently, Contempt proceedings were drawn and Inspector General of Police, amongst others, was asked to show cause. He, accordingly, submitted affidavit-in-reply to the said show cause and stated that the sergeants and Traffic Police were not required to salute the flag of the Supreme Court etc. In the said affidavit, he made some other derogatory comments. Accordingly, he was punished for contempt of Court. On an appeal, his subsequent apology was not accepted by the Appellate Division.

Referring to the various provisions of the Police Regulations Bangladesh, Regulation No. 728(XX), the Appellate Division held, amongst others, that:

> A Judge of the Supreme Court is a Judge wherever he is;
> A Judge of the Supreme Court is ex-officio justice of peace under Section 25 of the Code of Criminal Procedure and as such he can take cognizance of any offence taking place anywhere in Bangladesh;
> A Judge of the Supreme Court, accordingly, can command any law enforcing agency to do or not to do any act anywhere in Bangladesh.

In making such declarations, the Appellate Division discussed the law of contempt referring to various decisions of the superior Courts of this subcontinent and finally held that the belated apology of the contempner coming from pen, not from heart, cannot be accepted.

8. Truth as a Defense:

While truth is always regarded as an important defense in a case of defamation, the same is not regarded as a defense in contempt case. Even if a truth is disclosed by any writing, but in a manner to scandalize or undermine the court, that may also be regarded as contempt of court. This has been the underlying view of our Appellate Division when it convicted Mr. Mahmudur Rahman, the editor of the news paper "Amer Desh," when he published an article with the heading "Qð¡l j¡eC plL¡l fr ®ØV" [See 9 LG (AD) 119]. In that Article, he tried to scandalize a particular Chamber Judge of the Appellate Division. This decision of the Appellate Division in Mahmudur Rahman's case by our Appellate Division is a unique case of its type. In that case, Mr. Mahmudur Rahman tried to argue truth in his self defense in that he described true facts in the said article. But the same was not accepted by the Appellate Division because of the way and demeanor in which he expressed his opinion in the said article. Accordingly, he was convicted and sentenced to six months imprisonment and a fine of Tk. 1 Lakh, in default one month's simple imprisonment.

Similarly, in a recent case against Mr. Swadesh Roy of Daily Jonokontho, the Appellate Division, in Contempt Petition No. 19 of 2015, convicted him and sentenced him to confinement till rising of the Court and to pay a fine of Tk. 10,000/- when he wrote an Article in the news paper under the title "p¡L¡l f¢lh¡ll avfla¡z f¡m¡h¡l fb Lj ®NRz" Referring to a recorded conversation of the Hon'able Chief Justice and a sitting Judge of the Appellate Division, he tried to project in the said article that Mr. Salahuddin Kader

Chowdhury, a convict of International War Crime Tribunal in Dhaka manipulated the constitution of Bench of Appellate Division to hear his appeal. When his lawyer referred to the said recorded conversation, which was admitted by the Hon'ble Chief Justice in open Court, his defense of truth was also not accepted on the same ground.

Expressing the same anxiety, the High Court Division convicted renowned journalist of "Prothom Alo" Mr. Mizanur Rahman Khan and sentenced him to confinement till rising of the court when he published an article "¢j¢eV HL¢V BN¡j S¡¢je L£i¡h" and thereby made some aspersions on a particular Bench of the High Court Division.

6. Conclusion:

While the power of contempt has been conferred on the higher courts historically for the protection of Court's dignity and majesty, it has to be borne in mind that this power should always be exercised sparingly in particular when the modern democracy demands freedom of expression being not less important than the dignity of Court. In a modern society, where freedom of press is regarded as life-blood of democracy, a proper balance has to be drawn between such freedom of expression and dignity of Court so that both of them can co-exist mutually. Therefore, while the judges of Superior Courts should always try to practice restraint while exercising this extra ordinary power of contempt, the people in press or media should also keep patience while criticizing the decisions of the Apex Court and the judges of the same. Only with this continuous endeavour of balancing between these two important pillars of the State, a democracy can reach its desired goal.

Thank you all.