THE CONSTITUTION AND ENFORCEMENT OF DIRECTOR DUTIES IN BANGLADESH AND THE UNITED KINGDOM: A COMPARATIVE STUDY

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Abstract

Directors' duties of loyalty and care, as well as the enforcement of these requirements through derivative lawsuits, are significant aspects of the corporate legal system. These controls and accountability measures are put in place to make sure directors are held to a high standard of responsibility and oversight when running a business. To identify problems with the Bangladeshi law governing directors' duties to act sensibly, honestly, and in the best interests of the company as a whole while avoiding conflicts of interest, the comparative legal technique was employed in this study.

This study aims offer a critical analysis of Bangladeshi law governing directors' responsibilities within its unique social and historical context and to make reform recommendations. This study assesses the conciseness, clarity, and accessibility of Bangladeshi legislation, and it exposes the problems that are present in it. The baseline for this evaluation is the corporate law of the United Kingdom. For the purpose of laying the framework for legal reform in Bangladesh, an investigation into the practicability of importing certain legal principles and norms from the corporate law of the United Kingdom to its equivalent in Bangladesh is being carried out. In Bangladesh, the Companies Act of 1994 is the primary piece of legislation governing a company, which underwent two revisions in 2020, is argued to have fundamental flaws in Bangladeshi law regarding directors' duties of care and derivative proceedings. Although the 2018 Corporate Governance Code has addressed several difficulties that are associated with the duty of directors, there is still an area for further improvement. The need for legal reform is necessitated by the ambiguity surrounding directors' obligations and enforcement of the law. Alternative measures would not sufficiently secure the accountability of directors, according to the Bangladeshi context's limitations on other legal and extra-legal accountability mechanisms.

The study looks at the feasibility of change by legal transplanting and concludes that the UK legal model can only be effectively transferred if it can be modified to work in Bangladesh's institutional and legal framework. This is important to make sure that the new environment of the host nation would accept new laws appropriately. The majority of UK legal models and standards are exportable, it may be inferred. The primary source of guidance for the research has been a policy that advocates for finding a balance between the need to safeguard directors' use of their management power and the need to strengthen directors' responsibility.

Copyright

Table of Abbreviations

Abbreviation	Explanation
ACC	Anti-Corruption Commission (Bangladesh)
ADB	Asian Development Bank
AGM	Annual General Meeting
CA 1985	Companies Act 1985 (United Kingdom)
CA 2006	Companies Act 2006 (United Kingdom)
CEO	Chief Executive Officer
CGC 2016	Corporate Governance Code (United Kingdom)
BAS	Bangladesh Accounting Standards
BB	Bangladesh Bank
BEI	Bangladesh Enterprise Institute
BSA	Bangladesh Standards for Auditing
CGC 2018	Corporate Governance Code (Bangladesh)
CA 1994	Companies Act 1994 (Bangladesh)
CLRSG	Company Law Review Steering Group (United Kingdom)
CrPC	Code of Criminal Procedure 1898 (Bangladesh)
FCA	Financial Conduct Authority (United Kingdom)
FI	Financial Institution
IPO	Initial Public Offering
LR	Listing Rules (United Kingdom)
LRs	Listing Rules Dhaka Stock Exchange and Chittagong Stock
CSE	Chittagong Stock Exchange (Bangladesh)
DSE	Dhaka Stock Exchange (Bangladesh)
IAS	International Accounting Standards
ICAB	Institute of Chartered Accountants of Bangladesh
ICMAB	The Institute of Cost and Management Accountants of Bangladesh
ISA	International Standards on Auditing
NBFI	Non-banking financial institutions (Bangladesh)
NFI	Non-Financial Institution
RJSC	Registrar of Joint Stock Companies and Firms

SEC	Securities Exchange Commission (Bangladesh)
SOCB	State Owned Commercial Bank
FDI	Foreign Direct Investment
GDP	Gross Domestic Production
GM	General Meeting
CPC	Civil Procedure Code (Bangladesh)
PC	Penal Code (Bangladesh)

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Companies Act 2006

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The Economic Crime and Corporate Transparency Act 2023

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The Financial Service and Markets Act 2000

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Corporate Governance Code 2016

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The Companies (Shareholders' Rights) Regulations 2009

Bangladesh

The Constitution of the Peoples Republic of Bangladesh

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Syed Al Nesar Ahmed, MD, United Food Complex Ltd vs. Nafisa Choudhury and others 53 DLR (AD) 83

Tropical Homes 48 DLR (1996) 576

Chapter 1

1.1 Navigating Directorial Authority: Corporate Governance, Accountability, and the Imperative of Derivative Actions in the United Kingdom and Bangladesh Company Law

The decision-making authority of the board of directors is a crucial part of any organisation, which includes the companies.[1] The argument that shareholders find it challenging to examine the company's activities on a daily basis due to their size or lack of competence can be used to support this extensive assignment of decision-making authority to directors.[2]

The discussion of how companies should be managed is important for each company or organization because the framework of corporate governance is anticipated to have an impact on corporate actions and the decision-taking framework within the organisation. This is because how directors manage the company affects shareholder interests, the company's business growth, and more widely its financial prosperity.[3] With the similar context, a sound corporate governance framework could be thought of as having procedures and standards that prevent directors from abusing their managerial authority[4], hold them accountable for unethical behaviour[5], and provide incentives for them to operate wisely and efficiently.

As instruments of corporate governance and accountability, obligations of trustiness and loyalty owed by directors might be thought of as legal standards that guide their behaviour

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[1] John Armour, Henry B. Hensman and Reinier Kraakman, 'What is Corporate Law?' in Reinier Kraakman and others. (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, Oxford, OUP 2009) 5.

[2] Paul L. Davies, Sarah Worthington and Christopher Hare, *Gower Principles of Modern Company Law* (11th edn, London, Sweet & Maxwell 2021) 214.

[3] Due to the fact that academics have researched the topic from a variety of disciplinary perspectives, encompassing law, economics, administration, and political science, the concept of corporate governance seems to be hard to define and has been characterized in a variety of different ways. In Shann Turnbull, 'Corporate Governance: Its Scope, Concerns and Theories' (1997) 5(4) Corporate Governance: An International Review 180: states Corporate Governance in the UK is the best possible definition provided so far, which includes the structure through which companies are organised and managed. see Report of the Committee on the Financial Aspects of Corporate Governance, *The Cadbury Report* (UK, December 1992) para. 2.5, <http://www.ecgi.org/codes/documents/cadbury.pdf> accessed 2 September 2019.

[4] John Birds and others., *Boyle & Birds' Company Law* (10th edn, Bristol, Jordans 2019) 16.3

[5] Jill Solomon, *Corporate Governance and Accountability* (3rd edn, Chichester, John Wiley & Sons 2010)

while using their discretion.[6] These procedures are intended to give directors guidelines for appropriate behaviour as well as a legal foundation for penalising them if critical guidelines are not followed or breached. Most importantly, the effectiveness of such obligation's rests on the existence of enforcement mechanisms for when they have been broken.[7] A derivative action is a crucial tool for upholding the company's rights and ensuring director accountability. Derivative proceedings enable shareholders, in general, and especially minority shareholders, to pursue claims against directors for misconduct on the company's behalf.[8]

The company law's major ambiguities and shortcomings in defining directors' responsibilities, as well as the establishment of an impractical derivative action to hold misbehaving directors accountable, constitute the core issue. Because there is not a thorough regulation of directors' obligations and there is no clear-cut judicial advice, the legislation of Bangladesh, which is the focus of this study, serves as an illustration of this type of complex company law.

1.2 Company Laws and Director Duties in Bangladesh

The following statement accurately reflects the reality of directors' responsibilities and the manner in which they must be fulfilled in the Bangladesh perspective: "*The Companies Act, 1994 provides for many stringent rules in respect of any negligence, default, breach of duty or trust on the part of director, manager or officer of a company. But experience would appear to show that these are more honoured in the breach than observance."*[9] However, the Companies Act of 1994 (CA 1994) of Bangladesh contains a number of provisions that are designed to prevent directors from recklessly abrogating their obligations or responsibilities. The only exceptions to this rule are the positions of managing director, manager, or legal or technical adviser or banker, as stated in section 104 of the Companies Act of 1994. It is also illegal for a director to hold a position in the company that generates a profit without the prior approval of

[6] Andrew Keay, *Directors' Duties* (2nd edn, Bristol, Jordans 2014) 5–6.
[7] Andrew Keay, 'An Assessment of Private Enforcement Actions for Directors' Breaches of Duty' (2014) 33(1) Civil Justice Quarterly 76, 76.
[8] Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford, OUP 2007) 18.
[9] Muhammad Zahirul Islam and Mohammad Nazrul Islam and Sumon Bhattacharjee and A.K.M. Zahirul Islam, 'Agency Problem and the Role of Audit Committee: Implications for Corporate Sector in Bangladesh' (2010) 2(3) International Journal of Economics and Finance 177, 184

the company's shareholders in a general meeting.[10] Furthermore, section 112 of the CA 1994 provides that within the corporate sphere, no director may arrange for the distribution of pay instead of removal from office. Transparency is required in this financial transaction, whether a firm or its assets are being parted with. The disclosure must take place, necessitating the careful disclosure of payment details to the members of the company. Additionally, the disclosure must occur in the general meeting and must approved by the members of the company.[11] Sections 104, 105 and 112 of the CA 1994 are encapsulate the director duty to avoid conflicts of interests, however is in prohibitory nature. The similar position can be found in section 175 of the Company Act 2006 of the United Kingdom (CA 2006), which clearly encapsulate the director's duty to avoid conflicts of interests. It further provides that a director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.[12]

By way of comparison the UK incorporates the common law duties of director in statute. In section 177 of the UK Company Act 2006 promulgate a director's obligation is to disclose any conflicts of interest in the proposed transaction or arrangement. Whereas Bangladesh CA 1994 imposes particular restriction on directors in such scenario. For instance, section 105 of the CA 1994 prohibits that director to enter any contract of sale, purchase or supply of good, where he is also a director. It is also the responsibility of the director to disclose any conflicts of interest.[13] Furthermore, in terms of the section 130 it is obligatory for at the meeting of the board at where such a contract or arrangement is decided, it is required for a director to disclose his interest in a contract or arrangement that was entered into on behalf of the company. Moreover, in the Section 131 of the CA 1994 prohibits voting by such interested director in such meeting. In the absence of a specific provision, a director does not lose his position if he is interested in

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[10] The Companies Act 1994, s 104
[11] Ibid, s 112
[12] See *Allnut v Nags Head Reading Ltd* [2019] EWHC 2810 (Ch); [2019] 10 WLUK 437. Under section 175 of CA 2006, It is necessary for a director to disclose the nature and scope of any interest the director may hold that may be in contradiction with the benefit of the corporation. This disclosure is required by law. The similar approach has been redefined in Somerville v 1051 GWR Ltd [2019] 8 WLUK 27 and further stated that the meaning of this statement is that section 175(3) should not be interpreted as only applying to transactions between a company and its directors. Doing so would create a contradiction with the broader scope of section 177(1). Section 177(1) is wider in its scope than section 175(3), and therefore interpreting section 175(3) too narrowly would cause it to clash with section 177(1). This suggests that section 175(3) should be read more broadly than just applying to transactions between a company and its directors.
[13] The Companies Act 1994, s 106

contracts with the company.

In addition, section 233[14] of the CA 1994 reflects the protection of minority shareholder's interest of Bangladesh, which is private enforcement mechanism. This section provides that those who are not in the control of the management of the company should have direct mode of complaint to the court if they can show that the affairs of the company are being run in a manner, which is prejudicial to the interest of the company. Section 233 read with Section 195[15] means that holders of one-tenth of shares in the case of company having share capital and in the case of a company not having a share capital one-fifth of the members are eligible to apply. While the Part 11 of the English Company Act 2006 empowered any shareholder to bring a derivative action.[16]

The UK Companies Act of 2006 codified directors' duties for the first time, as well as introduced the concept of enlightened shareholder value[17]. The seven duties set out in Chapter 2 of Part 10 of the UK Act cover only the substantive content of the directors' duties. On the other hand, the director duties regime of Bangladesh is immature and failed to deal with the modern-day corporate necessities. Finally, director duties in Bangladesh are in a piecemeal approach. There is no general set duty of the directors in this moment, which is not very helpful for the director of the companies in Bangladesh to follow and oblige. This also brings a number of problems including inaccessibility. The current statutory provisions are prohibitory in nature rather than being facilitative. In short it brings two problems, firstly there is no list of general directors' duties to follow by the directors and secondly the existing directors' duties are expressed in a piecemeal prohibitory manner and in a very incoherent way, which is very difficult to comply with.

1.3 Background of the Research

As instruments of corporate governance and management, the duties of care and loyalty which directors are required to uphold can be seen as legal norms that limit the conduct that directors exhibit while they are using their authority.[18] These procedures are intended to give

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[14] ibid, s 233
[15] ibid, s 195 which states the Investigation of affairs of company by inspectors.
[16] The UK Companies Act 2006, s 260
[17] Ibid, s 172
[18] Andrew Keay (n 6) 5–6; Andrew Keay and Joan Loughrey, 'The Framework for Board

directors with behavioural norms as well as a legal justification for discipline them for non-compliance with such norms of conduct when they fail to meet such norms. Importantly, the effectiveness of such responsibilities is contingent on the existence of procedures for their enforcement in the event that they have been violated.[19] A derivative action is a crucial private enforcement instrument since it allows shareholders to sue business directors for their wrongdoing on behalf of the company.[20]

1.4 Aim(s) of the investigation

The aim of this research is to analyse Bangladeshi regulations in the field of directors' duties within the company law, with a view to proposing a new directors' duties scheme.

1.5 Objective(s) of the Research

Firstly, this research involves an in-depth investigation into the corporate laws of Bangladesh, specifically focusing on director duties. Secondly, the research will extend to English company laws and their corresponding regulations concerning director duties. Through this research, aims to identify and evaluate the existing problems with Bangladesh's current laws and potential future issues that may arise as the country develops.

Furthermore, the research also seeks to suggest feasible solutions to the identified problems while taking into account the suitability of transplanting relevant legal provisions from English law. The feasibility of such legal transplantation will be assessed in conjunction with the proposed solutions, with the ultimate goal of improving the existing legal framework related to director duties in Bangladesh.

Accountability in Corporate Governance' (2015) 35(2) Legal Studies 252

[19] Andrew Keay (n 7) 76.

[20] See, Andrew Keay and Jingchen Zhao, 'Accountability in Corporate Governance in China and the Impact of Guanxi as a Double-edged Sword' (2017) 11(2) Brooklyn Journal of Corporate Finance and Commercial Law 377

1.6 Contribution of the Research

The original contribution that this study produces is that it provides substantive suggestions for legal reform. To do this, it looks at how much the Bangladeshi legislature may learn from the UK legal system's perspective on directors' duties in particular derivative action mechanisms when creating a legal framework that is suitable for Bangladesh in these areas. To be more explicit, we shall analyse, from a theoretical standpoint, whether or not it would be possible to import particular corporate law concepts and regulations from the United Kingdom into the applicable body of law in Bangladesh. This will be done in consideration of the institutional capacity and legal environment in Bangladesh. The research further deals with the question of whether specific legal models and rules from the United Kingdom can be adopted in the context of Bangladesh, and if this is the case, how these rules from other countries be adapted, if this turns out to be essential, to accommodate the changed environment in Bangladesh.

In addition, there is a little academic analysis seeking to understand directors' duties and its enforcement in Bangladesh. Thus, to the extent of the researchers' knowledge, this study will be the first carried out in this sector in Bangladesh. The research will enhance the understanding of both scholars and directors in the field of law and possibly make a contribution towards a better understanding of the company laws in Bangladesh in general.

More broadly, this report provides an overview of Bangladesh's current director roles and governance frameworks. It emphasises the importance of a robust a legal liability framework that provides responsibilities of care and loyalty in a well-designed and thoughtful manner, as well as derivative litigation that is easily accessible, in regards to the modernisation of corporate governance in Bangladesh. This report provides a more comprehensive review of Bangladesh's current director roles and governance frameworks. This thesis also evaluates the private and public formal enforcement in-details, considering the recent changes and progress brings by the Bangladesh Corporate Governance Code (CGC 2018), Company Amendment Act 2020 and Company (Second) Amendments 2020. Compare with the UK this research founds and shows the loopholes, uncertainties and vagueness of the director duties and its enforcement through private and public mechanism. It also shows that there is serious lack of accountability and control of the directors in Bangladesh current corporate law settings.

Importantly, the study applies the legal transplanting technique to enhance the efficacy of

Bangladeshi corporate law of directors' obligations and its enforcement. This is a very good positive move. In the areas of directors' duty of care, duty to act in good faith in the company's business interests, duty to avoid conflict of interests with special emphasis on corporate opportunities and self-dealing transactions, and derivative actions, to the best of the author's knowledge, this would be the first attempt to assess the viability of modernising Bangladeshi law through legal transplantation from the UK. All of these areas are included in the scope of the study. The study has the potential to be regarded as a significant addition to the existing body of literature on the topic of the viability of legal transplants as a strategy for improving corporate governance in Bangladesh.

Some practical contributions can be noted while assessing the viability of legal transplantation in the Bangladeshi setting. First, the actual response of foreign norms necessitates elements of the host country's institutional structure and legal context. As a result, the research determined that some UK legal principles cannot be transferred, however some legal ideas can be transplant with changes to suit inside Bangladeshi legal and institutional systems. Second, it is critical to recognise the insufficient competency of public enforcers for an example courts. In such cases, the legislation is expected to equip with clear and workable legal standards rather than confusing ideas. Third, the law is anticipated to play a bigger role in bridging this vacuum and giving investors adequate legal protection against directors' dishonest behaviour in jurisdictions where the market has a limited impact on encouraging good corporate governance, like Bangladesh.

In summary, this research makes proposals to alter the Bangladeshi company law settings to improve directors' accountability, and responsibility and to create a strong corporate governance system in the country. The research outcomes are important for a variety of legal professionals, which include lawmakers (legislators), judges and lawyers. This comparative study may significantly promote the legal growth of level corporate law knowledge in Bangladesh because the proposed transplanting issues can be brought as a bill to the parliament to change the present statute of directors’ obligations and derivative actions. Moreover, considering legal transplant this study aimed to create a legislative framework that resembled the UK legislative framework while remaining relevant to Bangladeshi distinctive nature. As a result, this would contribute to the development of intelligible Bangladeshi law, particularly for international investors and businesspeople.

1.7 Research Questions

The main question of this research is: To what extent it is possible to reform the legislation related to the directors' duties in listed companies in Bangladesh in the light of English law, taking into account the local, political, economic and legal environments, which significantly impact the board of directors?

1.8 Methodology

A legal doctrinal study is being undertaken, which is historically and currently the method expected and required by legislators, lawyers and other legal interest groups. A doctrinal legal research methodology that involves analysis of primary and secondary sources of law will be employed in this research. Relevant legislation, case law, policies, research studies, relevant reports by business community organisations and law societies, governments' reports and protocols related to or on the subject under study will be critically analysed. For example, statutory materials Bangladesh Companies Act 1994; UK Companies Act 2006 and case laws of Bangladesh and UK are publicly available. Case law is also available on number of law reports both in Bangladesh and UK. In Bangladesh i.e., Supreme Court Cases (SCC), Dhaka Law Report (DLR), Bangladesh Legal Decisions (BLD); in UK i.e. Butterworth Company Law Cases (BCLC), Weekly Law Reports (WLR), All England Law Reports (All ER). In term of primary reports of Bangladesh namely the Registrar of Joint Stock Companies and Firms (RJSC), Security Exchange Commission (SEC), Bangladesh Law Commission and in UK Law commission reports, UK Financial Conduct Authority (FCA), London Stock Exchange listing rules etc.

Secondary sources will be primarily consisting of academic texts and journal articles as well as contemporary media and industry specific commentary. For example, for UK Gower and Davies Company Law, leading journals like Modern law review, Journal of Legal Society, Company Lawyers etc; for Bangladesh Dr M Zahir, Company and Securities Laws, Bangladesh Journal of Law etc.

A comparative law technique will be used in this study because the major goals of the study are to use the UK model of directors' obligations to evaluate Bangladeshi law and assess the

viability of transferring specific regulations to Bangladeshi law.

An essential part of this approach is comparing analogous "legal institutions," or the rules that various legal systems use to handle similar legal situations, as it takes into account the larger contexts in which those rules operate.[21] This entails formulating and outlining the distinctions and affinities among diverse legal systems as well as the specific legal concerns.[22] Given that the issues in corporate law are of a similar character,[23] It would be wise to learn from the UK and carry out comparative study in order to identify and make accessible to legislators the answers that may be used to modify laws in other countries.[24]

There are two broad schools of thoughts of legal transplant are most recognised. Gunther Teubner[25] pointed out that it is quiet challenging for successful legal transplant and describe legal transplant as a misleading metaphor. In contrast Alan Watson[26] categorically shows and proves that legal transplantation is not only possible but also well-functioning. My view is it is possible as it is forward in the similar function as the similar nature of the problem in the two jurisdictions namely Bangladesh and UK.

1.9 Originality of the Research

This thesis on comparative legal analysis of Bangladesh and the United Kingdom had an original and significant contribution to the field of law. This is because this research explores and analyses the similarities and differences between two different legal systems, which are rooted in different historical, cultural, and political contexts.

One of the most important aspects of this thesis is its originality. While there is a considerable

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[21] See Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford, Clarendon Press 1998) 4–5.
[22] See Mathew Siems, *Comparative Law* (3rd impression, Cambridge, Cambridge University Press 2014) 20.
[23] David C. Donald, 'Approaching Comparative Company Law' (2008) 14(1) Fordham Journal Corporate and Financial Law 83
[24]See Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Tony Weir tr, Oxford, Clarendon Press 1990) 15– 18.
[25] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61(1) The Modern Law Review 11
[26] Alan Watson, *Legal Transplant an Approach to Comparative Law* (2nd edn, The University of Georgia Press, USA 1993) 21

amount of literature on comparative law, few studies have directly compared the legal systems of Bangladesh and the United Kingdom. By conducting a detailed analysis of these two legal systems, this thesis offers a new insight into how these systems have developed, how they operate, and what their strengths and weaknesses are.

The comparative methodology would allow the researcher to pinpoint the parallels and discrepancies between the two legal systems. For instance, the thesis explores how the legal systems of Bangladesh and the United Kingdom deal with issues of director duties construction and enforcement. The thesis clarified the advantages and disadvantages of each system and pointed out places where they may complement one another by comparing and contrasting the two systems.

The thesis also explores the historical and cultural factors that have shaped the development of the legal systems in Bangladesh and the United Kingdom. For example, the thesis examines how former British colonialism has influenced the development of legal systems in both countries and/or how social and cultural traditions have shaped the legal systems. By exploring these factors, the thesis provides a nuanced understanding of the legal systems in each country, and how they have been shaped by historical and cultural factors.

Finally, this thesis on comparative legal analysis of Bangladesh and the United Kingdom offers an original and significant contribution to the field of law. As a result of comparing and contrasting the two systems and the differences between these two legal systems, this thesis provides new insights into how legal systems develop and operate, as well as identifies areas in which one system could learn from the other. It also clarified the advantages and disadvantages of each system, as well as pointed out places where systems may complement one another. Moreover, by examining the historical and cultural factors that have shaped these legal systems, the thesis could provide a more nuanced understanding of the complexities of legal development and evolution.

1.10 Limitations and Avenues for Future Research

The topic of corporate governance interrelated with corporate law is vast. As part of Bangladesh's substantial legal and regulatory frameworks for directors' duty and

accountability, this research examined the laws governing directors' responsibilities of care and loyalty as well as how they are enforced in the public and private spheres. The emphasis was on specific concerns, and an argument was made for reforming Bangladeshi law by legal transplanting from UK corporate law framework. This study is limited in scope and does not examine all kinds of director duties, such as duty owed to the company.

Inquiries of the possibility of change through legal transplanting may also extend to personal actions taken by shareholders against directors and other shareholders. While it is expected that directors who break corporate commitments would face derivative proceedings, shareholders may also undertake personal lawsuits against directors and other shareholders.

The study focuses only on the question of when a shareholder may file a derivative action under the derivative action framework. Research and study in the domain of particular procedural rules governing derivative actions might also be beneficial. It may cover things like information accessibility, potential parties, potential liability, notification duration, and the company's response time.

The research is confined to evaluating relevant law from only two jurisdictions of the world namely Bangladesh and the United Kingdom. On the other hand, this suggests that the conclusions and suggestions for changing Bangladeshi legislation may not significantly be relevant to other jurisdictions. In addition, further investigation may focus on how legal transplantation may enable nations other than the UK to assist in establishing changes to directors' obligations and derivative actions.

Chapter 2: Bangladesh's Corporate Governance Framework

2.1 Introduction

The distribution of resources and responsibilities both inside and across corporations is heavily influenced by corporate governance. As a result, it also significantly affects economic performance and offers mechanisms that have an impact on return on investment. It demands responsibility and improves resource utilisation. The intention is to align interests of corporation and society. According to Weimer and Pape's research, the national context of legal, institutional, and sociocultural factors, which shape patterns of influence that stakeholders wield on managerial decision making.[27] The aim of good corporate governance framework would be the maximization of company's contribution to economy involving stakeholders.[28] Claessen argued that internationally accepted governance standards have diverse enticements for companies and states. Those not only help companies in attracting more investment but also assist the state strengthening its economy and encouraging business scrupulousness.[29] Further, a good corporate framework always helps to maximise the contribution of firms towards the country's economy. Under the umbrella of this definition, it can be documented that best practice in corporate governance includes the association between creditors, shareholders, financial markets and also employees.[30]

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[27] Jeroen Weimer and Joost Pape, 'A taxonomy of systems of corporate governance' (1999) 7(2) Corporate Governance an International Review 152

[28] There are two interconnected parts that make up corporate governance. An internal side, which refers to the relationship that the directors have with the company and its shareholders, and an exterior concept, which refers to the way in which the corporation interacts with society. The concept of corporate aim is the subject of continuous discussion. For more please see Edward B. Rock, 'Business Purpose and the Objective of the Corporation' (October 14, 2020) NYU Law and Economics Research Paper No.20-44, European Corporate Governance Institute Finance Working Paper < https://ssrn.com/abstract=3724710 > accessed 3 January 2021; Colin Mayer, 'The Governance of Corporate Purpose' (May 12, 2021) European Corporate Governance Institute - Law Working Paper No. 609/2021< https://ssrn.com/abstract=3928613> accessed 10 February 2022. Also see Prof Janice Denoncourt, 'Companies and UN 2030 Sustainable Development Goal 9 Industry, Innovation and Infrastructure' (2020) 20(1) Journal of Corporate Law Studies 199 where the author advocating for the sustainable model of the governance of the private sector in reference to the United Nations' 2030 Sustainable Development Goal 9, which focuses on building resilient infrastructure, promoting sustainable industrialization, and fostering innovation.

[29] Stijn Claessens, 'Corporate Governance and Development' (2006) 21(1) The World Bank Research Observer 91

[30] Ibid.

The practises of corporate governance are profoundly impacted by a variety of political, legal, and certain other socio-economic players and circumstances.[31] As a result, individuals should have a better grasp of the corporate governance system in Bangladesh after reading this chapter. This chapter outlines the manner in which the corporate governance system has been emerging in Bangladesh. It also identifies the actors and major stakeholders that have had an impact over its progression in the corporate environments of Bangladesh. Finally, the chapter concludes with a discussion on the future of the corporate governance framework in Bangladesh.

2.2. Bangladesh's Corporate Structure

This section examines the fundamental corporate framework within which Bangladesh's business sector functions in order to comprehend the nature of corporate governance in Bangladesh.

2.2.1 Legal framework

Bangladesh is a common law family member. The framework of Bangladesh's current institutional and legal system is largely traceable to the centuries old British rule.[32] Pandey and Mollah outline the development of the legal system in Bangladesh and stated that "…*passed through various stages and the process of evolution has been partly indigenous and partly foreign and the legal system of the present day emanates from a mixed system which has structure, legal principles and concepts modelled on both Indo-Mughal and English law*". [33]

From the standpoint of socio-cultural norms, religious doctrine, and economic principles, Bangladesh's current legal system differs somewhat from the absolute form of English law. For

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[31] Asli Demirguc-Kunt and Levine Ross, 'Stock market growth and financial intermediaries: stylized facts' (1996) 10(2) The World Bank Economic Review 291; Rafael La Porta, Florencio Lopez-De-Silance, Andrei Shleifer and Robert W. Vishny, 'Legal determinants of external finance' (1997) 52(3) Journal of Finance1131; Christine Mallin, *Corporate Governance* (3rd edn, Oxford: Oxford University Press, 2010); Kwasi Dartey-Baah and Kwasi Amponsah-Tawiah, 'Exploring the limits of Western corporate social Responsibility theories in Africa' (2011) 2(18) International Journal of Business and Social Science 126

[32] Pranab Kumar Panday and Awal Hossain Mollah, 'The judicial system of Bangladesh: an overview from historical viewpoint' (2011) 53(1) International Journal of Law and Management 6

[33] Ibid.

instance, the CA 1994 governs businesses in Bangladesh. This Act governs the incorporation of all domestic Bangladeshi companies and firms. It regulates the connection between shareholders and a corporation, the auditing process, transparency, the disclosure process, and the company court's authority.[34] However, Bangladeshi corporate rules do not yet contain a codification of director obligations, unlike the UK's Company Act 2006.[35] Bangladesh's common law system serves as the foundation for its legal system. The two hundred years of British rule provide the bulk of the groundwork for the current legal and judicial system.[36] Unlike other common law jurisdictions, Bangladesh has its constitutional supremacy.[37]The High Court Division of the Supreme Court of Bangladesh has the original jurisdiction of the Companies Act 1994 (CA 1994), that empowers only the High Court Division of the Supreme Court have the exclusive jurisdiction to initiate any suits under the Companies Act 1994.[38]

The corporate governance system of Bangladesh is also influenced by a few other important regulations. For example, the Securities and Exchange Commission Act 1993 establishes the Bangladesh Securities and Exchange Commission (SEC), and the Bangladesh Bank Order 1972 governs the Central Bank of Bangladesh. The Securities and Exchange Ordinance 1969 interacts with investor protection, capital issues, registration and regulatory oversight of the Stock Exchange, control of the capital market, and issues relating to securities. The rules for non-banking financial institutions are established under the Financial Institutions Act 1993,[39]

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[34] According to information from court sources, there are now about 211,000 commercial litigations involving issues linked to transactions worth about Tk3,000 crore pending in the High Court and district courts across the nation. More than 39,000 of these pending cases have been on hold for more than ten years. About 34,000 of the total cases involve Bangladeshi institutions and businesses engaged in various commercial disputes with institutions and businesses located abroad. See Rezaul Karim (The Business Standard, 22 February 2023) 'HC for drastic change to century-old company law to make it business-friendly' < https://www.tbsnews.net/bangladesh/hc-drastic-change-century-old-company-law-make-it-business-friendly-589226 > accessed 23 February 2023 –

[35] The Company Act 2006, ss 171-177

[36] Judicial Portal of Bangladesh, 'History of Judiciary of Bangladesh' <http://www.judiciary.org.bd/en/judiciary/history-of-judiciary>accessed 17th February 2019

[37]The Constitution of the Peoples Republic of Bangladesh, Art 7(2)

[38] The Companies Act 1994, s 3(1)

[39] According to the Financial Institutions Act 1993, s 27(2)(b)) - "*'Financial Institution' means such non-banking financial institutions, which- i) provide loans and advances for industries, commerce, agriculture or building construction; ii) carry out the business of underwriting, receiving, investing and reinvesting shares, stocks, bonds, debentures issued by the Government or any statutory organization or stocks or securities or other marketable securities; or iii) carry out instalment transactions including the lease of machinery and equipment; or iv) finance venture capital; and shall include merchant banks, investment companies, mutual associations, mutual companies, leasing companies or building*

Income Tax Ordinance 1984 have provisions for disclosure, audit, and penalties for contravention of fiscal and revenue matters; Bankruptcy Act 1997 handles the insolvency issues; Factories Act 1965, Industrial Relations Ordinance 1969, Employment of Labour (Standing Orders) Act 1965 etc. handles with the issues of social welfare of employees.

Despite the creation of an SEC, Bangladeshi law is more closely aligned with the UK than the USA or that of its neighbour, the Commonwealth of Australia. Bangladesh's judicial system is a well-organized court system that also closely resembles the one that British colonial rulers instituted. However, unlike the United Kingdom, Bangladesh's executive arm of government has great influence on the court, raising concerns about the independence of the nation's legal system.[40]

2.2.2 Ownership Pattern

Bangladesh's ownership structure differs from standard dispersed shareholder structures in terms of corporate governance, with family control and the predominance of kinship being some of the key characteristics.[41] In addition, the concentrate ownership structure has become the preeminent form of corporate governance. This is due to the fact that, according to the Companies Act of 1994 (CA 1994), sponsor directors are only allowed to retain a maximum of fifty percent of the total issued share capital while the company is in the process of going public. Furthermore, the three leading shareholders hold an estimate of thirty-two percent of the company's shares, and it is common practise for the chairman of the board to also hold the position of chief executive officer (CEO) in Bangladesh.[42] These dominant board members can modify the governance structure to better meet their needs and have a big influence on the way

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societies."

[40]It should not come as much of a surprise that Bangladesh has not a functioning judicial system. Because of the well-known political intervention on both lower and higher levels of the judicial system, as well as the pervasive corruption that exists within the court and the legal system, having complete private law rights is not very advantageous. For more see M Rafiqul Islam, 'The Judiciary of Bangladesh' in Hoong Phun Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge, Cambridge University Press 2017); Pranab Kumar Panday and Md. Awal Hossain Mollah, 'The judicial system of Bangladesh: an overview from historical viewpoint' (2011) 53(1) International Journal of Law and Management 6

[41] Omar Al Farooque and Tony Van Zijl and Keitha Dunstan and AKM Waresul Karim, 'Ownership structure and corporate performance: evidence from Bangladesh' (2012) 12(2) Asia-Pacific Journal of Accounting and Economics 127

[42] Ibid

the board makes decisions.[43] Even at the present day, the majority of businesses in Bangladesh are privately held small and medium-sized companies. In these types of companies, the owners have complete control over the corporate boards. The ownership pattern has significant consequences for the practice and future development of Bangladeshi corporate law.[44]

Generally, in Bangladesh corporate boards there is absence of using any sort of supervisory board rather unitary corporate board practice is strongly present in Bangladesh.[45] As a matter of fact Bangladesh Bank guidelines for Banking and Non-Banking Financial Institutions, Corporate Governance Code for the companies listed in Bangladesh, Bangladesh Securities Exchange Commissions for Corporate Governance rules and regulations all of them are highly recommend and suggest that the one-tired corporate board is in practice and the directors should be directly elected by the shareholders,[46] which is very much similar to the United Kingdom position. According to the board structure of Bangladesh, both executive and non-executive directors in Bangladesh carry out tasks together in one organisational layer, and CEO duality exists in some listed companies in Bangladesh. In addition, the board composition of Bangladesh disclosed that non-executive directors in Bangladesh accomplish duties separately from executive directors.[47]

In order to gain a knowledge of the development pattern of the Bangladesh stock market, market capitalization and the number of businesses that are listed were used, and the results showed that market capitalization[48] ratio rose from 1.4 percent in the years of 1990–1991 to 10.2 percent in the year of 2005–2006, and then it jumped to 29.0 percent in the 2006–2007 financial year. It is generally accepted that the Bangladesh Bank's adoption of a more restrictive monetary policy in 2005 in an effort to alleviate the effects of inflationary pressures and to promote a more stable environment on the foreign exchange market was responsible for at least

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[43] Bangladesh Quarterly Economic Update (Asian Development Bank, 2009) < http://www.adb.org > accessed 30th December 2019.
[44] Javed Siddiqui, 'Development of corporate governance regulations: The case of an emerging economy' (2010) 91(2) Journal of Business Ethics 253
[45] Afzalur Rashid, Anura De. Zoysa, Sudhir Lodh and Kathy Rudkin, 'Board Composition and Firm Performance: Evidence from Bangladesh' (2010) 4(1) Australasian Accounting Business and Finance Journal 76
[46] cf Javed Siddiqui (n 44)
[47] Ibid
[48] Market capitalization ratio equals the value of listed shares divided by GDP. Analysts frequently use the ratio as a measure of stock market size.

some of this unexpected expansion.[49] From Tk. 11.485 billion in 1990-91 to Tk. 1366.53 billion in 2006-07, the total market capitalization increased dramatically. In addition, this expansion has picked up its pace in the most recent years. The year 2019 is considered to be another landmark in the development of Bangladesh's capital market (after the stock market crashed in 1996 and 2008), with both institutional and individual investors pumped huge funds into the market, which assisted the stock market to reinstate investors' confidence. This occurred as a result of the stock market recovering from the crashes in 1996 and 2008.[50]

Some evidence of defaulters also accompanied this growth pattern of capital market. Companies such as Oriental Bank, Modern Food Products Limited, and SABINCO were alleged by the regulators of having some serious flaws in their day-to-day operations, which resulted in significant governance shortcomings. For example, near the end of the year 2002, a number of accusations were made against the Oriental Bank, including that the bank continued to engage in unsound lending practises, that it approved loans without doing risk assessments, and that it did not conduct credit checks on the borrowers. After that, in June of 2006, the Bangladesh Bank (BB) nominated an executive director to the position of administrator at Oriental Bank, disbanded the board of directors at Oriental Bank, and assumed complete control of the bank.[51]

Nevertheless, in 2011, the capital market experienced a further collapse, and the nation witnessed the greatest share market volatility in the history of the country; the repercussions of this event were harsh for the smaller investors.[52] After the recent collapse of the stock market, the government established a commission to conduct an investigation into the factors that led to the catastrophe. The committee discovered evidence of manipulation in both the primary

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[49] Shubhasish Barua and Md. Habibour Rahman, 'Monetary Policy and Capital Market Development in Bangladesh' (Bangladesh Bank, 2008) <https://www.bb.org.bd/pub/research/policynote/pn0708.pdf> accessed 30 December 2019.

[50] Ibrahim Hossain Ovi, 'Bangladesh Sees Highest Ever Foreign Investment' (Dhaka Tribune, 09 May 2019) <https://www.dhakatribune.com/business/2019/05/09/fdi-rises-by-67-in-2018> accessed 30 December 2019.

