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JUDGEMENT REVIEW

The State v. Advocate Md. Qamrul Islam and Another (2016)

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The last couple of years have seen a noticeable spike in the number of proceedings for the contempt of scandalization. In January 2015, the editor and joint editor of the most widely distributed national daily, *Prothom Alo* had to apologize to the Appellate Division of the Supreme Court of Bangladesh for an article published on the Chief Justice's appointment process.[2] In the same month the International Crimes Tribunal of Bangladesh called upon fifty people to explain a public statement issued in support of the British journalist David Bergman who had been found guilty of contempt for questioning the liberation war death toll.[3] Later in August 2015, the editor and a reporter of the pro-government *Janakantha* were not only fined for committing contempt but were also compelled to serve short custodial sentences.[4]

Further in March 2016 two cabinet ministers were found guilty of contempt of court for expressing "their doubts as to the independence and impartiality of the Chief Justice". The majority in this case went further by finding that the contemnors had also violated their oaths as ministers, severely denting their public standing. Starting with the Mahmudur Rahman cases[5] in 2010 right up to the recent case of the two cabinet ministers, the country's highest court, the Appellate Division has affirmed that scandalization very much forms part of the law of contempt in Bangladesh. However, the reasons provided have been less

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[2] Staff Correspondent, 'Prothom Alo editor, joint editor apologise to the Court over published article' (bdnews.24.com, 5 January 2015) accessed 12 November 2016,http://bdnews24.com/bangladesh/2015 /01/05/ prothom-alo-editor-joint-editor-apologise-to-court-over-published-article.

[3] Staff Correspondent, 'ICT asks 50 to explain their stand over Bergman contempt' (bdnews24.com, 14 January 2015) accessed on 12 November 2016, http://bdnews24.com/ bangladesh/2015/01/14/ ict-asks-50-to-explain-their-stand-over-bergman-contempt.

[4] *The State v. Swadesh Roy* (2015) 12 App. Div. Cases. 932 *(hereafter "Swadesh Roy Case").*

[5] *Advocate Riazuddin Khan v. Mahmudur Rahman* (2011) 63 DLR (AD) 29 *(hereafter" Rahman I Case")* and *Advocate Riazuddin Khan v. Mahmudur Rahman* (2012) 9 (AD) 140 *(hereafter" Rahman II Case").* Mahmudur Rahman was the acting editor of the *Amar Desh*, who was found guilty of the contempt of scandalization on two occasions. Amar Desh was eventually shut down by the police in 2013.

than convincing. So too have been the precedents relied on. The judgments cited show that the rationale for scandalization stands on weak foundations. The latest judgment of the apex court in the case of *The State v. Advocate Qamrul Islam and Another (hereafter " Two Ministers 'Case")*[6] has done little to rectify this.

Although most of the developed common law world has done away with scandalization, the Indian judiciary, which is widely respected in the sub-continent, has retained this form of contempt relying largely on English judgments of the 19th and early 20th century. These English judgments have not found favor with the superior courts of England for over eighty years. However, the Indian decisions often deliberately ignore or misrepresent the more recent English decisions.[7] Bangladesh law, which unfortunately is heavily reliant on Indian jurisprudence, has therefore sadly followed the fate of its Indian counterpart.

In 2010, in the case of *Rahman II* it was argued for the first time before the Appellate Division that scandalization no longer formed part of the law of contempt in view of the constitutional guarantee provided in article 39 of the Bangladesh Constitution. Reliance was placed on US and Canadian judgments as in both countries freedom of press (in addition to the freedom of speech) was guaranteed. Although in Canada (as in Bangladesh) the freedom is subject to reasonable limits, yet these limits did not deter Canadian judges from ruling that the contempt of scandalization was not a reasonable limit on the freedom. In *Rahman II,* however, the Appellate Division made no reference to this Canadian precedent, (which was relied on by the contemnor) relying instead on a number of Indian judgments, which either avoided any reference to the recent developments in the United Kingdom and Canada or simply misrepresented them.[8]

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[6] *The State v. Advocate Qaumrul Islam and Another* (2016) (AD), accessed 28October 2016,http://www.supremecourt.gov.bd/resources/documents/940003_Contempt_Petition_No_9_of_2016.pdf.

