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The Contempt of Courts Act, 2013: Evaluating the HCD's Judgment in *Asaduzzaman Siddiqui*

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Abstract: *The Parliament enacted the Contempt of Courts Act, 2013 repealing the Contempt of Courts Act, 1926. But the High Court Division (HCD) declared the Act unconstitutional in Asaduzzaman Siddiqui. This paper aims to evaluate the HCD's decision on the basis of two scenarios: (i) the necessity of a new contempt law; and (ii) the contempt of court as a narrowly construed exception to the norm of freedom of expression. The Court declared several provisions (namely, sections 4, 5, 6, 7, 9, 10, 11 and 13(2)) of the Act ultra vires for violating articles 26(1), 27 and 108 of the Constitution. The present paper will show that comparable provisions of the Act exist in other jurisdictions, such as, in the UK and India. In such view of the matter, it is to hold that those provisions of the Act should not have been declared unconstitutional by the Court. The paper finds the view held by the Court convincing to the extent that section 10 and some sub-section/s of section 11 of the Act appear to be in conflict with the Constitution. However, the paper does not agree with the Court's view that section 13(2) comes in conflict with the Constitution. The Court, as the paper would argue, committed an error of reasoning in holding sections 4, 5, 6, 7, 9 and 13(2) of the Act ultra vires the Constitution. The Court should have taken a much broader view of the freedom of expression and freedom of the press under article 39(2) of the Constitution. The objective of the paper if accomplished would help/guide the Court in striking the right balance between freedom of expression and contempt of court in our jurisdiction.*

Keywords: Contempt of courts, freedom of expression, press freedom, constitutional law, and the rule of law, *Asaduzzaman Siddiqui*.

1. Introduction

The single statute which used to regulate the contempt of court in Bangladesh was the Contempt of Courts Act, 1926.[1] In 2008, the Military backed Care-taker

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[1] However, apart from the Contempt of Courts Act, 1926, some other statutes have dealt the contempt matters. For example, sections 228, 175-180 of the Penal Code are in relation to contempt of court offences. Sections 480-487 of the Criminal Procedure Code concern contempt proceedings. Besides the general law like the Penal Code, a special law that creates any special court may also provide for the punishment of contempt of such court. For example, section

government promulgated the Contempt of Court Ordinance repealing the earlier colonial-era Act of 1926. But the Supreme Court declared the Ordinance *ultra vires* the Constitution in the case of *M Shamsul Haque v Bangladesh* in 2010.[2] Three years later, the Parliament passed the Contempt of Courts Act, 2013. The Supreme Court, however, declared this law also void and unconstitutional in the case of *Asaduzzaman Siddiqui and Ors. v The Secretary, Cabinet Division and Ors.*[3]

In *Asaduzzaman Siddiqui*, the Court declared sections 4, 5, 6, 7, 9, 10, 11 and 13(2) of the 2013 Act *ultra vires* the Constitution for violating articles 26(1), 27 and 108 of the Constitution. And having found those provisions as crux of the statute in question, the Court declared the whole statute void and illegal.[4]

In this paper, it is to argue that the right to freedom of expression is the *norm* of which the contempt of court should be a narrowly construed *exception*. The paper will show that comparable provisions of sections 4, 5, 6, 7 and 9 of the Contempt of Courts Act, 2013 could be found in other jurisdictions, such as, in the UK and India.[5] The paper intends to hold and emphasise that the Court should not have declared those statutory provisions unconstitutional. Despite that the paper endorses the Court's view to the extent that section 10 and some sub-section/s of section 11 seem to come in conflict with the Constitution and as such to be void and unconstitutional, it does not find the Court's view convincing to hold section 13(2) to be in conflict with the Constitution.

19 of the Family Courts Ordinance, 1985 specifies what amounts to a contempt of the Family Court and provides for punishment for such contempt(s). For detail, see, Ridwanul Hoque, 'The Province of the Law of Contempt of Court Undetermined?' (1998) 3 *Chittagong University Journal of Law* 182; and M. Jasim Ali Chowdhury, 'Contempt of Court: In Search of a 'law'' (2012) 17 *Chittagong University Journal of Law* 30-31.

[2] *M Shamsul Haque v Bangladesh* 15 (2010) BLC (HCD) 236 (hereinafter *M Shamsul Haque*).

[3] *Asaduzzaman Siddiqui and Ors. v The Secretary, Cabinet Division and Ors.* LEX/BDHC/0473/2013 (hereinafter *Asaduzzaman Siddiqui)*. The High Court Division pronouncing a short order on September 26, 2013 declared the law unconstitutional. After long nine years on November 16, 2022, the Court released the full text of the verdict. About the long delay in releasing the full text of the judgment, it may be noted that there is no specific time limit for the HCD for releasing the full text of a verdict after its announcement. See, Ashutosh Sarkar, *2013 contempt of court law discriminatory*, The Daily Star, November 17, 2022 (https://www.thedailystar.net); M Moneruzzaman, *Reinstatement of 1926 contempt act ordered*, NEWAGE, November 17, 2022 (https://www.newagebd.net).

[4] *Asaduzzaman Siddiqui*, Ibid, para. 65.

[5] The purpose at the first stance is to show that comparable provisions exist in other jurisdictions. The Indian jurisdiction has been chosen for comparison since the Bangladesh Supreme Court has been inspired by the Indian Supreme Court in many of its constitutional decisions. For example, the Supreme Court's decision on basic structure and enlarging the scope of the fundamental right of 'right to life' has been persuaded by the constitutional law developments in India. Besides the Indian jurisdiction, the UK jurisdiction has also been considered to add some more impetus to the argument of the paper. The UK jurisdiction has been preferred since Bangladesh is a member of common law family and the UK is the mother country of common law jurisdictions.

In this backdrop, the paper argues that the Court committed an error of reasoning in holding sections 4, 5, 6, 7, 9 and 13(2) of the Contempt of Courts Act, 2013 *ultra vires* the Constitution. It is also to suggest that the Court should have taken a much broader view of the freedom of expression and freedom of the press under article 39(2) of the Constitution.

The paper consists of six sections. Followed by this introductory note, section 2 ascertains the meaning, justification and forms of the contempt of court. Next, section 3 locates position of the contempt of court in the framework of the Constitution of Bangladesh. Section 4 then expounds some of the guiding principles to be followed in evaluating the HCD's judgment in *Asaduzzaman Siddiqui*.[6] Before summarising the core arguments in the concluding part of this paper, section 5 critically evaluates the HCD's judgment in *Asaduzzaman Siddiqui*.[7]

2. The Understanding of the "Contempt of Court"

2.1 Origin, Meaning and Justification

The concept of 'contempt of court' traces back its history to the monarchical rule in England. Initially, the ruler or the king himself used to dispense justice. Later on, he delegated this power of dispensing justice to courts presided over by the judges. The courts, naturally, demanded respect and obedience and "any disrespect to the court was treated as an affront to the dignity and authority of the king."[8] In the famous judgment of *R v Almon*, Wilmot J observed that the contempt power of 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.[9] Perhaps it was the first case in the legal history that marked the beginning of judicial interpretation of court's contempt power.[10]

So far as the Indian sub-continent is concerned, the Privy Council in *Surendra Nath Banerjee v Chief Justice and Judges of the High Court of Bengal* held that the Chartered High Courts of Calcutta, Bombay and Madras had contempt jurisdiction for scandalising them.[11] Then, subsequently, the contempt law received statutory recognition in the form of Contempt of Courts Act, 1926.