[51] Mustafizur Rahman and Debapriya Bhattacharya and Wasel Bin Shadat and Uttam Deb, 'Recent Inflation in Bangladesh: Trends, Determinants and Impact on Poverty' (2008) Centre for Policy Dialogue (CPD) < https://cpd.org.bd/wp-content/uploads/2014/10/FY2008_-Recent-Inflation-in-Bangladesh-Trends-Determinants-and-Impact-on-Poverty.pdf> accessed 31 December 2019.

[52] Rejaul Karim Byron and Md Fazlur Rahman, 'Tk 20,000 cr swindled' (The Daily Star, Friday 8 April 2011) < https://www.thedailystar.net/news-detail-180918 >accessed 30 December 2019

and secondary markets, similar to the fraud that occurred in 1996, but to a much bigger level. Regrettably, it was discovered that a number of SEC Executive officers, as well as a large number of policy makers, Members of Parliament, merchants, and officials from stock exchanges, were all participating in the practise of manipulating the market. The committee, however, placed blame for this crisis on the SEC since, in its role as a regulator, it was the SEC's job to investigate the kinds of misconduct, non-transparency, and immoral acts that led to the catastrophe.[53] The SEC has stated that they will pursue legal action against the defaulters. In 2011, it formed a department that is solely devoted to overseeing corporate governance, and it has since suspended certain regulatory members who were complicit in the fraud. However, the principal participants in the con have not been brought to justice as of yet.

2.2.3 Company Classification and Number of Listed Companies

The Securities and Exchange Commission (SEC) categorises the companies that it has on its stock exchange market in accordance with the governance practises of those companies and the number of dividends that are paid out to shareholders. This is done with the intention of assisting investors in gaining a better understanding of the characteristics of the securities in which they It organises the businesses into categories denoted by the letter's 'A', 'B', 'G', 'N', or 'Z. Companies that neither maintain annual meetings nor declare dividends are called 'Z' are not new as a company but newly enlisted, and 'G' symbolises Greenfield companies. 'A Companies' are the companies that regularly hold their annual meetings of shareholders and have declared dividends at the rate of at least 10 percent in the previous year; 'B Companies' are the companies that also regularly perform their annual meetings but instead have declared dividends mostly less than 10 percent; 'C Companies' are the companies that have declared dividends at On the other hand, the DSE list reveals that there are currently no G firms that are listed on either the DSE or the CSE. On the DSE, there were a total of 589 companies listed in the year 2020.[54] Both the number of businesses that are listed for sale and the market capitalisation are on the rise. As a result, the Bangladesh stock market requires the

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[53] Rejaul Karim Byron, 'Stock probe underway' (The Daily Star, 26 January 2011) < http://www.thedailystar.net > accessed 30 December 2019; Rejaul Karim Byron and Md Fazlur Rahman, 'Stock market manipulation: Finger pointed at 60 individuals' (The Daily Star, 9 April 2011) < https://www.thedailystar.net/news-detail-181073 >accessed 30 December 2019

[54] Dhaka Stock Exchange Ltd (2020) <https://www.dsebd.org/by_industrylisting1.php> accessed 5 February 2020.

establishment of governance and an increase in the level of monitoring to ensure compliance with the principles of good governance by the SEC, which serves as the major regulator of the country.

For the purpose of conducting an analysis based on the findings of this study, each of the different commercial industries was divided into two primary categories: financial institutions (FIs) and non-financial institutions (NFIs). The term "financial institution" can be further broken down into two categories: banking and non-banking institutions (NBFIs). The NFI accounts for 31 percent, and the NBFIs take the position with the second biggest percentage (15 percent). There are a huge number of commercial banks operating in Bangladesh, which is one feature that defines the country's banking sector.[55] Because Bangladesh does not have a developed capital market, the majority of the country's commercial activities have been financed by banks and non-bank financial institutions (NBFIs).

Altogether, 61 scheduled banks in Bangladesh listed with Bangladesh Bank (Central Bank of Bangladesh), all of which are subject to the complete control and supervision of Bangladesh Bank. Bangladesh Bank has the authority to exercise this control and supervision, in accordance with the Bangladesh Bank Order, 1972 and the Bank Company Act, 1991. The following categories constitute the various types of scheduled banks: State Owned Commercial Banks (SOCBs): There are a total of six SOCBs in Bangladesh, all or the majority of them are owned by the Bangladeshi government. Specialized Banks (SDBs): There are currently three specialised banks in operation. These banks were founded with the purpose of achieving certain goals, such as agricultural or industrial growth. These financial institutions are additionally wholly or primarily owned by the Bangladeshi government. Private Commercial Banks (PCBs): There are a total of 43 private commercial banks, the majority of which are owned by private people or organisations.[56]

As of 2023, 34 Banks are listed on DSE out of these total 46 schedule bank.[57] There are a total of 34 banks on this list; 29 of them are private community banks, and the remaining 1 is a

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[55] Siddiqui (n 44)

[56] Banks and Financial Institutions, Bangladesh Bank < https://www.bb.org.bd/en/index.php/financialactivity/bankfi > accessed 2 January 2023

[57] List of Companies (Bank), Dhaka Stock Exchange < https://www.dsebd.org/companylistbyindustry.php?industryno=11 > accessed 5 February 2020

nationalised commercial bank. None of the foreign banks are included despite the fact that the majority of their business still consists of international transactions connected to international trade. When compared to the expansion of the number of businesses in the banking sector. The banking industry in Bangladesh has recently undergone a period of deregulation, which has stimulated a considerable development in the number of private banks in the country, with a rate that is higher than other countries that are nearby.

The nation's economy owes a significant amount of its growth to the contributions made by the nation's banks. In the year 2018- 2019 the GDP of FIs banks contributed 64.06% of it.[58] On the other hand, a practice of loan default is the most significant concern facing the banking industry in Bangladesh.[59] Moreover, non-availability of information, absence of ethical practice, political influence, and an inadequate system of legal action against defaulters have been recognised as some of the primary causes of non-payment of debt in Bangladesh. Most pertinently, the practise of debt forgiveness by the government has been cited as one of the most significant factors.

In spite of this, over the course of the past several years, the Bangladesh Central Bank has already taken a number of initiatives specifically aimed at promoting good governance within the banking industry. For instance, it has implemented Lending Risk Analysis (LRA) and created the Credit Information Bureau (CIB), both of which centralise information on borrowers, particularly their loan information to make it easier for banks to make educated credit decisions. In addition to these, a few additional significant changes are currently in the process of being adopted to assure the performance and competitiveness of banks. Since 2001, the International Accounting Standard 30 has been something that banks have been expected to comply with (IAS-30).[60]

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[58] Trading Economics, Bangladesh - Domestic Credit Provided By Banking Sector (% Of GDP) (2019) <https://tradingeconomics.com/bangladesh/domestic-credit-provided-by-banking-sector-percent-of-gdp-wb-data.html> accessed 5 February 2020

[59] The banking sector of Bangladesh experienced a 16.38% growth in default loans after many banks refrained from extending the moratorium facility in 2021. *See*, TBS Report 'Banks register Tk31,000cr default loans in 9 months'(The Business Standards, 13 November 2022) < https://www.tbsnews.net/economy/banking/banks-register-tk31000cr-loan-defaults-9-months-531350> accessed 2 December 2022

[60] IAS 30 is the disclosures requirements for banks and similar financial institutions.; Md Shamim Hossain and Abdul Ali Baser, 'Compliance of IAS-30: A Case Study on the Specialized Banks of Bangladesh' (2011) 2(4) Research Journal of Finance and Accounting 13

The Financial Act of 1993 is the legislation that governs NBFIs. Insurance and leasing are the two primary categories that are used to categorise NBFIs. As of the year 2020, the DSE is home to the listings of 47 different insurance businesses. A significant number of Bangladesh's leasing businesses have diversified their operations to include various types of commercial activities. For example, the provision of loans and advances, the operation of an underwriting or acquisition business, the investment in and reinvestment in shares, stocks, bonds, debentures, or debenture stock or securities issued by the government or any local authority, etc.[61]

2.2.4 Audit Culture of Bangladesh

It is compulsory by law for any and all businesses that have been registered in Bangladesh to have an annual audit conducted by a chartered accountant. There are currently four local audit firms that are affiliated with the Big4 auditors, despite the fact that none of these worldwide Big4 auditors have an office in Bangladesh. The auditing market in Bangladesh is rather small and has a high level of competition.[62] Since 1975, privatisation and the development of the Ready-Made Garments (RMG) sector in Bangladesh have led to a significant increase in the country's need for auditing services. In addition, the significant number of nongovernmental organisations (NGOs), each of which must also be audited, served as a driving force behind the growing need for audit services in Bangladesh. However, in recent years the companies in Bangladesh exercise their freedom of strong bargaining power in terms of the appointment of an auditor.[63] Therefore, audit companies are perceived as being subordinate to the interests of company management; nonetheless, one of the most challenging aspects of the audit environment is its low audit fees, which are somewhat lower than those of many of the

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[61] See List of Companies, Dhaka Stock Exchange Ltd (DSE), < https://www.dsebd.org/otc_company_listing.php > accessed 20 November 2022

[62] Humayun Kabir and Divesh Sharma and Ainul Islam and Amirus Salat, 'Big 4 auditor affiliation and accruals quality in Bangladesh' (2011) 26(2) Managerial Auditing Journal 161; Ahsan Habib and Ainul Islam, 'Determinants and consequences of non-audit service fees: Preliminary evidence from Bangladesh' (2007) 22(5) Managerial Auditing Journal 446; Shahed Imam, Zahir Uddin Ahmed and Sadia Hasan Khan, 'Association of audit delay and audit firms' international link: evidence from Bangladesh'(2001) 16(3) Managerial Auditing Journal 129.

[63] The Companies Act 1994, s 210(2); A.K.M. Waresul Karim and Peter Moizer, 'Determinants of audit fees in Bangladesh' (1996) 31(4) The International Journal of Accounting 497.

country's neighbouring countries.[64] Because there is not yet an appropriate regulatory structure in place, audit companies in Bangladesh are therefore more vulnerable to the risk of lacking ethics.[65]

2.2.5 Rights and Remedies of Shareholders

In Bangladesh, minority shareholders' rights are often disregarded, and they do not have adequate rights with regard to related party transactions, the selection of board members, or the disclosure of control.[66] In addition, the prevalence of family ownership structures makes it extremely difficult, if not impossible, for NEDs, if there are any, to protect the rights of minority shareholders.[67] Conflict arises between shareholders who have dominating positions and those who hold minority stakes when such a phenomena occurs and when shareholders are ignorant of their rights. Concerns are also raised by the notion that the most significant possible conflict of interest in Bangladesh may result from a power dynamic among controlling shareholders and minority shareholders.[68]

The law in Bangladesh, on the other hand, safeguards the fundamental rights of shareholders.[69] They have the power to elect and dismiss directors, as well as the ability to make numerous requests for information and the right to exercise in shareholder meetings in person or by

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[64] Kamran Ahmed and Mehendra Goyal, 'A Comparative Study of Pricing of Audit Services in Emerging Economies' (2005) 9(2) International Journal of Auditing 103

[65] Humayun Kabir and Divesh Sharma and Ainul Islam and Amirus Salat, 'Big 4 auditor affiliation and accruals quality in Bangladesh' (2011) 26(2) Managerial Auditing Journal 161.

[66] Farooque, Zijl, Dunstan and Karim (n 41); World Bank, 'Report on the Observance of Standards and Codes' (ROSC, 2009): Corporate Governance country assessment, Bangladesh. The World Bank < https://documents1.worldbank.org/curated/en/224981468201260168/pdf/625340WP0P108400Box0361486B0PUBLIC0.pdf> accessed 30th December 2019.

[67] Md. Shamimul Hasan, Rashidah Abdul Rahman and Syed Zabid Hossain, 'Monitoring family performance: family ownership and corporate governance structure in Bangladesh, (2014) 145 Social and Behavioural Sciences 103

[68] Eugene F. Fama and Micheal C. Jensen 'Agency problems and residual claims' (1983) 26(2) Journal of Law and Economics 327.; Andrei Shleifer and Robert W. Vishny, 'A survey of Corporate Governance' (1997) 52 Journal of Finance 737.

[69] The Bangladesh Companies Act of 1994, the Bangladesh Securities and Exchange Ordinance of 1969 (along with the Bangladesh Securities and Exchange Commission Act of 1993 and the rules made thereunder), the rules of the Dhaka Stock Exchange (DSE), the Chittagong Stock Exchange (CSE), and the Company's Articles of Association all include the rights of the shareholders (including the holders of AIM Securities) of the Company. Also, section 233 of the Companies Act 1994 specifically states regarding the protection of the minority shareholders rights.

proxy.[70] Prior to actually making any changes to the company's articles, dividends, or engaging in some big transactions, businesses are required to get consent from their shareholders. This requirement is of the utmost importance. Even through this, they do not exercise their rights, in part because they still not care enough about or concern themselves with their rights. In other words, they do not put their rights into practise.[71] In addition to the aforementioned issues, World Bank reports[72] shows limited access of information, ambiguity in the method of choosing directors, lack of rights on authorising directors' compensation, lack of limitations on notifying shareholders before any related party transactions occur, etc. are some of the other problems with shareholders' rights in Bangladesh.

2.3 Bangladesh's Socioeconomic Perspectives and Corporate Governance Development

2.3.1 The Socio-Cultural Setting of Bangladesh

The nation of Bangladesh, officially Bangladesh is officially referred to as the People's Republic of Bangladesh, is a unitary and sovereign republic. The South Asian region is where you will find it. It is bordered to the south by the Bay of Bengal, which is the largest bay in the world. In the year 1634, the Mughal emperor offered additional privileges to the English traders who were operating in the territory of Bengal. In the year 1717, he cancelled all customs duties that were associated with the trade.[73] Furthermore, even in the current day, a huge number of Bangladesh's businesses, such as the Chittagong Ship Breaking Yard, which is the world's second biggest ship breaking yard, have their headquarters on this port.[74]

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[70] See The Companies Act 1994 ss 81, 83, 91 and 106.
[71] The changes of the constitution of the companies are similar with UK which is, if the directors sought to change the articles of a UK company without obtaining shareholder approval as required by the Companies Act the change would be void and the original articles would prevail.
[72] The Extent of shareholder rights index (0-10.5) in Bangladesh was reported at 3.36 in 2017 which was 4 in 2016. World Bank collection of development indicators, (World Bank) <https://tcdata360.worldbank.org/indicators/h0fe73d6c?country=BRA&indicator=645&viz=line_chart&years=2007,2017#table-link> accessed on 5th February 2020.
[73] K.N. Chaudhury, *The Trading World of Asia and the English East India Company: 1660-1760* (Cambridge, Cambridge University Press, 1978)
[74] Chottogram (Previous known as Chittagong) is the second largest city of Bangladesh.

Bangladesh has a national population of more than 169 million people in the year 2021, making it one of the countries with the highest population density in the world. In Bangladesh, remote regions are home to the majority of the country's population, which accounts for approximately 75 percent of the total. However, the majority of the country's commercial enterprises and corporate facilities (such as network connectivity, merchant banks, and so on) are centred in the country's major cities, such as Dhaka and Chittagong. These cities include the Bangladesh Stock Exchange and the Bangladesh Bank.[75]

Culturally, Bangladesh is said to as a hierarchical society. In this society, people are valued due to their age and status, and the importance of the family unit is strongly recognised.[76] The ethos of corruption, on the other hand, is deeply embedded in the business world.[77] One of the primary reasons for such widespread corruption is the relatively low levels of money received by government officers, in addition to the presence of big contracts for internationally sponsored development.[78] Recently, the Corruption Perception Index that was conducted by Transparency International and distributed worldwide suggested that Bangladesh is among the most corrupt countries throughout the entire globe.[79]

Furthermore, the nonperforming Loans (NPL) in Bangladesh are broken down into three distinct categories: substandard, dubious, and bad or loss. These categories are determined using a consistent set of standards. If a loan is outstanding for 3 months or more but a little less than 9 months, it is considered substandard; if it is overdue for 9 months or more but less than 12 months, it is considered dubious; and if it is overdue for 12 months or more, it is considered

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[75] Population Bangladesh, World Bank < https://data.worldbank.org/indicator/SP.POP.TOTL?locations=BD&most_recent_year_desc=false > accessed 23 December 2022

[76] Gofran Faroqi, 'Social Structure', Banglapedia National Encyclopaedia of Bangladesh <http://en.banglapedia.org/index.php?title=Social_Structure> accessed 25th March 2020.

[77] See Bangladesh Corruption Report, GAN Business Anti-Corruption Portal, (May 2018) <https://www.ganintegrity.com/portal/country-profiles/bangladesh/> accessed on 01 February 2020; Monir Mir and Abu Shiraz Rahaman, 'The adoption of international accounting standards in Bangladesh'(2005) 18(6) Accounting, Auditing & Accountability Journal 816.

[78] Bangladesh ranks 143 out of 180 countries in Transparency International's 2017 Corruption Perceptions Index (CPI) with a score of 28/100 (Transparency International 2018) with 0 denoting the highest perception of corruption and 100 the lowest. See Kaunian Rahman, Overview of corruption and anticorruption in Bangladesh, (2019) <https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-bangladesh-2019.pdf > accessed on 1 February 2020

[79] Bangladesh ranked 146/180 in Corruption Perceptions Report 2019. See Transparency International < https://www.transparency.org/country/BGD > accessed 25th March 2020.

terrible or a loss.[80] The size of NPLs in Bangladesh is much higher than in other countries in Asia and the Pacific. From its independence in 1971 until 1999, there was a steady rise in the share of NPLs in Bangladesh, with the gross NPL ratio to total loans in the banking system peaking at 41.1% in 1999. NPLs have increased for all types of banks. The SCBs and DFIs recorded the highest NPL ratios, as they granted loans on weak appraisal, and under directed lending programs, especially during the 1970s and 1980s. After loan disbursement, the banks' follow up on repayments was not strong, and such directed lending programs have led to a massive build-up of poor-quality loans, resulting in continued heavy losses. Banks were also reluctant in writing off the long-lasting bad loans mainly due to below standard underlying collateral and fear of probable legal complications. This also contributed to the increase of NPLs in the asset portfolio of these banks.

In comparison to the sizes of nonperforming loans in other nations in Asia and the Pacific, Bangladesh's NPLs are significantly larger. Since the country's independence in 1971, Bangladesh has had a gradual increase in the proportion of nonperforming loans (NPLs), with the gross NPL ratio to total loans in the banking sector reaching a high point of 41.1 percent in the year 1999. NPLs have risen across the board for all different kinds of institutions. The ratio of nonperforming loans held by DFIs and SCBs was the highest since these institutions provided loans based on poor appraisals and participated in directed lending initiatives, particularly during the 1970s and 1980s. After loan disbursement, the banks did not follow up on repayments in a coherent fashion, and such driven lending initiatives have led to a massive build-up of weak loans, which has resulted in continuous heavy losses. In addition, financial institutions were hesitant to write off long-term bad loans, mostly because the underlying collateral did not meet industry standards and they feared possible legal difficulties. This also played a role in the accumulation of nonperforming loans inside the asset portfolios of these institutions.

NPL recoveries, on the other hand, saw considerable improvements after the year 1999, and the NPL ratio steadily declined to 6.1 percent in 2011 as a result of loans being written off, provisioning, and a sharp decline in the amount of new bad debt. In addition to stricter

[80] The central bank of Bangladesh "Bangladesh Bank" revised the loan classification rules effective on 30 June 2019, 'Banking Regulation and Policy Department Circular No. 03. 21 April 2019.

regulations, factors such as expanded legal rights for banks to recoup problem loans through money loan tribunals and improved credit screening of new loans by the Credit Information Bureau contributed to the improvement. The implementation of new and stricter loan classification and provisioning criteria, as well as the sanctioning of big loans without much examination, are among the factors that continue to contribute to the high levels of nonperforming loans recorded by the SCBs and DFIs.[81] In addition, bribery has developed into a widespread practise across practically all industries.[82] The editorial pages of the nation's newspapers often bring attention to these problems and advocate for the implementation of effective governance as a means of combating pervasive instances of corruption. However, despite the fact that the government of Bangladesh passed an anti-corruption law in 2004 and established an independent Anti-Corruption Commission (ACC), the commission has not yet been successful in prosecuting corrupt officials.[83] It has a strong connection to the broader example of corrupt governance that exists in Bangladesh's surroundings.

2.3.2 Political View Point

The political history of Bangladesh has resulted in an evolution of the corporate governance structure of the country over the course of the country's long history. The basic structure of Bangladesh's government was established during the time that the country was under British colonial administration, and it has undergone consistent evolution ever since. Bangladesh was subject to British control from the years 1757 until 1947, a span of around 200 years. During that time period, the infrastructure for corporate governance was marked by low levels of industrialisation, high levels of ownership concentration, and a managerial style that was based on authoritarian principles. In addition to the development of the legal system, British colonial

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[81] See Barun Kumar Dey, 'Managing Nonperforming Loans in Bangladesh'(116 Asian Development Bank Briefs, November 2019) <https://www.adb.org/sites/default/files/publication/533471/adb-brief-116-managing-npls-bangladesh.pdf > accessed 25th March 2020; Bangladesh Monopolising loan Defaults, South Asia Journal, (The Daily Star, 23 June 2019) < http://southasiajournal.net/bangladesh-monopolising-loan-defaults/ >accessed 01 February 2020; AKM Zamir Uddin, 'Default loans soar 26pc' (The Daily Star 27 February 2019) <https://www.thedailystar.net/business/banking/default-loans-in-bangladesh-banking-sector-soar-26-per-cent-1707811> accessed 01 February 2020; Mazrur Reaz M and Thankom Arun, 'Corporate governance in developing economies: Perspective from the banking sector in Bangladesh'(2006) 7(1/2) Journal of Banking Regulation 94.

[82] Md Shariful Islam, *Bangladesh: politics - corruption nexus in Bangladesh: An empirical study of the Impacts on Judicial Governance* (Kowloon, Hong Kong, Asian Legal Resource Centre 2010)

[83] See organisational capacity assessment of Anti-Corruption Commission of Bangladesh in chapter 6.

control was responsible for the introduction of a number of techniques that are still widely used in business today. For instance, the prolonged economic exploitation and political dominance that occurred under colonial rule ultimately led to the institutionalisation of corruption within the bureaucracy, an environment that was unfavourable for encouraging entrepreneurialism, and a stopping in the development of a positive capital market.[84] India was awarded its independence inside that British Commonwealth in August 1947, and at same time, the country was also partitioned into the dominions of India and Pakistan. East and West Pakistan were created after an additional partition of Pakistan. The region that is now known as Pakistan was formerly known as West Pakistan, and the region that is now known as Bangladesh was formerly known as East Pakistan. During the time that Pakistan was in charge, one of the most notable characteristics was a very authoritarian state apparatus from August 1947 - December 1971.

After Bangladesh's fight for independence in 1971, the country emerged from the conflict with severe poverty, an excessive population, and a severely damaged corporate and socio-economic infrastructure. The administration was forced to work hard to overcome challenges such as a continuous lack of foreign exchange reserves, an inefficient public sector, and inadequate governance. Due to a chronic lack of natural resources and wealth creation, the government was unable to create capital market establishments or smoothly carry out structural reforms for the next thirty years after the country gained its independence. This made it impossible for the government to even build capital market institutions. As a result, it should not have come as a surprise to learn that the international community had some reservations about the potential of the country and frequently referred to it as a "test case of development."[85]

Following the country's attainment of its independence, the administration faced the problem of fostering economic growth and diversification while also luring foreign investment to Bangladesh. Despite this, a discernible corporate governance structure, which may be referred to as the “Governance system of Bangladesh,” has begun to take form in Bangladesh since the country gained its independence and, in particular, during the course of the past two decades.[86]

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[84] Farooque, Zijl, Dunstan and Karim (n 41)

[85] Just Faaland and J.R. Parkinson, *Bangladesh: The Test Case of Development* (Boulder, CO: Westview Press, 1976).

[86] Monir Mir and Abu Shiraz Rahaman, ‘The adoption of international accounting standards in Bangladesh’ (2005) 18(6) Accounting, Auditing and Accountability Journal 816; Salman Ahmed, ‘Bangladesh's economy: surrounded by deadly threats’ (2009) 35(1/2) International Journal of Social

Since 1972, the government has implemented several industrial reformation plans, and it has also evaluated company and corporate level initiatives, all in an effort to pull the country out of its economic calamity. The primary policies were focused on the following areas: the privatisation of publicly owned companies with bad governance, fostering the growth of public corporations and international investors while gradually discouraging the expansion of the public sector, enhancing the efficiency of public sector industrial businesses through financial restructuring and making improvements in pricing policies.[87]

For an example the successful development of the pharmaceutical industry in Bangladesh and their critical roles played by this industry for boosting country's economy is Bangladesh National Drug Policy established in 1982 subsequently new policy come in 2016.[88] Once largely dependent on imports and multinational companies to meet the local demand, Bangladeshi pharmaceutical industry is growing very fast meeting 98% of domestic demand and posting a 27% growth in export earnings. In 2018, the country's domestic pharmaceutical market size stood at Tk 20,511.8 crore with 15.6% compound annual growth rate (CAGR) for the last five years. One of the impacts is this Life expectancy of people has significantly increased — the average life expectancy of 66.4 years in 2002 rose to 72.81 years in 2017. [89]

Since 1972, when the economic crisis first began, the government has been working on some industrial reformation plans, and it has also been reviewing company and corporate level initiatives. These efforts are intended to help the economy recover. The primary concerns addressed by the policies were: the privatisation of public companies that have a bad management structure, promoting the growth of public corporations and international investors while gradually inhibiting the expansion of the public sector, changes to the import regime, as well as the introduction of investment and export incentives, improvements to the efficiency of public sector industrial companies through debt restructuring and enhancements to pricing

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Economics 138; Siddiqui (n 44).

[87] Sajal Palit, 'The Impact of socio-economic reforms on governance: The Bangladesh experience' (2006) 1(1) The Journal of Administration and Governance 68

[88] The National Drug policy (NDP) 2016 has been formulated by keeping compliance with the National health policy 2011 and the National population policy 2012 in Bangladesh.

[89] Ibrahim Hossain Ovi and Niaz Mahmud, 'Bangladesh Pharmaceutical Industry blooms bigger' (The Dhaka Tribune, 22 August 2019) <https://www.dhakatribune.com/business/2019/08/22/bangladesh-pharmaceutical-industry-blooms-bigger accessed 26 March 2020

practices.[90] They went on to criticise the fact that transparency, accountability, and disclosure are some of the areas that have received less attention from the governments of Bangladesh. In addition to this, even when such governments make measures intended to better the situation, those decisions are routinely thwarted by a variety of political goals.

2.3.3 Economic View Point

Throughout Bangladesh's history, public enterprises, often known as government owned companies or State owned companies, have served as the primary driver of the country's economy.[91] In the years immediately after the country's attainment of its independence, the government adopted a socialist economic structure in which the majority of the industrial enterprises were taken over by the state.[92] In addition to this, significant barriers were placed in the way of both nationally and internationally private investments. These included bans on foreign direct investment, big manufacturing ownership, and even multinational joint ventures together within private sector. [93] However, as a result of factors such as bribery, political interference, bureaucracy, ineffective management, excessive personnel, and other similar factors, these divisions of the public sector evolved into money-losing enterprises.[94] As a result of these failures and the worldwide trend towards privatization, the successive governments in Bangladesh pursued the principles of a market economy. The government adopted liberal economic policies in 1977, which resulted in the return of certain small businesses to their

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[90] Sadiq Ahmed, Sandeep Mahajaan and Wahiduddin Mahmud 'Economic reforms, growth, and governance: the political economy aspects of Bangladesh's development surprise' (2008) Working Paper No. 22. The World Bank; Mehedi Imam, 'Ethics in the judiciary system of Bangladesh' (2010) 1(2) Bangladesh Journal of Bioethics 34; Md Awal Hossain Mollah, 'Does the judiciary matter for accountability of administration in Bangladesh?' (2010) 52 (4) International Journal of Law and Management 309

[91] Abu Elias Sarker, 'The political economy of public enterprise privatization: The case of Bangladesh' (2011) 28(3) International Journal of Management 595

[92] The government took charge of over 305 state-owned enterprises in order to help the war-torn economy recover. As a result, the government's share of the economy increased from 34% in 1969-1970 to almost 90% in 1972. See MU Ahmed, 'Privatization in Bangladesh' in Gopal Joshi (ed.) *Privatization in South Asia: Minimizing Negative Social Effects through Restructuring* (New Delhi, South Asia Multidisciplinary Advisory Team (SAAT), International Labour Organization (ILO) 2000)

[93] V. Bhaskar and Mushtaq Khan, 'Privatization and employment: A study of the jute industry in Bangladesh' (1995) 85(1) The American Economic Review 267

[94] Farooque, Zijl, Dunstan and Karim (n 41)

owners[95] and since then, and primarily until 1991, governments have, under the influence of donor organisations, embraced proposals for increasing privatisation and removing barriers to foreign investment.[96]

Despite this, Bangladesh's manufacturing industry continues to be extremely unproductive an d inadequate.[97] As a result, in recent times there has been a greater importance put on industri al development that is focused on exports and is led by the private sector. A number of signifi cant steps have been taken by successive governments in order to entice domestic and interna tional investment. These include: embracing rapid industrialization as a central strategy for ac hieving more rapid economic development[98]; bolstering the Stock Exchange and then establis hing a Securities and Exchange Commission (SEC) for the purpose of developing private sect or capital and maintaining control over it; and providing a number of inducements (such as fi scal incentives, the establishment of special industrial zones aimed at fostering the growth of specific industries).[99] The consequence of this can be seen in the recent performance of the ec onomy. The quarterly expansion of Bangladesh's gross domestic product was 5.47 percent on average from 1994 till 2010.The Gross Domestic Product reached a peak of 7.9 percent durin g the Financial Year 2018-19.[100]

The ever-increasing contribution made by the industrial sector is one of the most important driving forces behind the recent economic expansion. It is said that private sector driven export - based economic growth is represented in the expansion of export earnings, which went from $1994 million in 1991-1992 to $8655 million in 2004-2005, and it has reached $23.86 billion

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[95] Shahzad Uddin and Trevor Hopper, 'Accounting for privatization in Bangladesh: Testing World Bank claims' (2003) 14(7) Critical Perspectives on Accounting 739

[96] Ibid

[97] Syed Hossain and Ming-Yu Cheng, 'Bangladesh: Building for a better future?' (2002) 29 (10) International Journal of Social Economics 813

[98] Ataur R Belal and David L. Owen, 'The views of corporate managers on the current state of, and future prospects for, social reporting in Bangladesh: An engagement-based study' (2007) 20(3) Accounting, Auditing and Accountability Journal 472.

[99] Nizam Ahmed Khan and Ataur R. Belal, 'The politics of the Bangladesh environment protection' (1999) 8(1) Environmental Politics 311; Sarker (n 91).

[100] GDP Growth (Annual) Bangladesh, (World Bank) <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=BD&most_recent_year_desc=false> accessed on 29th December 2021

in 2011 since then.[101] Despite the effects of Covid-19, the specific export revenues of the Readymade Garments business expand from $19.1 billion in 2012 to $31.46 billion in 2021.[102] As a consequence of this, the World Trade Organization ranked Bangladesh as the 3rd biggest garments manufacturer in the world in the year 2010.[103]

In addition, the country has been successful in luring significant amounts of overseas investment during 1980's thanks to the low cost of labour and government commitments to adopt market economic policies. As a result, concerns regarding corporate governance have recently come to the forefront in Bangladesh. This is due to the fact that the country's domestic economy has become more integrated with the global economy, which has put increased pressure on businesses to remain internationally competitive. Other sectors of economic indicators, such as poverty reduction, population growth, educational attainment, and so on, have also shown some degree of success in recent years.

Despite this, it is common knowledge that foreign direct investment (FDI) has a significant influence on economies that are capable of sustained growth.[104] There is no exception for There seems to be no issue concerning Bangladesh, and this finding also indicates that sustained and structured economic growth is still possible to achieve through effective utilisation of foreign direct investment (FDI)[105], taking initiatives to attract more investment, increasing domestic savings, creating jobs, and guaranteeing higher standards of technology. The quality of this economic expansion is a subject of much debate, despite the fact that the increase in the economy has been nothing short of phenomenal.[106]

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[101] cf Belal and Owen (n 98)

[102] Export value of ready-made garments (RMG) in Bangladesh from 2012 to 2021 (Statistics Jan, 2023) < https://www.statista.com/statistics/987707/bangladesh-export-value-garments/> accessed 20 January 2023

[103] For further details, see World Trade Organisation<https://www.wto.org/english/tratop_e/devel_e/bangladesh.pdf> accessed on 21 January 2022.

[104] Sudip Dey and Badrul Hasan Awal, 'Impacts of Foreign Direct Investment on Economic Growth of Bangladesh: An Econometric Exercise' (2017) 7(2) Asian Business Review 71; See also Elias Ali Sarker, 'The political economy of public enterprise privatization: The case of Bangladesh' (2011) 28(3) International Journal of Management 595

[105] According to a report by the United Nations Conference on Trade and Development, foreign direct investment (FDI) into South Asia has decreased because of the recession, but FDI into Bangladesh has surged by over 30 percent to a total of $913 million. <https://unctad.org/system/files/official-document/wir2021_en.pdf > accessed 21 January 2022.

[106] Ibid

Even though the level of poverty and inequality has decreased, the effectiveness of the government's efforts could be much higher than what is currently being realised. Furthermore, the benefits of economic growth have bypassed the majority of the people in the country in order for the government to really achieve its quality economic growth[107]. The expansion is sometimes referred to as being unsustainable due to the fact that it does not have a solid basis of good governance and rather serves as an excellent illustration of weak governance. In addition, the opponents emphasise that in order to bring the country's unemployment rate down to an acceptable level, it would require a significantly higher GDP (about 8.89 percent on an annual basis) that is maintained over an extended period of time.

2.4. Bangladesh's Regulatory Framework and Key Institutions for Corporate Governance

The Bangladesh Securities Exchange Commission (SEC), The Registrar of Joint Stock Companies and Firms (RJSC), Bangladesh Bank (BB), the two Stock Exchanges (Dhaka and Chottogram) and the Institute of Chartered Accountants of Bangladesh (ICAB) are the major players to control the capital market of Bangladesh. Furthermore, there are a number of other important entities that are actively participating in the process of formulating corporate governance legislation in the country. This section of the research provides a cursory overview of the authorities and institutions that are contributing to the establishment of Bangladesh's corporate governance structure.

It is the responsibility of the RJSC to register companies that are formed as a result of the Companies Act of 1994. The administration of it falls within the purview of the Ministry of Commerce. The CA 1994 gives the Company Registrar the right to make requests for information and explanations, as well as the power to call for the establishment of companies and the filing of statutory returns. On the other hand, one of the most significant shortcomings

[107] World Bank, 'Bangladesh Economy Continues Robust Growth with Rising Exports and Remittances' (October, 2009) < https://www.worldbank.org/en/news/press-release/2019/10/10/world-bank-bangladesh-economy-continues-robust-growth-with-rising-exports-and-remittances> accessed 03 February 2020; Sohel Parvez, 'Quality of economic growth improves' (The Daily Star, 03 September 2018) <https://www.thedailystar.net/news/business/quality-economic-growth-improves-1628176> accessed 3 February 2020.

of the RJSC in Bangladesh is that it does not make use of computer technology.[108] Even in the modern era, the records of the company are maintained manually, which slows down the display of information in a timely manner. This data should be open to scrutiny by members and other competent organisations.

The Central Bank of Bangladesh, widely known as Bangladesh Bank (BB), is the country's reserve bank and was established in 1972 in accordance with the Bangladesh Bank Order. BB is the major regulator of financial institutions, including banks and non-banking financial firms (NBFI). The government of Bangladesh is responsible for making appointments to the board.

In addition to having the authority to regulate commercial banks and other banking institutions, BB has been given the responsibility of performing all of the traditional functions of a central bank. This includes being solely responsible for the issuance of currency, the keeping of reserves, the formulation and management of monetary policy, and the regulation of Bangladesh's credit system. The primary objective of BB's operations is to maintain stability in both the domestic and international monetary value of Bangladesh. Recently, BB has been working to improve governance standards in the financial market by reforming a large number of its policies. Some of these policies include: provision regarding independent director in the Bank Company Act 1991, provisions regarding the audit committee and rules regarding disclosure by the banks.[109]

In Bangladesh, the Stock Exchanges are significant players in the process of developing the framework for corporate governance. Chittagong Stock Exchange (CSE) and Dhaka Stock Exchange (DSE) are the two stock exchanges that operate in the country (CSE). The DSE is a publicly traded company, and its operations are overseen by the Articles of Association, in addition to the Securities and Exchange Ordinance of 1969, the Companies Act of 1994, and the Securities and Exchange Commission Act of 1993. The CSE is a public limited corporation that operates on a not-for-profit basis in its capacity as a legal entity. It operates independently

[108] The lack of computerisation slows down the process of company formation, whereas in the UK a company can be open and registered within few hours. See Companies House, 'Starting a company' < https://www.gov.uk/topic/company-registration-filing/starting-company > accessed 23 November 2021

[109] Regular policy updates and reforms through the methods of circulations, Bangladesh Bank <https://www.bb.org.bd/en/index.php/monetaryactivity/index >access 05 February 2020.

from the board that sets policies and has its own secretariat. In order to maintain complete openness and honesty, the board is made up of an equal number of broker and non-broker directors. There is a separate secretariat that operates under its own authority and is led by a CEO who works full time. The primary regulatory authority for CSE activities is the SEC.

For ensuring transparency and rapid transactions, in 1998, being financed by the Asian Development Bank (ADB)s, DSE introduced an automated trading system similar to the Western countries, and in 2004, launched the Central Depository System for electronic settlement of share trading. Currently both of the stock exchanges use computerised automated trading systems. Each Stock Exchange establishes listing requirements[110], approves, suspends or removes listing privileges of companies, monitors listed companies in compliance with legal regulatory provisions, but need to have their operating rules approved by the SEC.