[7] For instance, in case of case of *E. M. ShankaranNamboodiripad v. T. Narayanan Nambiar* (1970) 2 SCC 325 the Supreme Court of India erroneously observes that many successful prosecutions for scandalization had been carried out in England since the 1936 Privy Council decision in *Ambard.* Moreover, although *R v. Metropolitan Police Commissioner ex parte Blackburn* (No.2) (1968) 2 QB 150 is cited there is no discussion on it. However, when the Supreme Court of India does deal with *Blackburn (No.2),* in *Perspective Publications (P) Limited v. The State of Maharastra AIR* 1971 SC 221 it is quick to dismiss it holding that it was "clear that there was no attempt to scandalize the Court," which is contrary to the view of the author judge Lord Denning himself. See Lord Denning, *The Due Process of Law* (Oxford: Oxford University Press, 1980), p. 34. Unfortunately all of the above Indian decisions were relied on in the cases of *Rahman I and II.*

[8] Ibid.

On 6 March 2016, *Jugantor*, a Bengali language daily reported that two cabinet ministers, Advocate Qamrul Islam, the Minister for Food and A.K.M. Mozammel Huq, the Minister for Liberation War Affairs had commented that the Chief Justice should not sit in on the appeal preferred by Mir Quasem Ali against the death sentence imposed by the International Crimes Tribunal of Bangladesh on allegations of war crimes committed during the country's liberation war. The ministers stated that the Chief Justice had disqualified himself because during the course of the hearing, he (the Chief Justice) had allegedly expressed dissatisfaction with the prosecution and investigation teams of the Tribunal stating that he would put "the prosecution-investigation team in the dock along with the accused and that the prosecution/Government is doing politics with this case."[9] Although the ministers apologized unconditionally at the earliest opportunity, their apologies were not accepted "taking into consideration that the contemnors are sitting Cabinet Ministers holding constitutional posts."[10] In an elaborate judgment spanning 45 pages, the Appellate Division considered whether the comments constituted scandalization[11] and concluded that the contemnors had "scandalized the Supreme Court in a highly motivated manner."[12] It however, indicated that it was taking a lenient view, directing the contemnors to pay Tk. 50,000 each.[13]

The Appellate Division did not feel it necessary to enter into lengthy discussions as to the juristic aspects of the contempt of scandalization indicating that they had been dealt with in detail in *Rahman II* and *Swadesh Roy*. Yet it still offered some justification for the contempt of scandalization by referring to Justice Wilmot's judgment in *R v. Almon*.[14] The Appellate Division relied on this to explain the 'primary rationale' of the contempt of scandalization, i.e. public confidence and administration of justice.[15] Because of the increasing reliance placed on this judgment by the Appellate Division, the factual background of this case is considered here. In 1765, proceedings were drawn up against Mr. Almon for a publication against Lord Mansfield, where he had described certain actions of Lord Mansfield as having been taken "officiously, arbitrarily and illegally."[16] The Attorney General initiated proceedings against Mr. Almon, but they were

[9] Ibid, p. 6.
[10] Ibid, p. 5.
[11] Ibid, pp. 7 & 9.
[12] Ibid, p. 45.
[13] Ibid, pp. 5 & 45.
[14] 1765 Wilm. 243
[15] *Two Ministers' Case*, above n. 5, at p. 18.
[16] Lord Denning, The Due Process of Law (Oxford: Oxford University Press, 1980), p. 31.

dropped when Almon apologised and the Attorney General resigned.[17] According to another account, a sudden change of ministry "put in power men with whom Almon had influence, and the Attorney General was ordered to stop the proceedings."[18] Whatever be the reasons for the discontinuation of the proceedings, the judgment remained undelivered in Justice Wilmot's private papers until published by his son in 1802.[19] According to one commentator, "[i]t was written without the benefit of any arguments from defence counsel"[20] and had "a rhetorical eloquence, interrupted by very few precedents, that has tempted generations of judges since to quote it with relish."[21] The Appellate Division too has quoted liberally from the undelivered judgment of *R v. Almon not* only in the *Two Ministers' Case,* but also in the cases of *Swadesh Roy,*[22] *Rahman I,*[23] and *Rahman II.*[24] Thus one of the bases of the contempt of scandalization in Bangladesh is an undelivered judgment written over 250 years ago.