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6 *Asaduzzaman Siddiqui* (n 3).

7 Ibid.

8 JD Kapoor, 'Contempt of Court' (2005) 47 (4*) Journal of the Indian Law Institute* 582.

9 *R v Almon* (1765) Wilm. 249, at p. 254. Quoted in Chowdhury (n 1) 27.

10 Chowdhury (n 1) 27.

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

But the 1926 contempt statute provided neither any definition nor explanation as to what the contempt of court would mean. In the absence of statutory guidance, one is required to take recourse to judicial pronouncements and scholarly expositions to determine what amounts to contempt of court. The word "contempt" generally means lack of respect or reverence for something. With reference to an authority, the word "contempt" may mean willful disregard to or disobedience of that authority. With respect to court, the word "contempt", therefore, means any act that brings authority of the court into disregard or disrepute or undermines its dignity and prestige.

Hoque defines 'contempt of court' as "an act that lowers down the image, status or authority of the court in the estimation of the public or an act that interferes with or tends to interfere with the administration of justice."[12] Willful disregard to the order of the court or intentional and motivated attempt to undermine the position, prestige and dignity of the court can be considered as contempt of court. Oswald explained it as follows:

> To speak generally, Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation.[13]

As a matter of practice, the test to determine whether contempt has been committed is to see whether fair trial has been prejudiced. 'Prejudice fair trial', as a test, was laid down by Lord Hardwicke in *St. James's Evening Post Case*.[14] And the component criteria of 'prejudicing fair trial', as Hoque observes, are 'tendency to prejudice', 'real prejudice' and 'substantial interference with the administration of justice'.[15]

So far as the justification of the court's contempt power is concerned, it may be said that the law of contempt is based on sound public policy by punishing any conduct which shakes the public confidence in the administration of justice. The common law principle 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 speech and expression or the freedom of the press.[16] Indeed, for the protection of organised society and maintenance of rule of law, an independent and fearless

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[12] Hoque (n 1) 184.

[13] Oswald, *Contempt of Court*, 1910, p. 6. Quoted in Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers: Dhaka 2012) 919.

[14] *St. James's Evening Post Case* (1744) 2 Atk. 269 (hereinafter *St. James's Evening Post Case*). Cited in Hoque (n 1) 184.

[15] Hoque (n 1) 184.

[16] Chowdhury (n 1) 25.

judiciary is the *sine qua non* in which the public will have full confidence as dispenser of justice. Mahmudul Islam, therefore, rightly justifies the necessity of the contempt law in the following words:

> The dignity and authority of the Courts has a link with the supremacy and majesty of law. Any conduct which is calculated to diminish that dignity or authority is a criminal contempt which the Court is under duty to punish. The Judges cannot perform their duty properly if they are exposed to libellous attack. It is necessary as stated by Wilmot J to keep a blaze of glory around them and to deter people from attempting to render them contemptible in the eyes of the public. At the same time, it is essential that confidence of the public in the courts be maintained.[17]

Thus, a court is granted the contempt power not for the protection of the individual judges from imputations, but for the protection of the people themselves from the mischief they will incur if the authority of the court is impaired. In short, the contempt power exists "to ensure sanctity and honour of the courts and due observance of the verdicts of the courts with the ultimate object of maintaining rule of law in a society."[18]

2.2 Forms of Contempt

Like the definition of contempt of court, the 1926 contempt statute is silent also about the different forms of contempt. In such a scenario, taking recourse to judicial utterances and foreign statutory provisions is essential to perceive the different forms of contempt of court. Lord Hardwicke made the earliest attempt to classify the contempt of court in the following way:

> There are three different sorts of contempt. One kind of contempt is scandalising the court itself. There may be likewise contempt of this court in abusing parties who are concerned in cases here. There may also be contempt of this court in prejudicing mankind against persons before the cause is heard.[19]

At modern times, however, the contempt of court is usually classified as 'civil contempt' or 'criminal contempt'. The Indian Contempt of Courts Act, 1971, for example, has adopted this classification. Herein below let us briefly reflect on these two forms of contempt of court.

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[17] Islam (n 13) 919-20 (internal citation omitted). On another occasion, the learned author writes the following to justify the court's contempt power: "Punishing a person for contempt of court is a drastic step which normally may not be taken. At the same time, it should be remembered that it is not only the power but the duty of the court to uphold and maintain the dignity of courts and majesty of law which may call for such extreme step. For proper administration of justice and to ensure due compliance of the orders of the courts, the courts should not hesitate to take the drastic step if that is necessary." Ibid 924 (internal citation omitted).

[18] Hoque (n 1) 181.

[19] *St. James's Evening Post Case* (n 14) 270, 271. Quoted in Hoque (n 1) 185.

2.2.1 Civil Contempt

The Indian Contempt of Courts Act, 1971 has not only classified contempt of court either as 'civil' or 'criminal' but also has defined them. It may profitably be used that definition to know what constitutes a civil contempt. According to section 2(b) of the Indian contempt law, 'civil contempt' means "willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court."[20]

There can be no laxity in case of the above perceived civil contempt because otherwise the court orders would become the subject of mockery.[21] Furthermore, there can be no mode of enforcing a writ of *mandamus* and committal for contempt of court is the way of executing any direction given by the court in writ jurisdiction.[22] Mahmudul Islam appreciates the necessity of civil contempt in the following words:

> This power is necessary not only for the purpose of retaining the confidence of the public in the administration of justice, it is necessary for enforcement of the orders and directions of the Supreme Court because the orders and directions given by the Supreme Court cannot be executed except by way of moving for contempt of court in case of refusal of the executive authorities to comply with the directions given by the Supreme Court.[23]

However, in order to hold a person guilty of civil contempt, *three* conditions need to be satisfied: (i) the order of the court must not be an order which is without jurisdiction or nullity;[24] (ii) the order of the court must be clear and specific;[25] (iii) it must be shown that there was willful disobedience of the court's order. In other words, the disobedience must be deliberate and intentional.[26]

2.2.2 Criminal Contempt

Like the definition of 'civil contempt', the Indian contempt statute defines 'criminal contempt'. According to section 2(c) of the statute, the 'criminal contempt' means:

> the publication (whether by words, spoken or written, or by signs, or by visible

[20] Section 2(b) of the Indian Contempt of Courts Act, 1971.

[21] Islam (n 13) 927.

[22] Ibid.

[23] Ibid 932.

[24] *Razia Sattar v Azizul Huq* (2007) 12 BLC 357.

[25] *Kedar Singh v Dhaniram* (2009) 9 SCC 396.