Within the context of Bangladesh's corporate governance landscape, the Security Exchange Commission (SEC) of Bangladesh functions as the major government regulator.[111] By virtue of the Securities and Exchange Commission Act of 1993, the Securities and Exchange Commission (SEC) was given the authority to function independently in the year 1993. The Chairman and members of the SEC are both appointed by the government, and the commission is affiliated with the Ministry of Finance. The Securities and Exchange Commission (SEC) saw some upheaval not long after it was first established. Both the Dhaka Stock Exchange and the Chittagong Stock Exchange witnessed an unparalleled boom between July 1996 and the middle of November 1996. During this time period, there was an increase of 265%[112] in market capitalization, which prompted a significant increase in the number of domestic investments made in the capital market. Following the bursting of the bubble, the index dropped from a high of 3648 points to a low of 486 points. According to the findings of market analysts, the primary reasons for the crash were lack of regulations, the failure of a number of regulatory

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[110] Listing Rules, Dhaka Stock Exchange (DSE) <https://www.dsebd.org/process_of_listing.php > accessed 30th December 2019.
[111] Siddiqui (n 44).
[112] According to the official record, the daily turnover rate on average saw a rise of more than one thousand percent. At that time, about 192 stocks were listed on each of the stock exchanges; the price index at the Dhaka Stock Exchange climbed by 281 percent, while the price index at the Chittagong Stock Exchange increased by 258 percent. See, Tureen Afroz,' Index crash of 1996: A case of regulatory failure' (The Daily Star, 7 October 2006)
< https://archive.thedailystar.net/law/2006/10/01/fmr.htm> accessed 20 December 2022

institutions along with the SEC, and poor governance among companies, which made it possible for some market manipulators to participate in fraudulent activities. After the stock market frauds that occurred in 2008 and 2011, the Securities and Exchange Commission (SEC) received a great deal of backlash for its lukewarm response to such market scandals and for failing to use their regulatory authority to take stringent actions against such market misbehaviour and malpractice.[113] Investors were discouraged from participating in the stock market for many years as a result of this event. After some time, the government adopted a variety of various actions to restore the confidence of investors.[114] The Asian Development Bank (ADB) provided financial support and technical assistance in 1999, allowing the SEC to further strengthen itself by streamlining its operational functions. As part of the project, a number of training sessions and workshops were held in order to equip the participants with the knowledge and skills necessary to foster the growth of a robust capital market and ethical standards for corporate governance. On a "comply or explain" basis, the SEC issued an order relating to corporate governance in 2019, on the recommendation of donor agencies. The order was for the Corporate Governance Guidelines “SEC Guidelines”. Companies that are traded on public exchanges are required to either comply with the provisions or provide an explanation as to why they were unable to do so.

The only professional accountancy body in Bangladesh that confers chartered accountant (CA) status is the Institute of Chartered Accountants of Bangladesh (ICAB).[115] The ICAB is responsible for the regulation of the accounting profession, as well as the oversight of its members' professional ethics and codes of conduct. Additionally, the ICAB offers specialised training and professional expertise, and it reserves the right to take disciplinary action against its members for violations of regulation. Despite the fact that the SEC punished some audit companies on grounds of deception, it appears from the results of many studies that the Institute

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[113] M. Akhtaruddin, ‘Corporate mandatory disclosure practices in Bangladesh’ (2005) 40 The International Journal of Accounting 399; Mahmood Osman Imam and Mahfuja Malik, ‘Firm performance and corporate governance through ownership structure: evidence from Bangladesh stock market’ (2007) 3(4) International Review of Business Research Papers 88; S.M. Solaiman, ‘Recent reforms and developments in the securities market of Bangladesh’ (2006) 41(3) Journal of Asian and African Studies 195.

[114] For an example it was entrusted as the final rule-making authority for capital markets; its organogram was updated to integrate two new members; large personnel were hired; and a new investors' education Program was created. These are only some of the main changes that the SEC went through.

[115] Bangladesh Chartered Accountants Order 1973, under this Act ICAB was created.

has not been successful in disciplining its members.[116] People have the impression that these kinds of failures invite donor agencies to intervene in the activities of the organisation and govern the audit environment. In 1999, the International Certification and Accreditation Board (ICAB) started attempts to improve audit standards in Bangladesh while receiving funding from the World Bank. As a consequence of this, it produced the Bangladesh Accounting Standards (BAS) and the Bangladesh Standards for Auditing (BSA) respectively, based on the International Accounting Standards (IAS) and the International Standards on Auditing (ISA). The Bangladesh Financial Reporting Standards (BFRS), which were modelled after the IAS, are the standards for financial reporting that have been mandated by the ICAB. On the other hand, the ICAB decided to go with the more modern version of the BFRS not too long ago. The new BFRS are now patterned after the IAS and International Financial Reporting Standards (IFRS) published by the International Accounting Standards Board. [117] A professional accreditation in Cost and Management Accountancy, with an emphasis on accounting for business, can be obtained through the Institute of Cost and Management Accountants of Bangladesh (ICMAB), which is an independent professional body operating under the Ministry of Commerce of Bangladesh.

In addition to these well-established regulatory organisations and institutions, a new private think tank known as the Bangladesh Enterprise Institute (BEI) has developed in recent years to play an active role in the formation of corporate governance legislation in the country of Bangladesh. BEI was created in the year 2000 as a research centre that is non-profit and non-political. Members of the business community, political figures, and bureaucrats are all represented on its Board of Governors. The Business Environment Institute (BEI) offers training to directors of firms and engages in communication with decision-makers and various stakeholder groups. The voluntary Code of Corporate Governance for Bangladesh (2004) was developed by BEI in 2004, marking a significant step forward in corporate governance. At the time of its creation, it was the only voluntary code applicable to Bangladesh. The SEC has just issued the Corporate Governance Code 2018 (CGC 2018) with the intention of improving corporate governance in order to protect investors and the capital market.

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[116] Karim and Moizer (n 63); Siddiqui (n 44); Mir and Rahaman (n 86)

[117] Companies in Bangladesh are required to comply with the BFRS by the Securities and Exchange Commission (SEC), however these standards are not mandatory nor enforceable through ICAB regulations.

2.5. Conclusion

By integrating socioeconomic, political, cultural, legal, financial, financial market, as well as other institutional aspects and significant individuals who influenced the formation of the current framework, this section has detailed the corporate governance framework in Bangladesh. From the argument as a whole, the major turning points and indications imply that the current organisation structure has been evolving under the influence of numerous socio-economic elements, where the government has played a considerable role. However, the Government's actions failed in many cases, and it could be argued that this gave international lending agencies the opportunity to step in (through the Government, the Bangladesh Bank, and most recently and via private think tank BEI) to restructure Bangladesh's corporate governance system to an international standard.

The quality of the economy has been questioned despite the economy's tremendous expansion. According to the arguments above, Bangladesh needs to encourage industry and sustain economic growth. Therefore, fostering an atmosphere that is conducive to investment has moved up the priority list for the survival of the nation. Its sustainable economic growth is hampered by problems like kinship, corruption, poor infrastructure, and political instability, among others. Most crucially, it shows that, despite the legal and regulatory authorities' putative independence, they are vulnerable to assaults to their legitimacy because of their inefficiency. It is implied that significant reforms to the corporate governance structure have been made over the past 20 years in order to make it easier to understand the fundamental features of Bangladesh's corporate governance framework. However, a further collapse of the capital market and several bank scams[118] undoubtedly increased concerns and show that there are still some issues with the current regulations and infrastructure. Political and socioeconomic issues in Bangladesh have a significant impact on the development of the corporate governance process, suggesting that these elements should be taken into account for the successful implementation of any good governance efforts.

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[118] Kallol Mustafa, 'The 'mega serial' of bank scams' (The Daily Star, 14 Febuary 2023) available on < https://www.thedailystar.net/opinion/views/news/the-mega-serial-bank-scams-3247641 > accessed on 15 December 2023

Chapter 3 Historical Evaluation of Bangladesh Corporate Law

3.1 Introduction

Evaluations of corporate law place a strong emphasis on the significance of "legal families" or "legal origins." This is because the extent to which a particular legal system's foundational principles of company law are able to protect the interests of stakeholders, including shareholders, varies greatly. In order to determine the origins or families of the various legal systems, they are divided into two categories: those that belong to the family of common law, and others that belong to the family of civil law.

There is a school of thinking that states that if a jurisdiction offers greater legal protection to investors (both in terms of the legislation and the enforcement of it), then it will result in capital markets that are larger and more valuable than systems that offer less protection.[119]

Following an exhaustive comparison of the civil law system with other common law systems, La Porte and others finally conclude that the common law provides a better response for equity investment than civil law does.[120] However, a high number of criticisms has been addressed regarding this theory.[121] The evolution of corporate law has been profoundly influenced by the split of legal systems into common law and civil law, which occurred centuries ago. However, it is essential to emphasise that this classification should not be considered definitive and calls for a more nuanced investigation. This is due to the fact that there can be substantial variations in corporation law within each category of legal family.[122] It was common practise for colonial

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[119] Porta, Lopez-De-Silance, Shleifer and Vishny (n 31), Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, 'Law and Finance' (1998) 106 Journal of Political Economy 1113 and Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 Journal of Finance 471

[120] Porta, Lopez-De-Silance, Shleifer and Vishny (n 31)

[121] In order to provide a concise overview of this literature, see John Armour and Priya Lele, 'Law, Finance and Politics: The Case of India' (2009) 43(3) Law and Society Review 491, 493-95. Simultaneously, a number of competing hypotheses have developed over time to account for the disparities between the various corporate law systems. These investigate topics that extend outside the scope of this thesis, including history, politics, special interests, and even anthropology and culture.; Amir N. Licht, 'The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems' (2001) 26 Delaware Journal of Corporate Law 147

[122] Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp and Mark D. West, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2002) 23(4) University of Pennsylvania Journal of

powers to enforce their own judicial rules on the colonies that they invaded. As a consequence of this, several distinct legal families evolve in different parts of the world, which ultimately led to the creation of corporation law in a number of different jurisdictions. These "legal transplants" had a significant and long-lasting impact on the judicial systems of a great number of countries and continue to have an effect on corporation law even in the modern day.[123]

Despite the fact that the idea of legal transplants has gained a significant amount of confirmation in legal study,[124] additionally, extreme caution has been advised in regard to it.[125] Simple importation of a legal standard or law code that has not been adequately tailored to the circumstances of the local context is risky and may fail.[126] the importation of legal systems from one country to another can be complex due to differences in social, political, and economic factors between the countries. These differences can impact how the laws are interpreted and applied, leading to challenges in the successful implementation of the imported legal system. Legal transplants refer to the adoption of laws or legal principles from one jurisdiction to another. The effectiveness and lasting impact of these transplants can vary widely depending on the receiving jurisdiction and its cultural, political, and legal context. Despite a growing body of research in this area, there is no universally accepted theory that can fully explain the outcomes of legal transplants.

An efficient method for determining the usefulness and general acceptability of a transplanted legal system is to investigate how that system developed in the host nation throughout the colonial era and after decolonization. This method can provide light on the extent to which the transplanted legislation was accepted and adopted by the host society, as well as how it changed over the course of time to become more compatible with the local culture and legal system. Study will try to obtain a better grasp of the factors that contribute to the success of legal

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International law 791. See also Holger Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law', (2009) BYU Law Review1813; Mathias M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law', (2007) 52(1) McGill Law Journal 55

[123] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51(1) American Journal of Comparative Law 163, 165.

[124] Alan Watson (n 26)

[125] Pierre Legrand, 'The Impossibility of Legal Transplant', (1997) 4 Maastricht Journal of European and Comparative Law 111.

[126] See Konrad Zweigert and Hein Kotz (n 21)

transplants and the contributing factors to their efficacy by researching these factors.[127] This idea says because when colonial rules are transferred into a host nation, they may not be fit for the characteristics of the country. As a result, significant changes in the legal system of the post-colonial free state may result from their implementation. However, if the legislative and judicial structures of the colonial and post-colonial periods are similar, the transplanted legislation may persist due to inertia and continue to be in effect.[128]

Colonial similarities may also evolve as a result of the post-colonial state's emphasis on employing the acquired laws to advance its own purposes, frequently at the expense of the rights and liberties of its population. This can contribute to the perpetuation of colonial legacies.[129]

In the context of this conceptual framework, it may be said that the evolution of company law is interwoven with it.[130] Since the country's inception in the middle of the colonial era, all the way through its emergence as an independent state, and all the way up to the current day, Bangladesh's economy has been growing at a rate that is among the quickest in the entire globe.[131] The investigation of Bangladeshi corporate law is fascinating on a number of levels that are important to the investigation that came before it. Bangladesh is unquestionably a part of the "common law" family due to the fact that it was a part of the larger British India Empire during its period of colonial rule.[132] Given that the emergence of corporate law in Bangladesh

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[127] Iza Hussin, 'Circulations of law: Colonial Precedents, Contemporary Questions', (2012) 2(7) Onati Socio-Legal Series 18; J.N. Matson, 'The Common Law Abroad: English and Indigenous Laws in the British Commonwealth' (1993) 42(4) International and Comparative Law Quarterly 753

[128] See Moiz Tundawala, 'On India's Postcolonial Engagement with the Rule of Law' (2013) 6 NUJS Law Review 11.

[129] Anil Kalhan and Gerald P. Conroy and Mamata Kaushal and Sam Scott Miller, 'Colonial Continuities: Human Rights, Terrorism, and Security Laws in India' (2006) 20(1) Columbia Journal of Asian Law 93.

[130] This article's use of the phrase "corporate law" calls for an explanation of what exactly that term means. In essence, it refers to the rules, regulations, and court decisions that pertain to firms and company law. However, where applicable, it also covers securities laws and regulations that concern with investor protection and corporate governance.

[131] International Monetary Fund (IMF), 'Bangladesh Building a Strong and Inclusive Economy' (IMF, 2018) <https://www.imf.org/en/News/Articles/2018/06/06/NA060818-Bangladesh-Building-A-Strong-Inclusive-Economy> accessed 3 February 2022

[132] M.C. Setalvad, *The Common Law in India* (Steven & Sons, London, 1960) 3-4; M.P. Jain, *Outlines of Indian Legal and Constitutional History* (6th edn, LexisNexis India, 2007) 364-67; V.D. Kulshreshtha, *Landmarks in Indian Legal History and Constitutional History* (7th edn, Eastern Book Company, India, 2004), ch. 15 'Influence of English Law in India'; Peter De Cruz, *Comparative Law in Changing World*

was a result of the replicating of English company law, it offers a wonderful approach to the study of legal transplants because of this historical fact.[133] Last but not least, Bangladesh, which has been an independent nation for over fifty-two years after gaining freedom from colonial rule, can be considered a helpful example to investigate whether the company law in that region still adheres to its colonial roots or has significantly diverged from the corporate law of the country from which it originated. This is because Bangladesh gained independence from colonial rule.

3.2 Pre Independence-Era (1757-1971)

3.2.1 British Period (1757-1947)

The development of corporation law in Bangladesh may be dated back to the colonial period, with numerous earlier companies' legislation largely mirrored on contemporaneous English laws. This was the case for a number of previous companies' legislation as well.[134] In the Indian sub-continent company legislation started in 1850. Act No 43 of 1850 was based on the English Companies Act of 1844 which made it possible, for the first time, to incorporate and register a company without obtaining a royal charter. The Indian Act of 1850 granted the Supreme Court in the Presidency towns of Calcutta, Bombay, and Madras the authority to order the registration of unincorporated companies of partners associated under a deed containing a provision stating that the shares were transferable. These towns were all located in the Indian Presidency. Although a corporation was allowed to sue and be sued in its registered name, the privilege of limited liability was not granted by this Act. However, the Act did allow a company to sue in its registered name.

An Act for "the incorporation and regulation of Joint Stock Companies and other Associations

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(3rd edn, London, Routledge, 2007) 127-29.

[133] Before the year 1947, Bangladesh was a province of British India, which was located on the Indian Subcontinent. Following the end of the Second World War in 1947, Bangladesh became a province of Pakistan known as East Pakistan. 1971 marks the year when Bangladesh achieved its independence and became a sovereign nation.

[134] See Professor William J. Magnuson, *For Profit: A History of Corporations* (Basic Books, New York 2022).

either with or without limited liability of the members thereof" was passed in British India in the year 1857. However, the privilege of limited liability was not extended to a company under this Act if the company was formed for the purpose of banking or insurance. Act VII of 1860, which was modelled after the English Companies Act of 1857, removed this restriction from the law. Then, after the English Companies Act of 1862, in 1866, a comprehensive Act was passed in India for the purpose of consolidating and amending the laws relating to the incorporation, regulation, and winding up of "Trading Companies and other Association." This Act was modelled after the English Companies Act of 1862. Between the years 1866 and 1913, a number of adjustments were made to the legal system in India, mirroring adjustments made in England.

The Companies Act of 1913 brought about a complete reform of the entire body of law that was previously applicable to businesses organised as corporations. The Companies (Consolidation) Act of England and Wales from 1908 served as the primary inspiration for this Act. Between the years 1908 and 1936, a number of inconsequential changes were made to the Act of 1913.[135] Important new provisions were added to the Act of 1913 by the Indian Companies (Amendment) Act of 1936. This was done in response to the English Companies Act of 1929. Additionally, for the very first time, the system of administering agencies in the subcontinent was acknowledged according to the Amendment Act of 1936.

3.2.2 Pakistan Period (1947-1971)

In 1947, Bengal was partitioned. The East part of Bengal become the part of Pakistan known as East Pakistan. The western part of Bengal becomes the part of India, which had the oldest High Court of India at Kolkata (known as Calcutta). The High Courts (Bengal Order, 1947 was promulgated, under which a High Court of Judicature foe the Province of East Bengal was established at Dhaka.[136]

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[135] Leonard W. Hein, 'The British Business Company: Its Origins and Its Control' (1967) 15(1) The University of Toronto Law Journal 134

[136] Hamid Khan, *A History of the Judiciary in Pakistan* (1st edn, Oxford University Press 2016) 10-11

During Pakistan time, a Company Law Commission was set up and it did suggest amendments in 1962 in the light of the English and Indian amendments. However, no law was passed although small amendments were made in that time. The Securities and Exchange Ordinance 1969 was the most important piece of legislation touching our corporate activities during this period. It supplemented the Capital Issues (Continuance of Control) Act of 1947, which gave extensive powers to the Controller of Capital Issues.

3.3 Post Independence Era 1971- Present Day (Bangladesh Period)

After the emergence of Bangladesh, a Company Law Reform Committee was set up in 1979 comprising leading government servants, chartered accountants and lawyers. The Istiaq Committee made extensive recommendations for changes in our company law but not until 1994 was a new comprehensive Act passes by the Parliament. The Securities and Exchange Commission Act of 1993 established the Securities and Exchange Commission, whose primary purpose is to protect the general public with regard to their investments in corporate securities. The SEC is responsible for monitoring the issuance of capital. It possesses wide authority to formulate rules and regulations because of this. In accordance with the Acts of 1947 and 1969, it is responsible for a variety of tasks, including those of the Controller of Capital Issues.[137]

Following the decolonization in 1947 from British Rule and independence in 1971 from Pakistan, colonial laws remained to exert a substantial impact, as evidenced by the fact that the most important component of corporate legislation, the Companies Act of 1994, was patterned after the English Companies Act of 1908. Even while the Companies Act of 1994 was the product of a tried-and-true method of legal transplantation, its development beyond that point followed a quite different course. Constant modifications to the Act were required because of statutory requirements that emerged as a result of local situations and problems that were specific to the corporate setting in Bangladesh. These conditions and difficulties were unique to Bangladesh.[138]

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[137] Dr M Zahir, *Company and Securities Laws* (3rd edn, The University Press Limited, Dhaka Bangladesh, 2015) 5

[138] On 22 February, 2023, the High Court bench of The Supreme Court of Bangladesh, led by Justice Md Ashraful Kamal, released a 232-page full-text judgement in which they made recommendations regarding a case filed under the Company Act, 1994 over the ownership of Top Ten Fabrics and Tailors Limited. The High Court (HC) has made 14 recommendations to the commerce ministry to take

There are many important takeaways from the development of company law in post-colonial and post-independent countries. To begin, despite the fact that common law is thought to have originated in England and that Bangladesh is believed to be a member of the "common law" family, Bangladesh's corporate law has developed slightly differently than in England. In this sense, it raises serious doubts about the notion that all of the countries that are part of the same legal family are comparable. On the other hand, each host country may choose a path that is distinct from the one that the country of origin of company law has taken. Because of this, the legal families need to have a deeper comprehension of the principles governing corporations. Second, it lends credence to the idea that obtaining permission from the appropriate authorities to perform a transplant can be difficult unless the local conditions in the recipient country are comparable to those in the place of origin. Discord in the functioning of a transplanted legal system may be the result of differences in economic, social, political, and cultural aspects of the host country. Third, a comparison between the historical colonial experience in the functioning of the transplanted legal system and the more contemporary experience in the post-colonial period suggests that the foundations of the transplant are fragile. This conclusion can be drawn from the fact that the colonial experience occurred during the post-colonial period.

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necessary measures so that the existing Company Act, 1994 is amended and updated, which are Law to be amended and the new law to be drafted similar to India's model promptly, and the commerce minister must update the act every year; Constitute one or more company law tribunals in every district in proportion to the number of companies there; Create a company appellate tribunal in each department; Establish special criminal courts for offences under the Company Act; Modernise the Registrar of Joint Stock Companies and Firms (RJSC), strengthen the legal framework and improve its services; Every company has to keep a copy of the company law code in Bangla in its office; Companies must have a permanent legal officer and a lawyer experienced in company law as a consultant; Training centres have to be established under the Ministry of Commerce in each district. Compulsory for officers to undergo regular training from the said training centres at least once a year; Mandatory appointment of an independent director, a company secretary and an internal auditor in every company; Compulsory to have a full-time company secretary (who will be a member of ICSB) in every company if the paid-up capital is above Tk5 crore; Issue a circular making annual general meetings (AGM) mandatory in the city where a company's office is registered; Avoid and prevent conflicts with stock market laws, and untoward situations in company AGMs, and make the filing of tax returns easier; Formulate regulations completely prohibiting any gift, gratuity, or cash payments from companies to its shareholders at AGMs or anywhere else and automatically cancel the registration of a company if it fails to hold an AGM and Introduce specific rules for filing profit and loss accounts, balance sheets, and tax returns with the RJSC.
In the time of writing this thesis it was an unreported case. Now this case has been reported '*Md Ujjal v Top Ten Fabrics and Tailors Limited and others*, Company Matter No. 90/2019 available on < https://www.supremecourt.gov.bd/resources/documents/1548640_CompanyMatter90of2019_1.pdf > accessed on 20 November 2023.

While there is a growing amount of research on post-colonial thought that especially discusses with reference to India,[139] a neighbour jurisdiction of Bangladesh. Despite the importance of corporate and commercial rules in the contemporary day, this chapter devotes little attention to them. Sadly, Bangladesh has not been the subject of any such research in the post-colonial and post-independence era. The historical and comparative study presented here may also help us better comprehend Bangladesh's current corporate law settings.[140]

3.4 English Case Laws Referred in Bangladesh Company Law Cases

The judiciary of Bangladesh has been highly influenced by English common law. As it has centuries old legacy on the common law jurisdiction. English case decisions are frequently referred in Bangladesh courts. As the volume of case has been referred and it is out of the scope of this thesis, I will confine myself to the company cases. The supreme court of Bangladesh is the highest court of the land. The Supreme Court of Bangladesh has two separate division namely High Court Division and Appellate Division. Interestingly, the jurisdiction of the Companies Act 1994 start from High Court Division as it has the original jurisdiction. So that there are no case laws from lower judiciary.

In the case of *Eusof Babu and Ors v State and Ors*.[141] *it* pertains to a dispute regarding the applicability of sections 138A and 141 of the Negotiable Instruments Act, 1881 to a company. The issue was whether the company was liable to be proceeded against as an individual under section 138A or as a company under section 141. The question arose after an order was passed by an assistant registrar of the Supreme Court, High Court Division, on November 2, 2011, directing the Registrar General of Companies (RGC) to take action against a company for non-payment of taxes and fees as required under section 141(b) of the Negotiable Instruments Act. This case was heard by a bench of five judges comprising Mr Justice Md Zafar Iqbal

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[139] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) 23(3) Law and History Review 631; Marc Galanter, 'The Aborted Restoration of 'Indigenous' Law in India', (1972) 14 Comparative Studies in Society and History 53; Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and The Indian State* (Oxford University Press, India, 2006).

[140] *See* John W. Head, *Great Legal Traditions: Civil Law, Common Law and Chinese Law in Historical and Operational Perspective* (USA, Carolina Academic Press, 2011)

[141] 14 ADC (2017)792, 68 DLR(AD) (2016) 298

Chowdhury (Retd), Mr Justice Md Moniruzzaman Khan (Retd), Mr Justice M A Jahanzeb and Mr Justice A Fazle Kabir (Retd). The learned judges unanimously held that both sections were applicable. In this case A.H.M. Shamsuddin Chowdhury, J. refer a number of English cases and also a number of English doctrines such as doctrine of juristic personality, corporate criminal liability, rules of attribution, brain and hand theory and so on.[142]

In Section 22 of the Companies Act 1994 states about the effect of memorandum and articles. In *Md Aktar Hossain and others v Capital Tower (Pvt) Limited and Others*[143] the *Exeter Football Club Ltd* case was referred and stated that section 22(1) is a similar provision to section 9 of the English Companies Act 1956 and is more absolute in its effect and thrust as compared. In section 59 of the Companies Act 1994 states about the reduction of Share capital and section 64 order confirming reduction. In *Grameen Solutions Limited v Registrar of Joint Stock Companies,*[144] the *Denver Hotel Co* 1893 (1) Ch Div 495 case was referred and stated that the company limited by shares is permitted to reduce its share capital in any manner, meaning thereby a selective reduction is permissible within the framework of law.

Further in section 83 of the Companies Act 1994 states about the statutory meeting and statutory report of company. According to the section 83(1) every company either limited by shares or guarantee within a period of not less than one month and not more than six months from the date of its incorporation hold a general meeting of the members of the company, which

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[142] In paragraph 60-109 some of the mentioned English case are as follows:: Salomon vs. Salomon & Co., (1897 AC 22) (Para-60); Meridian Global Funds Asia Ltd vs. Securities Commission, 1995, 2 AC 500; Gateway Food markets Ltd [1997] 2 Cr App P.40 (CA), Great North of England Railway Co (1846) 2 Cox CC 70, Chuter vs. Freeth & Ltd (1911) 2 KB 832; Griffiths vs. Studebakers Ltd (1924) 1 KB 103; Tesco Supermarkets Ltd vs. Nattrass [1972) AC 153; DPP vs. Kent & Sussex Contractors Ltd [1944] KB 146 Macnaghten; ICR Haulage Ltd [1944] KB 551 (CCA); Moor vs. Bresler Ltd [1944] 2 All ER 515; Bolton (Engineering) Co Ltd vs. TJ Graham & Sons Ltd [1957] 1 QB 159 Worthy vs. Gordon Plant (Services) Ltd [1989] RTR 7 (DC); P&O Ferrier (Dover) Ltd (1991) 93 Cr App R 72; Lennard's Carrying Co Ltd vs. Asiatic Petroleum Co Ltd [1915] AC 705 ; Attorney-General's Reference (No. 2 of 1999) [200] QB 796 (CA); Rowley vs. DPP [2003] EWHC 693 (Admin.) 87; R vs. HM Coroner for East Kent, ex parte Spooner (1989) 88 Cr App R 10 (DC); Director of Public Prosecution vs. Kent and Sussex Contractor Ltd, 1944 1 KB 146 ; Jackson Transport (Ossett) Ltd (1996), English Brothers Ltd (2001), Teglgaard Hardwood Ltd (2003), Dennis Clothings and sons Ltd (2003), Halimandi Heating Services Ltd (2004)"and Keymark Services (2006); Lennard's Carrying Co. Ltd. vs. Asiatic Petroleum Co. Ltd. [1915] AC 705; Magna Plant vs. Mitchell (unreported) April 27, 1966; Viscourt Haldane LC in Lennard's Carrying Co. Ltd. vs. Asiatic Petroleum Co. Ltd. [1915) AC 705; Bolton (Engineering) Co. Ltd. vs. TJ Graham & Sons Ltd. [1957] 1 QB 159, 172; Reg vs. Coroner for East Kent, Ex parte Spooner (1987) 88 Cr.App; Req. vs. British Steel Pic. [1995] 1 WLR 1356.

[143] 7 LG (HCD) 265

[144] 65 DLR 186

is referred to as 'the statutory meeting'. Also, in section 83(2) it is a statutory duty of the directors of the company to prepare a report which is called as a 'statutory report' and forward that report to all the members of the company at least 21 days before the statutory meeting take place. In para 10 of the case *Sayem Sobhan and others v Registrar of Joint Stock Companies and Firms*[145], the English case *Yenidje Tobacco Co* (1916) 2 Ch 426, was referred and Cozens Hardy MR observed as follows:

"It has been argued upon us that although it Is admitted that the just and equitable Clause is not to be limited to cases ejusdem generis, it has nevertheless been held, according to the authorities, not to apply except where the sub-stratum of the company has gone or where there is a complete deadlock. Those or two instance which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the 'just and equitable' clause, as found in the Companies Act. I think that, in a case like this, we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which would include the court to exercise its jurisdiction under the 'just and equitable' clause and to wind-up the company."

In section 210 of the Companies Act 1994 states about the appointment and remuneration of auditors. Management and Administration of the Company. In the case of *Nurul Haque Chowdhury v Mrs Mehzabin Chowdhury and others*[146] case para 15 it was stated that company was incorporated under the provisions of section 26 of the Companies Act 1913 as an association, without any share capital, not for profit, as such, in view of as such, in view of section 195(b) of Companies Act 1994 as required under sub-section 1 of section 233, an application is not maintainable unless filled by at least one-fifth members of the company since in the instant case, there is only one applicant, which member fails to fulfil the condition of the required minimum as a specific under section 195(b), the instant application is not maintainable. In this connection with regard to the conduct of the affairs of the company by the majority members of the company, the test propounded by Lord Kyllachy in *Cameron v Glenmorangie Distillery Co ltd* (1896) as follows:

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[145] 66 DLR 461.This case is relating to winding-up of the company under section 241 of the Companies Act 1994, for not holding its statutory general meeting according to the section 83(1).
[146] 1 LG (HCD) 127

"The test always the thing complained of a thing done in the interest of the company? or , to put it perhaps more accurately, Is the action of the majority irreconcilable with their having proceed upon any reasonable view of the company's interest?"

The reference was made to section 210 of the Companies Act 1984 in England and section 397 of the Companies Act 1956 in India, both of which relate to the term 'unfairly prejudicial'. This term is also applicable in section 459 of the Companies Act 1985 in England, and even before issuing any instruction under section 233 of the Companies Act 1994 in Bangladesh.

In the same case *Nurul Haque Chowdhury v Mrs Mehzabin Chowdhury and others*[147] in para 33 the English established rule *Foss v Harbottle* (1843) has been referred as a good law to the extent subject however to its exception. It is also mentioned that the Court will not interfere with charges of irregularities in the internal management of a company if those allegations are ratified or affirmed in a general meeting by a majority of the company's members, particularly in the case of a private limited company. In similar manner the House of Lords case of *Scottish Co-Operative Wholesale Society Ltd v Meyer* (1958) case was referred and states the word 'Oppressive' was explained.

In para 35 it is also stated that in the case of allegation of fraud or bad faith raised against the Board, the Court will not be slow in investigating it as indicated by Sir George Jassel MR in *re Rica Gold Washing Co* (1879) 11 Ch. D 36, where the allegation of fraud was only vague, holding that 'people are not be brought into court on a vague charged of fraud and affirmed the order of dismissal of a petition for winding up. Whereas in para 37 it was further explained by the Court of appeal in case of re Jermyn St. Turkish Baths Ltd (1971) 3 All ER 184, Buckly L J held at page 199c -f: as follows:

"What does the word 'oppressive' mean in this context? In our judgment, oppression occurs when shareholders, having a dominate power or procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the Company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in Scottish

[147] 1 LG (HCD) 127

Co-operative Wholesale Society Ltd. V Meyer "burdensome, harsh and wrongful' to the others members pf the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs; see Scottish Co-operative Wholesale Society Ltd. Meyer and re HU Harmer Ltd. We do not say that this is necessarily a comprehensive definition of the meaning of the word "'oppressive" in section 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overlearning act or attitude on the part of the oppressor."

The Protection of minority interest and duties of the court are expressly stated in the Section 233 of the Companies Act 1994. In the case of Nurul Haque Chowdhury v Mrs Mehzabin Chowdhury and others[148] it was mentioned that Section 233 of the Companies Act 1994 Protection of minority interest and duties of the court. Section 233 was enacted in Bangladesh in 1994. Under this the Court definitely has a wide jurisdiction and virtually without any guideline to "make such order as prayed for or such other order as it deems fit but the court does not sit under a palm tree, to borrow the words of Warnes J, in order to exercise-

"... in order to exercise its power under section 233, the court must not lose sight of the various provision of the Companies Act, 1994, the memorandum and the article of the association, the agreement, if any and the duties, function and the obligations of the board owed to the company and its members." (Para- 41).

No doubt, this provision confers a very wide power on the Court 'to make such order as prayed for or such other order as it deems fit' but that does not mean that the Court do whatever an individual Judge may consider 'the interest of the applicants has been or is being or is likely to be prejudicially affected'. Rather, while winding the powers of the court, put the Judges in Bangladesh to be alert, carefully, cautious and on guard, to use such power under this provision. (Para- 42). Under the same section in the case of *ABS Safdar and others v People's Republic of Bangladesh*[149] in para 15-17 and 19 it was stated that:

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[148] 1 LG (HCD) 127, Para 41
[149] 52 DLR 249, para 15-17,19 and 24

"There cannot be any profit out of revaluation of any fixed assets of the company without disposal of the same by sale or otherwise and that too without writing off the trading losses in earlier financial periods. A shareholder does not become automatically entitled to any part of the profit until a resolution is taken and a dividend is declared by the company out of such profit."

Further in para 24 of the case relevant case referred are mostly English case laws. Such as *Salomon v Salomon & Co.* (1897) AC 22; *Burland v Earle* (1902) AC 83; *Cook v Deeks* (1916) 1 Ac 554; *Lubbock v British Bank of South America* (1892) Ch. 198. Considering the principles from the English cases the court states Balance sheet, no doubt is good evidence of acknowledgement of any liability of the company, But the balance sheet should not be accepted as an acknowledgement if it is found that the directors of those who are in control of the company took decision favouring or in furtherance of their interest although that was to the detriment of the company and the minority shareholders.

In the same para 24 further relevant English cases has been referred: *Transplanters (holding Company) Ltd.* (1958) 1 WIR 822 and *Daniels and Others vs. Daniels and Others* (1978) 1. It is further stated by. The court that "Since the points raised by the applications under consideration do not require detailed investigation and can be entertained and adjudicated upon the Company Court, pendency of the civil suit will not operate as a bar."

In the case of *Nafisa Choudhury v Syed Al Nasar Ahmed, MD, United Food Complex Ltd*[150] paragraph 21 another relevant English case along with Indian case has been Referred: M Moorthy vs. Drivers and Conductors Bus Service P Ltd. (1991) 71 Company Cases 136(Mad.); Faruk (Md) vs. Abdul Hamid and others 51 DLR (AD) 48; *HR Harmer Ltd.* (1958) 3 All England Reports 689. The court determined that

Any underrepresented group's interests can be protected by the court's ability to issue directives and recommendations in this regard. In a number of different pieces of law, the word "interest" has been utilised in a variety of different senses. However, in this particular setting, it is not

[150] 53 DLR 81, para 21

necessary for there to be simply the prospect of a monetary gain; rather, it might just as easily refer to the potential of a monetary loss. In order to ensure that the rights of minority shareholders are protected, the court has the authority to issue any order that is fair and reasonable, regardless of whether or not it is related to the relief that was requested. The Managing Director that is chosen for a specific time period in compliance with the provisions should be granted permission to continue serving in that role with all of the same rights that are outlined in those articles of association and in accordance with the applicable legal provisions. (Relevant paragraph 21).

The dissolution of a company by the court is addressed under Section 241 of the Companies Act of 1994. In accordance with the provisions of this section, the High Court Division of the Supreme Court of Bangladesh possesses the authority to order the dissolution of businesses under specific conditions.[151] In *Mazharul Haque v Bulk Management (Bangladesh) Limited and Others*[152] the English case *Re Chesterfied Catering Co Ltd (1976) All England R 294* has been referred and the court concludes that, the petitioner having not shown how he would derive any advantage or minimize some disadvantage from winding up of the respondent company he has no locus standi to petitioner for its winding up.(Relevant Paragraph 20-21).

In the case of *SMA Matin Sarker v Bangladesh Jute Mills Association and another*[153] it was held that "Section 241(V)-A "debt' must be a definite amount payable in present or in future. But an uncertain sum which may or may not be payable in future in return of services rendered by one person is another does not qualify itself as dept within the meaning of the Act. (Relevant paragraph- 23). In addition, Section 241(VI-On a close reading of the section 241 it appears that a petition for winding up should be considered keeping in view the advantage or disadvantage of a shareholder and therefore only a shareholder can resort to this provision of Law." (Relevant paragraph 30).

In *Amin (Md.) v Bengal Shipping Line Ltd and others*[154] in paragraph 10 of the judgment

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[151] The Companies Act 1994, s 241
[152] 48 DLR 453, para 20-21
[153] 57 DLR 128. In this case two other relevant English case has been referred along with other cases which are *Webb vs. Stanton* (1883) 11 QBD 518; *Ibrahimi vs West Bourne Galleries Ltd and others* 1973 Appeal Cases, House of Lords 360
[154] 60 DLR 444

another English case has been referred *Re Chesterfied Catering Co Ltd* (1976) All England R 294 and According to the court, the need to safeguard a company's reputation as well as the interests of all other shareholders has concurrently enabled the development of significant legal precedent that supports the idea that even admission of winding up applications should be given sparingly and not as a matter of course. The petitioner could have relied on section 241(vi) to have the Company wound up on just and equitable grounds, but that too would only be as a last resort and at the discretion of this Court should he have been able to demonstrate that the winding up of the Company is the only solution under the instances or that he actually has no other remedy available to him. It is evident that the petitioner has not satisfied this Court in that regard. (Relevant paragraph-10)

Regarding the company's dissolution situation in the case of *Mr Sayed Sobhan & Others v Registrar of Joint Stock Companies 7 Firms & Others*[155] a number of English case principles has been referred which is as follows:

"Where there is deadlock in the affairs of the company and there is no hope or possibility of running the company smoothly and efficiently the Court may wind up the same on an application under section 241 read with section 245 of the Companies Act, 1994 to meet up justice and equity.