The Appellate Division also relied on the judgment of the Privy Council in *Ambard v. Attorney General of Trinidad and Tobago.*[25] This was a judgment on appeal from a decision of the Supreme Court of Trinidad and Tobago which in 1934 had found the editor-manager and part proprietor of a newspaper guilty of scandalization holding that they had published statements "with the direct object of bringing the administration of the criminal law in this Colony by the judges into disrepute and disregard." It was delivered at a time when the power of contempt was considered necessary to maintain law and order over a colonized population. Although the colonial court had found it necessary to convict the contemnor, the Privy Council reversed the judgment on appeal holding that there had been substantial miscarriage of justice. However, in allowing the appeal the Privy Council made the following observation (also quoted in the Two Ministers' Case) -

> *The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public*

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[17] Ibid.
[18] Douglas Hay, 'Contempt by Scandalizing the Court: A political history of the first hundred years', Osgoode Hall Law Journal 25 (1987) 431 at p. 464.
[19] Ibid, p. 466.
[20] Ibid, p. 464.
[21] Ibid.
[22] The State v. Swadesh Roy, above n. 3.
[23] Rahman I, above n. 1, at para. 35.
[24] Rahman II, above n. 1, at para. 33.
[25] Ambard v. Attorney General for Trinidad and Tobago (1936) AC 322.

> *abstain from imputing improper motives to those taking part in the administration of justice...*

Yet 30 years later, the Court Appeal refused to draw up proceedings for contempt of court in the case of *R v. Metropolitan Police Commissioner ex parte Blackburn (No.2)*[26] although the words used against the court were "as strong as those in which Mr. Almon criticized Lord Mansfield."[27] However, the Appellate Division fails to refer to the case of Blackburn (No.2).

And then we find two statements of the Appellate Division proclaiming that scandalization of the judiciary is not tolerated anywhere in the world. The Appellate Division observes:

> *[P]ersonal attacks on individual judges or imputation of improper motives of judges acting in the course of their duty is not tolerated anywhere in the world. Scurrilous remarks about judges and scandalization of the Court are everywhere dealt with under the law contempt of court.*[28]

The observations could not be further from the truth. In the United States scandalization never formed part of the law of contempt. There it has been described as English foolishness that "has long since been disavowed in England, and has never found lodgment here."[29] Judges in the United States are expected to be men of fortitude able to thrive in a hardy climate"[30] In Canada too judicial fortitude is expected as "courts are not fragile flowers that will wither in the hot heat of controversy."[31] And in the land of our former colonial masters from which we have inherited this law, no successful prosecution for scandalization has taken place since 1931. In 1985, Lord Diplock described it as "virtually obsolescent."[32] Scandalization was finally abolished by the UK Parliament in April 2013.

The Appellate Division also relied on and quoted with approval from the judgment of the Supreme Court of Zimbabwe in *Re: Patrick Anthony Chinamasa,*[33] where the

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[26] (1968) 2 QB 150.
[27] Denning, above n. 15.
[28] Ibid, p. 16.
[29] *Bridges v. California* (1941) 314 US 252 at p. 287, per Frankfurter, J.
[30] *Craig v. Harney* (1947) 331 U.S. 367 at p. 376.
[31] *R v.Kopyto,* (1987) 47 DLR 213.
[32] *Secretary of State for Defence v. Guardian Newspapers* Ltd (1985) AC 339 at p. 347.
[33] S.C. 113/2000, 6 November 2000, p. 24, per Gubbay, CJ.

contempt of scandalization was justified because "[u]nlike other public figures, judges have no proper forum in which to reply to criticisms."[34] Chief Justice Gubbay of the Supreme Court held that "protection should be given to judges when it is not given to other important members of society such as politicians, administrators and public servants."[35] This judgment has to be read in the context of the conditions in Zimbabwe at the time. Racial tensions were high with hordes of Mugabe supporters taking over white-owned farms. The judiciary (which still had a substantial number of white judges) was perceived as thwarting the plans of the executive and was often at loggerheads with the government.[36] This had eventually led to the early retirement of the English-born Chief Justice Gubbay, which was arranged by then Justice Minister Anthony Chinamasa, i.e. the very person who was the subject of contempt proceedings in *Re: Patrick Anthony Chinamasa.*