[26] *Bahawal v State* (1962) 14 DLR (SC) 273; *Sohel Ahmed Chowdhury v Salahuddin Ayubi* (2002) 54 DLR (AD) 82.

representations, or otherwise) of any matter or the doing of any other act whatsoever which –

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.[27]

Hoque very succinctly describes criminal contempt as "an obstruction to or interference with the administration of justice committed by scandalising, prejudicing or intimidating the court or otherwise."[28]

It transpires from the above definitions that criminal contempt is committed mainly in *two* ways: (1) by scandalising the court and (2) by interfering with the due course of justice. The proper understanding of criminal contempt depends to a large extent on the proper perusal of these two forms. These two ways of committing criminal contempt are, therefore, described below in brief.

a. Scandalisation of the Court

Derogatory comments which are calculated to undermine the confidence of the people in the integrity of the judges constitute criminal contempt for scandalising the court. However, it should be borne in mind that when a vilification of a judge is made in his individual capacity, it is not a contempt. It is actionable only as libel or slander. But when the vilification is against the judge as a judge it constitutes contempt as in such case the integrity of the court comes into question.[29]

A publication attributing unfitness or inefficiency to the judges in discharge of their duty is scandalisation of court and constitutes criminal contempt.[30] However, constructive criticism to protect the neutrality and independence of judiciary was held not to be contempt of court.[31] Where the writing contained scandalous language to bring the court into disrespect, castigated its dignity,

[27] Section 2(c) of the Indian Contempt of Courts Act, 1971.

[28] Hoque (n 1) 185.

[29] *State v Nazrul Islam* (1985) 37 DLR (HCD) 200 (scathing language was used about the performance of a judge in discharge of his judicial function); *Md. Faiz v Ekramul Haque Bulbul* (2005) 57 DLR (HCD) 670; *Riaz Uddin Khan v Mahmudur Rahman* (2011) 63 DLR (AD) 29 (in the national daily called "Amar Desh", a news was published with caption 'Chamber means stay in favour of the State' which was held by the Court to have the tendency of eroding the confidence of the public in the administration of justice by the Highest Court of the land).

[30] *Sir Edward Snelson v Judges of High Court* (1964) 16 DLR (SC) 535 (hereinafter *Sir Edward Snelson*).

[31] *Dr. Ahmed Hossain v Shamsul Huq Chowdhury* (1996) 1 BLC 321.

its majesty and challenged its authority, the writer was held to have committed criminal contempt.[32]

Scandalising and attacking the court in unbecoming language in open court is a gross form of criminal contempt.[33] However, criticism of the decisions or proceedings of the court does not *ipso facto* constitute contempt provided it is done honestly and fairly without imputing any motive or inefficiency to the judges.[34] A severe criticism even on incorrect premises in the absence of any imputation of motive or bias was held to be no contempt.[35] They are regarded as innocent publication and as such amount to no contempt. However, it should be remembered that in these 'innocent publication' cases, 'fairness' of comments or criticisms is a question of fact to be decided with reference to the peculiarity of the facts and circumstances of each case.[36]

b. Interference with the Due Course of Justice

Apart from scandalising the court, criminal contempt may be committed by interfering with the due course of justice. A glaring example of this type of contempt may be the facts leading to the case of *State v Abdul Karim Sarker*.[37] In this case, one Upazila Nirbahi Officer sitting by the side of a munsif-magistrate in the court room told the munsif in presence of advocates and litigants as to how to conduct criminal cases. The High Court Division found it to be an unprecedented and unwarranted interference with the due course of justice and punished the contemnor with imprisonment. On appeal, the Appellate Division in *Abdul Karim Sarker v State*,[38] affirmed the verdict of the High Court Division.

For further understanding, few other conducts are cited below which were held by the court to be of criminal contempt for interfering with the due course of justice:

(a) lawyers and litigants terrorising or intimating judges to secure favourable orders;[39]

(b) communication with a judge for the purpose of influencing him on the subject matter of a case pending before the judge;[40]

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[32] *Judges of the High Court Division v Ashok Kumar Karmaker* (1996) 48 DLR (HCD) 179.

[33] *State v Nazrul Islam* (1985) 37 DLR (HCD) 200.

[34] *Sir Edward Snelson* (n 30).

[35] *R v Metropolitan Police Commr. Ex p. Blackburn (No. 2)* [1968] 2 QB 150.

[36] Hoque (n 1) 188.

[37] *State v Abdul Karim Sarker* (1985) 37 DLR (HCD) 26.

[38] *Abdul Karim Sarker v State* (1986) 38 DLR (AD) 188.

[39] *Chetak Construction Ltd. v Om Prakash* (1998) 4 SCC 577.

[40] *State v Chief Editor, Manabjamin* (2005) 57 DLR (HCD) 359 (hereinafter *Manabjamin*).

(c) publication expressing opinion on a question of law which is *sub judice*;[41]

(d) any action whereby pressure is put on a party to abandon his case pending or about to be initiated;[42]

(e) sending threatening letters to the opposite party and demanding withdrawal of certain allegations in the pleadings;[43]

(f) affirming false affidavit;[44]

(g) interference with witnesses attending the court by assault or threat or by any other method;[45]

(h) misrepresentation of the proceedings in the newspaper;[46]

(i) anticipation of the judgment of the court that has been reserved;[47]

The above instances are not exhaustive but only illustrative of how criminal contempt may be committed by interfering with the due course of justice. Where interference with the due course of justice is alleged, the court does not proceed unless there is a real prejudice which can be regarded as substantial interference.[48] And, in determining 'substantial interference', the intention of the contemnor is not relevant. Rather, it is the effect of the contemnor's action that is to be taken into consideration in deciding whether the contempt has been committed.[49]

To wrap up the discussion of this part, civil contempt consists of disobeying the order of the court which aggrieves any individual or any party to the dispute. Civil contempt can be remedied if the individual aggrieved is satisfied.[50] Criminal contempt, on the other hand, consists of offence against the dignity and majesty of the court itself and "leaves a long-lasting damage upon the image of the judiciary."[51]

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[41] *Advocate General v Shabir Ahmed* (1963) 15 DLR (SC) 355; *Shamsuddin Ahmed v Md. Gholam Rabbani & Others* (2000) 52 DLR (AD) 81. Comment on a matter *sub judice* is a contempt of court for it is likely to pre-judge or influence the future judgment of a case. Hoque (n 1) 184.

[42] *MH Khandker v AW Qazilbash* (1968) 20 DLR (HCD) 945.

[43] *Rajendra Singh v Uma Prasad* AIR 1935 All 117.

[44] *Sunkara v Laksminarassama v Sagi Subba Raju* (2009) 7 SCC 460.

[45] *Roland v Samuel* [1847] 9 LJOS 280.

[46] *State v Editor, Pakistan Observer* (1958) 10 DLR (SC) 255.

[47] *Abdus Salam v State* (1958) 10 DLR (SC) 176.

[48] *Rizan-ul Hasan v UP* AIR 1953 SC 185.

[49] *Elders Ltd. v Sunil Chandra Chowdhury* (2002) 54 DLR (HCD) 226; *Solaiman v Mosharraf Hossain* (2002) 54 DLR (HCD) 531; *Manabjamin* (n 40).

[50] Chowdhury (n 1) 47.

[51] Ibid 48. According to Hoque, where contempt involves a public injury, it is criminal in nature and the proper remedy is committal. On the contrary, where the contempt involves a private injury, it is civil in nature and the proper remedy is either attachment or committal. See, Hoque

In light of the discussion made above, let us now turn to reflect on the Bangladesh Constitution to perceive the place of contempt of court in its framework.