Following this consideration, the court consider at first, as to whether clause (vi) of section 241 of the Act can be considered separately or independently of the clauses (I) to (V) of section 241 of the Act as a ground for passing an order of winding up by the court, if the facts and circumstances of the case of justify. Then, having considered several authorities on this point, it was one time held that the power or winding up under this clause (clause- vi) was a power only exercisable upon grounds of the same class as those specified in preceding clauses, i.e., *Expert Spackman*, (1849) 2 Ch App 737 and *Anglo-Greak Steam Co. Re*, (1866) 2 EQ1. But this view is not prevailed and the reasons for holding "just and equitable ' to winding up are not be considered ejusdem generis, with the reasons given in preceding clause of the section, Cozens Hardy MR in the case reported in *re Yenidje Tobacco Co* (1910) 2 Ch 426, observed as follows: "*it has been urged upon us that although it is admitted that the just and*

[155] 34 BLD (HCD) 541

equitable clause is not to be limited to cases ejusdem generis-it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those or two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the just and equitable' clause a found in the Companies Act. I think that, in a case like this, we are bound to say that circumstances which would justify the winding-up partnership between these by two by action are circumstances which would induce the court to exercise its jurisdiction under the 'just and equitable' clause and to wind-up the company."[156]

In the same case at page 435 Warrington, L.J. observed as follows, that opinion (the opinion previously prevailing) has long been abandoned. These views have been confirmed by the judicial committee of the Privy Council in a judgment on *Loch v John blackwood*, 1924 AC 783, in the course of which the authorities were carefully reviewed. This judgment is very important and leading one. It must therefore now be taken as established that the just and equitable clause confers upon the court a separate ground of jurisdiction to make-up to winding-up order. The order under this clause rests upon the opinion of the Court to be formed on the circumstances of the case whereas the previous clauses each prescribe certain definite conditions and are quite different in character. The court will not be fettered in forming its opinion under this clause (i.e. clause-VI) by the necessity of the finding the existence of the facts analogous to those which constitute the previous grounds. The aforesaid Privy Council case in *Loch V. John Blackwood Ltd*. 1924 A.C. 783, has been considered and followed in a recent case decided by The Supreme Court of India, vide AIR 1956 SC 213: Rajahmundry Electric Supply Corporation. vs. Nageswara Rao. Besides, the law is thus stated in Halsbury's Laws of England, 3 Edition, Vol.6, p.534, para 1035: The terms "fair and equitable" in the statute outlining the reasons for a court's winding-up are not to be interpreted in the same way as the statute's earlier phrases. This law has been referenced and used.

Before the Companies Act 1994, the English Companies Act 1913 was enforced in Bangladesh. Section 38 and 246 of the Companies Act 1913 deals with the jurisdiction of the company court. In *Maqbul Ahmed and another v Ahmed Impex (Pvt) Limited and others*[157] it was held

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[156] *re Yenidje Tobacco Co* (1910) 2 Ch 426 Para 10
[157] 1 BLC (AD) 121

that as the Government has not empowered any District to exercise any of the jurisdictions under the Companies Act the High Court Division remains the only Court having jurisdiction under the Companies Act. While a single company Judge of the High Court Division is exercising the power under section 38 of the Companies Act an appeal from its decision has to be taken by way of leave to appeal to the Appellate Division under Article 103(1) of the Constitution but the grounds of such appeal will be in accordance with the Article 103(1) of the Constitution. The Division Bench exceeds its jurisdiction in entertaining an appeal against the entire judgment of the learned Company Judge without regard to the proviso to section 38(3) of the Act and decided the fact wrongly for which the impugned judgment is null and void having been passed completely without jurisdiction, a classic case of coram non judice.

The Company's Act does not make the Government the authority to prescribe the appellate forum and the Government has also framed no rules as far as the appellate forum is concerned. The rule making power of the Supreme Court does not extend to providing an appellant forum from the decision of a single Company Judge of the High Court Division acting under section 38 of the Act. The referred cases on this point are *Dacca Jute Mills Ltd. vs Satish Chandra Banik*, 19 DLR 735; *Jabed Ali Sarker vs Dr. Sultan Ahmed*, 26 DLR 196; *Watson vs Winch* (1916) 1K.B.688; Maxwell Interpretation of Statute (12th Edition) at page 18.

In the case of Tropical Homes 48 DLR (1996) 576 the English cases of Scott v Scott (Frank F) London Ltd 1940 Ch 794, (1940) 3 All ER 508 (CA) was referred. Along with numerous English cases and legal doctrinal principle referred in Bangladesh these are some of the most influential English case laws that are referred to in Bangladesh Company Law and are considered to be a part of the legal jurisprudence of Bangladesh. Considering the numerous applications of English common law cases and English doctrines in the higher judiciary clearly sketch the deep-rooted impact of English legal system on Bangladesh judiciary. It is also mentionable that more than hundreds of legislations which was promulgated by British Government is still in force including some major Acts such as Code of Criminal Procedure Act 1898, the Penal Code1860, the Contact Act 1872.

3.5 Conclusion

The first English law was introduced in the land of Bangladesh (Former East Pakistan and

British India) was in 19 September 1836 'The Districts Act', which is still in force.[158] Since then until the year of 1947 which named English Period a large number of legislations had been introduced over the centuries. Most of this legislation remails in force. However, certain legislation has been amended.[159] With Bangladesh's economic liberalisation, the differences between Bangladeshi corporation law and its English counterpart became more obvious. In particular the scope of corporate law has expanded beyond the Companies Act, 1994 to include securities regulations related to or issued by Bangladesh's Securities and Exchange Commission, the country's securities regulator, as a result of the growth of foreign investment and the country's capital markets. While English laws continued to have some impact in this stage, Bangladesh position on director duties regime still has a long way to go before it reaches the required level. To this end, in chapter 4 and chapter 5 the author will investigate not only the recognition and legal framework of director duties of care but also the enforcement of director duties of care with a view to fill the gap in Bangladeshi director duties regime.

[158] The Districts Act, 1836 (Act of XXI of 1836)

[159] Gazi Shamsur Rahman, '*History of the Laws of Bangladesh*' Original title in Bangla '*বাংলাদেশের আইনের ইতিহাস*' (Khoshroj Kitab Mahal, Dhaka, Bangladesh, 2016) 11

Chapter 4 An Appraisal of Directors' Duty of Care

4.1 Introduction

This chapter examines the duty of care owed by directors within Bangladeshi law and identifies any gaps or ambiguities. The primary method of rational assessment of Bangladeshi law is in compared with the UK law. In terms of organisation, the chapter is separated into three primary divisions. First, an examination is conducted of Bangladeshi law and the UK's legal recognition of the responsibility of duty of care. An inquiry into the standard of care required is covered in the second part. The factors affecting the court's determination of what constitutes a breach of an objective level of care are next looked at. To clarify the elements of the duty of care obligation, the primary underlying responsibilities of directors i.e. keeping oneself informed, monitoring, and abstain undue dependence on others—will be discussed in this section.

The director's actions may be divided into two categories: taking steps and forming decisions. Even though a choice will typically be reached by consensus among the members of the board of directors during the meeting, an action will frequently be taken by an individual director.[160] In the framework of corporate governance, a system needs to be implemented in order to address the issue of guaranteeing that those held to account for the management of the company must have appropriate levels of diligence and care. They must act on the basis of correct information, and give careful consideration to the likely outcome of their actions and decisions.[161] One of the most common types of improper behaviour on the part of directors is known as "shirking," and it occurs when directors avoid making the necessary efforts involved in making a decision or taking an action.[162] A legal requirement to exercise a specific degree

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[160] The acquisition or disposal of corporate assets is an example of the kinds of activities that directors typically take.

[161] Carsten Gerner-Beuerle, Philipp Paech and Edmund Phillipp Schuster, 'Study on Directors' Duties and Liability' (A paper prepared by LSE for the European Commission DG, April 2013) 74 < http://eprints.lse.ac.uk/50438/1/__Libfile_repository_Content_Gerner-Beuerle,%20C_Study%20on%20directors%E2%80%99%20duties%20and%20liability(lsero).pdf > accessed 4th September 2019.

[162] See Alessio Pacces, *Rethinking Corporate Governance: The Law and Economics of Control Powers* (Routledge 2012) 99; Micheal C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 313; Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford, Clarendon Press 1997) 123.

of care when managing the company's activity is imposed upon directors by law to reduce the likelihood that directors may participate in shirking their responsibilities.

The main reason for concern regarding the duty of due care is the concept that the directors' duty of care is a type of regulatory strategy that leaves the exact choice of compliance to adjudicators after the facts.[163] However, in order to ensure that this does not have a negative impact on overall accountability, the law needs to play a pivotal part in clarifying the nature and scope of the duty that is being imposed. There is still ambiguity in the law when it comes to the exact standards of conduct that the obligation of care places on directors and the existence of extra criteria pertaining to the director's responsibility when it comes to Bangladeshi law. This uncertainty can be attributed to the fact that Bangladeshi law does not have a clear definition of the duty of care.

These questions include whether or not there are additional standards of the director's liability. In addition, directors can take on a variety of tasks and responsibilities, depending on the style of directorship, as well as the kind of company and its size.[164] The most important thing to keep in mind is that because directors are responsible for a wide variety of tasks, the court must take into account the breadth of their responsibilities when determining the appropriate level of care.[165]

However, as Finch pointed out '[a] dominant view on how to develop such duties has nevertheless yet to emerge'.[166] The concerns that were just mentioned do not provide a straightforward basis for change, which is one of the obvious challenges. It is not necessary for

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[163] John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems and Legal Strategies' in Reinier Kraakman and others. (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, Oxford, OUP 2009) 39–40

[164] This remark was made during the topic about reforming the duty of care that directors have in the UK. See, The Law Commission and the Scottish Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating and Statement of Duties* (Law Com No. 261 and Scot Law Com No. 173, September 1999) para 5.15 <http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc261_Company_Directors.pdf > accessed 4 September 2019.

[165] During the discussion on the duty of care reform that was taking place in the UK, this remark was made. See, C. A. Riley, 'The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard' (1999) 62(5) Modern Law Review 697, 699.

[166] Vanessa Finch, 'Company Directors: Who Cares about Skill and Care?' (1992) 55(2) Modern Law Review 179, 200–204.

us to reject such leniency simply because the current legislation continues to be "lenient" toward directors. This is true regardless of the degree to which the law is "lenient." To be sure, if we were only concerned with maximising the protection that was provided to shareholders, creditors, or whoever else, then we might appropriately view the duty in strictly political concepts, working out that methodology of the duty that was most likely to maximise the protection that was provided to shareholders, creditors, or whoever else.[167] However, this would not provide any reason as to why the law should be utilised in such a partisan manner, nor would it provide any explanation as to how we could justify to the director the imposition of such a responsibility.

4.2 The Legal Basis for Directors' Duty of Care

Almost all jurisdiction around the globe has a similar view that directors have responsibilities towards the corporation and its members, shareholder. It is also universally accepted that in the event of the breach of that duty is referred towards the directors of the company.[168] This section revisits the duty of care owed by directors of the company, considering Bangladesh as well as the United Kingdom.

4.2.1 The Recognition of The Duty of Care in The United Kingdom

In accordance with subsection (1) of section 174 of the CA 2006, which establishes the directors' duty of care, directors are required to carry out their responsibilities with due care, skill, and diligence. Even before the Companies Act of 2006 was enacted, it was generally accepted and established principle that directors bear this kind of commitment to the company they served. One of the main elements in proving that directors had a responsibility of care and

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[167] J.E. Parkinson, *Corporate Power and Responsibility* (Oxford: Clarendon Press, 1993); A.J. Boyle, 'Draft Fifth Directive: Implications for Directors' Duties, Board Structure and Employee Participation' (1992) 13 The Company Lawyer 6; A.S. Sievers, 'Farewell to the Sleeping Director – The Modern Approach to Directors' Duties of Care, Skill and Diligence' (1993) 21 Australian Business Law Review 111; Sarah Worthington, 'The Duty to Monitor: A Modern View of the Director's Duty of Care' in F. Patfield (ed), *Perspectives on Company Law: 2* (London: Kluwer Law International, 1997); the Rt Hon Lord Hoffman, 'The Fourth Annual Leonard Sainer Lecture' (1997) 18 The Company Lawyer 194.

[168] See John Armour, Luca Enriques, Henry Hansmann and Reinier Kraakman, 'The Basic Governance Structure: The Interests of Shareholders as a Class' in Reineier Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford, OUP 2017) 49.

competence was the common law, which also played a significant role in defining and acknowledging this duty. In *Re City Equitable Fire Insurance Co.,*[169] it was stated, that directors are expected to not only "use some degree of both competence and diligence" to protect themselves from legal responsibility for failing to fulfil their responsibilities but also to act in good faith It is essential to emphasise the fact that the duty of care and loyalty each gave rise to their distinct bodies of case law. In the course of history, responsibilities of loyalty[170] were formed by norms and principles of fiduciary relationships, whereas duties of care are based on common law concepts of negligence.[171] In the current literature of the CA 2006, there is no provision for distinguishing between fiduciary obligations and the responsibility of care. The CA 2006 lists the requirement to use reasonable care, which is one of the seven general duties laid out in Chapter 2 of Part 10. In spite of this, the CA 2006 renders it quite evident that there is no fiduciary duty associated with the duty of care. This is due to the Act's provision that the duty of care, which is regulated by the relevant common law standards, is not covered by the fiduciary solutions pertaining to legal duties that are outlined within Chapter 2 of Part 10 of the Act.[172] Remember that even with the definition of directors' responsibilities, the common law still has a big say in how the broad duties set forth in the Act are interpreted and carried out.[173] There is also the possibility of circumstances in which the duty of care coincides with several other broad statutory responsibilities that directors have.[174] In addition, some situations may arise in which the duty of care and many other broad statutory requirements placed on directors conflict with one another. To put it another way, section 179 of the CA 2006 specifically acknowledges the possibility of violations happening in more than only one duty.

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[169]Re City Equitable Fire Insurance Company Ltd. (1925) Ch 407 (CA)

[170] Company law literature have traditionally emphasised fiduciary duties as a central feature of the obligations.; see, for example, Paul L. Davies, Sarah Worthington and Christopher Hare, '*Gower Principles of Modern Company Law'* (11th edn, London, Sweet & Maxwell 2021) and Professor John Birds and others, *Boyle & Birds' Company Law* (10th edn, Hampshire UK, Jordan Publications, 2019)

[171] Davies, Worthington and Hare (n 2) 249.

[172] See section 178 of the CA 2006. In the event that a breach of duty of care occurs and fiduciary remedies (such as rescission or restitution) are not available to correct the situation, the offsetting remedy is the one that will be granted to the corporation. See, for example, *Bristol and West Building Society v Mothew* (1997) Ch 1, 17–18.

[173] The Company Act 2006, s 170(4)

[174] See the Explanatory Notes to the Companies Act 2006, para 311 < http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpgaen_20060046_en.pdf > accessed 5th March 2019.

4.2.2 Bangladesh's Recognition of the Duty of Care

The company law of Bangladesh is fraught with uncertainty since there is no suitable regulation of directors' obligations, and there is also a lack of clear judicial advice. Both of these factors contribute to the problem. It is arguable that norms and regulations for legal culpability that are not well adapted could give directors with incentives to operate in a manner that is both disloyal and inept. The specific statutory obligations that are required of company directors are not specified in any of the company statutes that apply in Bangladesh, including the Companies Act of 1994 (Act 1994). On the other hand, the articles of association of companies in this country always include a clause that is analogous to the one described above, and in such a scenario, the board of directors is vested with the primary managerial responsibilities. It is in the best interest of the firm for the directors to make use of their power and fulfil their duties as trustees in a manner that demonstrates both an objective sense of judgement and complete independence.

4.2.3 Statutory Framework

The following statement accurately reflects the reality of directors' responsibilities and the manner in which they must be fulfilled in the context of Bangladesh:

"The Companies Act, 1994 provides for many stringent rules in respect of any negligence, default, breach of duty or trust on the part of director, manager or officer of a company. But experience would appear to show that these are more honoured in the breach than observance."[175]

It has been established that clearly articulated duty of loyalty by board members to the company and to all shareholders is a key to protect non-controlling shareholders who do not have enough

[175] Muhammad Zahirul Islam, Mohammad Nazrul Islam, Sumon Bhattacharjee and A.K.M. Zahirul Islam, 'Agency Problem and the Role of Audit Committee: Implications for Corporate Sector in Bangladesh' (2010) 2(3) International Journal of Economics and Finance 177, 184

safeguards against potential abuse.[176]

The Companies Act, on the other hand, includes provisions with the purpose of preventing irresponsible abandonment of obligations by directors or the piecemeal assumption of liability by directors. Section 96[177] of the Companies Act 1994 (CA 1994) requires that board meetings to be held every three months whereas section 102 provides "*that save as provided in this section, any provision, whether contained in the articles of a company or any contract or otherwise, for exempting any director...from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void, provided that a company may, in pursuance of any such provision as aforesaid, indemnify any such director against any liability incurred by him in defending any proceeding against him in which judgment has been given in his favour.*"[178]

It is forbidden for a director to occupy any office that results in financial gain for the company, with the exception of the roles of managing director, manager, legal or technical adviser, or banker, according to Section 104.[179] According to section 105, a director of a company, the company of which he is a partner, or any partner of such firm, or the private company of which he is a director or member, shall not enter into any contract for the sale, purchase, or supply of goods and materials of the company, unless they have the consent of the board of directors to do so. This provision applies even if the director is also a partner in the private company.[180] Albeit with the approval of the members in general meeting, a public company or the subsidiary of a public company is not allowed, under the regulations of Section 107, to sell or dispose of the undertaking of the company or remit any debt due by the director without the permission of the shareholders.[181] In relation to the violation of the duties that were referenced, Section 108 of the Companies Act of 1994 stipulates that the office of a director must be vacated in those circumstances, the majority of which take place if the director acts in violation of the

[176] Louis Bouchez, 'Principles of Corporate Governance: The OECD Perspective' (2007) 4(3) European Company Law 109, 112.
[177] The Companies Act 1994, s 96
[178] ibid, s 102
[179] ibid, s 104
[180] ibid, s 106
[181] ibid, s 107

statutory control that was discussed earlier.[182]

There are qualifications that prospective managing directors must have, as outlined in Section 109. It is against the rules for a public company or the subsidiary of a public company to appoint someone to the position of managing director if that person already serves in that capacity for more than one company. In addition, the company's general meeting is where the nomination of the managing director should be approved before it is made official. The limits outlined in this section may be loosened by the government. Please take note that the restriction on the number of managing directorships a person can hold is not applicable in the case of a private company. As a result, if there is a group of private companies, then the same person may be the managing director of all of the companies in the group. This restriction does not apply in the case of a public company.[183]

According to the provisions of Section 112, no director of a company may, in connection with the transfer of the whole or any part of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement from office from such company or from the transferee of such undertaking or property or from any other person, unless particulars with respect to the payment have been disclosed to the members of the company and approved by them in general meeting. This is because Section 112 states that the members of the company are required.[184]

According to the provisions of Section 113, a director is not eligible to receive any payment as compensation for loss of office in connection with the transfer to any person or all or any of the shares in a company, provided that the handover is the result of an offer made to the overall body of shareholders, a deal offered by a body corporate with the view of the company becoming a subsidiary to such body corporate, or an offer made by or on behalf of an individual with the view of obtaining the right to acquire control of the company. In It is possible for a director to receive payment from the transferee; however, he is obligated to take reasonable means to obtain that precise information regarding the payment intended to be made by the transferees, etc. be supplied with the notification of the offer made for the shares. In the event that it is not carried out, any sum that he receives must be placed in trust for the benefit of any

[182] ibid, s 108
[183] ibid, s 109
[184] ibid, s 112

person who has sold their shares in response to the offer that was made.[185]

In accordance with the provisions of section 114, the relevant director is prohibited from taking the money in an indirect manner, which would be in violation of sections 111 to 113. Every company is required to keep a register of its directors, managers, and managing directors according to Section 115 of the Act.

According to the provisions of Section 130, any director who is directly or indirectly concerned or engaged in any contract or arrangement joined into by or on behalf of the company is required to disclose the nature of his interest at the meeting of the directors where the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest etc., whichever comes first. This requirement applies to any director who is concerned or interested in any contract or arrangement entered into by or on behalf of A general notice that a director is a participant of any specified firm or is a director of any specified company and is regarded to be interested in any subsequent transaction with such firm or company will be regarded as a sufficient notice for the purpose of the section. This notice must state that the director is regarded to be interested in the transaction.[186]

A director who is concerned or interested in a contract or arrangement in any way, whether directly or indirectly, is barred from voting on that contract or arrangement under Section 131. His attendance at such a meeting will not count toward establishing a quorum for the purposes of the proceedings, nor will his vote be taken into consideration in the decision-making process.

The interests of Bangladesh's minority shareholders were taken into consideration when drafting Section 233[187]of the Companies Act of 1994. This section states that those who are

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[185] ibid, s 112
[186] ibid, s 131
[187] ibid s 233 states: "Power of Court to give direction for protecting interest of the minority-*(1) Subject to fulfilment of the conditions of the required minimum as specified in section 195 (a) and (b) any member or debenture holder of a company may either individually or jointly bring to the notice of the court by application that- (a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest; or (b) the company is acting or is likely to act in a manner which discriminated or is likely to discriminate the interest of any member or debenture holder; (c) a resolution of the members, debenture holders or any class of them has been passed or is likely to be passed which discriminates or is likely to discriminate the interest of one or more of the members or likely to debenture holder: and pray for such order, as in his or their opinion, would be necessary for*

not in grasp of the management of the company should have a direct mode of complaint to the court if they can show that the affairs of the company are being run in a manner that is detrimental to the interests of the company. This section also states that those who are not in control of the management of the company should have a direct mode of complaint to the court.

Section 233, when combined with Section 195, [188] states that holders of one-tenth of the shares in a company with share capital and one-fifth of the members in a company without share capital are eligible to apply. While in England, any shareholder may file a derivative action under Section 11 of the Company Act of 2006. [189] The court concluded in Nahar Shipping Lines vs Homera Ahmed that a remedy under Section 233 of the Companies Act 1994 can be granted only if the directors acted in breach of duty or if the company violated any of its articles or any relevant agreement. [190] Subsection (3) of Section 233 mentions remedies. [191]. According to an Appellate Division decision, the company court may make any order prayed for or deemed appropriate, including a direction to cancel or modify any resolution or transaction, or to regulate the conduct of the company's affairs, or to amend the provisions of the memorandum or articles of association. [192] Furthermore, under Section 233, the company court has been given jurisdiction to issue any order or orders to protect the interests of minority shareholders. [193]

Similarly, the Act of 1994 does not set a comprehensive derivative action system or statutory director responsibilities structure that might increase directors' responsibility to the firm and its shareholders, especially minority shareholders. Given the potential role that derivative actions play in discouraging directors from breaching their duties and protecting companies and shareholders. This method of enforcing violations of directors' obligations will not include a

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safeguarding his or their interest and also the interest of any other member or debenture holder."

[188] The Companies Act 1994, s 195, Investigation of affairs of company by inspectors: - "*The Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Government may direct-*
(a) in the case of a company having a share capital, on the application of members holding not less than one-tenth of the shares issues;
(b) in the case of a company not having a share capital, on the application of not less than one-fifty in number of the person on the company is register of members;
(c) in the case of any other company, on a report by the Registrar undersection 193(5)."

[189] The Company Act 2006, s 260

[190] 56 DLR (AD) (2004) 36.

[191] The Companies Act, 1994, s 233(3)

[192] *Government of Bangladesh & Another v Sheikh Munsur Rahman* [2005] 10 MLR (AD) 74

[193] *Kader Textiles v Lehajuddin Miah* [2006] 58 DLR (AD).

mechanism that incentivizes directors to fulfil their responsibilities by making them answerable for unethical behaviour and so increases the likelihood of directors' compliance if derivative actions are not accessible. Without this mechanism, this system of enforcement that punishes violations of directors' duties and obligations will not succeed in producing incentives for directors to fulfil their responsibilities. The limits and deficiencies of other key means of oversight and accountability in Bangladesh actually reinforce the need for appropriate laws regarding directors' obligations and derivative actions.

The aforementioned provisions in the Act relating to the activities of a director and the constraints thereon have been introduced so that a director would not act improperly when interacting with the money that belongs to other people.

4.2.4 Contracts with The Company

The obligations that are expected of a director in Bangladesh are measured against the same criteria that are used in England and the other commonwealth countries. Directors are obligated to act in the best interests of the company at all times, whether they are interacting with the company directly or acting on its behalf, because they are fiduciaries. They are obligated to operate in good faith, doing what they consider to be in the company's best interests at all times. They are obligated to use their authority for the specific purpose for which it was granted to them and not for any other purpose, despite the fact that they may sincerely feel that using their authority in this manner would be in the company's best interest. Any contract that the board of directors enters into on behalf of the firm with one of their own number is null and void due to the trustee-like role that directors have.

The Act of 1994 places some regulations and constraints on the contracts that can be made between a company and its directors. Before a director can engage into a contract for the sale, purchase, or supply of any goods and materials with the firm, the director is required by Section 105 of the CA 1994 to obtain the consent of all of the other directors. At the meeting of the board at which the decision to enter into a particular contract or arrangement on behalf of the firm is made, a director is required by Section 130 of the CA 1994 to disclose any interest he has in that particular contract or arrangement.

It is against the law for an interested director to vote in a meeting according to Section 131 of

the CA 1994. In the absence of a stipulation to the contrary, a director will not be removed from his or her position even if there is a conflict of interest regarding contracts with the company. It was decided that the director of one company who was also the managing director of another firm and was only paid a salary should not be disqualified from serving as a director of the first company on the grounds that he had a financial interest in contracts with the second company. A violation of the statutory provisions, on the other hand, immediately triggers the application of the fundamental principle of equity, which means that the contract can be nullified by the company and that the profits made by the interested director are subject to reimbursement. This particular case included a violation of the provisions for disclosure contained in the Articles, and the repercussions of failing to observe a statutory provision are unlikely to be as limited as those in this instance.

According to Section 108(e) of the Act of 1994 and Regulation 78 of the First Schedule to the Act of 1994, the director's office must be vacated if, among other things, the director accepts or holds any office of profit under the company other than that of a managing director or manager or legal or technical adviser or a banker without the sanction of the company in general meeting. This provision applies only if the director is not a managing director or manager or legal or technical adviser or banker.

4.2.5 Fiduciary Agents

It has been more than 150 years since British justices declared that the trustee-like status of directors was liable to vitiate any contract, which the board entered into on behalf of the firm with one of its number. The contract in question was with one of the directors. A corporate body can only take action through its agents, and it is, of course, the responsibility of those agents to take actions that are optimised to advance the corporate interests of the corporation whose business they are conducting. This fundamental idea has been given concrete form in the statutes that have been enacted across the sun-continent. The Act of 1994 includes sections 105, 130, and 131 that carry out the constraints on the rights of directors when entering into contracts or arrangements that concern the company. According to the section 105 of the CA 1994 it was states that a director who has an interest of this kind in a contract or arrangement with the company is required to disclose the nature of that interest, and they are also

disqualified from voting on that agenda while the board are taking decision through vote.

According to the language of section 131, the word "arrangement" does not appear to cover a general framework of the type within which, at the period the arrangement is approved by the board of directors, no right or liability accrues or is incurred by the members of the company, the directors, or the company itself. This conclusion can be drawn from the fact that the word "arrangement" does not cover a general scheme of this type. The word "arrangement" suggests a transaction in which a director immediately becomes interested, in that he either acquires some of a certain company or enables members of the company to have their dealings in the future registered with the company. However, it was not until such registration took place that any member became interested in the scheme that was approved by that resolution, and it was not a scheme under which any one, in his individual capacity, or any director in his capacity as a company official, could become interested in the scheme Because of subsection 131, the California Business and Professions Code of 1994 does not apply to private companies (3).

4.2.6 Loans to Directors

In the same way that the Sarban Oxley Act of 2002 in the United States bars lending money to any executive, Section 103 of the Companies Act of 1994 in Bangladesh does not allow loans, guarantees, or securities to be given to directors. In addition, Section 108(1)(g) stipulates that a director's office must be vacated in the event that the director, any firm in which he is a partner, or any private company of which he is a director accepts a loan or guarantee from the company in violation of Section 103. This provision applies to both public and private companies.

If the loan is approved by both the board of directors and the general meeting of the company, and if it does not exceed fifty percent of the paid-up value of the director's shares that are held in his own name, then a private corporation is allowed to lend or guarantee the loan. Every person who is a party to such a contravention may be subject to a fine of five thousand taka or simple imprisonment for six months in lieu of the fine if they are found guilty of violating section 103. This is in addition to the possibility that the director's position will be vacated if the section is violated. In addition, Regulation 78 of the First Schedule to the Act stipulates that a director's position must be resigned if the director receives a loan from the company for which the director is responsible.

4.2.7 Corporate Governance Code

Despite the fact that the Bangladeshi corporate code does not include the directors' duty of care directly, the situation is very different for companies that are traded on the Bangladeshi stock market. On 3rd June 2018 in exercise of the power conferred by Section 2CC of the Securities and Exchange Ordinance, 1969[194], the Security Exchange Commission (SEC) of Bangladesh issued Corporate Governance Code, which is mandatory for all, listed companied in both stock exchange in Bangladesh namely Dhaka Stock Exchange and Chittagong Stock Exchange. In the preamble of this very code states that *"...these conditions or Code are imposed on 'comply' basis; the companies listed with any stock exchange in Bangladesh shall comply with these conditions or Code in accordance with the condition No.9*."[195]

Few restrictions have been included in the Corporate Governance Code in governing Directors of listed companies from Bangladesh. These companies are located in Bangladesh.

Condition No.5 the director reports to Shareholders are clearly a director duty, which binds directors to report including risk and profit of the company's business, related party transactions, any extraordinary activities and so on.[196]

In addition, Condition no. 7 stipulates the code of behaviour for the Chairman, along with the other members of the Board, and the Chief Executive Officer (CEO). The seventh pre-condition in particular was stated —

"(a) The Board shall lay down a code of conduct, based on the recommendation of the

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[194] The Securities and Exchange Ordinance 1969, s 2(cc) - "Commission" means the Securities and Exchange Commission constituted under the Securities and Exchange Commission Act, 1993 (Act No. 15 of 1993)]

[195] Corporate Governance Code 2018, Preamble.

[196] See, The Corporate Governance Code (2018) Condition 5, *"The Directors' Report to Shareholders: The Board of the company shall include the following additional statements or disclosures in the Directors' Report prepared under section 184 of the Companies Act, 1994 (Act No. XVIII of 1994):*
(i) An industry outlook and possible future developments in the industry;
(ii) The segment-wise or product-wise performance;
(iii) Risks and concerns including internal and external risk factors, threat to sustainability and negative impact on environment, if any;
(vi) A detailed discussion on related party transactions along with a statement showing amount, nature of related party, nature of transactions and basis of transactions of all related party transactions;

Nomination and Remuneration Committee (NRC) at condition No. 6, for the Chairperson of the Board, other board members and Chief Executive Officer of the company;

(b) The code of conduct as determined by the NRC shall be posted on the website of the company including, among others, prudent conduct and behaviour; confidentiality; conflict of interest; compliance with laws, rules and regulations; prohibition of insider trading; relationship with environment, employees, customers and suppliers; and independency."[197]

In addition to that, the code also discussed the various other responsibilities. Reporting to Shareholders and General Investors - *"(7) Reporting to the Shareholders and General Investors. Report on activities carried out by the Audit Committee, including any report made to the Board under condition No. 5(6)(a)(ii) above during the year, shall be signed by the Chairperson of the Audit Committee and disclosed in the annual report of the issuer company."*[198]

Regarding the nomination process and the recruitment of new members, Directors are directly tied to and responsible for the committee. In Condition 6(1) of the CGC 2018 stated as follows: *"6. Nomination and Remuneration Committee (NRC). (1) Responsibility to the Board of Directors*
(a) The company shall have a Nomination and Remuneration Committee (NRC) as a sub-committee of the Board;
(b) The NRC shall assist the Board in formulation of the nomination criteria or policy for determining qualifications, positive attributes, experiences and independence of directors and top-level executive as well as a policy for formal process of considering remuneration of directors, top level executive;
(c) The Terms of Reference (ToR) of the NRC shall be clearly set forth in writing covering the areas stated at the condition No. 6(5)(b)."[199]

Directors are accountable not only for the keep the company website updated, which is mandated by Condition No. 8, but also for the reporting and compliance requirements

[197] Ibid, Condition 7
[198] ibid
[199] Corporate Governance Code 2018, Condition 6(1).

associated with corporate governance. Furthermore, Condition 9(1) states regarding the reporting and Compliance of Corporate Governance. This condition imposed and encapsulated that, on annual basis, the company is required to obtain a certificate regarding compliance with the conditions of the CGC 2018 from a practising Professional Accountant or Secretary (Chartered Accountant or Cost and Management Accountant or Chartered Secretary) other than its statutory auditors or audit firm. Further, it is mandatory to disclose this certificate in the Annual Report of the company. It is also required that if the directors of the company failed to obtain compliance certificate, they must disclose this to the directors' report. However, the company's statutory auditors or audit firm are exempt from this requirement.[200]

Being empowered by section 2CC of the Securities and Exchange Ordinance 1969, the SEC has issued a notification dated of 21st May 2019 imposed the condition of namely in condition (1) All sponsors and directors other than independent directors of a company listed with any stock exchange shall all time jointly hold minimum 30% (thirty percent) shares of the paid-up capital of the company. This condition was imposed by the Securities and Exchange Ordinance of 1969, which states that the consent to the issue of capital in Bangladesh or the public offer of securities for sale shall be subject to certain additional conditions. These conditions were put in place to protect investors and to facilitate the growth of the securities market in Bangladesh.

It is essential to keep in mind that the Bangladeshi corporate code does not stipulate that a person must possess a particular set of talents or a significant amount of experience in order for them to be eligible for becoming as a member of a board by election. The Bangladeshi corporate statute, refers to the company's articles of organisation in deciding whether or not a person is essential to possess certain credentials. There is a suggestion floating around that listed companies should choose a board member who is knowledgeable, has an understanding of finances, and is competent in the necessary areas. Concerning the boards, in particular the independent directors' qualification condition 2 and 3 of the CGC 2018, as well as the audit committee requirement that a specialist in financial and accounting concerns be appointed to the audit committee, these conditions can be found below. In addition, the necessity that a professional with expertise in financial and accounting issues be nominated to serve on the

[200] Ibid, Condition 9(1) (3)

audit committee is also incorporated into the conditions.[201]

4.2.8 Judicial Development

Along with this statutory scheme of director duties there are some judicial developments in this area. Such as in *Abdul Hafiz (Md) and others v Director General, Bureau of Anti-Corruption, Government of Bangladesh*[202] It was determined that the managing director of the firm was responsible for managing and exercising all of the company's power over a period of 14 years, despite the fact that he did not convene any board of directors' meetings or statutory annual general meetings. It was determined that the managing director of the firm was responsible for managing and exercising all of the company's power over a period of 14 years, despite the fact that he did not convene any board meetings or annual general meetings. The managing director controlled all the affairs of the company without participation of any other Director. The court concludes that it is an abuse of power of the position and clear breach of fiduciary duty of the directors.

Additionally, in the case of *Abdul Wadud (Md) v Heaven Homes Private Ltd and Others,*[203] the court took in a view that despite having irregularities in the appointment of the director, an act done by the board consisting of new director is valid. The court also confirms the question of legality of the board meeting without serving any written notice upon the directors (the petitioner in this case) which was enquired by section 95 of the Act. The same question was dealt in the case *Ittefaq Group of Publications Ltd. vs Arab Bangladesh Bank Ltd*.,[204] It has been decided that "written notice must be given to all of the members of the board of directors in order to hold a legitimate meeting of the board of directors." If someone is excluded, the decision that was made during that meeting will be considered void." However, the Court has inherent jurisdiction to pass appropriate order for ends of justice in a case in which non-compliance of the provision of law comes to its notice.

In the case of *Alhaj Md Mizanur Rahman Chowdhury and another v Commissioner of Custom*

[201] See Corporate Governance Code 2018, Condition 2 and 3
[202] 51 DLR (1999) 72
[203] 65 DLR (2013) 143
[204] 50 DLR 597

Bond commissionarate, Dhaka and Others[205] it was held that the company did not pay the duties and tax to the government revenue board. After the evasion of taxes these directors transfer their share to the new directors and new board has been constituted did not know anything about this tax avoidance. Long after the reconstruction of the board received a notice from the bank upon an order from the Commissioner of Customs Bond Commissionarate freeze all the company accounts due to evasion of government duties and tax. The court come to a view that in the event their liability is found to be negative the certificate case shall proceed against the company and its directors, who were at the helm of affairs of the company at the relevant time. If the liability is found against the current board the case will continue against them as well.

Further, in *Giasuddin Ahmed v Green Delta Insurance Company Ltd. and another*[206], Justice K M Hasan affirms that Given that the firm was a public one, the board of directors did not have the authority to exercise its discretion and refuse to register the transfer of shares as the company was public company. Whereas, in the case of *Md. Yameen and another v K.A. Baskar and others*[207] the appellate division has commented and held Directors serve as trustees of the business's money and are subject to legal action if they are found to have misappropriated corporate funds. These are the few examples of the judicial development of director duties along with the CA 1994, which have piecemeal approach toward director duties in Bangladesh.

Given that the firm was a public one, the board of directors did not have the authority to exercise its discretion and refuse to register the transfer of shares.

4.3 The Standard of Care: Current Company Law framework

The establishment of a standard of responsibility is one of the primary contributions that the legal framework governing the directors' duties has made to the business world, through which the inability of directors to carry out the duties that are incumbent upon them can be evaluated. The law offers an option between a norm that is totally objective or one that combines both

[205] BDHC (2012) 43
[206] 2004 24 BLD (AD) 27, 56 DLR(AD) (2004) 31
[207] (1986) BLD (AD) 305

subjectivity and objectivity, and this decision will be explained using examples from Bangladesh and the UK. Before beginning the comparison of the laws of Bangladesh and the United Kingdom, it is essential to keep in mind that the conduct of the directors themselves, and not the results that were achieved, should be the primary focus of the judicial investigation. Riley has offered a compelling justification for this, arguing that rather than the calibre of the directors' conduct, unfavourable outcomes like a company's share devaluation may be attributable to other noteworthy events (such stock market collapses). This is an essential point to emphasise.[208] Consequently, in order to mitigate risks, the court will assess the directors' actions to ascertain whether or not they fulfilled their duty of care to the shareholders. This assessment will happen regardless of how the directors' activities turn out.[209] Stated differently, the conduct of directors should be the basis for their liability for violating their duty of care, not the results of their decisions. This should be the case rather than the other way around.