The judgment in *Re: Patrick Anthony Chinamasa* was a case of the Supreme Court arrogating to itself powers in a very public spat against the Executive, which it would eventually lose when Gubbay would be forced to resign in favour of Godfrey Chidyausiku, a former cabinet minister loyal to the President Mugabe.[37] Seen from another angle (i.e. from the view of the Mugabe supporters), this was a judgment delivered by a white judge to protect the colonial land arrangements and was simply a hangover from the colonial past. It is unfortunate that the Appellate Division felt it necessary to rely on the judgment of a country in racial turmoil (where race and politics played and no doubt still plays an important part in judicial proceedings) in preference to those of stable democracies. The 'inability-to-respond-to-criticisms' argument is no longer considered attractive. The power to imprison or impose a penalty seems to be a disproportionate compensation for the inability to speak out against criticisms or offensive remarks. The UK Law Commission saw this power afforded only to judges as both anomalous[38] and self-serving.[39] And Lord Pannick, QC observed that retaining the contempt of scandalization suggested that the judiciary is alone amongst the public institutions that needs protection from criticism and can not

[34] Two Ministers' Case,above n. 5, at p. 20.
[35] Ibid.
[36] David Blair, 'Harare's sacked Chief Justice returns to work', The Telegraph, 2 March 2001,accessed on 23 November 2016, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/ zimbabwe/1324823/Harares-sacked-Chief-Justice-returns-to-work.html.
[37] Ibid.
[38] UK Law Commission, Contempt of Court: Scandalizing the Court, Law Com No. 335 (London: The Stationery Office, 2012), para. 64.
[39] Ibid, para. 63. The UK Law Commission observed "... there is something inherently suspect about an offence both created and enforced by judges which targets offensive remarks about judges."

maintain its reputation by public perception of how it actually performs its functions.[32]

Australia and New Zealand are 2 other major common law jurisdictions, where contempt of scandalization still is in force. And as such the Appellate Division relies on the Australian case of *Gallagher v. Durack* to justify its necessity. But even in Australia this form of contempt has been critcised by many commentators and at times by judges themselves. At the 13th Lucinda Lecture at Monash University in 2005, Justice Ronald Sackville of the Federal Court stated that

> *It is to be hoped that the High Court will interpret the scope of the implied freedom of communication more broadly than recent decisions might suggest. If the High Court does not do so, there is a strong case for legislation to bring the principles governing criticism of the Australian judiciary into line with those of other liberal democracies.*[40]

It thus remains to be seen how long the contempt of scandalization survives in Australia and other parts of the common law world. The more the courts are compelled to rely on the contempt of scandalization, the less convincing are the justifications offered for its retention. Although it is not possible for men of common decency to support the statements that have been made against the judiciary in the cases discussed, yet the courts' increasing reliance on this form of contempt begs the question as to whether the Judiciary should enjoy recourse to such a harsh penalty. It has already been noted by one commentator that it has the potential to lead to severe sentences.[41] One also has to consider whether the contempt of scandalization has had a beneficial impact on the administration of justice or its dignity or whether they would be better served through other means. As with other public institutions, the courts are also facing criticism and a growing lack of deference. But deference through the fear of incarceration and penalties is not desirable. True, the dignity and honour of the judiciary has to be upheld. But the stress on the tattered fig leaf of the contempt of scandalization is increasingly becoming more evident.

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[40] Justice Ronald Sackville, 'How fragile are the courts? Freedom of speech and criticism of the judiciary', 29 August 2005, Lecture delivered at Monash University,accessed on 23 November 2016,http://www.wbde.org/documents/2005_Aug_29_Justice_Sackvill_%20Re_Criticism_of_Judiciary.pdf.

[41] Mahmudul Islam, Constitutional Law of Bangladesh (Dhaka: Mullick Brothers, 2012), p. 927.