3. Contempt of Court in Constitutional Law Framework

The Bangladesh Constitution makes reference to 'contempt of court' in two articles – article 108 and article 39. Article 108 declares the Supreme Court to be a court of record. It is an incident of a court of record that it shall have the inherent summary power to punish for its contempt. However, to remove any doubt, article 108 specifically mentions the power of the Supreme Court to punish for the contempt of itself. Article 108 of the Constitution may be quoted as below:

> 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* make an order for the investigation of or punishment for contempt of itself.[52]

There may be two important legal implications of the above article 108. *First*, since the Supreme Court's contempt power has been laid down in the Constitution itself, this power, therefore, cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution. *Second*, but since the Constitution itself makes the contempt power 'subject to law', the power of each Division of the Supreme Court to punish for its contempt may be governed by law.[53]

Article 39 that also makes reference to 'contempt of court' is basically a provision dealing with the fundamental right of freedom of speech and expression and the freedom of the press. Under this provision, reasonable restrictions may be imposed by law upon the said right to freedom of expression on *seven* specified grounds: (1) security of the State; (2) friendly relations with foreign States; (3) public order; (4) decency or morality; (5) contempt of court; (6) defamation; and (7) incitement to an offence.[54]

Thus, as per the constitutional scheme, freedom of expression like any other freedom is not absolute and is subject to reasonable restrictions on grounds enshrined in article 39.[55] In brief, freedom of speech and expression as well as

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(n 1) 185. Besides the civil and criminal contempt, Hoque observes that contempt may also be distinguished either as 'direct contempt' or 'constructive contempt'. See, Hoque, Ibid 186, 187.

[52] Article 108 of the Constitution of Bangladesh (emphasis added).

[53] To emphasise again, this is possible due to use of the expression 'subject to law' in article 108 itself. See, Ibid.

[54] See, article 39(2) of the Constitution of Bangladesh.

[55] Indeed, to be accurate, the Fundamental Rights (FRs) of the Bangladesh Constitution may be of *three* types on the basis of imposing restrictions on them: (i) FRs upon which *no* restriction

freedom of the press comes with restrictions, and contempt of court is one of them. At first sight, it may seem that contempt of court has been given an overriding effect since the right to freedom of expression is subject to the law of contempt of court.

But the Constitution of Bangladesh should be read as a whole. Part III of the Constitution guarantees fundamental rights. Article 39 is an important fundamental right of the 3rd part of our Constitution. The rights guaranteed under article 39 are the rights of free man. They have long been regarded as the hallmark of democracy and a free society. Liberty of the press is often viewed as the fourth pillar of democracy. Justice Kapoor rightly appreciates that the right to freedom of expression is "basic to a democratic form of government which proceeds on the theory that problems of government can be solved by the free exchange of thought and public discussion."[56] In *Maneka Gandhi v Union of India*, Justice Bhagwati delineated the nexus between democracy and freedom of expression in these words:

> Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people, by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his rights of making a choice, free and general discussion of public matters is absolutely essential.[57]

Democracy for which freedom of expression is so basic and indispensable as perceived above is one of the Fundamental Principles of State Policy (FPSP) of the Bangladesh Constitution as stated in its preamble.[58] Article 11 elaborates on such principle when says, "The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed." Article 11 thus emphasises on fundamental rights and human dignity in the *democratic* Bangladesh. And article 39(2) guaranteeing freedom of speech and expression and freedom of the press is one of the most precious rights of all the fundamental rights.

Understood this way, the contempt power of the court cannot claim any lexical priority over freedom of expression simply because the right to freedom of expression is subject to contempt of court. Instead, the law of contempt of

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may be imposed; (ii) FRs upon which *only* reasonable restrictions may be imposed; and (iii) FRs upon which *any* restrictions may be imposed. For detail, see, Moha. Waheduzzaman, 'Justifying Limitations on Freedom of Expression for Contempt of Religion' (2023) 34 (2) *Dhaka University Law Journal* 58.

[56] Kapoor (n 8) 581.

[57] *Maneka Gandhi v Union of India* 1978 AIR 597.

[58] See, second paragraph of the preamble of the Constitution of Bangladesh.

court should be evaluated in the context of the individual's right to freedom of expression. There should be harmonious interplay of the concepts of the freedom of expression and the court's power to punish for its contempt. The judges, rightly observes Hoque, "should not forget that time and climate has changed and the world has now entered a new century where concept of individual's freedom and freedom of press, speech and conscience are highly valued."[59]

In light of the above understanding of contempt of court, the present paper will assess the Supreme Court's decision which found the Contempt of Courts Act, 2013 unconstitutional. However, before doing so, it may be further useful to know the principles which the following discussion would rely upon to evaluate the HCD's judgment in *Asaduzzaman Siddiqui*.[60]

4. The Guiding Principles to Evaluate *Asaduzzaman Siddiqui*

In my view, HCD's judgment in *Asaduzzaman Siddiqui* should be evaluated in the context of two guiding principles: (1) the necessity of a new contempt law; and (2) contempt of court as a narrowly construed exception to freedom of expression. The principles are explained below in brief.

4.1 The Necessity of a New Contempt Law

Why do we need a new contempt law in Bangladesh? The answer lies in the deficiencies of the existing contempt law, that is, the Contempt of Courts Act, 1926. Let us have a cursory glance at this law.

The 1926 contempt statute contains only 3 sections. Section 1 states the name of the Act, mentions the jurisdiction of the High Court Division and the time from when it has come into force in Bangladesh. Section 2 is comprised of 2 sub-sections. Section 2(1) provides that the High Court Division shall have the same jurisdiction, powers and authority in respect of contempt of subordinate courts as it has and exercises in respect of contempt of itself. Section 2(3) states that the High Court Division shall not take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Penal Code, 1860. Section 3 speaks of the limit of punishment for contempt of court. Under this provision, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand taka, or with both. It contains an important proviso that "the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court."[61]

[59] Hoque (n 1) 197-98.

[60] *Asaduzzaman Siddiqui* (n 3).

[61] See, proviso to Section 3 of the Contempt of Courts Act, 1926.

A plain reading reveals that the 1926 statute punishes acts (contempt of court) without defining first the act (contempt of court) itself which is very contrary to the basic principles of criminal law jurisprudence. Before punishing any act, the act should be defined first. In the absence of any statutory definition, it now all depends on the discretion of the courts as to what amounts to contempt of court. As a result, it has to be ascertained from the case law, which is voluminous and not always consistent.[62] Even then, a citizen may not know where he stands since the contempt law may take new form and shape in an ever-changing complicated world of today.[63]

There is, therefore, a general feeling that the law relating to contempt of court is somewhat uncertain, undefined and unsatisfactory.[64] In *Asaduzzaman Siddiqui*, the Court noted that the present idea of "scandalising the court" has little sense and all that it amounts is that it justifies wide power of the judges to punish people for contempt of court.[65] In the Indian jurisdiction, former Justice of the Supreme Court of India, VR Krishna Iyer J famously termed the law of contempt as giving "a vague and wandering jurisdictions, with uncertain boundaries; contempt law, regardless of the public good, may unwittingly trample upon civil liberties."[66] Chowdhury aptly observes the problem of the 1926 contempt statute with eloquent expression:

> 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 court and judges.[67]

In the case of Mainul Hosein v Sheikh Hasina Wazed, the High Court Division aptly observed that what could readily be read as contemptuous in 1900 or 1926 is not so easily read now in the context of expanding rights guaranteed as fundamental to human existence under the Constitution.[68]

[62] *Asaduzzaman Siddiqui* (n 3) para. 11.