4.3.1 Duel Subjective and Objective Standards: The Standard in the United Kingdom Law

The actions of directors are to be judged in accordance with a benchmark that is presented in subparagraph (2) of section 174 of the CA 2006. According to these guidelines, a sufficiently vigilant director is required to demonstrate both of the following qualities: (a) the general knowledge, skills, and experience in respect to the company that may reasonably be expected of a person carrying out the functions carried out by the director in connection to the company and (b) the director's broad knowledge, skills, and experience in the industry as a whole.

This section presents care standards that can be categorised both as objective and subjective.[210] Section 174(2)(b) pertains to a subjective norm of the basic knowledge, competence, and experience of the director who has been examined, whereas subsection 174(2)(a) offers an objective standard of a reasonable person operating to fulfil the job of a director. It would seem that to escape legal repercussions for a duty violation, directors must satisfy both of these

[208] C.A. Riley, 'The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard' (1999) 62(5) Modern Law Review 697, 704.
[209] Ibid, p. 707
[210] Keay (n 6) 212.

requirements. This implies that in addition to acting in a way that one would reasonably expect of someone with the necessary expertise and experience, directors must fulfil their directorship obligations (the objective requirement) in a way that makes sense to a reasonable person (the subjective requirement). To clarify, if a highly talented director merely meets the objective level of a reasonable person carrying out corporate responsibilities entrusted to them but does not conduct as a reasonably diligent person with their abilities, then the statutory criteria implicitly do not release them from liability. To put this another way: the statutory standards do not absolve highly skilled directors of liability.[211] Similarly, directors who are extremely inept and incompetent cannot avoid culpability by just acting in a way that a rational person of their expertise and experience would have acted in, if they do not behave in that way. This is due to the fact that unskilled and very incompetent directors are unable to determine what a reasonable person in their situation would do.[212] It is crucial to remember directors conduct and behaviour who are assigned to specialised positions, such as the post of finance director, will be evaluated based on the standard of competence that is anticipated of someone with the necessary training and credentials.[213]

It is essential to remember that section 174(2) lays out the common law standards of competence and care that were established in the landmark case Norman v. Theodore Goddard rulings.[214] and Re D'Jan of London Ltd.[215] Lord Hoffmann said in the judgments previously cited that section 214(4) of the Insolvency Act 1986 appropriately expressed the common law test of directors' duty of care. This section of the Act contained a dual objective/standard test[216] that used the objective standard, and also consideration the 'subjective circumstances' of the directors who were in question.[217]

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[211] Ibid 212-213.
[212] ibid
[213] See, for example, *Re Brian D Pierson Ltd.* (1999) BCC 26, 55.
[214] (1992) BCC 14
[215] (1993) BCC 646
[216] See *Norman & Anor v Theodore Goddard & Ors (1992) BCC 14,* 15; *Re D'Jan of London Ltd* (*1993) BCC 646,* 646. In accordance with the section 214 of the Insolvency Act 1986 which was legislate with a view to responsible directors for the benefit of the creditors. For more details see, Demetra Arsalidou, 'The impact of Section 214(4) of the Insolvency Act 1986 on Directors' Duties' (2001) 22(1) Company Lawyer 19
[217] Justice Ipp, 'The Diligent Director' (1997) 18(6) Company Lawyer 162, 166. It is important to point out that the language used in subdivisions (a) and (b) of section 174 of the Corporations Act of 2006 is almost identical to the language used in subdivisions (a) and (b) of section 214 of the Insolvency Act of 1986.

Company law matters were decided using quite diverse standards, both subjective and objective, prior to the cases of Norman and Re D'Jan of London Ltd. In particular objective standard of reasonable care was determined observing that an ordinary man will do the or expect to do the same manner or same behaviour on this kind of circumstances. While in terms of the subjective criteria, it was linked to the knowledge and experience of the director.[218]

On the other hand, the manner in which the law was implemented by courts gave rise to the suspicion that the first common law established an extremely lack of standard of care,[219] Consequently, directors may only violate their duty of care in cases where there was evidence of egregious carelessness,[220] or another viewpoint of one analyst, this constitutes 'the gravest negligence'.[221] The decision in Re Brazilian Rubber Plantations and Estates Ltd, which held that directors were not obliged to have any part in the management of the company's affairs, exemplified the courts' lax treatment of directors in these early instances. This decision served as an illustration of the courts' lax treatment of directors in earlier business issues.[222] Additionally, there was no requirement for specific training or knowledge of the company's operations to be able to hold a board position, and directors were never held responsible for their own poor decisions.[223]

Although it placed a fairly lenient duty of care on directors, the older case law was critiqued. Specifically, "no basic professional standard of competence was required of directors," meaning that they were not held to an objective standard of proficiency or obliged to show constant attention to the company's operations. This led to the criticism that the early case law was relatively undemanding.[224] It was a widely held assumption that incompetent and clueless directors were not held to a "floor" or "baseline" of care; if they lacked either skills or expertise,

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[218] See, for example, *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425, 437; *Re City Equitable Fire Insurance Company Ltd (1925) Ch 407 (CA),* 427–428.
[219] Davies, Worthington and Hare (n 2) 249.
[220] See, for example, *Charitable Corporation v Sutton* (1742) 2 Atkyns 400; *Re Brazilian Rubber Plantations and Estates Ltd* 425.
[221] Venessa Finch, 'Company Directors: Who Cares About Skill and Care?' (1992) 55(2) The Modern Law Review 179
[222] *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425, p 437
[223] ibid
[224] Andrew Hicks, 'Directors' Liabilities for Management Errors' (1994) 110(Jul) Law Quarterly Review 390, 390.

the likelihood was that the care received was of inferior quality. This belief persisted even though it was demonstrably false.[225] Furthermore, the court used to see directors in particular non-executive directors—as "amateurs" in the past.'[226] generally they only worked on a part-time basis,[227] they were under no obligation to show up to meetings[228] and whose responsibilities were perceived to be more specific.[229] In point of fact, previous case law mandated that non-executive directors only participate in the operation of the corporation to a limited extent,[230] and that the judicial approach is not compatible with the significance of his function in the corporate governance codes.[231] Prior to the major change brought about by Norman v. Theodore Goddard and Re D'Jan of London Ltd, it was claimed that the duty of care was applied too loosely, leading to the assumption that the standard of care was only subjective, even though the norm included a clearly objective component.[232] The Hicks claim that while the development of case law in the nineties may not have significantly altered the law, it did persuade the court to abandon the "minimalistic criterion of competence."[233]

That being said, this presents a serious question regarding the usefulness of incorporating the common law's duty of care into company law. Considering the conclusion reached in the Company Law Review Steering Group's (CLRSG) Final Report.[234] It was made clear in 2001 (the Final Report 2001) that to have more clarity on the kind of standards of care and expertise that the company's directors must possess. The greater the clarity the more enhanced standard corporate governance will be.[235] Additionally, as stated in the previously stated passage, it supports the state's implementation of a duty of care by promising to give directors "[a] clear, accessible, and authoritative guidance for directors on which they may safely rely... on the

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[225] David Kershaw, *Company law in context: text and materials*, (2nd edn, Oxford, Oxford University Press 2012) 425.When the author stated that the subjective standard may be regarded as the "amiable lunatic" standard, he or she was being somewhat provocative.
[226] C.A. Riley (n 207)
[227] Keay (n 6) 206.
[228] *Re Cardiff Savings Bank (Marquis of Bute's Case)* (1892) 2 Ch 100, 108–109
[229] *Re City Equitable Fire Insurance Company Ltd* (1925) Ch 407 (CA) 429
[230] Davies, Worthington and Hare (n 2) 249
[231] See, for example, *The Cadbury Report* paras 4.10–4.17
[232] cf (n 223) 393.
[233] ibid
[234] In 1998, the Companies Legislation Reform Steering Group (CLRSG) was founded in order to examine the company law in the UK.; see CLRSG, Modern Company Law for a Competitive Economy, *Final Report* (vol 1, June 2001) paras 1.1 and 1.3.
[235] Ibid para 3.7.

basis that it will bind the courts and thus be constantly applied".[236] There is no room for judicial discretion to depart from the law as it is stated in the CA 2006 since the standards of care and competence have been codified by statute, leaving no room for debate on the nature of the standard. It is crucial to remember, nevertheless, that the question of what standard of care must be shown cannot be stated statutorily; in other words, every case involving a section 174 infringement will be determined on its own grounds, taking the case's facts into account.[237]

4.3.2 Bangladeshi Law: Merely Objective Standards

The Director of responsibilities of care were specified and codified in legislation in the United Kingdom's 2006 Act more than a decade ago, however neither CA 1994 nor CGC 2018 in Bangladesh specified or codified director duties. In the United Kingdom, the 2006 Act was the relevant piece of legislation. Legislation in Bangladesh did not compel directors to handle their companies with caution and thoroughness in an explicit manner. On the other hand, the duties that currently exist can be derived from two different sources: the common law duty of care and legislation in Bangladesh.

To start, shareholders might specifically ask directors to behave diligently by including a phrase in the Companies Article of Association. This clause's binding effect on directors originates from the Bangladesh corporate laws, which gives the clause its authority.[238] It is essential, however, to point out that the Model Article and Memorandum of Association of Joint Stock Exchange Registrar does not contain any explicit set of references to the duties of care that directors are obligated to uphold.[239]

The question that was posed concerned the extent to which directors of a firm who violate these rules may be subject to enforcement measures., even in the absence of the presence of statute law and any specific obligation that is not mentioned in the article of association. This was a concern because the article of association does not mention any specific obligations. At the

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[236] Ibid para 3.9.
[237] Keay (n 6) 215.
[238] The Companies Act 1994, ss 17, 23
[239] Model Article of Association and Memorandum of Association is available in RJSC website. See Registrar of Joint Stock Companies and Firms (RJSC) < http://www.roc.gov.bd/ > accessed 21 February 2022

outset, statutory companies that are registered with joint stock companies are contacted in order to establish themselves.[240] The inquiry centred on the scope of enforcement proceedings that might be pursued against directors of a firm that violate, even in the absence of the presence of statute law and any specific obligation that is not mentioned in the article of association.[241]

To have a thorough understanding of Bangladeshi law's stance on the recognition of directors' duties of care, it is necessary to look at whether the court would infer such a responsibility into the company's articles of association. To have a comprehensive understanding of the legal landscape in Bangladesh, this is an essential first step. However, it is a truth that must be recognised that liability lawsuits under Bangladeshi law filed by joint stock corporations against their directors are not frequently disclosed. Furthermore, there aren't many examples in the record of directors of joint stock firms being held accountable for their deeds.[242]

There are very few judicial decisions are available to sue against the persons responsible for managing companies with limited liability. The study of joint stock companies might benefit from the reference to judicial decisions that were made about conflicts involving limited liability companies for two reasons. Firstly, the striking similarities between the two firms, particularly in terms of their core qualities. Secondly, the fact that directors of listed corporations and managers of limited liability companies carry out their respective tasks under a principal-agent relationship and are consequently subject to the same legal norm for conduct and assessment. To return to the subject of director duties of care in Bangladesh, this means that directors of companies in Bangladesh have no choice but to manage their organisations with the utmost care in order to avoid being held legally accountable for their actions.

It's possible that looking at public enforcement cases can assist us obtain a better understanding of directors' responsibilities in Bangladesh. The SEC has filed a lawsuit against the directors of Wonderland Toys Ltd. as well as the company's Issue manager, National Securities and Consultant Ltd., on the grounds that they allegedly "induced the investors into purchasing its

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[240] The Contract Act 1872 will be applicable in such case of the companies.
[241] The Companies Act 1994, s104
[242] Only a small number of decisions have been recorded on director duties in Bangladesh throughout the entirety of the years 1994 to 2019, when it comes to the quantity of judgments and principles that have been handed down in corporate affairs. See chapter 3.

shares by artificially showing a rosy picture of the company." The business decided to raise 50 million takas in an initial public offering. The company demonstrated in their prospectus that Wonderland's counterpart in Hong Kong had fulfilled their obligations under the joint venture agreement by providing them with the plant and machinery, and that all of the machinery had been put into operation. The case was initiated by the SEC on the basis of its investigation reports. According to the SEC's lawsuit, "all of these assertions are completely false, misleading, and an illegal attempt to gain by providing false information with the intention of attracting investors into buying its shares." It is possible to highlight here that for the past two years in a row, Wonderland has not generated any profits and has not paid any dividends.[243] Given this, each incidence of carelessness on the part of managers is one of the factors that makes them liable to the firm. In other words, even if the contract that regulates the firm makes no mention of it, the court feels that managers have an implied obligation to manage the company with a particular degree of care. Even if the direct reference was omitted, this is still the case. This leads to the same conclusion with regard to joint stock companies. The court will nevertheless anticipate the director to behave with diligence even if the company's articles of organisation do not expressly mandate it. This is due to the fact that the director will be held legally responsible for the company's misconduct, which stems from carelessness, and the court will thus require the director to act with diligence.

Second, despite the fact that the directors' duty of care is not mentioned specifically in the Bangladeshi corporate code, one may argue that the responsibility has been statutorily established in a vague and ambiguous way. That example, one may claim that the responsibility has been statutorily created since the corporate legislation implicitly compels directors to use reasonable care when administering the firm. It is undeniable that directors will not be immune from lawsuits in the event that the firm's management is flawed due to their own fault.

4.4 Elements That Affect the Determination of What Indicates a Violation of an Objective Standard of Care

It has been shown that because section 174 provides either an objective or a subjective standard, the duty of care in the UK includes a certain amount of objectivity**.** This is far more accurate

[243] For detail, see M S Rahman, 'Court Summons Wonderland Toys Directors for Alleged Deception: Fake IPO Info Make Investors Buy Scrips' (The Daily Star, Dhaka, 19 January 2001)

in Bangladesh, where the conduct of directors is typically evaluated through the use of a strictly objective test. There is a possibility that the objective standard of care could be called into doubt. To phrase the question another way, what kinds of considerations would the court take into account as a guide when deciding whether or not a director satisfies the requirements of the duty?

The issue of how much the court considers specific situations, such as each director's specific function, in determining directors' responsibility will remain unclear because there aren't many cases related to directors' duty of care breaches in joint stock companies that have been published in Bangladesh. The Companies Act of 1994 and the Companies and Governance Code of 2018 (CA 1994 and CGC 2018) should be kept in mind by Bangladeshi courts again when it is pertinent to the issue of what acceptable behaviours is anticipated from directors, despite the absence of legislative and judicial guidance. There is no doubt that one possible drawback to this proposal is that only firms registered on the Bangladeshi stock market are able to utilise the provisions of the CGC 2018, and non-listed companies are exempt from the legally obligatory regulations. Still, there are other restrictions as well. Despite the lack of legislative and judicial guidance, it is possible to make the argument that Bangladeshi courts should take into consideration the Companies Act of 1994 and the Companies and Governance Code of 2018 (CA 1994 and CGC 2018) whenever it is relevant to the question of what reasonable conduct is expected from directors. The fact that issues about companies listed on the Bangladeshi stock market are the only ones that can have recourse to the provisions of the CGC 2018 and that The idea that non-listed corporations are exempt from legally obligatory regulations may have certain limitations. However, this limitation is not the only one.

This is not the case with regard to the law of the United Kingdom, which has a tendency to be clearer on this matter than the law that applies in Bangladesh. The "activities carried out by the director in regard to the company" are something that the courts in the UK are entitled to take into account according to section 174 of the CA 2006.[244] In this sense, it is well-established by case law that the extent of the care obligation may change depending on the role of the concerned director. The case law has firmly demonstrated this acknowledgement;[245] i.e. in *Re*

[244] Section 174 of the CA 2006

[245] if section 174 of the Companies Act of 2006 continues to facilitate the growth brought about by the case of Norman v. Theodore Goddard and Re 'D Jan and continues to argue that the criterion of the common law duty of care should be followed. Also, in section 214(4) of the Insolvency Act of 1986, it

Barings plc,[246] Jonathan Parker mentioned the duty's scope cannot reasonably be created in a fashion that will apply to every circumstance since various circumstances may necessitate varying degrees of response or activity.' This is because different situations will call for different levels of action or reaction. It is common knowledge that the roles and responsibilities of directors can shift significantly depending on a variety of factors, such as the size and type of the organisation they oversee[247] and the type of directors (executive or non-executive).[248]

Following a discussion of the roles and responsibilities of directors, it is imperative to move away from the notion of collective board responsibility, which holds all directors equally accountable for corporate failure, and toward the idea of individual directors' functional responsibility, which bases directors' actions on the responsibilities assigned to them as well as their level of experience or expertise.[249] Even while the board acts and makes decisions as a whole, this suggests that each director's compliance with the duty to take reasonable care should be assessed separately. The judicial move more towards functional responsibility of individual directors has been noted in the UK literature on the mode of responsibility concerning directors' obligations. This shift allows the court to "to distinguish between directors as per their job descriptions," for example, a finance director and a non-executive director. This has been brought up in the literature on the manner of responsibility with reference to the duties of directors [250] Reed highlights the significance of functional responsibility, saying that the bar is significantly greater if the court assesses non-executive directors' actions based on collective obligation, taking into consideration the knowledge and expertise that are imparted as well as the level of caution necessary for efficient collective supervision.[251] According to Hoffman's point of view, in addition to putting non-executives at greater risk of legal action, the application of an excessively stringent standard to non-executive directors "pitted against the executives with their superior access to information and the

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signifies that it has been clearly established since the cases that were cited before that the objective evaluation needs to reference the roles and obligations of the directors. This provision was included after the cases were discussed.

[246] *Re Barings plc and others Secretary of State for Trade and Industry v Baker* (1998) All ER (D) 659.

[247] *Re City Equitable Fire Insurance Company Ltd.* (1925) Ch 407 (CA) pp.426–427

[248] C.A. Riley (n 207), 708

[249] This line of thinking has been advanced in the United Kingdom's legislation governing directors' duty of care, and it holds true in relation to Bangladeshi law as well. see Rupert Reed (n 250)

[250] Adrian Walters, 'Directors' Duties: The Impact of the Company Directors Disqualification Act 1986' (2000) 21(4) Company Lawyer 110, 113

[251] Rupert Reed, 'Company Directors: Collective or functional Responsibility' (2006) 27(6) Company Lawyer 170, 176.

familiarity with the corporate culture," is likely to deter truly independent people from accepting a position as a company director.[252] It is possible to conclude the arguments presented above that there is an essential need to move away from collective board responsibility and permit the functional responsibility of individual directors to be the basis of cases brought against directors for corporate failure. This is especially true in light of the significant role that non-executive directors play in the corporate governance process.

To continue, in accordance with the legal framework of Bangladesh, the management of the firm is the collective responsibility of the board of directors as a whole. In principle, the board's decisions and actions are supposed to be carried out collectively by all of its members. However, there are exceptions to this general rule in which the authority is delegated to specific directors. This model of responsibility may be found in company law, which frequently refers to "members of the board of directors" in regard to specific sections of the Bangladeshi corporate laws. This form of responsibility was developed in the United Kingdom. One glaring illustration of individual responsibility is the fact that the board has been given authorisation by the legislature to assign certain responsibilities to any of its members.[253] This suggests that individuals are responsible for carrying out the responsibilities that have been delegated to them. The Companies Act of 1994 gives the company and the shareholders the ability to sue any member of the board for any mistake made while the company was being managed if the error was caused by the board member.[254] In the event that the California Corporations Act of 1994 is violated, individual directors may be subject to the criminal sanctions that are included in this provision. Based on the examples that have been provided thus far, it is possible to draw the conclusion that the Bangladeshi courts are able to apply the duty of care at the individual level regardless of the collective nature of the board's behaviour. When determining whether or not there has been a breach of the duty of care, courts consider a number of significant elements to ascertain whether or not the company's directors violated in their responsibility to oversee the company's operations, stay informed, and refrain from relying only on others.

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[252] Lord Hoffmann, 'The Fourth Annual Leonard Seminar Lecture: The Rt Hon Lord Hoffmann' (1997) 18(7) Company Lawyer 194, 196.
[253] The Companies Act 1994, s 105
[254] Ibid s 233

4.4.1 The Obligations of Monitoring

It is essential to begin by stating that, from a purely pragmatic standpoint, the board is incapable of managing the company on a day-to-day basis and, as a general practice, delegates this responsibility to the executive directors as well as the staff.[255] As a result, both jurisdictions have acknowledged the board's outsourcing of its administrative responsibilities as a legitimate practise (the UK and Bangladesh).[256] It is crucial to remember that the delegation's scope in Bangladesh may include specific authority and duties, but it cannot encompass managerial duties in and of itself. For example, the Chief Executive Officer (CEO) or another board member may be granted authority to buy and sell real estate or get a loan. Furthermore, a corporation's shareholders have the power to assign particular duties or tasks to any person they want through the articles of association of the company. Similarly, in the UK, directors can transfer some responsibilities to managers who report to them below the board, but they cannot assign the management function itself in a fashion that releases them from complete responsibility.

Therefore, one of the most important jobs of the board is to keep an eye on how the company's management is running things. In both Bangladesh and the United Kingdom, which both have one-tier systems, the board is made up of both executives and independent directors. In both the Bangladesh CGC 2018 and the UK CGC 2016, the prevalent tendency is visible, which is to add more non-executive and independent members to the board of directors in order to boost the monitoring role of the board. This is done in order to improve corporate governance. Non-executive and independent directors have been regarded as a crucial monitoring tool for the purpose of ensuring that management is not misusing their power.[257] As a basic component of the directors' duties, [258] and the obligation of supervision entails the responsibility of regulating

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[255] Hoffmann (n 251)

[256] See The Companies (Model Articles) Regulations 2008 Part 2 and 5. In the UK, it is general practice of the board's administrative functions and its delegation. Similarly in Bangladesh Model Article of Association (pre-set format prescribed by the Registrar of Joint Stock Companies and Firms) allows board to carry on the administrative functions and its delegation.

[257] Wolf-George Ringe, 'Independent Directors: After the Crisis' (2013) 14 European Business Organization Law Review 401; Richard C. Nolan, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non- Executive Directors Following the Higgs Report' (2005) 6 Theoretical Inquiries in Law 413, 415 and 443–444; Donald C. Clarke, 'Three Concepts of Independent Directors' (2007) 32 Delaware Journal of Corporate Law 73, 84.

[258] Joan Loughrey, 'The Directors' Duty of Care and Skill and the Financial Crisis' in Joan Loughrey

company risk. Directors, specifically independent non-executives, are obliged to minimise the excessive risk-taking that corporations engage in.[259] As a result of the global financial crisis that occurred between 2007 and 2008, the efficacy of the monitoring role that company directors (especially independent directors) play has been called into question. This is because company directors failed to carry out effective risk monitoring within their respective companies, which either contributed to the financial crisis or made it worse.[260] It appears evident that it is in the company's best interests to guarantee that directors oversee the company's risk management.,[261] Inquire with the co-director and the executives or accountants for details,[262] In other words, the monitoring role compels directors to be active in dealing with the business and issues of the organisation.

When evaluating whether or not there has been a violation of the duties, the court will, complying the current state of the law in the UK, investigate the level of reasonableness in order to ascertain whether or not there has been a breach. The Judge stated in the case of *Re Westmid Packing Services Ltd*[263] that the director was bound to participate in the monitoring of the corporation alongside the other directors. It further stated that the director is not allowed to passed his control to his peers to look over the company's operations because that would violate the director's duties.[264] It is expected of the director to prevent other directors or top management from running the business as if it were their own and to deny them the opportunity to do so.[265] In *Re Barings plc*,[266] Leeson, a trader was in charge of the unauthorised trading activities that led to the collapse of Barings Bank. Three directors were named in this case for disqualification because they lacked the requisite level of competence in running the business, making them unqualified to serve as directors. The claim that the directors were unfit to serve as company directors served as the foundation for the lawsuit.[267] To be more explicit, legal action was brought against the three directors for their failure to keep an eye on the work that

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(ed), *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Cheltenham, Edward Elgar Publishing Limited, 2013) 21.

[259] cf Wolfe-Georg Ringe (n 256); Joan Loughrey (n 257)

[260] Ibid Wolfe-Georg Ringe, 403-404

[261] ibid 404-405

[262] Keay (n 6) 219

[263] *Re Westmid Packing Services Ltd (No. 3)* (1998) BCC 836

[264] ibid

[265] ibid 841-842

[266] *Re Barings plc and others Secretary of State for Trade and Industry v Baker* ((1998) All ER (D) 659.

[267] The facts of the case of *Re Barings plc* are written down as mentioned in the headnote of the case.

Leeson was doing. Jonathan Parker found[268] that the three directors should not have been allowed to be in charge of the company because they had broken their duty of care by not monitoring Leeson's trading operations in a reasonable manner and so were unfit to do so.[269] There was no imposition or enforcement of risk restrictions on Leeson's trade, there was no adequate analysis of how Leeson's operations had achieved high profitability,[270] and there was a failure to respond to avoid evident hazards, according to the various papers that were shown to the court.[271] In a nutshell, directors can be held accountable for a violation of their duty of care if they entirely relieve themselves from the responsibility to oversee the company's affairs and if they do not take the required actions to prevent evident hazards.[272] As Keay points out, simple oversights on the part of directors during the monitoring process make it much simpler to infer that they have been negligent.[273] Because of this, it is quite likely that passive directors will be held accountable.[274] Directors should thus take the appropriate steps to oversee the company's management and voice any questions or concerns they may have about certain management-related matters in order to protect themselves from legal liability.

A closer look of Bangladeshi company law reveals that, like its successor, the Companies Act of 1994 (CA 1994) does not specifically require a director to keep an eye on the reasonable administration of the company's operations. Nevertheless, it can be deduced from the articles of the new CGC 2018 that there is a legislative acknowledgement of the monitoring duty as an important component in a well-functioning corporate governance system. In contrast to the CA 1994, the new CGC 2018, which came into effect in 2018, mandates the establishment of an "audit committee" in every joint stock company.

Concerns may be voiced in respect to the duty of monitoring that directors are required to fulfil under Bangladeshi law as a component of directors duty of care. To begin, the Bangladeshi Companies Act of 1994 does not specify whether or not each director is required to keep track

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[268] The Court of Appeal upheld the ruling of Jonathan, see *Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker* (n 726) 524–525.
[269] ibid 569
[270] Part 3
[271] ibid
[272] ibid
[273] Keay (n 6) 221.
[274] Ipp mentioned about the directors should not shut their eyes and must observe what is happening within the company they are responsible. see Justice Ipp, 'The Diligent Director' (1997) 18(6) Company Lawyer 162, 164

of the actions of the company and those of his or her fellow directors in order to protect himself or herself from legal responsibility for a breach of duty of care. This would give rise to legal confusion regarding the extent to which courts will consider directors' competence with the duty of care for corporations exempt from the CA 1994's requirements when evaluating their compliance with monitoring responsibilities. This would have an impact on businesses that are exempt from the CA 1994's regulations. Second, even though the CGC 2018 establishes the responsibility of monitoring that board members are responsible for, as was indicated before, it limits this duty to the monitoring of senior managers that are below board level. It does not imply that the obligation should include the need that each director should be responsible for monitoring the behaviour of their co-director or ensuring that co-directors are properly performing activities that have been entrusted to them. It is plausible that the incapacity to offer a more expansive monitoring remit might incite directors to forego effective oversight in favour of tolerating their colleagues' behaviour—a subject that will be discussed in more detail later.

Third, it is widely acknowledged that directors may be held accountable for a violation of the duty to exercise reasonable monitoring if they neglect to carry out their obligation to monitor the company in the same manner that a reasonably prudent person would, even in the absence of judicial guidance on the subject. In this context, it is important to note that even if the board was held jointly accountable for overseeing senior management, individual board members should bear the responsibility for the board's oversight shortcomings rather than the board as a whole. This is because even if the board was in charge of overseeing senior management as a whole, it should be emphasised that even if the board was collective.

4.5 Conclusion

Directors of companies are the individuals accountable for the company’s overall management. They are obligated to conduct themselves in a manner that is most likely to advance the success of the company and to the advantage of its shareholders, arguably including stakeholders as well. They are also responsible to the company's employees, as well as the company's trading partners and the state. The Companies Act of 2006 in the United Kingdom was the first legislation of its kind, which formally codified the responsibilities of board members and introduced the idea of enlightened shareholder value. The only part of the directors’ duties that is covered by the responsibilities that are outlined in Chapter 2 of Part 10 of the UK Act is the

substantive nature of those responsibilities. On the other hand, Bangladesh's director duties regime is undeveloped and does not take into account the requirements that are placed on companies in the present era namely in the Companies Act 1994. This subject of law in Bangladesh is notable for being difficult to access and having a dearth of relevant material. In addition, the Bangladeshi Company Act of 1994 does not contain any well-ordered statement of the responsibilities of directors or the consequences of breaching those responsibilities. When all of this is taken into consideration, it is abundantly evident that the rules of the United Kingdom and Bangladesh regarding director duties of care and obligations are unlike. Since Bangladesh's corporate rules do not have any director obligations that are well-structured, it is necessary to introduce functional transplanting from a developed jurisdiction, specifically the United Kingdom. This results in uncertainty and ambiguity in the process of corporate governance. Following the discussion in Chapter 4, the author will go on to the next chapter, where they will study the various types of director duties enforcement mechanisms in particular the private enforcement of director responsibilities in the United Kingdom and Bangladesh.

Chapter 5: Private Enforcement of Director Duties

5.1. Introduction

The people responsible for the general administration of a corporation are its directors. Directors are obligated to conduct themselves in a manner that is most likely to advance the success of the company and to the advantage of its shareholders. They are also responsible to the company's employees, as well as the company's trading partners and the state. The Companies Act of 2006 in the United Kingdom was the first legislation of its kind to formally codify the responsibilities of board members and to introduce the idea of enlightened shareholder value.[275] The only part of the directors' duties that is covered by the responsibilities that are outlined in Chapter 2 of Part 10 of the UK Act is the substantive nature of those responsibilities. On the other hand, Bangladesh's director duties regime is undeveloped and does not take into account the requirements that are placed on corporations in the present era. This subject of law in Bangladesh is notable for being difficult to access and having a dearth of relevant material. In addition, the CA 1994 does not contain any well-ordered statement of the responsibilities of directors or the consequences of breaching those responsibilities. This results in uncertainty and ambiguity in the process of corporate governance.[276] In addition, both statutory and informal methods of enforcing director responsibilities impose sanctions on agents in an effort to ensure compliance with the requirements. A more in-depth discussion of this topic can be found towards the end of this chapter. Whether this interference takes the form of effective decision-making on major issues, an appropriate selection of agents and structure of rewards, credible threats of removal, or effective decision-making on key issues, the success

[275] Over the course of a number of years, the topic of whether or not the maximisation of shareholder value is the primary purpose of businesses has been the subject of a great deal of discussion and controversy. The challenges that occur when attempting to combine the commitment of shareholders to the maximisation of profits with the adoption of purpose statements that may favour other aims are brought to light by this statement. A considerable reduction in the capacity of shareholders to hold the board accountable, as well as the definition of the company's purpose by a court or regulator, are both potential remedies that are currently being studied. For more see Paul L. Davies, Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements (November 1, 2022). European Corporate Governance Institute - Law Working Paper No. 666/2022, < https://ssrn.com/abstract=4285770> accessed 15 December 2023.

[276] See Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12; Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) Journal of Political Economy 169

of this intervention in securing agent compliance is primarily dependent on the principals' capacity to coordinate their actions and do so at a low cost. Certainly, the operation of governance strategies is dependent on the underlying legal rules that are in place to support them. More specifically, governance strategies are dependent on rules that define the decision-making authority of the various business actors.[277] They consequently also require legal enforcement structures to make such delineations of authority effective. However, in order for courts and regulators to implement governance strategies, a lower level of knowledge and information is necessary from them than what is required in order for them to directly enforce agent compliance via regulatory techniques.[278] As a result, enforcement institutions are of first-order importance for regulatory tactics, whereas for governance methods, they are only of second-order importance. In relation to the characteristics of these "enforcement bodies", it is possible to differentiate between two distinct modes of enforcement, each of which is based on the nature of the players who are responsible for taking the initiative: (1) governmental officials and (2) private parties who are operating in their own interests and/or strategically placed private parties who have been conscripted to act in the public interest.[279] It is possible, of course, to categorise modalities of enforcement in accordance with a variety of additional parameters. Therefore, simply draw up out a heuristic classification based on one element such as the kinds of enforcements and how issues might be affected by other dimensions, which we will investigate through the lenses of two different jurisdictions. The goal here is not to categorise for the sake of categorising, but rather to provoke thought about how the influence of substantive legal strategies is mediated by different modalities of enforcement.

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[277] For instance, decision rights methods require the courts to refuse legitimacy to a putative decision produced via a procedure that does not reflect the principals' decision rights. This is because such processes do not accurately represent the decision rights of the principals. Even tactics that are just focused on governance won't be effective if there aren't any legal structures in place that are able to safeguard the entitlements of principals in regard to company assets.: see Bernard Black, Reinier Kraakman, and Anna Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong?' (2000) 52 Stanford Law Review 1731

[278] See Alan Schwartz, 'Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies' (1992) 21(2) Journal of Legal Studies 271; Edward B. Rock and Michael L. Wachter, 'Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation' (2001) 149(6) University of Pennsylvania Law Review 1619

[279] Ernest Lim, *A Case for Shareholders' Fiduciary Duties in Common Law Asia* (1st edn, Cambridge University Press, UK, 2019)

5.2. Modes of Enforcement

Compliance can be ensured through enforcement using the modalities indicated, or indeed through governance interventions, by adding an ex-ante requirement for approval, or by imposing an ex-post penalty.[280] The term "penalty" refers to a broad functional category that encompasses all of the potential repercussions of enforcement that are likely to be expensive for the offender and, as a result, serve to discourage inappropriate behaviour.

A monetary fine is one type of consequence, and it is perhaps the one that is most easily understood.[281] The question of who should be responsible for the consequences arises early on. When it comes to legal techniques that aim to manage manager–shareholder and shareholder–shareholder agency difficulties, the agent in question is the most obvious candidate for the role of defendant.[282] Having the firm itself pay the penalty, on the other hand, pushes managers to take into account the potential expenses that may be incurred as a result of the violation. This is important for the control of externalities. However, in some jurisdictions it is normal practise for corporations to provide indemnities and insurance for managers (sometimes known as "D&O insurance"). This has the effect of moving the burden from the individual onto the company. This results in a general reduction in the effective size of the financial obligations imposed on managers by civil liability. This reduction is so significant, in fact, that even in jurisdictions with a high incidence of shareholder litigation, outside directors[283] are rarely, if

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[280] Latin terms "ex-ante" and "ex-post" are utilised in the process of estimating the returns that will be received from an investment. The projection of a certain event that will take place in the future is referred to as ex-ante. One example of this would be the prospective profits of a corporation. Predictions made ex-ante are notoriously unreliable because it is mathematically impossible to take into consideration all of the variables that can be influenced by the supply and demand dynamics of the market. On the other hand, "after the event" is what is meant by the term "ex-post," whereas "before the event" is what ex-ante refers to. Ex-post is an approach that looks in the rear-view mirror and analyses results after they have already taken place. Analysts working for investment companies can estimate the likelihood of turning a profit or incurring a loss on an investment based on the historical returns of the company's investments.

[281] In accordance with the expansive connotation of the word 'penalty,' we will refer to both remedial and punishing, which will be defined more strictly, payments here.

[282] See Jingchen Zhao and Chuyi Wei, 'Shareholder remedies in China—developments towards a more effective, more accessible and fairer derivative action mechanism' (2021) 16(4) Capital Markets Law Journal 445, 464; Andrew Keay and Jingchen Zhao, 'Transforming Corporate Governance in Chinese Corporations: A Journey, not a Destination' (2018) 38(2) Northwestern Journal of International Law and Business 187, 191

[283] An outside director is a member of a company's board of directors who is not an investor or an employee of the organisation. Depending on the terms of the agreement, the yearly retention fee for outside directors may be paid in the form of cash, benefits, or stock options. A predefined number or

ever, required to make payments from their own personal assets following a shareholder lawsuit.[284] The operational justification for this position is that an overzealous imposition of personal accountability on managers could cause such managers to act in a manner that is risk-averse, which would be in direct opposition to the preferences of diverse shareholders.[285] On the other hand, shifting the responsibility for failing to control any externalities away from the company and onto individual agents might be advantageous in certain circumstances. If the assets of the corporation are not enough to cover the losses that are anticipated, then low shareholder responsibility indicates that there may not be enough of an incentive to internalise the costs associated with potentially dangerous operations. It is possible that the efficiency of relevant legal methods could be improved by the imposition of penalties on individuals involved with the firm.[286]

The primary ex post consequence of breaching company law regulations that this study focuses on is the annulment of corporate decisions. This is done for the sake of comparison with many nations that follow common law.[287] The legal efficacy of corporate acts that were reached on the basis of a process that did not comply to applicable rules can be called into question by such orders. This technique is helpful for assuring compliance with standards and process rules about the many different governance measures that are used to control the first two sorts of agency cost. Because a company may incur significant expenses as a result of cancelling or delaying its acts until the process has been regularised, certain annulments function as penalties in the sense that we use the term here.

If the wrongdoing is considered to be of a serious enough nature to be considered a "crime," then the possibility of incarceration as a form of punishment may also be open to individual

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proportion of independent directors must be present on the boards of directors of publicly traded companies in order for them to meet the standards for effective corporate governance. Outside directors are generally believed to be more capable of providing objective judgments. Alternative names for outside directors include “non-executive directors” and “independent directors.”