[63] Ibid.

[64] Ibid.

[65] Ibid para. 13. Rajeev Dhavan in the Indian jurisdiction observed the same when said that the offence of scandalising the court was a mercurial jurisdiction in which there were no rules and no constraints. Rajeev Dhavan, *Contempt of Court and the Press* (Indian law Institute: Press Council of India 1982) 99-100.

[66] Cited in Surabhi Sudhanshu Godbole, 'Free Speech & Contempt of Court: Where to Draw the Line?' (2021) 4 (1) *International Journal of Law Management & Humanities* 637.

[67] Chowdhury (n 1) 24.

[68] *Mainul Hosein v Sheikh Hasina Wazed* (2001) 53 DLR (HCD) 147. See also Justice Latifur

The context so far delineated clearly suggests that we need a new Contempt of Courts Act which would help remove the doubts existing in the mind of the people regarding conducts that amounts to contempt of court. An Act that would not only define 'contempt of court' but also categorically state the acts that may be exempted from being contempt. To observe further, regarding what should be the scope and limit of such an Act, it may be worthy to quote Chowdhury's general guideline:

> A free society built upon freedom of thought, opinion, expression and tolerance requires more breathing space for the citizenry than it could be contemplated by a colonial and regulatory legislation like the Contempt of Courts Act, 1926.[69]

Indeed, recognizing the need of the time, some countries of this sub-continent have already enacted new contempt law. India, for example, enacted the Contempt of Courts Act, 1952 repealing the 1926 statute. However, considering some flaws of the 1952 Act, India replaced it by the Contempt of Courts Act, 1971. Pakistan 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.[70] Very recently on February 2024, Sri Lanka has adopted a new Contempt Act, namely, the Contempt of a Court, Tribunal and Institution Act, 2024.[71] Chowdhury, therefore, rightly observes that while the rest move forward, the Bangladeshi jurisprudence on the contempt of court unfortunately still lives in the era of 1926.[72]

The foregoing discussion leaves no doubt that we now need a timely contempt law in Bangladesh. It only requires to be seen whether any such law is permissible in the scheme of the Bangladesh Constitution. Under article 108 of the Constitution, the Supreme Court is a court of record and has all the powers of such a court including the power to contempt for itself. Bur article 108 which says so itself makes the power 'subject to law'.[73] There is thus no constitutional bar on the Parliament to enact law governing the contempt power of the Supreme Court.[74]

Rahman, 'Accountability of Judges' (1999) 51 DLR (Journal) 67.

69 Chowdhury (n 1) 49.

70 Ibid 28.

71 The Contempt of a Court, Tribunal and Institution Act, 2024 (Act No. 8 of 2024).

72 Chowdhury (n 1) 28.

73 See, *supra* texts accompanying notes 52 and 53.

74 Same was affirmed in *Dr. Md. Mahiuddin v Dr. Hasanuzzaman* (1992) 44 DLR (HCD) 535 (the power of the Supreme Court to punish for its contempt may be regulated by law). See, by contrast, *M Shamsul Haque* (n 2) 249 (the High Court Division per ABM Khairul Haque J held that article 108 gave Supreme Court the contempt power unconditionally). Chowdhury has rightly pointed out this as a flawed interpretation by the Court. See, Chowdhury (n 1) 37.

4.2 Contempt of Court as a Narrowly Construed Exception to Freedom of Expression

The place of contempt of court in the framework of the Constitution of Bangladesh has been discussed earlier.[75] Freedom of expression and freedom of the press are guaranteed under article 39(2) of the Constitution. Contempt of court is one of the grounds on which restriction may be imposed on such freedom of expression. But even if freedom of expression is subject to contempt of court, freedom of expression should be viewed as the *norm* of which contempt of court should be a narrowly construed *exception* due to free speech's valuable role in a democracy.

Freedom of expression is the cornerstone of any democratic society. The core of free speech is the ability to speak freely and to acquire information from others. It is a foundation without which many other basic human rights cannot be enjoyed. That is why it is rightly called the first condition of liberty; the mother of all other liberties. Freedom of expression makes valuable contribution to some other key areas, such as, good governance and rule of law. One author, therefore, rightly depicts the importance of freedom of press (one form of freedom of expression) in the following words:

> Freedom of the press is undoubtedly one of the basic freedoms in a democratic society based on the Rule of Law. Nonetheless we venture to suggest that freedom of the press is not an end in itself. It is the means for ensuring that in a democratic society there is good governance, transparency in administration, enforcement of accountability of the wielders of power and that human dignity and other human rights are respected.[76]

It must not be forgotten that today the judges do not dispense justice on the basis of delegated authority of the king. Rather, they are now one of the three wings of the government. In this changed scenario, the courts should mould the archaic jurisdiction to subserve values of a democratic republic by protecting free speech.[77] Furthermore, in constitutional democracy professing 'rule of law', law is above all other organs of the government. Executive is held accountable to the people. The laws made by the Parliament are within the ambit of judicial review of the higher courts. Likewise, the judiciary should also be held accountable. And judiciary's accountability is ensured by criticism of the judicial reasoning. In the *Constitution 16th Amendment Case*,[78] SK Sinha CJ rightly observed that

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[75] See generally, *supra*, section 3 of this paper.

[76] V. Govindu, 'Contradictions in Freedom of Speech and Expression' (2011) 72 (3) *The Indian Journal of Political Science* 649.

[77] Kapoor (n 8) 582.

[78] The Constitution 16th Amendment Case: *Bangladesh v Advocate Asaduzzaman Siddique and Others* (2017) CLR (Spl) 5.

"Individual Judges are accountable to the public in the sense that in general their decisions are made in public and are discussed, often, critically, in the media and by interest groups and sections of the public affected by them."[79]

The learned Chief Justice held that the decision of the appellate courts may be criticized and published without limitation.[80] His lordship further held that the academics, lawyers and researchers are free to criticize judicial reasoning.[81] And this is how the accountability of the judges is ensured and different from the other co-ordinate branches of government, namely, the legislature and the executive.

Regarding the right of the people to criticize judiciary, Alam's observation is also note-worthy:

> Reaction of the people at large to the decisions of the courts and their right to criticize the judiciary is a great check on the judicial activities and decision making. It is not the decision of an individual case which matters, it is the totality of several decisions taken by the different courts over a period of time which moulds the attitude of the community towards the judiciary. If people's general evaluation is negative, well, judiciary loses its legitimacy. People must be accorded opportunity to express their opinions through press, meetings and general deliberations. Judiciary is likely to benefit from general criticism. People's collective regard for the judiciary ought to form the basis of its legitimacy. The Contempt of Courts Act, 1926 is no bar against constructive criticism. If any other law is any bar that needs to be amended.[82]

It would, therefore, be no exaggeration to say that to keep the judiciary accountable through public opinion and criticism, freedom of expression and freedom of the press is indispensable. Justice Latifur Rahman observes that a judge is, first of all, accountable to his conscience. But that in itself is not enough, because conscience is not always invulnerable. What is also needed is accountability to the Constitution, by which he meant accountability to public opinion, for the Constitution is, in the ultimate analysis, an embodiment of public opinion prevailing in a country.[83] Judiciary may be benefitted by constructive criticism of the public. Godbole's observation is worth quoting as to what should be the role of judges in facing public criticism:

> Ultimately, the judiciary is strengthened by heightened scrutiny, and judge should take the lead to counter any attempt to silence critics. Eventually, contempt law is

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79 Ibid 129.

80 Ibid 126.

81 Ibid.

82 M. Shah Alam, 'Dialectics of Judicial Independence and Judicial Accountability', The Daily Star, Dhaka, 19 November 1999.

83 Justice Latifur Rahman (n 68) 67.

> an archaic law. The punishment for contempt could procure submission but not respect for the judicial institution and the higher judiciary should not really be spending its time and energy invoking its power for contempt of itself.[84]

Freedom of the press to criticize judiciary has attracted special attention from different quarters. Justice Latifur Rahman, for example, observes the following:

> The press plays an important role in keeping an eye on judges and their behaviour. I honestly believe that the press is the watchdog of the judges. As long as the newspapers do not impute improper motives, they should have full freedom to criticize the magistrates and the judges.[85]

MA Mutaleb, a distinguished lawyer, writes the following to emphasise on the role of the press in having public confidence in courts:

> The press serves a very significant role in maintaining public confidence in courts. The press should be free to criticize the courts and judges so long as it is done with good taste and in good faith and judges should very sparingly resort to the extreme measure of contempt of court to suppress criticism of courts and the judges.[86]

Lord Atkin, in the Privy Council, justified public criticism of courts and judges in the following words:

> Where the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. *Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men*.[87]

Islam rightly remarks that the above observation of Lord Atkin is applicable with greater force in Bangladesh in view of the provisions of article 39 guaranteeing

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[84] Godbole (n 66) 638-39. The author observed the same on another occasion: "Judges should not silence criticism with threat of contempt of court but should remove the weakness and drawback that crept into the judicial system. Administration of justice and upholding the majesty of law is undoubtedly a herculean task but not a cloistered virtue." Ibid 638.

[85] Justice Latifur Rahman (n 68) 66.

[86] MA Mutaleb, 'Public Accountability of Judges' (1999) 51 DLR (Journal) 71.

[87] *Andre PR Ambard v Attorney General of Trinidad and Tobago* [1936] AC 322, 335 (emphasis added). Cited in Islam (n 13) 349.

freedom of speech and expression.[88] Thus, if the judges are to ensure their accountability, they should be tolerant to the public opinion. They should admit of the right of the people to evaluate and criticize the judiciary. Public criticism of court should be viewed as part of a democratic practice in a free society.[89]

The above discussion goes to prove one thing i.e., time has ripened enough to change our stance towards contempt of court. Time now favours "unrestricted freedom of speech to the greatest possible extent of toleration."[90] Contempt of court should, therefore, be viewed as a narrowly construed *exception* to the *norm* of freedom of expression.

Let us now move on to assess the HCD's judgment in *Asaduzzaman Siddiqui* [91] mainly on the basis of the two guiding principles discussed above.

5. Evaluating *Asaduzzaman Siddiqui*

Unlike the Contempt of Court Ordinance of 2008 which was promulgated by a military backed Care-taker Government, the Contempt of Courts Act, 2013 was enacted by the Parliament itself. But, like the Contempt of Court Ordinance, the 2013 law was also declared void by the HCD in *Asaduzzaman Siddiqui*.[92] The Court held quite a good number of provisions of the Act *ultra vires* the Constitution. Let us see what the reasonings of the Court were for declaring them unconstitutional.[93]

5.1 Publication of Something to Intrude the Administration of Justice

Section 4(1) of the Act provided that a person cannot be charged for contempt of court for publication or distribution of any matter by words, spoken or written, or by signs or visible representations which may interfere or obstruct or tend to interfere or obstruct with the administration of justice unless he had reasonable ground to believe that the matter is pending disposal or *sub judice* in a court of law. Section 4(2) further provided that a person cannot be held responsible for contempt if the subject matter was not pending before the court of law at the time of publication. Without assigning any cogent reason, the Court simply found the provisions unconstitutional for violating articles 26 and 27 of the Constitution.[94]

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88 Islam (n 13) 922.

89 Hoque (n 1) 194.

90 Chowdhury (n 1) 43.

91 *Asaduzzaman Siddiqui* (n 3).

92 *Asaduzzaman Siddiqui* (n 3). For declaring the Contempt Ordinance of 2008 unconstitutional, see, *M Shamsul Haque* (n 2).

93 This paper has deliberately abstained itself from evaluating the judgment in *M Shamsul Haque* (n 2) which declared the Contempt of Court Ordinance of 2008 unconstitutional since that has already been evaluated or elaborately dealt with by Chowdhury. See, Chowdhury (n 1) 36-43.

94 *Asaduzzaman Siddiqui* (n 3) para. 39.

The view held by the Court seems to be unconvincing. Section 4 of the Act as mentioned above simply exempts innocent publication and distribution from being the contempt of court. Similar provisions exist in the UK and Indian Contempt of Courts Act. It is not possible to cite the whole text of their laws due to limited space of this paper. For this reason, this paper would refer to only the relevant provisions of the concerned Acts. Section 3 of the UK Contempt of Court Act, 1981 contains similar provision under the heading 'defence of innocent publication or distribution'.[95] Section 3 of the Indian Contempt of Courts Act, 1971 embodies similar provision under the heading 'innocent publication and distribution of matter not contempt'.[96]

5.2 Constructive Criticism of Judicial Decisions

Section 5(1) provided that true and accurate news or reporting of the proceedings of the court shall not constitute contempt of court. Section 5(2) provided that neutral and constructive comments or remarks of the judgment of the case after the final disposal of the case shall not be contempt of court. The Court without explaining its reasons quite convincingly, held the provisions unconstitutional.[97]

Again, let us disagree with the Court's view. The above stated provision only states that true and accurate reporting of court proceeding would not be contempt of court. True, media cannot conduct a parallel trial. But it can certainly make fair report regarding the backlog of cases, inordinate delay, lethargic prosecution, numerous adjournments etc. which will rather act as a catalyst to ensure speedy justice. A distinction thus can be maintained between media activism and aggressive journalism.

In addition to what has been discussed above, it is to submit that similar provisions exist in the UK and Indian jurisdictions. Section 4 of the UK Contempt Act contains a similar provision under the heading 'contemporary reports of proceedings'.[98] Likewise, sections 4 and 5 of the Indian Contempt Act incorporate a similar provision under the headings 'fair and accurate report of judicial proceeding not contempt'[99] and 'fair criticism of judicial act not contempt'[100] respectively.