[284] Bernard Black, Brian Cheffins, and Michael Klausner, ‘Liability Risk for Outside Directors: A Cross- Border Analysis’, (2005) 11(2) European Financial Management 153; Tom Baker and Sean J. Griffith, ‘How the Merits Matter: Directors’ and Officers’ Insurance and Securities Settlements’ (2009) 157(3) University of Pennsylvania Law Review 755

[285] Reinier Kraakman, ‘Corporate Liability Strategies and the Costs of Legal Controls’ (1984) 93(5) Yale Law Journal 957

[286] John Armour and Jeffrey N. Gordon, ‘Systemic Harms and Shareholder Value’ (2014) 6(1) Journal of Legal Analysis 35

[287] See Martin Gelter, ‘Why do Shareholder Derivative Suits Remain Rare in Continental Europe*?’* (2012) 37(3) Brooklyn Journal of International Law 843

defendants, but not to corporate defendants.[288] Loss of a company's regulatory licence, which will result in the corporation's effective closure, is potentially the most severe punishment that can be imposed on corporate defendants operating in industries that are subject to regulation. Without proper calibration of expected sanctions, the threat of criminal sanctions and/or the loss of regulatory licences can easily result in over-deterrence. This is especially true if the threat is taken alone.[289] As a result of enforcement actions, defendants may be subject to a variety of extra-legal penalties, the majority of which are reputational in nature. Loss of employment and increased difficulty in obtaining alternative work could be among the consequences for directors of firms.[290] When it comes to businesses, reputational damage can be defined as when contracting partners lower their expectations of the firm's performance, which has a negative effect on the terms of trade that the company is able to negotiate.[291] This can much outweigh the scale of any financial fines that are issued; in fact, no monetary penalty needs to be paid in order to cause damage to one's image; all that is required is the reliable broadcast of information regarding wrongdoing.[292] The possibility of suffering a loss of one's reputation not only makes the total effective penalty more severe, but it also makes it more difficult to anticipate..[293] Furthermore, corporate misconduct that does not damage contracting counterparties but rather imposes costs that are entirely external does not necessarily imply any change in expectations regarding the performance of contractual Structured Differences, and it

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[288] It is debatable whether or not legal individuals can ever be held accountable for their actions through the criminal justice system, despite the fact that these provisions contain in the majority of jurisdictions. See, Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43(3) International and Comparative Law Quarterly 493

[289] See Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23(2) Journal of Legal Studies 833; Daniel R. Fischel and Alan O. Sykes, 'Corporate Crime' (1996) 25(2) Journal of Legal Studies 319. The enforcement of antitrust law is a significant concern within the context of the EU. See Case C-172/12 P, *EI du Pont de Nemours v Commission* [2013] European Court Reports I-0000, ECLI: EU: C:2013:605 (the parent company was given a fine for the subsidiary's violation of competition law, and the amount of the fine was determined based on a percentage of the parent's total revenue).

[290] See Maria Correia and Michael Klausner, 'Are Securities Class Actions "Supplemental" to SEC Enforcement? An Empirical Analysis', Working Paper, Stanford Law School (2012).

[291] See Jonathan Karpoff and John Lott, Jr., 'The Reputational Penalty Firms Face from Committing Criminal Fraud' (1993) 36(2) Journal of Law and Economics 757; Cindy Alexander, 'On the Nature of the Reputational Penalty for Corporate Crime: Evidence' (1999) 42(1) Journal of Law and Economics 489; Jonathan Karpoff, D. Scott Lee, and Gerald Martin, 'The Cost to Firms of Cooking the Books' (2008) 43(3) Journal of Financial and Quantitative Analysis 581

[292] See. G. Benjamin, L. Liebman and Curtis J. Milhaupt, 'Reputational Sanctions in China's Securities Market' (2008) 108(4) Columbia Law Review 929

[293] There is no connection between the amount of reputational loss and the financial punishment. See John Armour, Colin Mayer, and Andrea Polo, 'Regulatory Sanctions and Reputational Damage in 'Financial Markets' (2017) 52(4) Journal of Financial and Quantitative Analysis 1429.

does not seem to guide to reputational losses.[294] This has repercussions for the choices that can be made regarding the legal punishments that are associated with the control of externalities. On the basis of these considerations, the mechanism for enforcing director obligations can be broken down into two major categories, which are public enforcement and private enforcement of director duties.

5.2.1 Public Enforcement

When we talk about "public enforcement," we're referring to all of the legal and regulatory measures that are taken by different state agencies. This modality encompasses both criminal and civil lawsuits filed by public officials and agencies, in addition to a wide variety of ex ante approval powers that are exercised by public actors. For instance, issuers conducting a public offer are required to submit the relevant documents for evaluation by securities regulators in various jurisdictions. These documents include the offering circular and the prospectus.

Public enforcement action can be initiated by a broad range of governmental agencies, varying from offices of state prosecutors to national regulatory authorities that supervise the actions of corporations in real time, such as the Securities and exchange commission (SEC) of Bangladesh. Public enforcement action can be taken in response to a wide variety of violations, including securities fraud, tax evasion, and money laundering. There are various self-regulatory and quasi-regulatory authorities, such as national stock exchanges (the Dhaka Stock Exchange in Bangladesh and the London Stock Exchange in the United Kingdom), as well as the Financial Reporting Council[295] in the United Kingdom, which serves as a public enforcement agency. These organisations are considered enforcers to the extent that they are able to compel compliance with their rules ex ante or to inflict consequences for rule infractions ex post. These penalties can be reputational, contractual, or civil in nature. In addition to this, they are meaningfully described as public enforcers in situations where their regulatory efficacy is pushed by a genuine threat of state involvement, and they are also capable of being viewed as

[294] See Jonathan M. Karpoff, John R. Lott, Jr., and Eric W. Wehrly, 'The Reputational Penalties for Environmental Violations: Empirical Evidence' (2005) 48(2) Journal of Law and Economics 653

[295] The Financial Reporting Council in the United Kingdom audits the financial statements of publicly traded companies through its "Conduct Committee" to make sure they are compliant with the laws of the United Kingdom.

public franchisees. In situations when there is no such real danger, organisations of this type should ideally be regarded as being entirely private.[296]

In theory, public enforcement is limited by the fact that, in contrast to private enforcement, the officials responsible for initiating lawsuits have fewer financial incentives to do so than private plaintiffs do. This is because public enforcement officials do not keep any of the monetary payments recovered from successful lawsuits.[297] However, in circumstances wherein the public enforcers are authorised to retain some or all of the penalties issued against corporate offenders, this difference is rapidly undermined. This may cause enforcement decisions to be biased according to ability to pay instead of culpability.[298] In most jurisdictions, public enforcement is an important component of the overall compliance strategy for ensuring that business agents are acting in accordance with the law.[299]

5.2.2 Private Enforcement

In the same way that public enforcement encompasses a wide variety of institutions, private enforcement does as well. At the most formal end of the spectrum, these include class actions and derivative suits, both of which require a significant amount of legal and institutional infrastructure in the form of a plaintiffs' bar, cooperative judges, and favourable procedural law that facilitates actions through issues as diverse as discovery rights, class actions, and legal fees.[300] Private enforcement, in contrast to state enforcement, is primarily dependent on a

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[296] The "coerced self-regulation" concept is introduced and thoroughly discussed in Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Oxford, UK, 1992) 101–32

[297] Jonathan R. Hay and Andrei Shleifer, 'Private Enforcement of Public Laws: A Theory of Legal Reform' (1998) 88(2) American Economic Review 398

[298] Margaret H. Lemos and Max Minzner, 'For-Profit Public Enforcement' (2014) 127(3) Harvard Law Review 853; also see Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, London, 2014)

[299] See John Armour and Caroline Schmidt, '*Building Enforcement Capacity for Brazilian Corporate and Securities Law'* in Robin Huang and Nico Howson (eds),'*Public and Private Enforcement: China and the World'* (Cambridge University, UK, 2017); Howell E. Jackson and Mark J. Roe, 'Public and Private Enforcement of Securities Laws: Resource-Based Evidence' (2009) 93(2) Journal of Financial Economics 207; Rafael La Porta, Florencio Lopes-de-Silanes, and Andrei Shleifer, 'What Works in Securities Laws?'(2006) 61(1) Journal of Finance 1

[300] For instance, an enormous increase in the amount of private enforcement conducted in Japan is said to have been spurred by improvements achieved across a number of these characteristics. See, Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35(1) Journal of Legal Studies 31

mechanism known as deterrence. This mechanism involves the implementation of fines ex post upon the finding of wrongdoing. There aren't many instances where private enforcement can be directly compared to the ex-ante regulatory approval. The "scheme of arrangement" procedure in the United Kingdom is one example of this type of enforcement. Under this process, a company that wishes to engage in a major reorganisation transaction and has obtained the necessary votes from shareholders (and creditors, if they are parties) may seek court approval of the arrangement and thereby put it into effect.[301] The court will review the preceding procedural stages at this point, and if it decides to give its approval to the scheme, there will be no further opportunities to dispute it ex post. However, if the focus is broadened to encompass not only enforcement in the strict sense, but also measures of guaranteeing agent compliance more generally, there is an essential counterpoint: private actors are of course very much involved in ex ante governance interventions to achieve compliance by agents.

5.2.3 Advantages of Private Enforcement

In today's day and age, the practical application of legal principles is accorded a higher priority than legal theory. Roscoe Pound made this suggestion to academics more than a century ago, so they have had plenty of time to consider it. Pound was of the opinion that the practise of law should receive a greater amount of attention. Law in action theory investigates not just the law as it is written in statutes, but also the role that laws play in society and how they are applied.[302] Therefore, the duties that were discussed in the previous chapter are not likely to make any significant impact to company governance in any judicial framework, including the one that is used in Bangladesh, if they are not successfully executed. It is not the presence of regulations, laws on the books, or voluntary codes that is the critical factor in the development of a prosperous business environment and effective corporate management in developing countries and economic systems in transition; rather, it is the level of enforcement that plays this role. This is as a result of the fact that the manner in which the rules are implemented has an effect on the level of incentive that individuals have to comply with those regulations. Therefore, the effectiveness of a regulatory system is dependent not just on the substantive laws but also on the techniques to execution. In addition, the classification of enforcement as either public or

[301] The Company Act 2006, Part 26.
[302] See Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) American Law Review 12

private is determined by who exactly is responsible for taking the action: an official of the state or a private party.[303]

The primary distinction between public and private enforcers is that public enforcers are paid regardless of the outcome of the action, but private enforcers are only compensated for their work if the litigation they are involved in is successful.[304] Therefore, it makes sense to assume that cost reductions will have a greater effect on private enforcement and, moreover, that private enforcement will be more effective than public enforcement.[305] Furthermore, it is simpler for public agencies to start enforcement due to the greater level of capacity and resources that enable them to authorise any person or organisation to support them to enforce the law. One example of this would be appointing the insolvency practitioners to report whether the company directors are unfit in accordance with section 7 of the Company Directors Disqualifications Act (CDDA) 1986. This provision is found in the Company Directors Disqualifications Act. When compared to public fines, the financial repercussions of a private lawsuit can be considered significantly more severe. In instances that are open to the public, the penalties that are handed out to directors who are found responsible rarely have any bearing on the profits that were earned.[306] In addition, official enforcement agencies are highly centralised and are vulnerable to political influence, whereas private claimants are not subject Furthermore, because government entities have more power and resources to authorise any individual or group to assist them in enforcing the law, it is easier for them to begin enforcement. The designation of insolvency professionals to report on whether company directors are incompetent in line with section 7 of the Company Directors Disqualifications Act (CDDA) 1986 is one instance of this.to this type of control. On the other hand, although the private plaintiffs are responsible for funding litigation, the public actions are typically covered. While this facilitates faster coordination of public enforcement, critics point out that

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[303] John Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' ECGI - Law Working Paper No. 106/2008 (April 2008) <http://ssrn.com/abstract=1133542 > accessed on 20 April 2022.

[304] The primary objective of the public enforcer is not to achieve financial gain through the imposition of punishments. In spite of this, financial sanctions offer a system of securities regulation that is self-sufficient. This is because they supply public agencies with adequate money sources for future investigations, which in turn assures a more efficient enforcement system.

[305] John Armour (n 305); Jonathan R. Hay and Andrei Shleifer (n 299)

[306] For in depth see Andrew Keay and Michelle Welsh, 'Enforcing breaches of directors' duties by a public body and antipodean experiences' (2015) 15(2) Journal of Corporate Law Studies 255

it also makes it extremely simple to bribe public enforcers.[307] Furthermore, some data, however little, points to the possibility that the instruments employed in private enforcement are superior to those in public enforcement.[308] This is not to imply that public enforcement is not important; rather, it is to say that the effectiveness of private enforcement is increased when there is strong public enforcement.[309]

5.3 Private Enforcement of Director Duties

The declaration places a strong emphasis on how important of a role enforcement plays in corporate governance. When taking into account the impact of laws and regulations, this underscores the fact that the efficiency with which laws and regulations are enforced is the single most important element in determining the amount of protection afforded to corporate investors. Stated differently, it emphasises the need of having strong regulations and efficient enforcement procedures in order to increase investor protection.[310] A development would, as a result, improve the motive for outside investors to support enterprises, while simultaneously lessening the possibility that insiders would appropriating money from such company. When discussing the governance of directors' obligations within the context of directors' duties, it is generally agreed that the law of enforcement is a crucial component. This is due to the fact that main provisions of care and loyalty are practically useless in their operational capacity if the individuals to whom directorial responsibilities are owed do not have the ability to 'hold' directors accountable for breaches in their obligations. In point of fact, the existence of an efficient enforcement mechanism is required for the requirements placed on directors to have a deterrent effect on the performance of those directors.[311] Indeed, the deterrence effect on corporate directors' performance is dependent not only on the existence of a dependable method

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[307] Jonathan R. Hay and Andrei Shleifer (n 299)
[308] Jingchen Zhao, 'Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability' in Beate Sjafjell And Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, 2020) 39-40; Erik Berglof and Stijn Claessens, 'Enforcement and good corporate governance in developing countries and transition economies' (2006) 21(1) The World Bank Research Observer 123.
[309] Howell E. Jackson and Mark J. Roe, 'Public and private enforcement of securities laws: Resource-based evidence' (2009) 93(2) Journal of Financial Economics 207
[310] See Rafael la Porta and others, 'Investor Protection and Corporate Governance' (2000) 58(3) Journal of Financial Economics 15, 17.
[311] Keay (n 7)

for enforcing director responsibilities put on directors, but also on the necessity of a mechanism that is necessary for those requirements.

There are two main groups into which the idea of enforcement may be broadly classified. Firstly, formal enforcement and secondly informal enforcement. These categories are differentiated from one another according to whether or not the involvement of a court is utilised in the process of enforcing directors' obligations. Despite official enforcement[312] When non-judicial implementation occurs outside of the context of a court case, it is sometimes referred to as "informal enforcement."[313] Regardless of whether a private party or a government body is carrying out the judicial or extrajudicial action, a dichotomy between private and public enforcement can be drawn within each category. Regardless of whether the interference is judicial or extrajudicial, this difference can be drawn. For example, a shareholder acting on behalf of the corporation may file a derivative litigation against the directors and members of the board of directors as part of private formal enforcement.[314]

5.3.1 Informal Private Enforcement

Where the alleged wrongdoer is not the controlling shareholder but a minority institutional shareholder, informal private enforcement measures can consist of private criticisms and threats to sue. For instance, if an activist hedge fund has threatened to oust the directors and to publicly criticise them if the board does not cave in to the fund's demands to issue special dividends, the board may privately criticise the hedge fund or even threaten to sue the hedge fund for breach of fiduciary duties if it is of the opinion that the fund's action is in opposition to the interests of the company. This is the case if the board is of the opinion that the fund's action is in opposition. In addition, the UK Stewardship Code 2020 serves as one of the most important reference points for informal private enforcement.[315]

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[312] John Armour (n 305)
[313] Ibid
[314] Reisberg (n 8) 18.
[315] The UK Stewardship Code 2020, Financial Reporting Council (FRC) <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf>accessed 10 August 2021

5.3.2 Formal Private Enforcement

Formal private enforcement can be divided into three separate categories which are Lawsuit by board of directors, derivative action and Unfair prejudice claim.

5.3.2.1 Lawsuit by Board of Directors

The board may not bring an action against the delinquent shareholder for at least two reasons. First, if the delinquent shareholder is a controlling shareholder, the directors may be concerned that suing the controller will jeopardise their own careers as they might be removed or not be reappointed (despite the controller being subject to fiduciary duties when he exercises the power of removal or appointment)[316]. Second, the board may take the view that the costs of litigation exceed the benefits. These costs may include the financial expense of litigation, the potential for unfavourable publicity that it draws, and the potential for damage to the relationship between the company and the shareholder, particularly in situations in which the company and the shareholder have a business connection.

5.3.2.2 Derivative Action

A. Common Law

The rule of Foss v Harbottle[317], under this rule, given that the duties are owed to the company and thus harm is done to the company, only the company can sue. This is also known as the proper plaintiff rule. But where the company, acting through the board of directors, does not sue the delinquent director, the aggrieved shareholder can sue on the company's behalf provided that it falls within the two exceptions to the Foss v. Harbottle rule.

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[316] The UK approach is somewhat different than another developed jurisdiction. In the United Kingdom, shareholders have the powers according to the section 168 of the Companies Act to dismiss a director from their position.

[317] [1843] 2 Hare 461, 67 ER 189. Since the establishment of the CA in 2006, the English judicial system has adopted an approach that is utterly apart from its previous practises. See Ewan McGaughey, 'Holding USS Directors Accountable, and the Start of the End for Foss v Harbottle?' (Oxford Business Law Blog, 18 July 2022) < https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/07/holding-uss-directors-accountable-and-start-end-foss-v-harbottle > accessed 20 July 2022

The first exception is that the wrongdoer has engaged in conduct that is ultra vires in the sense that it is unlawful for the company to do the act. The second and more important as well as commonly invoked exception is fraud on the minority, or more accurately put, fraud on the company as the wrong is done to the company under the proper plaintiff rule. Further, the fraud exception only applies where the wrongdoer has control of the company (either the board or the general meeting), thereby preventing the company from bringing the lawsuit. There is uncertainty as to what mean by control.

B. Statutory Action

No statutory derivative claim but only common law action is available in Bangladesh. In contrast in the UK in Part 11 of the CA 2006 enshrined the derivative action. Due to avoidance of repetition this will discussed on the later part of this chapter.

5.3.3 Oppression/Unfair Prejudice

There is an overlap between corporate action (i.e., derivative action) and personal action (i.e., oppression/unfair prejudice) as the interests of a shareholder (or some shareholders) could be harmed by corporate wrongs such as breaches of fiduciary duties. This overlap is evidenced in the numerous decisions in which breaches of directors' fiduciary duties have given rise to oppression/unfair prejudice actions.[318]

Although courts in the common law countries in Asia like Bangladesh and India have not articulated clear criteria or guidelines as to what amounts to oppression or unfair prejudice[319], courts have relied on two indicia of oppression/unfair prejudice.[320] The first indicium consists of the legal rights and obligations enshrined in the company's statute, the company's constitution and any applicable laws. For example, breaches of company's statute, [321]

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[318] See *Lloyd v Casey* [2002] 1 BCLC 454; *Fowler v Gruber* [2010] 1 BCLC 563; *Allmark v Burnham* [2006] 2 BCLC 437; *Re Baumler (UK) Ltd, Gerrard v Koby* [2005] 1 BCLC 92

[319] Similar to s 994 of UK Companies Act 2006, s.233(1)(a) of Companies Act 1994 Bangladesh states that – *"(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest*."

[320] *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098–99.

[321] *Re a Co* (No.005134 of 1986), *ex p Harries* [1989] BCLC 383 (violation of the obligation that members give their assent before non-pro rata share allocations); *Re a Co* (No.00789 of 1987) ex p Shooter [1990] BCLC 384 (failures on the part of the organisation to hold general meetings and to allow

company's constitution,[322] listing rules and directors' fiduciary duties[323] have given rise to oppression/unfair prejudice actions. The second indicium is equitable considerations which arise from an unwritten or informal understanding between the member and the company, which makes it inequitable to insist on legal rights.[324] Such equitable considerations usually involve 'a personal relationship or personal dealings of some kind'.[325] Such personal relationship usually arises in small companies – called quasi- partnerships – where there is a relationship of mutual trust and confidence among the members.

Nevertheless, despite these limitations, where there is an alleged breach of fiduciary duties by the general meeting or the shareholders, it should be easier and more likely for the aggrieved shareholder to pursue an oppression/unfair prejudice action as compared to a derivative action for two reasons. First, although the aggrieved shareholder has to pay the cost of litigation, the compensation (if awarded by the court) will go to her, and not to the company, unlike in a derivative action. Second, the remedies that the court can award for oppression/unfair prejudice are wide and flexible. The court may make any order that it deems fit for giving relief including but not limited to: regulating the conduct of the company's affairs in the future; directing or prohibiting any act or cancelling or varying any transaction or resolution; authorising civil proceedings to be brought in the name of or on behalf of the company; providing for the purchase of the shares of the petitioner by the company or other members; and winding up the company.

However, it may be said that because the most common remedy awarded by the court is the buyout order, it is unlikely that an aggrieved shareholder of a listed company is in need of that remedy as she could sell her shares on the market. Thus, it may be said that the cost of bringing

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members to authorize accounts).

[322] *O'Neill v Phillips* [1999] 1 WLR 1092; *Re Mediavision Ltd* [1993] 2 HKC 629; *Re A and BC Chewing Gum Ltd* [1975] 1 WLR 579; *Re Harmer Ltd* [1959] 1 WLR 62; *Re Bondwood Development Ltd* [1990] 1 HKLR 200.

[323] See e.g.UK cases: *Fowler v Gruber* [2010] 1 BCLC 563; *Lloyd v Casey* [2002] 1 BCLC 454; *Allmark v Burnham* [2006] 2 BCLC 437; *Re Baumler (UK) Ltd, Gerrard v Koby* [2005] 1 BCLC 92. In regard to the lawsuits filed in the Asian nations that follow common law, See e.g., *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745; *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337; *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 2 SLR(R) 114; *Re Bondwood Ltd Development Ltd* [1990] HKLR 200; *Re Playmates Investments Ltd* [1996] 4 HKC 577; *Re Tai Lap Investment Co Ltd* [1999] 1 HKLRD 384.

[324] *O'Neill v Phillips* [1999] 1 WLR 1092; *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379.

[325] *Re Astec (BSR) plc* [1999] BCLC 556 at 588; *O'Neill v Phillips* [1999] 1 WLR 1092 at 1101.

the action will exceed the benefit (i.e., the buyout order). This may be one reason why there are very few oppression/unfair prejudice cases involving listed companies. For an example to date, there appears to be two such case in India.[326]

5.4. Private Enforcement of Directors' Duties in the UK

In the United Kingdom, in an effort to strike a more equitable balance between company directors and shareholders, a complex body of statutory legislation has been developed in recent decades. These statutes call into question the possibility of wrongdoing and specify the methods and duties of directors.[327] In the field of corporate law, the United Kingdom is widely regarded as one of the most progressive nations, in particular they way they address directors' responsibilities and the enforcement of those responsibilities. Several sources of UK legislation will be examined in this chapter, drawing on its extensive prior expertise in the relevant sector. Court rulings and legislation, in particular the CA 2006, have exhaustively explored a range of remedies that minority shareholders might employ to enforce directors' duties. These actions include voting against directors who breach their duties and responsibilities.

5.5 Statutory Derivative Claim

Encapsulate a view from *Foss v Harbottle,*[328] the corporate action rule states, that a company that experiences injury will represent itself as the plaintiff in any resulting legal action to make amends for the harm. When a business is harmed, the business itself files a complaint. This implies that unless the firm has granted permission for them to do so, individual shareholders or a group representing minority shareholders cannot file a lawsuit in the corporation's name. However, because the principle of majority rule, if left unchecked, could result in unfair ramifications, the courts have sanctioned several exceptions to the Foss v. Harbottle decision.

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[326] *Morgan Ventures Ltd v Blue Coast Hotels and Resorts Ltd* [2010] 155 Comp Cas 431; *Union of India (UOI) v Satyam Computer Services Ltd* [2009] 148 Comp Case 252.
[327] Shuangge Wen, '*Shareholder primacy and corporate governance: legal aspects, practices and future directions*' (first publish, Routledge, New York, 2013) 74.
[328] [1843] 2 Hare 461.

One such exception is the derivative action, which is a form of legal action that enables minority shareholders to exercise a right that is ordinarily only available to the company itself: the authority to file a lawsuit for duty violation upon directors. In addition, the corporation is entitled to receive any compensation that may be granted.[329]

In the past, there were no codified regulations in place in the UK for matters pertaining to derivative claims. Nevertheless, derivative claims were permitted in a few instances; however, in reality, it was unthinkable for a single shareholder to file a lawsuit on the company's behalf. This was determined in the 1843 decision of Foss v. Harbottle, and ever then, deviations to the rule have been subject to extremely strict guidelines.[330] After that, the Companies Act of 2006 enacted the general derivative action in part 11, sections 260-264 of the Act. This extensive legislative derivative action is noteworthy because it gives the courts the authority to determine whether an action will serve the corporation's best interests before allowing proceedings to be started in each particular situation. This implies that before proceeding with any further steps in the procedures, a minority shareholder who wishes to file a derivative action must first obtain the court's approval.[331] It has been confirmed that minority shareholders gain from obtaining the court's consent although they can get a ruling on the main issue (which is, if it is for the benefit of the company for organisation of a lawsuit). But the excitement of the minority shareholders for derivative litigation is reliant on a judge being convinced that the company has to file a case.[332]

According to the CA 2006, a derivative suit is any claim resulting from the actions or inactions of a current or prospective corporate director that involve negligence, duty violation, or breach

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[329] Ben Pettet, *Company Law* (4th ed., Pearson Education, England, 2012) 38-39. In the past, the United Kingdom did not have any regulations that were codified in place for anything that had to do with derivative claims. But, in certain situations, derivative claims were permitted; however, it was not conceivable for an individual shareholder to file a lawsuit on behalf of a corporation. In practise, it was not permissible to bring a claim on behalf of a company. To put it another way, a shareholder is not permitted to bring a derivative claim. This was ruled in the case of Foss v. Harbottle in 1843, and ever since then, deviations from the norm have been subjected to exceptionally high levels of scrutiny.

[330] Mathias Siems, 'Private Enforcement of Directors' Duties: Derivative Actions as a Global Phenomenon' (November 16, 2010). Final version published in: Stefan Wrbka, Steven Van Uytsel and Mathias Siems (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge, Cambridge University Press, 2012) 93 <http://ssrn.com/abstract=1699353 > accessed on 12 August 2021.

[331] Davies, Worthington and Hare (n 2) 576

[332] Ibid 653.

of trust.[333] According to Part 11 of the CA 2006 directors include de jure, former, de facto, and shadow directors.[334] Based on a claim that happened before they joined the firm, shareholders may file a derivative action against the directors.[335] However, even in the event that the problem arose when the ex-member was a shareholder, they are not permitted to make a claim.[336]

The Act maintains to recognise three situations in which permission to bring a derivative action by a minority shareholder should also not be granted. Two of them relate to the question of whether the existing or prospective violation of duty has been confirmed or authorised.[337] The tests have been criticised since it is likely that they will overlook such lawsuits brought against and in reference to negligent activities taken by common directors.[338] Cases when an issue's incorrect has been approved will be surrounded by arguments over the legitimacy of the ratification. This is the case even though the likelihood of authorization has been reduced as a result of section 239 of the Act, which prohibits members with self-interested in participating in the ratification vote. This is because Section 263 of the Act makes it abundantly clear that leave should not be granted when the wrong has been committed. As a result of this, it is not anticipated that it will induce a shift in emphasis that is in favour of broad judicial authority. This is because it implies that the success of a purported ratification will often outweigh the leave application trial. It is a challenging topic, and it is highly unlikely that it will be resolved by utilising the most recent process.[339] In the case of *Franbar Holdings v Patel*[340] it was an application for authorization to proceed with a derivative claim that gave rise to the ratification problem. In this case, the court must decide if the ratification resolution has the unlawful effect of denying the claimant the right to file a claim on behalf of the firm.

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[333] The Company Act 2006, s 260(3)
[334] Under some conditions, these directors can have obligations to the company they serve. This topic has been thoroughly examined before in this thesis in Chapter 4.
[335] The Company Act 2006, s 260(5)
[336] Ibid, s 260(1)
[337] The Company Act 2006, ss 263(2) (B), (C). Earlier on in this thesis, the regulations governing the ratification and authorization were dissected and analysed under Chapter 4.
[338] Arad Reisberg, 'Corporate Law in the UK After Recent Reforms: The Good, the Bad, and the Ugly' (2010) 63(1) Current Legal Problems 315
[339] Arad Reisberg, 'Derivative Claims Under the Companies Act 2006: Much Ado About Nothing?' in John Armour and J. Payne (eds), *Rationality in Company Law: Essay in Honour of DD Prentice*, (Hart Publishing, 2009); University College London Law Research Paper No. 09-02. <http://ssrn.com/abstract=1092629> accessed 02 May 2021
[340] [2009] 1 BCLC 1

Thirdly, in the event that the directors exercising in compliance with section 172 (relating to the obligation to promote the success of the firm) decide against pursuing the case, the court must refuse permission to bring a derivative action. This is due to the fact that section 172 deals with the need to advance the company's prosperity.[341] In *Lesini and Others v Westrip Holdings Ltd and Others,*[342] the court construed this in a limited way and made the pronouncement that it can only reject leave for a derivative action if it is satisfied that no director would want to pursue the claim themselves. In light of this, the court cannot automatically grant leave in the event that some directors wish to pursue action.

Furthermore, it's ambiguous if non-shareholders are covered by section 172. It is acknowledged, therefore, that the legislative list pertaining to non-shareholder constituencies in section 172(1) is not all-inclusive, Andrew Keay[343] in his notable works holds the similar viewpoint. This means that if a director fails to evaluate all of the factors involved for the choice under discussion, they will be held accountable for failing to perform their duties. However, in actuality, this is extremely difficult to achieve. In addition, the courts are not in a position to conduct an in-depth investigation into whether or not a director has taken into account all of the non-shareholder issues facing the company. If they did so, there would be a possibility that the courts would evaluate business decisions using the advantage of hindsight.[344]

The judge should authorise a legal action if it does not fit into any of the previously specified criteria, but only after stipulating a few conditions that must be met before a decision can be made regarding whether or not permission should be granted, per section 263.[345] Think about things like whether the plaintiff is operating in good faith, if the business has decided not to pursue the litigation, and whether the action is harmful to the firm's interests. Moreover, as demonstrated in Iesini v. Westrip Holdings Ltd.*[346],*Section 263(2)(a) is only used where the courts determine that no director is pursuing the derivative action while working in line with the duty to foster

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[341] The Companies Act 2006, s. 263(2)(A)
[342] [2009] EWHC 2526 (Ch)
[343] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29 Sydney Law Review 577, 601-602
[344] Shuangge Wen (n 329) 161
[345] The Company Act 2006, s 263(3)
[346] [2011] 1 B.C.L.C. 498

the company's success embodied in section 172. Section 263(3) (b) is used when certain directors wish to move on while others are not interested in doing so.

When the minority shareholders try to file a lawsuit against the company directors, this may provide them with a challenge that makes it more difficult for them to do so. Keay adds that the board of directors is a group and that it is undoubtedly influenced by the characteristics that are shared by groups.[347] Philip Stiles states the Company board as elite and episodic decision-making body.[348]

Because the derivative action can only be launched under the CA 2006, some believe the new statutory derivative entitlement may be more comprehensive and elastic than the common law claim. However, a simple accusation of directors' negligence, without any accusation of absence of good faith or profit to the directors, may on the face of it be the issue of a derivative action by shareholders for the company. This is because a breach of duty, breach of trust, or default by directors is considered to be a violation of the directors' fiduciary responsibilities.[349] This is a significant change that will increase the directors' risk of being held accountable for carelessness.[350] In addition, the judges are no longer constrained in their decision-making by the principle stated in Foss v Harbottle.

Despite this, it is questionable whether this may genuinely be regarded a step forward; fact, courts will continue to preserve a large amount of discretion regarding whether or not a derivative action can follow. In light of this, petitioners should expect the courts to continue to treat such actions with the customary scepticism they have always shown, notwithstanding the fact that at the present time the courts have an extremely limited statute to 'substantiate' their positions. In England, there are questions over the maximum number of times that these kinds of activities can be allowed. Additionally, a shareholder has a chance of surviving this legal requirement. On the other hand, it is not clear why she or he would want to carry out such an

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[347] Keay (n 345).
[348] Philip Stiles, *Elements in Corporate Governance Board Dynamics* (Cambridge, Cambridge University Press, 2021)
[349] Khurram Raja, 'Majority shareholders' control of minority shareholders' use and abuse of power: a judicial treatment' (2014) 25(5) International Company and Commercial Law Review 162
[350] David Kershaw, 'The Rule in Foss v Harbottle is Dead', LSE Legal Studies Working Paper No.5/2013 (January 30, 2013) <http://ssrn.com.ezproxy.lancs.ac.uk/abstract=2209061 > accessed 02 October, 2020.

activity in the first place. If the case was unsuccessful, the shareholder may be accountable for all application expenses; if successful, the petitioner will not earn profits promptly.[351]

A handful of times permission is granted and the case is resolved before court is unknown. It is reasonable to expect that a significant proportion of instances may fall into this category, particularly taking into consideration the fact that courts have a tendency to steer the parties in this particular direction when they issue leave.[352] In the same vein, one school of thought contends that the courts in England ought to exert a larger amount of effort to oversee the settlement of derivative lawsuits. This can be accomplished by imposing a condition that states that the court's permission is required to settle or drop a case. In the event that the court orders the corporation to compensate the derivative claimant for claim expenses, this is crucial.[353]

Even while the statutory derivative suit reorganisation has not had the dramatic effect some experts expected (and others were worried about), it has improved shareholder protection rules. As was shown in the previous paragraphs, this was revealed by the fact that the above. There is little doubt that arguments about derivative proceedings have become significantly more typical in the judicial system. During these arguments, it is common practise to deliberate on the question of whether or not such allegations should be allowed to go to a full court hearing. Only a very small percentage of instances have been documented as progressing to full court trials.[354]

Judges are hesitant to provide permission for derivative proceedings to go to full trial to an application in circumstances where there are remedies in section 994, such as buying the shares, in situations where the stock purchase order almost invariably seeks a majority to overturn the

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[351] Mathias M. Siems, 'Private Enforcement of Directors' Duties: Derivative Actions as a Global Phenomenon*'* (November 16, 2010). Final version published in: Stefan Wrbka, Steven Van Uytsel and Mathias Siems (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge, Cambridge University Press, 2012) 93 <http://ssrn.com/abstract=1699353 > accessed 10 October 2020

[352] David Milman, 'Shareholder litigation in the UK: the implications of recent authorities and other developments' (2013) 342 Company Law Newsletter 1

[353] Daniel Lightman, 'Two aspects of the statutory derivative claim' (2011) 156(1) Lloyd's Maritime and Commercial Law Quarterly 142

[354] David Milman, 'Shareholder law: recent developments in practice' (2015) 378 Company Law Newsletter 1

minority shareholders.[355] In actuality, in exercising their discretion under Section 263(3)(a)-(f), the judges in *Mission Capital Plc v Sinclair*[356], Permission to proceed with a derivative claim under Section 261 of the Act was denied because a notional director was unlikely to add further weight to the allegation and the alleged damage was fictitious. The petitioner had brought the lawsuit in good faith. Nonetheless, while a hypothetical director may continue with the case, the director may not give the action more weight, especially if the injury that the firm may suffer as a result of the applicant's illegal removal from office was exploratory. It was quite likely that the employer would substitute applicant rather than take action against those responsible for the injury caused by their illegal termination. Furthermore, the petitioner may be able to get the desired remedies by filing an undue prejudice petition under Section 994 of the Act.

In *Kiani v Cooper*[357] it is established that a director whose decision were in question does not present any substantive proof supporting his argument against the claims that the he had broken his fiduciary obligations, authorization was granted to continue a derivative claim within the confines of section 261. Milman with a view to that the decision from Kiani v Cooper good faith has been instituted for derivative claim rather obstacle for bringing the suit considering the remedy offered according to the section 994 of the CA 2006. *Kiani v. Coope*r was cited as an example in Milman's observation. When determining whether or not to grant permission to continue with the trial, the court was only required to consider this one factor.[358]

In *Cullen Investments Ltd v Brown*,[359] a derivative claim petition was granted permission to proceed to trial. The application operated under the presumption that the director of the company improperly diverted a potentially lucrative business prospect for his own benefit. The judges examined a few potential roadblocks on the way to obtaining a derivative action while they deliberated on whether or not to let the matter proceed to trial. To begin, the panel of judges reached the conclusion that the alleged violation of duty was not permitted. Second, the

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[355] Ben Pettet, John Lowry and Arad Reisberg, *Pettet's Company Law: Company and Capital Markets Law* (4th edn, England, Pearson Education Limited, 2012) 261
[356] [2008] EWHC 1339 (Ch).
[357] [2010] EWHC 577 (Ch).
[358] David Milman, 'Avenues for shareholder redress in the 21st century' (2011) Company Law Newsletter 295
[359] [2015] EWHC 473 (Ch).

judges rejected the claim that any director who was acting in fulfilment of his or her responsibility in accordance with the provisions of section 172 would not have supported the pursuit of the derivative action. Even though the potential advantages of the activity were nothing out of the ordinary, this was not a barrier in any way. One of the most important aspects of this case was the shareholder's decision to assume all of the financial risks associated with the proceedings. Because of this, there is no possibility that the business will have to deal with a negative costs order. Regarding each of these concerns, the court granted authorization to move forward with the trial.[360]

A concern in regards to this whether a shareholder of a parent company can bring a derivative claim against the subsidiary of the said parent company, having said that he have no share of rthe subsidiary company. The phrase "double" or "multiple" derivative action is used to describe this scenario. When a plaintiff C possesses stocks in a corporation A, it gives birth to this situation. Of turn, firm A is the sole shareholder in company B, holding all of its stock. This corporation, B, is the one that has been harmed as a result of an illegal act committed by the respondent, D. Is it feasible for the plaintiff C to bring a derivative action on behalf of the company B in the event that Company B does not take legal action against D? A positive response appears to have been given by common law in response to this worry.[361]

Briggs J, in *Universal Project Management Services Ltd v Fort Gilkicker Ltd*[362]*,* with a view to accept the double derivative claims as it was accepted in the common law principle as well as the CA 2006 now. Briggs J. takes the view from Lord Millett in *Waddington Ltd v Chan Chun Hoo Thomas*[363] in the Court of Final Appeal. In addition, the judge who presided over the case of Bhullar v. Bhullar [364]made it abundantly clear, after taking into consideration the numerous case laws that have been decided since the realisation of the statutory derivative claim.