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[95] See, section 3 of the UK Contempt of Court Act, 1981.

[96] See, section 3 of the Indian Contempt of Courts Act, 1971 (Act No. 70 of 1971).

[97] *Asaduzzaman Siddiqui* (n 3) para. 42.

[98] See, section 4 of the UK Contempt of Court Act, 1981.

[99] See, section 4 of the Indian Contempt of Courts Act, 1971.

[100] See, section 5 of the Indian Contempt of Courts Act, 1971.

5.3 Comment on Good Faith about a Judge

Section 6 provided that any *bona fide* statement or comment about a presiding judge of the subordinate court is not contempt of court when made before any other subordinate court or the Supreme Court of Bangladesh. The Court observed that a court "never punishes someone for a *bona-fide* innocent statement or comments made in good faith"[101] and held the provisions *ultra vires*.[102]

Section 6 at first sight may seem to be allowing contempt to be committed against the judges of the subordinate courts. But it is not so as it seems to be. The provision does not allow statements to be made on a wholesale basis against any subordinate court judge. Any statement to be exempted from contempt of court under this provision, two conditions must be satisfied: (i) the statement was made before any other subordinate court or the Supreme Court; (ii) the statement was made *bona fide*. Thus, any statement concerning a judge of the subordinate court may amount to contempt of court if not made before any other subordinate court or the Supreme Court. Again, any statement concerning a judge of the subordinate court even if made before any other court may amount to contempt of court if the statement was *mala fide*. And whether a statement is made *bona fide* or *mala fide* depends on the court's understanding and interpretation of the facts and circumstances of each case. Section 6 did not take away the power of deciding *bona fide* of a statement from the court.

A similar provision exists in the Indian jurisdiction. Section 6 of the Indian Act incorporates a similar provision under the heading 'complaint against presiding officers of subordinate courts when not contempt'.[103]

5.4 Publication Relating to Proceedings in Chambers or *in camera*

Section 7(1) provided that a true, accurate and neutral publication of information obtained from the chamber of the court or *in camera* shall not be considered contempt of court unless such publication was (i) contrary to any other law in force; or (ii) specifically prohibited by the court for public interest; or (iii) relating to a *camera* trial held due to public order or state security; or (iv) relating to any confidential matter of such proceeding. The Court observed and held that "a trial *in camera* means the court wants the trial be kept in abeyance from mass public and publication, so such a provision is absolutely unnecessary and requires to be set aside."[104]

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[101] *Asaduzzaman Siddiqui* (n 3) para. 43.

[102] Ibid.

[103] See, section 6 of the Indian Contempt of Courts Act, 1971.

[104] *Asaduzzaman Siddiqui* (n 3) para. 44.

The reasoning of the Court for setting aside section 7[105] is not as strong as it apparently sounds. Since there may be doubt as to whether the proceedings in chambers or *in camera* may be published, section 7 has clarified the issue. It states when such proceedings may and may not be published. In simple terms, if it falls under any of the four clauses of section 7(1), it is not publishable; in all other cases, it is publishable. And the four clauses of section 7(1) covers mostly all the areas for which proceedings in chambers or *in camera* may be withheld from the mass public.

It is to note that a similar provision exists in the Indian law. Section 7 of the Indian Contempt Act embodies a similar provision under this heading 'publication of information relating to proceedings in chambers or *in camera* not contempt except in certain cases'.[106]

5.5 Scope of Contempt of Court

Section 9 provided that any breach, publication or any other act not punishable as contempt of court under the Contempt of Courts Act, 2013 shall be considered as included within the Act and shall not otherwise be punishable as contempt of court. The Court held that this provision vitiated all the powers of the court and directly in contrast with article 108 of the Constitution.[107]

Section 9 speaks of 'not to imply enlargement of scope of contempt'. Section 9 of the Indian Contempt Act contains exactly the same provision. To quote section 9 of the Indian Act: "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."[108]

5.6 Public Servants Exempted from Contempt of Court

Section 10(1) provided that any act done by a public servant in accordance with law and rules and done in public interest and in good faith cannot be considered as contempt of court. Section 10(2) provided that even after having due effort, if it is not possible for a public servant to implement any judgment, order or direction of a court, no contempt proceeding will be drawn against him. The Court observed that "if any public servant has any problem implementing an order of the court, he must immediately either inform the concerned court, or prefer an appeal to the higher court informing the bottle neck performing the

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[105] Ibid.

[106] See, section 7 of the Indian Contempt of Courts Act, 1971.

[107] *Asaduzzaman Siddiqui* (n 3) para. 45.

[108] See, section 9 of the Indian Contempt of Courts Act, 1971.

order."[109] The Court further observed that section 10 provided undue advantage and unfettered prerogative to public officials.[110] The Court also viewed section 10 as a provision giving clean and clear mandate to the government officials to disregard any court order.[111] Section 10 if allowed, further observed the Court, would bring a disaster for rule of law.[112] The Court reminded article 112 of the Constitution which requires all authorities of the state (executive and judicial) to act in aid of the Supreme Court and in such view of the matter declared section 10 *ultra vires*.[113]

Section 10 aims to exonerate the delinquent government officials who may be accused of contempt of court. Certain judicial checks in the form of contempt of court are essential to deter administrative excesses. The Court's reasoning for declaring section 10 of the Act *ultra vires* seems to be well founded.

5.7 Public Servants Exempted from Personal Appearance

Section 11(4) exempted the public servants from personal appearance before the court. Section 11(6) provided that a public servant shall be discharged from the charge of contempt of court on his retirement, dismissal or removal. The Court considered this a flat rule which cannot be made for all those who are alleged to have committed contempt. [114] The provisions, therefore, were found *ultra vires*.

Section 11(4) particularly violates the equality clause of article 27 of the Constitution by exempting the government officials from personal appearance before the court. The Court's reasoning for declaring section 11 *ultra vires* is convincing.

5.8 Apology of the Contemnor

Section 13(2) made specific guidelines for the court to exonerate a contemnor or remit the sentence inflicted on him on seeking unconditional apology before the appellate court. The Court viewed it as nothing but tying up the hands of the Court and, therefore, declared the provision *ultra vires*.[115]

Declaring section 13(2) *ultra vires* was totally unwarranted since section 13(2) did not make it obligatory for the court to accept apology when tendered

[109] *Asaduzzaman Siddiqui* (n 3) para. 50.

[110] Ibid para. 54.

[111] Ibid para. 60.

[112] Ibid para. 50.

[113] Ibid para. 49.

[114] Ibid para. 54.

[115] Ibid para. 55.

unconditionally. It simply stated that the court *may* accept apology when tendered to its satisfaction. This kind of provision exists not only in the Indian Act of 1971 but also in the Contempt of Courts Act, 1926 itself. Proviso to section 12 of the Indian Contempt Act states that "the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court."[116] Exactly the same provision exists in the proviso to section 3 of the Contempt of Courts Act, 1926.[117]

To summarize the HCD's view, the Court found sections 4, 5, 6, 7, 9, 10, 11 and 13(2) of the Act inconsistent with the Constitution. The Court found those provisions as the crux of the statute and, therefore, declared the whole Contempt of Courts Act, 2013 to have been passed *ultra vires* the Constitution.[118] In view of the Court, the whole statute was drafted to throttle the Court's power disregarding articles 108, 112 and 27 of the Constitution.[119] The impugned provisions of the Act, further observed the Court, were inserted to save and protect government officials and journalists from contempt charge which is beyond the scope of law, discriminatory in nature and hence in violation of article 27 of the Constitution.[120] The Court also observed that the provisions of sections 4, 5, 6 and 7 which exempts certain acts from being considered as contempt undermines the inherent authority of the Supreme Court under article 108 of the Constitution.[121]

Now, to evaluate the HCD's judgment, in my view, only sections 10 and 11 of the Contempt of Courts Act, 2013 was rightly struck down by the Court. If government officials may be discharged from the charge of contempt of court, it will not be possible to ensure obedience to the orders and directions given by the Supreme Court. The Supreme Court's power of judicial review under article 102 would become simply meaningless. Furthermore, the special treatment accorded to the bureaucrats under sections 10 and 11 would clearly violate the guarantee of equality under article 27 of the Constitution. Sections 10 and 11 of the Act were, therefore, rightly held to be *ultra vires*.

So far as sections 4, 5, 6, 7, 9 and 13(2) are concerned, this paper has shown that the reasoning of the Court is not well founded. It has further shown that comparable provisions of sections 4, 5, 6, 7, 9 and 13(2) exist in other jurisdictions, such as, in the UK and India. Comparable provision to section 13(2) exists in the Contempt of Courts Act, 1926 itself. In such view of the matter, the paper is firmly

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[116] See, proviso to section 12 of the Indian Contempt of Courts Act, 1971.

[117] See, *supra* texts accompanying note 61.

[118] *Asaduzzaman Siddiqui* (n 3) para. 65.

[119] Ibid para. 57.

[120] Ibid para. 64.

[121] Ibid para. 65.

of the opinion that these provisions of the Act could/should have been saved by the Court.

The Contempt of Courts Act, 2013 meant by 'contempt of court' either 'civil contempt' or 'criminal contempt'.[122] It then defined both the 'civil contempt' and 'criminal contempt'.[123] It may, therefore, be said that the Act categorically stated what amounts to contempt of court which was absent in the Contempt of Courts Act, 1926. Sections 4, 5, 6 and 7 exempted certain conducts from being contempt. Any person being aware of these exemptions could have exercised his right to freedom of expression or freedom of the press more effectively and cautiously. Sections 2(3), 2(6), 2(8), 4, 5, 6 and 7 by removing uncertainly and by giving a more breathing space for free speech basically enacted a contempt law suitable for its time and also acknowledged that freedom of expression is the *norm* of which contempt of court is a narrowly construed *exception*.

The Court could have saved the remaining part of the Act after declaring only sections 10 and 11 *ultra vires*. But, by not doing so, the Court simply failed to address the concerns that 'we now need a new and timely contempt law' and that 'contempt of court should be a narrowly construed *exception* to the *norm* of freedom of expression.'[124]

6. Conclusion

In this paper, the central aim was to evaluate the HCD's judgment in *Asaduzzaman Siddiqui*[125] that declared the Contempt of Courts Act, 2013 unconstitutional. Any such attempt requires first a rudimentary understanding of what contempt of court is. This paper, therefore, began by ascertaining the meaning, justification and forms of contempt of court.[126] The purpose of the contempt law is not to protect the self-esteem of the individual judges. Rather, the purpose is to enable the court to function effectively since the courts are primarily responsible for administering justice in a state.

Then the paper proceeded to ascertain the place of contempt of court in the framework of the Bangladesh Constitution.[127] The Constitution confers upon the Supreme Court the power of contempt of court but that power may be governed

[122] See, section 2(3) of the Contempt of Courts Act, 2013.

[123] See, sections 2(6) and 2(8) of the Contempt of Courts Act, 2013 respectively.

[124] For the concerns of 'necessity of a new contempt law' and 'contempt of court to be construed as a narrow *exception* to the *norm* of freedom of expression', see generally, *supra*, section 4 of this paper.

[125] *Asaduzzaman Siddiqui* (n 3).

[126] See generally, *supra*, section 2 of this paper.

[127] See generally, *supra*, section 3 of this paper.

by law enacted by the Parliament.[128] And 'contempt of court' is one of the grounds upon which restriction may be imposed upon the right to freedom of expression and freedom of the press guaranteed under article 39(2) of the Constitution.[129] But reading the Constitution as a whole, the paper argued that there is no scope of giving contempt of court an overriding effect over freedom of expression since freedom of expression plays an important role in democracy and democracy is one of the four basic Fundamental Principles of State Policy (FPSP) as declared in the preamble and elaborated in article 11 of the Constitution.[130]

Next, the paper urged on the necessity of having a timely contempt law in Bangladesh and argued that contempt of court should be a narrowly construed *exception* to the *norm* of freedom of expression.[131] Based on these two guiding principles, the paper then moved on to evaluate the HCD's judgment in *Asaduzzaman Siddiqui*.[132] The Court could not provide any cogent and sound reasoning for declaring sections 4, 5, 6, 7, 9 and 13(2) of the Contempt of Courts Act, 2013 *ultra vires*.[133] The paper has categorically shown that similar provisions do exist in the UK and Indian contempt law.[134]

In this context, it may not be out of place to mention that 'scandalising the court' as a form of criminal contempt has been abolished in the UK in 2013.[135] It is quite unfortunate that while the UK abolished 'scandalising the court' as a form of contempt in 2013, our judges in 2013 could not even admit some exceptions/defences to contempt of court created by sections 4, 5, 6 and 7 of the Contempt of Courts Act, 2013.[136] Exceptions/defences which were quite reasonable, found in other jurisdictions as well, and could not have hampered the effective administration of justice in any way.

In applying the law of contempt of court, some basic and general guidelines should be followed by the court. An attempt should be made to strike a balance between the freedom of expression and the need to maintain the authority of the court, otherwise the law will have serious chilling effect on the freedom

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[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] See generally, *supra*, section 4 of this paper.

[132] *Asaduzzaman Siddiqui* (n 3).

[133] See generally, *supra*, section 5 of this paper.

[134] Ibid.

[135] < https://www.lawreform.vic.gov.au> (last visited: 6 July 2024).

[136] See generally, *supra*, section 5 of this paper.

of expression and speech and cannot pass the test of reasonable restriction.[137] Furthermore, the power of contempt of court must be exercised very sparingly and only in the case of extreme necessity; the judges must guard their positions jealously, but should not be touchy about it.[138]

Could the HCD follow the above guidelines in *Asaduzzaman Siddiqui*?[139] To this paper's view, the Court could not; it rather became too touchy about its contempt power. It is high time that the judges should change their stance towards contempt of court. In the interpretation involving freedom of expression vis-a-vis contempt of court, the judges should lean more in favour of protecting freedom of expression to the greatest possible extent of toleration. In simple terms, the judges are expected to attach more importance to the people's right to freedom of expression and freedom of the press.

[137] Islam (n 13) 349.

[138] M. Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (Northern University Bangladesh 2010) 428.

[139] *Asaduzzaman Siddiqui* (n 3).