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[360] David Milman (n 366)
[361] David Milman, 'Shareholder litigation in the UK: the implications of recent authorities and other developments' (2013) 342 Company Law Newsletter 1
[362] [2013] EWHC 348 (Ch).
[363] [2008] HKCU 1381
[364] [2015] EWHC 1943 (Ch).

5.6 Personal Claims

The derivative action may be used to enforce the duties and make absolutely sure they are followed if it is found that a corporate director has disregarded the obligations that they have to the company. Even if it does not happen very often, the duties of the directors may sometimes be owed to individual shareholders rather than the company itself.

A derivative action may use as a tool to recover and enforce the responsibilities dirctors hold individually, which may call personal claim.[365] A share in a company is a right to an asset, and furthermore, it should go without saying that the shareholder automatically obtains some private rights as a result of the ownership of the shares. In practice, the most crucial thing to think about is whether the reflective-loss rule hinders a particular claim. This regulation forbids a shareholder from being compensated for a damage that is a perfect duplicate of a loss incurred by the company.[366] To activate the principle, the company and the shareholders must discover a complaint against the managers came up with a similar body of evidence, and the harm to a part or all of the shareholders might be viewed as an imitation of the induced loss. The board of directors of the corporation.[367] Similarly, in *Prudential Assurance v Newman Industries Ltd*[368] The corporation is the qualified applicant, and its members are not entitled to reimbursement for the injury caused by reflection.

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[365] Davies, Worthington and Hare (n 2) 578.

[366] David Milman (n 366); See also *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 where Lord Reed examines the decisions which are said to have established the "reflective loss" principle, namely *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 and *Johnson v Gore Wood & Co* [2002] 2 AC 1. Lord Reed concludes that *Prudential* laid down a rule of company law: a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company and is therefore not recoverable. In light of this, Lord Reed holds that the reasoning in *Johnson* (other than that of Lord Bingham) should be departed from and that *Giles*, *Perry* and *Gardner* were wrongly decided. The rule in *Prudential* does not apply to Marex, which is a creditor of the Companies, not a shareholder; Jonathan Hardman, 'Sevilleja V Marex Financial Ltd: Reflective Loss and The Autonomy Of Company Law' (2022) Modern Law Review 85(1), 232-246.

[367] Davies, Worthington and Hare (n 2) 586.
[368][1982] Ch 204.

This clause does not, however, prohibit any shareholder from filing a claim to recover individual losses that are distinct from the losses incurred by the company. Heron International Ltd. v. Lord Grade demonstrates the unique aspect of the reflective and distinct damages.[369] During the course of a heated takeover offer for the target firm, it was claimed that the directors of the target company, who held the majority of the voting shares, had violated their obligations to the company and its shareholders. This alleged violation concerned the board of the company agreeing to ideas that would reduce the value of the assets owned by the organisation. This would then result in a decrease in the value of shares, which would force shareholders to accept the offer for the company that was lower than the other two that were being considered. The judge ruled that the loss that was sustained by the firm's shareholders was distinct from the loss that was sustained by the company itself. Due to the fact that the shareholders would not have been able to accept the greater offer, they have the ability to recover their losses through the filing of a personal claim. The only people who would be affected by this loss are shareholders. It would not be considered a loss for the corporation, and the amount of money held in reserve would not change as a result.

5.7 Private Enforcement of the Director Duties in Bangladesh

In his writings, Paul Davies contended that it is not possible to conclude from the common law assertion that a company must file a lawsuit if it feels a director has failed to uphold their obligations to the organisation. The most important question is whether or not the corporation would benefit from going to court, and the answer to this question is entirely dependent on the facts that are associated with a particular instance.[370] Although there's a chance the firm may suffer greater consequences from a lawsuit than from a decision to drop the case, the decision to drop the lawsuit may also be heavily influenced by a director's personal interests. In light of these factors, the law plays an essential role in the process of selecting a trustworthy expert to evaluate whether or not going to court is the best way for the corporation to assert its legal rights.[371] The results of this investigation revealed that there is a need to control the governance techniques that are used by enterprises affiliated with Bangladeshi banks[372] by instituting a monitoring

[369] [1983] B.C.L.C. 244. See also Sevilleja v Marex Financial Ltd [2020] UKSC 31
[370] Davies, Worthington and Hare (n 2) 493-495.
[371] *Ibid*, 499-500
[372] Companies defined in section 5 of the Bank Companies Act 1991

procedure with the goal of ensuring both openness and the continued stability of the market.[373]

The Companies Act of 1994, which was enacted in Bangladesh on October 1, 1995, is the country's most important piece of company related legislation. Since that time, there have not been any major changes made to the legislation. The Companies (First and Second Amendment) Act 2020, which was only recently passed by the parliament of Bangladesh in February 2020, does not include any provisions that would alter the existing director duties framework in Bangladesh. Bangladeshi company law was radically updated and modernised by the Companies Act of 1994, bringing it more in line with global developments in corporate governance and law. It was brought closer to international norms in order to achieve its international standard. The Companies Act of 1994 does not provide an exhaustive or lucid explanation of the rules pertaining to the responsibilities and obligations of directors. Furthermore, the inquiry surfaced regarding the measures that shareholders might undertake to ensure the defence of their entitlements in the event that directors fail to fulfil their contractual commitments.

As a result of the absence of an appropriate regulatory framework in Bangladesh, it is possible to make the argument that minority shareholders in Bangladeshi listed businesses have very little opportunity to participate in the decision-making process of these companies.[374] The majority of financial, legal, and political studies on corporate governance systems in developing nations revealed that minority shareholders' concerns are mostly disregarded. These results provide credence to this opinion. In the context of this conversation, it has been suggested that broad ownership provides sufficient security for minority shareholders.[375] Furthermore, it has been emphasised that the Bangladeshi legal structure grants minority shareholders minimal rights. The Bangladeshi Corporate Governance Code, 2018 provides a definition for this absence of rights[376] by which Minority shareholders are defined as individuals who have no

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[373] Niluthpaul Sarker and Md. Jamil Sharif, 'Simultaneity Among Market Risk Taking, Bank Disclosures and Corporate Governance: Empirical Evidence from The Banking Sector of Bangladesh' (2020) 24(1) Academy of Accounting and Financial Studies Journal.

[374] Md Nazrul Islam Khan, 'How minority shareholders of listed companies can seek protection' (The Financial Express, 01 July 2019) <https://thefinancialexpress.com.bd/views/how-minority-shareholders-of-listed-companies-can-seek-protection-1561995249 > accessed 10 Sep 2020.

[375] Porta, Lopez-De-Silance, Shleifer and Vishny (n 31)

[376] Corporate Governance Code 2018, Bangladesh Securities and Exchange Commission <https://www.sec.gov.bd/slaws/Corporate_Governance_Code_10.06.2018.pdf >accessed on 15 October 2021.

influence or control over a corporation. As a corporate regulation system that is still in the process of being developed, Bangladesh CA 1994 and CGC 2018 exhibit significant structural flaws. These shortcomings are principally linked to the large degree of concentrated ownership that it permits, favouring the government and a few well-known families. Liquidity has significantly decreased as a direct result of these issues, and competition on stock exchanges is virtually non-existent at this point.

Determining if the Bangladeshi legal system has recognised the derivative action may be achieved by listing all potential legal actions that are included in any kind of legislation. This is a useful way for establishing whether or not the action has been recognised. Within the framework of the Bangladeshi legal system, one has the statutory right to file a lawsuit against members of the board.[377] A corporation's legal representative acts independently of the company's owners, although under certain conditions, the legal representative has the power to file a lawsuit on the shareholders' behalf. The purpose of the company's action is to make certain that the company's rights and interests are not compromised in any way, as this could have an effect on the company's day-to-day business operations. A company can be harmed in a variety of ways, such as when its directors breach the confidence of the company's shareholders, which can result in monetary loss; when obligations are violated; when negligence, default, or default on payments; or when fraudulent revenue is allocated to shareholders. The accountability of company directors for such damage is specified in Section 102 of CA 1994.

Some believe that the law of Bangladesh does not have any provisions that are relevant to this field. As was mentioned earlier, derivative action gives minority shareholders the ability to file a lawsuit against company directors who have breached their duties. This occurs when the company has been harmed as a result of the directors' actions, and the majority shareholders do not file a lawsuit in response to the company's misfortune. According to this definition, under the CA 1994, minority shareholders do not have the ability to bring legal action against corporate board members in the name of the firm.[378] The status remains unchanged under the

[377] The Companies Act 1994, s 233

[378] In addition, Rule 60 of the Companies Rule 2000 under the head of Application under section 233 of the companies Act states that a judge can dismiss or pursue a legal petition. If the judge finds the petition frivolous, it can be dismissed. If there is a viable case, the judge will notify the Respondents, Registrar of Joint Stock Companies, and Board of Directors of the company. The Respondents must respond within the allotted period with the detailed reasons why the petition's proposed reliefs should

Companies (First and Second Amendments) Act of 2020.

There are no guidelines in the Companies Act 1994 and Companies Rule 2000, particularly in sections 81 and 83 of the CA 1994, regarding what should be done in the event that the GM does not decide to pursue legal action towards the accused and does not address whether shareholders may pursue derivative claims on the company's behalf.[379] Minority shareholders cannot file a lawsuit in the name of the firm under any scenario.[380] A derivative action exemption has not yet been granted, although the business action in Foss v. Harbottle has been incorporated in CA 1994, supported by the concept of majority rule.

Following Millman's suggestion, the derivative claim reform that was passed into law unquestionably represents a significant improvement in the laws that protect shareholders.[381] As a result, this derivative claim is proposed for inclusion in the Bangladeshi Company law regime. However, it is necessary to modify the preventive measures against irrational claims made by minority shareholders, which could be detrimental to the company, by imposing certain limitations and screenings on such actions, while guaranteeing minority shareholders' access to the claim in order to preserve the rights of shareholders and restore the proper balance between directors and shareholders.

The most significant shortcoming of the CA 1994 is that it does not clearly describe the responsibilities of company directors or the enforcement actions that may be taken. To be more specific, the Companies Act of 1994 and the Companies (Amendment) Act of 2020 fail to provide clarification on a number of issues, including fiduciary duties, the various directorial positions. Specifically, the CA 1994 and the Companies (Amendment) Act of 2020 fail to

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not be granted. If the firm is traded on a public exchange, the judge can order the petition to be publicised according to the rules. Affidavits of compliance must be provided two days before the hearing to show compliance with court orders. Affidavits are needed to protest the application. After hearing all sides, the judge will decide what section 233 orders are needed. Finally, the order will be sent to the Joint Stock Company Registrar immediately. The Judge's actions suggest that they are willing to hear all arguments and reach a decision after carefully considering the evidence. The order is final and binding, ensuring justice for the existing circumstances.

[379] The Companies Act 1994, ss 81, 83

[380] See section 233 CA 1994, needs permission from the court and according to the Company Rule 2000 claim must have prima facie case.

[381] David Millman, 'Shareholder law: recent developments in practice' (2015) 378 Company Law Newsletter 1

provide clarification on issues such as fiduciary duties, different directorial.[382] Specifically, section 233 of the CA 1994 has been the subject of a substantial amount of controversy about the question of whether or not it gives minority shareholder derivative action provision. It is generally acknowledged that this clause's imprecise language and blurring of shareholders' personal and derivative acts caused the dispute.[383]

In order to remedy the situation, the government of Bangladesh enacted the Companies (First Amendment) Act 2020 in February 2020, and the Companies (Second Amendment) Act 2020 in November 2020. Both pieces of legislation came into effect in their respective months. However, as this chapter showed, regrettably, the power of minority shareholders to sue directors remains unaltered by the new law, as detailed in the section entitled "The statutory derivative claim." Various sections of the Companies Act 1994 states the director duties. For the reference purposes these sections are as given as follows:

> Section 104 of the CA 1994 says that the Director may not hold a profit-making post. No director or firm in which such director is a partner of a private company in which such director is a Director shall hold any profit-making office under the company without the consent of the company in general meeting, except that of a managing director or manager, a legal or technical adviser, or a banker.[384] For the Explanation of this section, it was stated that- for the purpose of this section, the office of managing agent shall not be deemed to be an office of profit under the company. Whereas section 105, Sanction of Directors necessary for certain contracts--Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm or the private company of which he is a member or director, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company.[385]
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> According to Section 112 of the CA 1994, it is strictly prohibited for any director of a company to receive any payment in relation to the transfer of the entire or a part of the company's property or undertaking, unless it is disclosed to the members of the company

[382] See Companies Act 1994, Companies Rule 2000 and Companies (First and Second Amendment) Act 2020.
[383] The jurisprudence of section 233 of the CA 1994 is presenting in Bangladesh.
[384] The Companies Act 1994, s104
[385] Ibid, s105

and approved by the company in a general meeting. This payment could be in the form of compensation for loss of office or retirement, and must be detailed along with the amount proposed by the transferee or any other person involved in the transfer.[386] In the event that a director receives any payment that violates the duty mentioned above, the amount received will be considered as being held in trust for the company. However, it is important to note that Section 112 does not have any bearing on the operation of Section 111 of the Companies Act 1994, which states Compensation for loss of office not permissible to managing or whole-time directors or directors who are managers.[387]

Furthermore, section 130 mandates that every director who is involved, directly or indirectly, in any contract or arrangement made on behalf of the company must disclose the nature of their interest at the meeting of directors where the contract or arrangement is discussed. If the interest exists at the time of the meeting, the director must disclose it then. If not, the director must disclose it at the first meeting of directors after the acquisition of their interest or the making of the contract or arrangement. However, if a general notice has been given to the directors that a director is a member of a particular company or firm and is likely to be interested in any transaction with that company or firm, then it is considered sufficient disclosure for any subsequent transactions with that company or firm.[388] It is very much clear from the plain reading if the section that directors of the company are not permitted to enter into any contract where his interest lies.[389] This section also has a penalty sanctions and includes that if a director contravenes

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[386] Section 112 of the Companies Act 1994, states that no director of a company can receives any payment as compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement from the transferee of an undertaking or property of the company or from any other person, unless the members of the company have been informed of the payment and the proposal has been approved in a general meeting. If a director receives such payment without prior approval, the amount will be deemed to have been received by him in trust for the company. This section does not affect the operation of Section 111 in any way.

[387] The CA 1994, s 111 allows a corporation to compensate a managing director, manager, or whole-time director for losing or retiring. Except in subsection (4)'s instances, such payment is limited to the limit (3). Subsection (1) allows a managing, whole-time, or management director to receive a payout upon retirement or loss of office. Other directors cannot be paid. Subsection (3) lists the circumstances in which a managing or other director shall not be paid, including resignation owing to the company's reconstruction or amalgamation, or when the director's office is vacated due to the Act or the company's winding up. The director's severe negligence, violation of trust, or incitement of termination will not result in reward.

[388] The Companies Act 1994, s 130(1)

[389] Nirmalendu Dhar, *Company Law and Partnership* (7th edn, Remisi Publications, Dhaka, Bangladesh, 2019) 110-111. Also, in the case of *Needle Industries (India) Ltd v Needle Industries Newly (India)*

the provisions of subsection (1), they may face a fine not exceeding five thousand takas. Additionally, a register must be maintained by the company that records details of all contracts or arrangements that are covered by this section. This register should be available for inspection by any member of the company during business hours at the company's registered office. If any officer of the company knowingly and intentionally acts in contravention of the provisions of subsection (2), they may face a fine not exceeding one thousand takas. Also, this section ensures transparency and accountability in the conduct of contracts or arrangements made on behalf of the company, thereby promoting the interests of the shareholders and maintaining the integrity of the company's affairs.[390]

In section 131 of the Companies Act 1994 restricts interested directors from voting on contracts and agreements. The legislation specifies that directors cannot vote on contracts or arrangements in which they have a direct or indirect interest. Interested directors cannot create a quorum during the voting. An interested director's vote will be ignored.[391] However, there is an exemption, directors can vote on indemnity contracts for damages incurred as sureties for the corporation. As the directors' interest is incidental; hence the law authorised them to vote. In Subsection (2) emphasizes the seriousness of noncompliance by stating that any director who breaches subsection (1) will be fined up to five thousand takas. Thus, breaking this clause has serious implications. Finally, subsection (3) states that private firms are exempt. This exemption has an exception. Section 131 applies to all contracts or arrangements concluded by a private subsidiary of a public business with anyone other than the parent company. This law prevents directors of subsidiary private enterprises from using their positions for personal gain.[392]

Furthermore, in section 233 of the CA 1994 outlines the power of the court to give direction for the protection of the interests of the minority. According to this section, any member or debenture holder of a company, individually or jointly, may bring to the

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Holdings Ltd., AIR 1981 SC 1298 widely interoperate the 'Director interested' which includes the friendliness with the director as well.

[390] The Companies Act 1994, s 130(2)(3)(4)

[391] Ibid s 131(1)

[392] Ibid s 131(2)(3); also see Gazi Shamsur Rahman, 'Company Law Commentary' Original title in Bangla '*কোম্পানি আইনের ভাষ্য*' (Khoshroj Kitab Mahal, Dhaka, Bangladesh, 2018) 444-445

court's attention through an application that the company's affairs are being conducted in a manner prejudicial to their interests or that of one or more members or debenture holders. They may also seek relief if the company is discriminating or likely to discriminate against their interests, or if a resolution has been passed or is likely to be passed that discriminates against one or more members or debenture holders. Upon receipt of an application under sub-section (1), the court must send a copy thereof to the board and set a date for hearing the application. If, after hearing the parties present on the date so fixed, the court is of the opinion that the applicant's interest has been or is likely to be prejudicially affected, it may make an order to safeguard the interests of the applicant and any other member or debenture holder.[393]

The court may cancel or modify any resolution or transaction, regulate the conduct of the company's affairs in the future, or amend any provision of the memorandum and articles of the company. If the court amends the memorandum or articles of the company, the company must not, without leave of the court, make any amendment or take any action inconsistent with the direction contained in the orders. In case of non-compliance with the court's order, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand takas. This section provides minority shareholders with a mechanism to protect their interests in a company and seek redressal for any grievances they may have against the management.[394]

5.8. Private Enforcement Challenges

5.8.1. Cost

The issue of cost is a significant barrier for minority shareholders who wish to take derivative claim on behalf of the company. Hence it is very important to confirm that there is substantial damage occurred for the company by the directors of the board and allow the access to the

[393] The Companies Act 1994, s 233

[394] See Kazi Mokhles Uddin Ahamed, 'The minority shareholder protection: the English rule of derivative action and Companies Act of Bangladesh' (2014) 7(2) International Journal of Private Law 129; Nirmalendu Dhar, *Company Law and Partnership* (7th edn, Remisi Publications, Dhaka, Bangladesh, 2019) 196-199

company's fund to use for the said action.[395] For the purpose of providing a reference point, in more than one third of claimants in New Zealand, costs have been awarded when they were sought. In addition, applicants did not seek reimbursement in forty percent of the cases, so no costs were given. [396]

Wallersteiner v. Moir was the very first case to identify and effectively get beyond the monetary obstacles blocking derivative claim.[397] Lord Denning MR rendered the decision at the Court of Appeal, stating that the minority shareholders are functioning as the company's representatives. In contrast, in *Smith v Croft (No.2)*[398], Walton J argued that minority shareholders should only get remuneration from the company in the clearest and most straightforward of situations. Because of this, the court now have to carefully consider all the available information before determining whether to issue an indemnity order right away or to postpone it. Ultimately, the court denied the indemnity order in Smith v. Croft, ruling that a strong case had to be established before such an order could be issued.

Legal fees in cases when directors are challenged by minority shareholders. Nonetheless, given that the lawsuit is being pursued both on its behalf and in its best interests, it may be claimed that the firm should bear the expenses irrespective of the procedures' conclusion. This perspective of view has received a lot of flak for being bad for the business. Giving each shareholder the right to file a derivative lawsuit in the company's name without having to pay the fees involved if the claim is rejected might have a significant effect on the company's operations. The UK Law Commission claims that doing so would be "killing the company by kindness," not to mention a waste of money and managerial time on pointless legal actions.[399]

Another important aspect of the UK corporate law, in the event that party A loses in a legal procedure between the two parties, party A will be required to pay all of the costs that party B has incurred as a result of the litigation. This is the case even though party A initiated the legal action. In actuality, the court will decide the expenses of the case on what is known as a

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[395] Arad Reisberg, 'Derivative Actions and the Funding Problem: The Way Forward' (2006) 5(Aug) Journal of Business Law 445
[396] Andrew Keay, 'Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006' (2016) 16(1) Journal of Corporate Law Studies 39, 57
[397] [1974] 1 WLR 991.
[398] [1988] Ch. 114.
[399] Law Commission, '*Shareholders Remedies'* (No 246, Cm 3769, London, TSO, 1997) Para 14.1

"standard" basis, which simply refers to the costs that the court considers to have been necessary because of the lawsuit.[400]

Using conditional and/or contingent fee agreement in the derivative claim can be a solution to address the dilution of derivative claim costs controversy.[401] The difference between the conditional fee agreement and the contingent fee agreement is that the conditional fee arrangement lay down that the legal professionals will get a higher premium award if the derivative suit is successful. However, the contingent fee arrangement states that the legal professionals will get a portion of award.[402]

It is possible that company will be advised to compensate the claimant for the costs of the court fight; however, this does not provide a more constructive stimulus for the company to initiate a derivative action. In addition, if the plaintiff only possesses a negligible interest in the company, then it is possible that the investment is not of a scale that is large enough to provide positive incentive.[403] The primary obstacle to derivative actions will continue to be the question of whether or not it is appropriate to support a shareholder in a legal action. A sensible shareholder will not be persuaded by the statutory derivative action method that he or she will be better off bringing the company to court as opposed to selling out his or her equities if the shareholder decides to pursue legal action in this manner. The position that the common law takes on the costs of derivative proceedings has not been changed, which is disappointing news. If there is going to be a true shift in the system, it is imperative that both the legislation governing litigation costs and the litigation costs themselves be reviewed.[404]

In the case of Bhullar v. Bhullar,[405] the court demonstrates a situation in which it may be appropriate to seek an indemnity for the expenses while taking up a derivative action, as well as the factors that courts may possibly have in mind at the time of making a judgement on the

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[400] Antony Morris, 'Does an indemnity for costs in a commercial contract mean anything?' (22 Sep 2020, Lexology) < http://www.lexology.com/library/detail.aspx?g=f45cb66e-4727-4c18-8fd5-cf457492feac.> accessed 25 October 2021
[401] Arad Reisberg (n 434)
[402] Antony Morris (n 449)
[403] Arad Reisberg (n 341)
[404] Arad Reisberg, 'Corporate Law in the UK After Recent Reforms: The Good, the Bad, and the Ugly' (2010) 63(1) Current Legal Problems 315
[405] [2015] EWHC 1943 (Ch).

grant of such a security of costs. In addition, the case also demonstrates the factors that courts may possibly have in mind when deciding whether or not to grant such a security of costs.

5.8.2 Lack of Awareness

Under Bangladeshi law, minority shareholders have the ability to exercise a variety of rights, including the right to interfere in the operations of the organisation. For example, shareholders have the right to call a general meeting under the provisions of section 81 of the CA 1994. This right is also recognised in the United Kingdom, where it is extended to shareholders who account for 5 percent of the share capital or, in the event that the firm does not have share capital, to shareholders who account for 5 percent of the overall voting power.[406]

One of the problems that is said to be widespread in Bangladesh is that shareholders, especially minority owners, either don't know they have privileges or, if they do, don't take any action to exercise their rights. In addition, because it is simple for shareholders to sell their shares, the vast majority of shareholders, particularly those in large public companies, are either careless or uneducated about concerns pertaining to the corporation.[407] Because the court system still has to be reinforced and improved, as well as because the means for enforcing rights have not yet been completely formed, the situation is made even worse by the dangers involved in engaging in legal processes. The severity of the problem has increased due to each of these circumstances.

5.9 Conclusion

Arguably, shareholders can take steps towards directors in certain circumstances. For instance, the derivative claims, personal claims, and the private enforcement mechanism about directors obligations in Bangladesh were analysed, and the results were compared with those of the UK jurisdiction. At this time in Bangladesh, there is no viable legal path that can be pursued in order to commence private actions that will result in the perpetrators of wrongdoing being

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[406] The Companies Act 2006, ss 303(2)(a)(b). The required percentage was 10% but it substituted to be 5% by The Companies (Shareholders' Rights) Regulations 2009 (S.I. 2009/1632) reg. 4(2).

[407] Pallab Kumar Biswas, 'Corporate governance reforms in emerging countries A case study of Bangladesh' (2015) 12 International Journal of Disclosure and Governance (2015) 1, pp.13 and 22; Md. Shamimul Hasan, Rashidah Abdul Rahman and Syed Zabid Hossain Monitoring family performance family ownership and corporate governance structure in Bangladesh (2014) 145 Social and Behavioural Sciences 103, pp.104 and 108

punished. It is not possible, for instance, for minority shareholders to bring any kind of legal action against directors on the company's behalf. One of the justifications these reforms are necessary is because it has been said that the legal system in Bangladesh would improve from the adoption of certain proposed improvements to the current Bangladeshi legislation.

Finally, the preceding analysis on private enforcement assumes that litigants will resort to the courts (or tribunals) to enforce their claims. It is suggested that in countries where the court system is very inefficient (such as in Bangladesh),[408] reforms should be made to the listing rules to give shareholders the ability to enforce their claims in arbitration, given that arbitral proceedings are generally known to be more efficient.[409] Private enforcement in itself is not an adequate mechanism to enforce breaches of directors' fiduciary duties by shareholders, particularly where the rules are unclear, the incentives for bringing claims are weak, the court system does not function well and public interest considerations are implicated. Effective enforcement also requires public enforcement, to which we will discuss in chapter 6. In the following chapter the author will investigate the public enforcement mechanism of director duties and care in the United Kingdom and Bangladesh.

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[408] Md Abdul Halim, '*The Supreme Court and the Judiciary: Rules, Irregularities, Problems and Prospects*' Original title in Bangla 'সুপ্রীম কোর্ট এবং বিচারব্যবস্থা: নিয়ম, অনিয়ম, সমস্যা ও প্রত্যাশা' (CCB Foundation, Dhaka, Bangladesh, 2017)

[409] See Roger S Haydock, 'Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future' (2000) 27(2) William Mitchell Law Review 745; Keith N Hylton, 'Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis' (2000) 8 Supreme Court Economic Review 209; Steven Shavell's 'Alternative Dispute Resolution: An Economic Analysis' (1995) 24(1) Journal of Legal Studies 1

Chapter 6: Public Enforcement of Director Duties

6.1 Introduction

This chapter will investigate the public enforcers in Bangladesh and the United Kingdom and the procedures etc will be discussed. Additionally, the author will investigate the challenges that are associated with public enforcement action.[410] A critical evaluation of the debate between hard and soft law approaches to public enforcement in Bangladesh and the UK will also be discussed.[411] From the comparative lens the new legislation passed by the UK namely The Economic Crime and Corporate Transparency Act, 2023 (ECCTA) will also be contemplated. It has been predicted that the ECCTA will be a game-changer in the battle against economic crime in the United Kingdom; however, despite the fact that its implementation is expected to result in greater enforcement action. Another primary objective of the Act is to bring about a shift in the culture of corporations, to successfully delegate the responsibility of preventing fraud to the business sector before it occurs. From the public enforcement perspective, Bangladesh can consider this.

One of the overarching goals of the thesis is to identify the relevance of enforcement of directorial responsibility, which is an integral element in the enhancement of Bangladesh's corporate governance practice and procedures. This is one of the overreaching goals of the thesis. The actions of private enforcement were discussed in the prior chapter; the activities of public enforcement will be analysed in this chapter. The term "public enforcement" refers to the sanctions that are enforced by the state on business directors who have acted in a manner that is not in the company's best interests.[412] It has been a topic of discussion for a very long time whether or not public organisations have the authority to become involved in this field. There are two primary reasons that this intervention is being carried out. To begin, states all over the world have traditionally been the ones to be the ones to pass laws that provide corporations the capacity to have limited liability. Because of this concession made by the

[410] See chapter 6.6
[411] See chapter 6.6.2
[412] The public and private enforcement are methodically different with each other. It was discussed in chapter 4.

government, businesses are now able to function as if they were legal persons.[413] Given that matters of public policy are of significant concern to the general people, the limited liability principle needs to be investigated by the authority. Second, the protection of society from the harm that irresponsible directors can inflict implement a significant financial liability on the national treasury due to the high expense of providing this protection. When a company goes bankrupt, the costs are shouldered by the government; for instance, the country's best interest always serves by making every effort to save financially unstable businesses. [414] Notwithstanding the views of some individuals who believe that enforcement costs should be taken into account, public regulators typically lack the resources necessary to identify, look into, and ultimately enforce all legal infractions of which they become aware. Some, on the other hand, disagree and think it is unimportant to take enforcement costs into account. There are others who are of the different opinion that it is not important to consider the costs of enforcement.[415] On the other hand, independent securities regulation exists within the domain of public enforcement. This is because it has the authority to impose severe financial penalties.[416] Even though the amount of empirical research that has been done is still relatively little, the findings imply that private enforcement tactics are more effective than public enforcement approaches. In point of fact, good public enforcement makes it easier for private enforcement to be effective. [417] This is the argument that underpins the consideration of enforcement by public agency mechanism in this part of the study.[418]

At the very highest level of public enforcement, criminal prosecutions can be brought for any kind of dishonesty or fraud. In the past, occurrences like these were extremely rare, and funding in investigations was scarce. However, the UK created a specialised crime agency around the end of 2011, which turned the emphasis more strongly toward the prevention of criminal behaviour. On the other end of the public enforcement spectrum, where prosecutions focus on what are referred to as technical offences, the emphasis is considerably more on serious crimes. An illustration of

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[413] See Michael Phillips, 'Reappraising the Real Entity Theory of the Corporation' (1994) 21(4) Florida State University Law Review 1064
[414] See David Milman*, Governance of Distressed Firms* (Edward Elgar Publishing, UK, 2013) 22-23
[415] See Andrew Keay and Michelle Welsh, 'Enforcing breaches of directors' duties by a public body and antipodean experiences' (2015) 15(2) Journal of Corporate Law Studies 255
[416] Howell E. Jackson and Mark J. Roe (n 311)
[417] See Jingchen Zhao (n 310); Erik Berglöf and Stijn Claessens, 'Enforcement and good corporate governance in developing countries and transition economies' (2006) 21(1) The World Bank Research Observer 123
[418] Howell E. Jackson and Mark J. Roe (n 311)

this would be the failure to file corporate accounts, in which case the prosecution would seek to support open disclosure through the use of a public registry. It is possible for this to result in firms being removed from the register; however, in most cases, this only applies to directors of smaller enterprises and organisations that are in debt.[419] According to the findings of recent studies, the exclusion of directors from companies that are traded publicly is an incredibly rare occurrence.[420] Moreover, to tackle economic crime, which includes money laundering, fraud, and the financing of terrorist operations, the UK is enacting new legislation. On October 26, 2023, the Economic Crime and Corporate Transparency Act 2023 (ECCTA) received royal Assent by the monarchy. Its goal is to improve the mechanisms for gathering, analysing, and presenting data regarding limited partnerships and UK firms, as well as foreign entities' ownership of UK real estate. Furthermore, businesses that neglect to take action to stop fraud by their workers or agents risk criminal penalties, and it will be simpler to prosecute businesses for criminal misbehaviour.

The three declared goals of the ECCTA are: (i) to stop kleptocrats, terrorists, organised crime, and fraudsters from abusing the UK economy through businesses and other corporate bodies; (ii) to bolster the UK's more comprehensive fight against economic crime and (iii) to promote business by allowing Companies House, the UK organisation in charge of corporate governance, to provide better services to businesses and increase the accuracy of its data, which is used to guide loan choices and commercial dealings.

Although the Economic Crime and Corporate Transparency law is structured in terms of certain legal concepts and industries, it brings new dangers, liabilities, and requirements for UK and international enterprises that must be addressed holistically.[421]

6.2. Public Enforcers in the UK

There are several different approaches to public enforcement that can be utilised in the United Kingdom. As opposed to that, as was mentioned before, the significance of these mechanisms

[419] See Brenda Hannigan, 'Board failures in the financial crisis: tinkering with codes and the case for wider corporate reform in the UK (Part 1)' (2011) 32(2) Company Lawyer 363
[420] See John Armour, Bernard Black, Brian Cheffins and Richard Nolan, 'Private enforcement of corporate law: An empirical comparison of the United Kingdom and the United States' (2009) 6(4) Journal of Empirical Legal Studies 687
[421] See Objectives of the Economic Crime and Corporate Transparency Act 2023

in everyday life is frequently greater than that of formalised private enforcement. Businesses and other organisations in the United Kingdom are regulated by one of four primary public enforcement bodies namely, the Financial Conduct Authority (FCA), the Financial Reporting Review Panel (FRRP), the Department for Business, Energy, and Industrial Strategy (DBEIS), and the Bank of England. By taking part in a range of officially and unofficially sanctioned events, these companies promote compliance.[422]

6.2.1 The UK Financial Conduct Authority (FCA)

The Financial Services Authority (also known as the FSA) was eliminated as a regulatory body as a result of the second section of the Financial Services Act of 2012. The PRA (Prudential Regulation Authority) and the Financial Conduct Authority (FCA) took up portions of its responsibilities after it was decided to divide its responsibilities between them (Financial Conduct Authority). As part of its mission, the PRA is tasked with providing assistance to the Financial Policy Committee (FPC) of the Bank of England in achieving the latter committee's goal of achieving financial stability. As one of its duties, the PRA is to promote the stability and security of businesses that it has authorised. In a broader sense, the PRA is responsible for assisting the FPC in the mitigation of any adverse effects that a failed distressed firm could have on the financial system in the UK.[423] The FCA is a standalone organisation, and its primary approach is to guarantee the efficient operation of the financial markets. Therefore, the FCA is responsible for maintaining economic efficiency, competition, and consumer rights. The FCA is also tasked with promoting efficient challenge that serves the needs of consumers.[424] In this case, the integrity of the market comprises the impartiality of price creation, the avoidance of usage in conjunction with financial crimes, and the absence of any behaviour that would compromise its integrity.[425] The FCA's methods and actions are more relevant thru this chapter

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[422] See John Armour (n 305)
[423] The Financial Services Act 2012, s 6 (2-A, B and C). Also see the Bank of England and FSA, 'The Bank of England, Prudential Regulation Authority: Our approach to banking supervision' (2011) 3 <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/banking-approach-2018.pdf?la=en&hash=3445FD6B39A2576ACCE8B4F9692B05EE04D0CFE3> accessed 27 October 2021
[424] The Financial Services Act 2012, s 6 (1-A)
[425] Ibid, s 6 (1-D)

because the subject of this research is limited towards how director obligations are implemented in sound organisations.

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6.2.2 The Financial Reporting Review Panel (FRRP)

Another public enforcement body that focuses on avoiding management exploitation in listed companies is the Financial Reporting Review Panel. This is what its mission statement says: Established in 1991 with the support of the Financial Reporting Council (FRC), the Financial Reporting Review Program (FRRP) aims to identify notable deviations from standard accounting practises made by big corporations and encourage them to make the required improvements when they can.[429] If companies do not address any anomalies, the Financial Reporting Review Program (FRRP) can get a court order authorising the repair of any data.[430] Crucially, the UK's Corporate Governance Code, which is based on the principle of "comply or explain," binds the Financial Reporting Council (FRC). Companies must declare whether they are in conformity with the Code and give a justification for any instances in which they are not. These defences must include a thorough explanation of the company's reasoning for

[426] The Financial Service and Markets Act 2000, ss 72, 77, 89, 91
[427] Ibid, ss 401-02; Criminal Justice Act 1993, Part V, 91, 123, 66
[428] Ibid, ss.87, 89
[429] John Armour (n 305)
[430] The Companies Act 2006, ss 456-57. The FRRP was given permission to use these power under Companies (Defective Accounts) (Authorised Person) Order 1991, SI 1991/13.

not thinking it acceptable to abide by the Code's standards.[431] Later on in this part, we'll take a look at how the FRC feels about the "comply or explain" idea and where they stand on the issue.

6.2.3 The Department for Business, Energy and Industrial Strategy (DBEIS).

This Department, which up until the year 2007 was known as the Department of Trade and Industry, is also responsible for the regulation of enterprises based in the United Kingdom (DTI).[432] After then, it briefly remerged as the Department of Enterprise and Regulatory Reform (BERR). Since 2009, the Department of Business, Innovation, and Skills (DBIS) has assumed responsibility for public enforcement. After Theresa May was nominated to be the prime minister, the department changed its name once more in July of 2016. The Department of Business, Energy, and Industrial Strategy was the new name of the department. The position of the DBEIS on public enforcement in relation to business instigation processes will be discussed in the ensuing debate. This will be done so in order to facilitate the following discussion.

The UK government is hesitant to take legal action towards corporate directors regardless the Department's important role because it does not want to spend public funds to settle disputes that belong to the company's and other shareholders' domains.[433]

6.2.4 The Bank of England

The Bank of England, in collaboration with the Financial Conduct Authority, the Prudential Regulation Authority, and the Treasury, protects public funds, investors, and the integrity of the UK financial system. Additionally, the Bank of England promotes these procedures. As a result, faith in various banking systems among the general public increases.[434] These three entities each possess the legal power required to carry out these objectives. To sell a failing bank to a private buyer, for example, the Bank of England may create a share transfer instrument. As a result, the Bank of England is spared from having to assume management of

[431] See Andrew Keay (n 351)
[432] See John Armour (n 305)
[433] See Davies, Worthington and Hare (n 2) 542.
[434] The Banking Act 2009, s 4

the bank. During this time, the Treasury Department has the authority to temporarily seize ownership of a bank through the use of a share transfer order.[435] Because these compliance methods provide these entities the ability to alter or discontinue a bank director's position, as well as the ability to appoint new directors when it is judged appropriate to do so.[436]

Following the global financial crisis that occurred between 2007 and 2008, the government made the decision to implement significant regulatory reform. The Financial Services Act 2021 brought about numerous changes to the existing monetary structure. This link will open a new window and announce the following: the establishment of an independent Financial Policy Committee (FPC) at the Bank of England; the establishment of a new prudential regulator, the Prudential Regulation Authority, as a subsidiary of the Bank to oversee providers of financial market infrastructure.

6.2.5 The Serious Fraud Office (SFO)

The Serious Fraud Office (SFO) is a specialised and independent body in the United Kingdom that is entrusted with the responsibility of investigating and prosecuting cases of fraud, bribery, and corruption that are considered to be serious and complicated. Matters that have a substantial impact on the economy or public trust are the focus of the SFO, which was established in 1988 and functions under the authority of the Attorney General since it is meant to handle such cases.

At the SFO, the major focus is on cases that include economic and financial crimes. These cases sometimes involve many jurisdictions, involve significant sums of money, and involve complicated financial systems. To successfully combat white-collar crimes, it works in conjunction with several different law enforcement authorities, both local and foreign, such as the National Crime Agency (NCA) and the Financial Conduct Authority (FCA).

The government agency is authorised to make use of a wide variety of legal powers, such as the power to force the production of documents and information, to carry out searches and seizures, and to prosecute persons and businesses for criminal charges relating to fraud and

[435] Ibid ss 11,13
[436] Ibid s 20

corruption. By holding individuals guilty of significant economic crimes accountable for their activities, the SFO plays a key role in safeguarding the integrity of the financial system and supporting the rule of law. Their actions are held accountable for the acts they have taken.[437]

6.3 Companies' Investigation Regime

The authority to investigate business operations is not included in the purview of public enforcement. The primary approach for determining whether or not directors have engaged in illegal activity is to conduct an inquiry into the firm in question and then compile a report on the findings. If it is determined that the information contained in the report is not in the public interest, the company may be shut down, its directors may be removed from their positions, and the individuals responsible may be sentenced to jail time. The agent who authorised the investigation report is the only person who has the legal authority to carry out any of these activities.

In the UK, the Secretary of State, who hires enforcement agents with experience, must be notified of corporate issues and any inquiries arising from them.[438] The DBEIS has been given the authority to conduct investigations. In *R v. Board of Trade, ex parte St Martin Preserving Co Ltd*[439], According to Winn J.'s definition, "the affairs of a company" include all commercial concerns, interests, and dealings as well as a company's outlays of cash, property holdings, profits or losses, and goodwill.[440] In the case of Re Pergamon Press Ltd., Sachs LJ came to the conclusion that inspectors are obligated to investigate whether the facts call for additional action on the part of other parties. It was determined that the person under enquiry is exempt from the natural justice criteria, and the inspector is not required to provide the reason behind the inquiry.[441]

It seems sense that, in light of Re Pergamon Press Ltd., directors who have broken the law or negligent auditors may be unwilling to comply with inspectors and submit evidence for fear of a

[437] See Serious Fraud Office (SFO), available on< https://www.sfo.gov.uk/about-us/ > accessed on 30 November 2023
[438] The Companies Act 1985, s 431(1)
[439] [1965] 1 QB 603.
[440] *R v. Board of Trade, ex parte St Martin Preserving Co Ltd* [1965] 1 QB 603.
[441] *Re Pergamon Press Ltd* [1971] 1 Ch 388 at 401.

possible criminal or civil lawsuit if any information is discovered.[442] The Court of Appeal observed and criticised that the party should not be permitted to transform the process into a complete trial of every complaint thrown at them in the instances of Re Pergamon Press Ltd. and Maxwell v. Department of Trade and Industry. It denied a request for inspectors to provide paperwork and transcripts of interviews as proof of their objections.[443] Inspectors are permitted to collect data as effectively as possible, but before passing judgement or offering criticism, they must provide a party with an opportunity to refute any complaint, as stated by Lord Denning in the Court of Appeal. Inspectors are not have to provide any information; they are simply needed to describe any charges.[444] As a result, the DBEIS has implemented this provision.[445]

The Secretary of State is given the authority to request records and other materials from businesses under CA 1985 Section 447. This provision for conducting investigations informally is utilised rather frequently. It has been amended in accordance with section 21 of the Companies (Audit, Investigations, and Community Enterprise) Act of 2004, and the Companies Act of 2006 did not bring about its abolition. The investigator has the ability to prescribe that certain information must be included inside each document, and the directors are required to comply with these directions. When it becomes necessary, the director has the ability to require evidence of the relevant power that the investigator possesses to do so.

Davies's study indicates that during the initial enforcement phase, there were twelve investigations and seven prosecutions. The quantity of inquiries during the second period was fifty-five, while the number of prosecutions during the third and final period was fourteen. The number of investigations during the fourth and final period was ninety-six. In total, there were sixteen hundred and thirty-three investigations, which resulted in sixty-nine successful prosecutions. Convictions are so difficult to obtain, and those who are found guilty typically receive sentences that are on the lighter side, despite the fact that the severity of their

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[442] See Mohammed Hemraj, 'Audit failure due to negligent audit: lessons from DTI investigations' (2003) 24(2) Company Lawyer 45
[443] See Derek French, Stephen Mayson, and Christopher L. Ryan, '*Company Law'* (33rd edn, Oxford University Press, Oxford, 2016) 600-605.
[444] *Re Pergamon Press Ltd* [1971] 1 Ch 388 at 399-400.
[445] cf Mohammed Hemraj (n 487)

misconduct is not always taken into account.[446]

An investigation of TransTec in the year 2000 was seen as having a quality that was superior to the investigations taken on by the DTI for inside trade transactions. Reactions to the 1995 collapse of Barings Bank were mostly negative, with little helpful input offered to the Bank of England, which raised issues about the objectives of the DTI in terms of monitoring.[447] In point of fact, Sikka stated in a study that he conducted in 2003 that he believed the failure of TransTec was caused by the carelessness of the auditors. He was critical of the fact that the TransTec auditors had been let unpunished for their actions.[448] The essay by Sikka was published in October 2003. Chief Executive Officer Carr and Finance Director Jeffrey were both indicted in October of 2004, with submitting dishonest financial accounts and manipulating auditors. Both of these offences took place one year after the article was published. It was determined that a settlement in the amount of US$18 million would be acceptable, but this information was not shared with the board of directors of Trans Tec, nor was it shown in the accounting as a liability.[449] Jeffrey travelled all the way back to the United States from Australia to take part in the proceedings, and on January 9, 2006, he entered a guilty plea to all of the accusations.[450] On March 31, 2006, Carr was found not guilty on all charges.[451]

According to subsection (1) of section 439 of the Criminal Procedure Act of 1985, the party or parties responsible for paying the costs of an inquiry are specified. Notably, the high rank of the inspectors and the drawn-out nature of the investigations both contribute significantly to the potential magnitude of this cost.[452] It is important to note that the primary responsibility for

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[446] See Jack Davies, 'From gentlemanly expectations to regulatory principles: a history of insider dealing in the UK (Pt.2)' (2015) 36(6) Company Lawyer 163.
[447] Ibid
[448] See Prem, Sikka, 'A comment on the DTI's 'review of the regulatory regime of the accounting profession' (January 2003) <http://visar.csustan.edu/aaba/DTIJan2003.pdf > accessed April 10, 2022
[449] See The annual report of SFO in 2006, The Official website of Serious Fraud Office (SFO) <http://www.sfo.gov.uk/about-us/annual-reports--accounts/annual-reports/annual-report-2005-2006/proceedings-underway-.aspx > accessed April 10, 2022
[450] See the Official website of Serious Fraud Office (SFO) <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2006/transtec-plc.aspx > accessed May 21, 2022
[451] See the annual report of SFO in 2006, The Official website of Serious Fraud Office (SFO) <http://www.sfo.gov.uk/about-us/annual-reports--accounts/annual-reports/annual-report-2005-2006/proceedings-underway-.aspx> accessed May 20, 2022
[452] See John Birds, Robert Miles, Robert Hildyard, Nigel Boardman. *'Annotated companies' legislation*' (3rd edn, Oxford, Oxford University Press. 2013) 1228. Also see Derek French, Stephen Mayson, and Christopher L. Ryan, '*Company Law'* (33rd edn, Oxford University Press, Oxford, 2016)

any cost's rests with the Secretary of State. According to subsection (2), if an officer is found guilty of an offence as a result of an investigative matter, then he or she may be required to pay the costs of the inquiry. This can happen if the officer was determined to have committed the offence. According to subsections (4) and (5), the corporate entity or applicant (or applicants) may be held liable for the costs associated with the investigation in specific circumstances (5).[453] In light of this, it has been suggested that there is no advice available regarding the manner in which courts should exercise their discretion regarding the recovery of investigation costs.[454]

6.4. Public Enforcers in Bangladesh

There are number of bodies who played a critical role to enforcement of director duties in Bangladesh. However, not all the body play as a mainstream role some of them played as an ancillary role. The name of the bodies namely Bangladesh Securities and Exchange Commission (SEC)[455], Registrar of Joint Stock Companies and Firms (RJSC)[456], Anti-Corruption Corruption (ACC)[457], Bangladesh Bank (BB)[458], Bangladesh Financial Intelligence Unit (BFIU)[459], National Board of Revenue (NBR)[460], Bangladesh Competition Commission (BCC)[461], Directorate of National Consumer Rights Protection[462], Dhaka Stock Exchange (DSE)[463], Chittagong Stock Exchange (CSE)[464] and Ministry of Commerce.[465]

600-605.

[453] The Company Act 1985, s 439

[454] See Andrew Lidbetter, '*Company Investigations and Public Law'* (1st edn, London, Hart Publishing, 1999) 193

[455] Bangladesh Securities and Exchange Commission (SEC) < https://www.sec.gov.bd > accessed 2 June 2022.

[456] Registrar of Joint Stock Companies and Firms (RJSC), < https://roc.gov.bd> accessed 02 June 2022

[457] Anti-Corruption Corruption (ACC), < http://acc.org.bd> accessed 02 June 2022

[458] Bangladesh Bank (BB), < https://www.bb.org.bd/en/index.php> accessed 02 June 2022

[459]Bangladesh Financial Intelligence Unit (BFIU) < https://www.bfiu.org.bd> accessed 02 June 2022

[460] National Board of Revenue (NBR) < https://nbr.gov.bd> accessed 02 June 2022

[461] Bangladesh Competition Commission (BCC) < http://www.ccb.gov.bd > accessed 02 June 2022

[462] Directorate of National Consumer Rights Protection < https://dncrp.portal.gov.bd> accessed 02 June 2022

[463] Dhaka Stock Exchange (DSE) < https://www.dsebd.org> accessed 02 June 2022

[464] Chittagong Stock Exchange (CSE) < https://www.cse.com.bd> accessed 02 June 2022

[465] Ministry of Commerce < http://www.mincom.gov.bd> accessed 02 June 2022

6.4.1 Company Investigation

Joint stock firms typically have a large number of stockholders. As a result, the general meeting of shareholders has very little authority and the board of directors is in charge of the company's governance. As a result, there is a need for a higher level of protection for the rights of minority shareholders. As an extension of the protection offered to shareholders' rights, the goal in Bangladesh is to provide minority shareholders with the opportunity to request that corporate operations be investigated. The possibility of avoiding the judicial court presents shareholders with time- and money-saving benefits that they would not be able to realise under any other circumstances.[466] As a result of the fact that the inspection procedure is derived from the capacities of the state administration body, according to comparative legislation, it is an important issue to include in this paper; Because of this, the board of directors is in charge of the company's governance, whereas the general assembly of shareholders has relatively little authority.[467] In Bangladesh, where inspection applications have to be submitted to the Ministry of Commerce and RJSC, this is likewise the situation. As an administrative body, the RJSC is typically seen of as being connected to the minister of trade in some capacity. As will be seen in the following section, the RJSC's powers are utilised by the corporate court in this scenario.

Since 1994, shareholders who control more than 10 percent of a firm have had the right to petition the Company Court for an inspection of that company. In this scenario, shareholders are required to make it clear that they believe the activities of the company are most likely being mismanaged by accounts managers or board members. After holding a meeting with the members of the company's board of directors, the Company Court will then make arrangements for an inspection of the company's managerial staff. Also, in section 182 states that – "Inspection *of books of account, etc. of companies: - (1) The books of account and other books and papers of every company shall be open to inspection during business hours by the Registrar or by such other Government officer as may be authorised by the Government in this behalf. (2) It shall be the duty of every director or other officer of the company to produce to*

[466] In Bangladesh, the practise of controlling board members is fairly common. The majority of the nation's most prosperous companies are run and controlled by members of the same family. Concentrated structures, as opposed to dispersed ones, predominate the shareholding structure in Bangladesh.

[467] Generally, from the Ministry of Commerce.

the person making inspection under sub-section (1), in this section referred to the inspecting person, all such books of account and other books and other papers of the company in his custody or control and to furnish him with any statement, information or explanation relating to the affairs of the company as the inspecting person my require of him within such time and at such place as he may specify. (3) it shall also be the duty of every director and other officer of the company to give to the inspecting person all assistance in connection with the inspection which the company may be reasonable expected to give." [468]

In Bangladesh, the focused representative is in charge of overseeing the corporate inspection process for shareholders. This individual does not cede any of their authority to the administrative body. It seems that the rationale for the limitations imposed on the Bangladeshi executive agency is predicated on an acknowledgment of the concept of market freedom. Furthermore, the Bangladeshi government only gets involved in the commercial affairs of private enterprises when it is absolutely necessary.

Under Bangladeshi law, there is no precise definition of misconduct associated with the execution of an inspection request. This is because Bangladeshi law does not define wrongdoing. Instead, shareholders may submit a request for an investigation into the corporation in the event that "suspicious" behaviour is observed. Because of this, the interpretation that is given to this portion of the legislation will likely contain some degree of ambiguity because it is difficult to give a precise definition of what constitutes "suspicious" behaviour.[469] As a result, it is proposed that shareholder demands for investigations may arise from a board member's apparent breach of duty or from apparent system misuse. Increased independence can be achieved by giving the court the power to decide whether or not to launch an investigation. However, this may be a time-consuming and financially burdensome endeavour. It has been proposed that the lawmaker grant the Ministry of Commerce the power to launch an inquiry in specific situations in order to aid in the process of lowering the quantity of open cases. This would be in addition to the power that the courts are granted under Bangladeshi law.

[468] The Companies Act 1994, s 182
[469] Rashid (n 45)

6.4.2 Bangladesh Securities and Exchange Commission (SEC)

Capitalization of the Bangladeshi stock market expressed as a percentage of GDP from 1993 to 2020. The lowest rate recorded for Bangladesh was 1.4 percent in 1993, and the highest rate recorded for the country was 39.6 percent in 2014. During that time period, the average number for Bangladesh was 17.99 percent. The most recent figure, which comes from 2020, is 27.69 percent.[470]

This anticipated expansion was, however, cut short by the market catastrophe that occurred on two separate times in 1996 and 2010. In response to this urgent scenario, the Securities and Exchange Commission of Bangladesh (SEC) published in 2018 a comprehensive corporate governance rules obligation designed to educate Bangladeshi companies on guiding principles in governance.[471]

In addition, the Securities and Exchange Commission (SEC) exerts a very substantial impact on the administration of securities businesses as well as the issue of securities by public joint stock corporations. In addition to its role as a mediator in the financial market, the SEC is vested with the right to penalise enterprises in the financial market that violate applicable laws. According to Section 24 (1) of the Securities and Exchange Commission Act of 1993, the role of the SEC is to ensure the application of the rules outlined in the Capital Market Law by providing necessary guidance to the relevant parties. The main goal of the Securities and Exchange Commission (SEC) is to regulate business practices and activities to protect the public and stockholders from unethical, fraudulent, or otherwise dubious business practises. The Securities and Exchange Commission (SEC) and its members are authorised by the Securities Act of 1993 to take evidence, seek relevant paperwork, and summon witnesses. This is done with the goal of achieving effective management of capital market corporations. The SEC is able to analyse the documentation that has been submitted in order to reach a judgement

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[470] The Global Economy, 'Bangladesh: Stock market capitalization, percent of GDP' <https://www.theglobaleconomy.com/Bangladesh/stock_market_capitalization/> accessed 25 May 2022

[471] Bangladesh Corporate Governance Code 2018 (SEC 10 June 2018) < https://www.sec.gov.bd/slaws/Corporate_Governance_Code_10.06.2018.pdf > accessed 12 December 2018

conclusion. This gives the SEC the ability to determine whether or not there has been a violation of the company system, senior management guidelines, or SEC requirements. This gives the SEC the ability to determine whether or not there has been a violation of the company system, senior management guidelines, or SEC requirements.

These reports should also include specifics regarding any developments that may have a substantial influence on the company's current financial situation. Prior to submitting the reports to the SEC, the company is prohibited from discussing them with any other organisation that is not legally obligated to maintain the secrecy of the reports in order to maintain the confidentiality of the information. A description of the business's activities, as well as details about the company's top shareholders, executives, board members, and investors, must also be included with reports, according to Securities and Exchange Commission regulations.

The Securities and Exchange Commission (SEC) is a government organisation in Bangladesh that was established to supervise the country's securities market. It is directly under the minister of finance. In accordance with the Securities and Exchange Commission Act of 1993, it was created on June 8 of the same year. Before it was established, the Capital Issues Act of 1947 served as the regulatory framework for the securities market. The primary location of SEC's operations can be found in Dhaka's Dilkusha Commercial Area.

The government appoints a chairman to lead the SEC, and that chairman is responsible for selecting four members to work under him. Two of the members are full-time executives, and the government makes the nominations for these positions directly. One of the other two is a nominee of the Bangladesh bank, while the other is a nominee of the ministry of finance of Bangladesh. The responsibilities of the members include registration, the issuance of capital, the auditing of the corporation, administration and finance, supervision and monitoring of the corporate and legal affairs, research and development, education and training, and education and training. There are also four executive directors, one corporate accountant, and one legal counsellor in addition to the members of the organisation.

The primary goals of the Securities and Exchange Commission (SEC) are to safeguard investors' confidence in securities and maintain the integrity of the stock market. Other goals of the SEC include developing the securities market, ensuring that proper procedures are

followed when issuing securities, and enacting new laws, orders, rules, and regulations for regulating and directing the securities market. The purpose of the SEC is to safeguard the financial interests of investors by imposing regulations on the market in accordance with the SEC Act. It is responsible for approving new capital issues and prospectuses, limiting illegal transactions and insider trading, and exercising control over stock exchanges, corporations associated to the securities industry, and companies participating in the public offering of shares. As part of these responsibilities, the SEC is responsible for monitoring the disclosure functions of the companies, ensuring that the annual general meetings of the companies are held on time, ensuring that dividends are paid on time, and ensuring that security issuers timely issue allotment letters and refund warrants.

Since it was first established in 1993, the SEC has played an important part in the market for securities. One of the most important jobs of the SEC is to put a stop to the unethical practices that are prevalent in the market. Since 1993, the SEC has issued the following orders and regulations in an effort to maintain control of the market and improve its overall efficiency: (a) Securities and Exchange Commission (stock broker, stock dealer and authorised representative) Regulation 1994; (b) Securities and Exchange Commission (merchant banker and portfolio manager) Regulation 1995; (c) Securities and Exchange Commission (mutual fund) Regulation 1997; (d) Credit Rating Rules 1997; (e) Securities and Exchange Commission (control of insider trading) Regulation 1995; (f) Public Issue Rules 1998; (g) Right Issue Rules 1998; and (h) Depository Act 1999.

The Securities and Exchange Commission (SEC) is responsible for issuing and revoking registration certificates to stock dealers, brokers, merchant banks, authorised representatives of members, and any other intermediaries that are active in the securities market. The SEC's primary responsibility is to conduct market surveillance. It examines the price changes that occurred on both the Dhaka Stock Exchange and the Chittagong Stock Exchange. The Securities and Exchange Commission (SEC) is responsible for the oversight and regulation of markets and the intermediaries that operate within those markets. As part of this responsibility, the SEC receives and investigates complaints lodged against stockbrokers and firms/companies, and it also takes appropriate action, such as issuing warnings and charging fines when irregularities are found. In addition to this, legal action is taken against the defaulting businesses and corporations.

The Securities and Exchange Commission (SEC) regularly releases the findings of research that it has conducted on the trading behaviour of participants in the securities market. The Securities and Exchange Commission (SEC) publishes a variety of useful materials, such as their Annual Report, Quarterly Reviews, and the SEC Parikrama (Bangla). In addition to that, it releases manuals and handbooks on a regular basis. The Securities and Exchange Commission (SEC) runs a number of educational programmes with the goal of educating investors as well as intermediaries. These programmes include training for investors, both corporate and individual, as well as training for authorised representatives of members of the DSE and CSE.

6.4.3 Registrar of Joint Stock Companies and Firms of Bangladesh (RJSC)

After the partition of India, the first Office of the Registrar of Joint Stock Companies & Firms under the Ministry of Commerce was established in Chittagong, the port and second largest city in Bangladesh. These files and records of Companies, Associations (Trade Organizations), and partnership firms had been received from Kolkata, India. Chittagong is also Bangladesh's largest city by population. The office was transferred to Dhaka, the capital of Bangladesh in 1962. Currently, the office of the RJSC has records of 272,598 companies in Bangladesh, which comprise of various types such as 3,631 public limited companies, 197,564 private limited companies, 1,013 liaison offices of foreign companies, 53,600 partnership firms, 1,159 trade organizations, and 15,507 societies.[472]

The vision of the RJSC is to Digital registration of companies and post-registration service activities to promote to world class. Whereas the Mission is to play a role in national development by simplifying, modernizing, modernizing and creating a business-friendly environment for online service delivery with the aim of gradually transforming it into a paperless office.

The Registrar of Joint Stock Companies and Firms (RJSC) is the sole authority which facilitates

[472] Md Fazlur Rahman, 'Registration of new Companies slow' (The Daily Start 24 July 2022) < https://www.thedailystar.net/business/economy/news/registration-new-companies-slows-3077781> accessed 23 November 2022

formation of companies etc.; and keeps track of all ownership related issues as prescribed by the laws in Bangladesh. The Registrar is the authority of the Office of the Registrar of Joint Stock Companies and Firms, Bangladesh. RJSC accords registration and ensures lawful administration of the entities under the provisions of applicable act as under: Companies and Trade Organizations: Companies Act, 1994 (Amendment of Companies Act 1913), Societies: Societies Registration Act, 1860, Partnership Firms: Partnership Act, 1932.

RJSC is in the business of incorporating companies (including trade organisations), societies, and partnership firms in accordance with the Companies Act 1994, the Societies Registration Act 1860, and the Partnership Act 1932. Additionally, RJSC is responsible for administering and enforcing the relevant statutory provisions of these acts in relation to the companies (including trade organisations), societies, and partnership firms that it has incorporated. Regarding the execution of director responsibilities, RJSC is authorised to take a number of different actions. For example, if a company has made the decision to wind down its operations, the court has made an order to do so, or the firm's Memorandum and Articles of Association provide such provisions, the corporation must submit the necessary paperwork to the RJSC in order to be dissolved. RJSC will remove a company's name from the Register if it is determined that the business is no longer active.

6.4.4 Anti-Corruption Commission of Bangladesh (ACC)

A statute that was enacted on February 23, 2004, was responsible for the establishment of the Anti-Corruption Commission (ACC). Even though it did not initially have the effect that was intended, immediately after its reformation in February 2007, the ACC resumed operating with fresh enthusiasm and determination, properly acceding to the United Nations Convention against corruption, which was ratified by the General Assembly on October 31, 2003. This occurred even though it did not initially have the effect that was intended. The Anti-Corruption Commission Act of 2004 governs its structure and operations. The divergence is in Bangladesh that, unlike the ACC, the UK have the National Crime Agency, which is investigating somewhat nearer the functions ACC played in Bangladesh perspective.

The main functions of the ACC is to (a) Inquiry and investigation into the offences set out in the schedule; (b)File and conduct cases under this Act on the basis of investigation and inquiry

under clause; (c) Investigate any allegations of wrongdoing in the public sector, either on its own initiative or in response to an application submitted by a person who feels wronged or by someone acting on their behalf; (d) Perform any duty entrusted to the commission by anti-corruption laws; (e) Review the legally accepted measures for preventing corruption and submit recommendations to the President their effective implementation; (f) Carry out research on the prevention of corruption and submit recommendations to the President regarding the actions to be taken on the basis of the research findings;(g) Promote the values of honesty and integrity in order to prevent corruption and take measures to build up mass awareness against corruption; (h) Arrange seminars, symposiums, workshops etc. on subjects falling within the jurisdiction of the commission. (i) Identify the sources of different types of corruption existing in Bangladesh against the backdrop of the country's socio-economic conditions and present to the President any recommendations for appropriate action. (j) Inquire into corruption, investigate, file cases and determine the process of approval by the commission in respect of such inquiry, investigation and filing of cases. (k) Perform any other work considered necessary for the prevention of corruption.

As part of monitoring of the Headquarters' performance, the Commission reviews the activity of each Wing once a week. The Director General of the concerned Wing remains present the specific date and time at the office of the Chairman to give updates about the Wing's performance and respond to queries of the Commission. However, the Commission has approved an inspection policy to institutionalise internal oversight of the performance of the Headquarters, divisional and integrated district offices. The Policy stipulates inspection of each functional unit by whom at which frequency. The Commission will prepare an inspection calendar for each year in order to ensure frequencies of inspections stipulated in the Policy.

As per the Inspection Policy, Inspection Unit of the Pending Matters and Inspection Wing will examine different units at least once a year; Directors will inspect respective Branches at least once in every six months; and the Director Generals will look into own wings at least once in every six months at the Commission's Headquarters.

The Commission is determined to rein in illegal practices and corruptions of its officers and staffs. Within the auspices of Rule 19 (1) of the Anti-Corruption Commission Rules 2007, the Commission has constituted a permanent Internal Anti-Corruption Committee, led by its

chairman, to constantly monitor, supervise, complain, inquire, and investigate into any corruption allegations against the ACC officials and to make recommendations for taking legal and departmental actions against the corrupt staff. As for example of its determination against staff corrupt practices, the Commission assigned the Rapid Action Battalion (RAB) to investigate into corruption allegation against a Deputy Director of the ACC in 2011. Based on its investigation, RAB submitted charge-sheet against the officer, which is undergoing trial in court.

Despite having all of the support and resources available, the ACC has been subjected to a variety of criticisms. It is quite obvious that the ACC in Bangladesh was unable to accomplish the goals and objectives with whom it began its mission.[473]

6.4.5 Bangladesh Bank (BB)

The Bangladesh Bank, the nation's central bank, has major impact over the operations of commercial banks and the financial market as well as over the creation, supervision, and continuous upkeep of Bangladesh's financial system and banking industry according to the stipulations of Bangladeshi law.[474] Although it is generally agreed that Bangladesh's domestic banking sector performs more competitively and effectively than the country's other industries, there is a school of thought that maintains the Bangladesh Bank (BB) is principally responsible for the success or failure of this sector. As a consequence of this, it is imperative that it be brought to everyone's attention that it would be prudent for the behaviour of Bangladesh's commercial banks to conform to the standards that are followed in more developed regions.[475]

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[473] See, Nurul Huda Sakib, 'Why anti-corruption efforts failed in Bangladesh?' (LSE Blog, 03 October 2021) <https://blogs.lse.ac.uk/southasia/2019/10/03/why-have-anti-corruption-efforts-failed-in-bangladesh/ > accessed 02 March 2022; Dr Iftekharuzzaman, 'Anti-Corruption Commission: How can it be truly effective?' (The Daily Star, 15 February 2019) https://www.thedailystar.net/supplements/strong-institution-good-governance/news/anti-corruption-commission-how-can-it-be-truly-effective-1701922 > accessed 02 March 2022

[474] Sharmin Akter Eva, Mohammad Saiful Islam, Mohammad Shibli Shahriar, Rozina Akter and Sakil Ahmed, 'Board of Directors Structure and Bank's Performance: Evidence from Bangladesh,' (2018) 18(2) Journal of Academy of Business and Economics 29

[475] Md. Rezaul Karim, Ranjan Kumar Mitra, Ibrahim Khan, 'Determinants of Board Independence in the Banking Sector of Bangladesh' (Asian Institute of Research, 20 January 2020) <https://www.asianinstituteofresearch.org/JEBarchives/Determinants-of-Board-Independence-in-the-Banking-Sector-of-Bangladesh >accessed 25 May 2022

A central bank, reserve bank, or monetary authority is a banking institution granted the exclusive privilege to lend a government its currency. Like a normal commercial bank, a central bank charges interest on the loans made to borrowers, primarily the government of whichever country the bank exists for, and to other commercial banks, typically as a 'lender of last resort'. However, a central bank is distinguished from a normal commercial bank because it has the monopoly on creating the currency of a nation, which is loaned to the government in the form of legal tender. It is a bank that can lend money to other banks in times of need. Its primary function is to provide the nation's Money Supply, but more active duties include controlling subsidized-Loan Interest Rates, and acting as a lender of last resort to the Banking Sector during times of financial crisis (private banks often being integral to the national financial system). It may also have supervisory powers, to ensure that banks and other financial institutions do not behave recklessly or fraudulently.

Bangladesh Bank, the country's central bank and the highest regulatory body for the country's monetary and financial system, was established in Dhaka as a body corporate on December 16, 1971 in accordance with the Bangladesh Bank Order, 1972 (Proclamation Order No. 127 of 1972). This order came into effect on December 16, 1971. At present it has ten offices located at Motijheel, Sadarghat, Chittagong, Khulna, Bogra, Rajshahi, Sylhet, Barisal, Rangpur and Mymensingh in Bangladesh; total manpower stood at 5807 (officials 3981, subordinate staff 1826) as on March 31, 2015.

Bangladesh Bank is increasing its concentration on infrastructural development because it’s a vital prerequisite for economic development. A Taka 200 crore refinance line has been introduced in FY-10 against bank loans for environment friendly investments in solar energy, Biogas plants and Effluent Treatment Plants (ETP). Already Participatory Agreement with some banks for receiving refinance facility for loan against ETP is under process. In addition, commercial banks have been persuaded to invest in power generation plant under Public Private Partnership (PPP). In the meantime, BB itself has established a 20 kilo watt solar panel. In addition, BB is always urging the financial institutions to be more committed to the society by fulfilling their Corporate Social Responsibilities (CSR) and BB issued guidance (DOS Circular No 01 Dated 1st June 2008). According to vision 2021 of present Govt. poverty has been targeted to reduce below 15%. As a short-term measure to achieve this target BB authority

hopes the credit facilities for agriculture and SMEs will be very effective and will ease the implementation of long-term strategies.

Basic financial services such as deposit, credit etc. is considered as entitlement of all people in a society, this is particularly true in developed countries. Inclusiveness of a greater segment of people in financial system is pre requisite for economic development of a country like Bangladesh to facilitate employment to ease credit facilities. In spite of the fact that our nation is home to a huge number of bank branches and microfinance institutions, a sizeable portion of our population, particularly those living in rural areas and in poverty, has limited access to the financial system. The Bangladesh Bank has begun looking for a solution out of this predicament, and in order to alleviate poverty as well as other social ills, it is imperative that basic financial services such as deposits and modest loans be made available to the general public. Both the Bangladesh Bank and the Government of Bangladesh (GOB) have implemented a number of corrective actions in an effort to close these gaps in financial inclusion.

Bangladesh Bank has introduced refinance schemes for banks against their loans to Small and Medium Enterprises (SMEs) multilateral development partners such as the IDA and ADB are supplementing BB's refinance programs with their co-financing lines. BB's refinance schemes for banks against their loans to Small and Medium Enterprises (SMEs) have been expanded from Taka 100 crore to Taka 600 crore for ensuring credit availability to this sector. To widen and strengthen SMEs, recently Bangladesh Bank has formed SME and Special Programs Department; to enhance investment in this sector specially to help women in increasing their contribution to industrialization, BB is detecting the hindrances on the way. In this regard it has been made mandatory that at least 15% of the credit will have to be disbursed among women entrepreneurs. Against the sector in total of Tk. 24000 will be disbursed in the current fiscal (FY 2009-10) through the banking channel

6.4.6 Bangladesh Financial Intelligence Unit (BFIU)

Bangladesh Financial Intelligence Unit (BFIU) is the central agency of Bangladesh responsible for analysing Suspicious Transaction Reports (STRs), Cash Transaction Reports (CTRs) &

information related to money laundering (ML)[476] and financing of terrorism (TF) received from reporting agencies & other sources and disseminating information/intelligence thereon to relevant law enforcement agencies. BFIU has been entrusted with the responsibility of exchanging information related to money laundering and terrorist financing with its foreign counterparts. The creation of an efficient system for the prevention of money laundering, the fight against the funding of terrorism, and the reduction of the proliferation of weapons of mass destruction is the primary goal of the BFIU. BFIU was established in June 2002, in Bangladesh Bank (Central bank of Bangladesh) named as 'Anti Money Laundering Department'. To enforce and ensure the operational independence of FIU, Anti Money Laundering Department has been transformed as the Bangladesh Financial Intelligence Unit (BFIU) in 25 January, 2012 under the provision of Money Laundering Prevention Act, 2012 and has been bestowed with operational independence. BFIU has also achieved the membership of Egmont Group in July, 2013.

BFIU works under the provisions of Money Laundering Prevention Act, 2012 and Anti-Terrorism Act, 2009 (including amendments in 2013). However, there are number of allegations against the BFIU for not fully capable of preventing money laundering.[477]

BFIU includes the number of institutions and professionals, who are bound to report to the BFIU any suspicious activity and transaction they might come across regarding money laundering or terrorist financing.[478] The following table shows the years in which institutes and professionals are included in which year.

[476] For money laundering prevention methods in Bangladesh see, Kazi Mokhles Uddin Ahamed 'Dead fish across the trial: The money laundering methods in Bangladesh' (2017) 69 Dhaka Law Reports Journal 21

[477] See, M. Anwarul Aziz Kanak, 'Role of Financial Intelligence Unit in Combating Money- Laundering and Terrorist Financing: An Analysis on the Functioning of Bangladesh Financial Intelligence Unit' (2016) 21(7) IOSR Journal of Humanities and Social Science 148; Shirin Sultana, 'Role of financial intelligence unit (FIU) in anti-money laundering quest: Comparison between FIUs of Bangladesh and India' (2020) 23(4) Journal of Money Laundering Control 931

[478] Reporting agencies in Money Laundering Prevention Act 2012, s 2(w)

Name of Reporting Organization	Year of inclusion
Bank Financial Institution	2002
Insurer Money Changer Any company or institution which remits or transfers money or money value Any other institution carrying out its business with the approval of Bangladesh Bank	2008
Stock Dealer and Stock Broker Portfolio Manager and Merchant Banker Securities Custodian Asset Manager Non-Profit Organization Non-Government Organization	2010
Cooperative Society Real Estate Developer Dealer in Precious Metals or Stones Trust and Company Service Provider Lawyer, Notary, Other Legal Professional and Accountant	2012

6.5. Public Enforcement Actions and Mechanisms

6.5.1 Public Humiliation or Reputational Sanction

There are several different approaches that can be taken in order to implement 'reputational' or' shaming' sanctions.[479] One example of this type of sanction is the dissemination of an official statement informing the public that a certain requirement has not been satisfied by a certain business. If it becomes essential, this publication may suggest to other businesses that they should avoid doing business with the current corporation. Importantly, all future dealings and interactions that a firm has with other

[479] Banking Control Act, 1966 s.22

business parties can be negatively impacted if the organization's reputation is tarnished. Even though dissatisfied trading partners have the ability to initiate reputational sanctions against a company, these sanctions have a tendency to be most effective when they are carried out by a neutral and qualified agency that investigates company behaviour and discloses the results of their findings.[480] For instance, in developed capital markets, the Securities and Exchange Commission (SEC) in the United States, along with other public agencies, closely monitors corporate disclosure and will censure and penalise companies for any false disclosures made by them.[481]

The actions of the parties will determine whether a director who has broken the rules will be publicly or privately called out for their transgressions. If the rule was broken in only a very modest way, the most likely consequence would be a verbal reprimand. On the other hand, if the situation is more serious, the director might be publicly reprimanded through the use of a statement. Although some studies suggest that negative publicity can have a negative impact on a company's reputation and, as a result, can lead to a decrease in the value of the company's shares, this does not always happen.[482]

It is noteworthy that reputational penalties have the potential to reduce public expenditure in comparison to other types of fines imposed by public enforcement. Nonetheless, studies carried out in China show that public censure by a regulatory body can have a detrimental impact on the stock price of the guilty business, even in the absence of any legal penalties. This remains true even in the absence of any legal penalties.[483]

In addition, it has been suggested that judges should have the authority to humiliate directors by criticising their behaviour, even if there is no evidence that the directors have violated their duties. This idea is supported by Professor Edward Rock, who felt that exposing a director to public humiliation might result in their termination, coworkers

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[480] John Armour (n 305)
[481] See Howell E. Jackson and Mark J. Roe (n 311)
[482] Ibid
[483] Benjamin L. Liebman and Curtis J. Milhaupt, 'Reputational sanctions in China's securities market' (2008) 108(40) Columbia Law Review 929

making fun of them, and harm to their reputation. Professor Rock thought that these kinds of behaviours may have these effects. However, this could be a significant approach that helps to contribute to discouraging behaviour of this kind in some regards.[484] Directors of companies are frequently advised to maintain their affairs in a careful manner so as to steer clear of making poor decisions and suffering business failures in order to avoid any unwanted publicity or embarrassment in front of the public.[485] This occurs frequently, even in situations when a violation of behaviour is unlikely to result in the imposition of formal punishment. However, it is important to note that these social variables may become less influential if the processes for enforcement are loosened or if those who violate their duties are subject to insignificant consequences. As a result, the possibility of unethical behaviour remains, and it even has the potential to become more widespread when there is no external responsibility present. As a direct result of this, proper standards of board behaviour may be substituted by inappropriate standards.[486] The legal system in Bangladesh has acknowledged the reputational consequence. Nevertheless, it is not used as the primary form of punishment but rather as a supplementary one. For instance, section 14 of the Companies Act of 1994 gives the court discretion, and very frequently company courts order humiliating consequences against the corporation that is being accused of wrongdoing.

6.5.2 Imprisonment in the event of directors' breach of duty

In the United Kingdom, directors have been sent to prison as a result of the Companies Act of 2006, the Bribery Act of 2010, and the Criminal Justice Act of 1993. If a director is discovered to have been involved in fraudulent business behaviour, the Fraud Act of

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[484] See Edward B Rock, 'Saints and Sinners: How Does Delaware Corporate Law Work?' (1997) 44 UCLA Law Review 1009 < http://ssrn.com/abstract=10192 > accessed 20 February 2021

[485] In the UK following statutory responsibilities, each director is obligated to behave in a manner that is consistent with what they believe to be the best interests of the firm. The Board of Directors has included in the terms of reference of its committees the matters that it deems appropriate for delegation. See, Governance and Constitution, (Financial Reporting Council, 25 September 2023) < https://www.frc.org.uk/about-us/policies-and-procedures/governance-and-constitution/#:~:text=All%20directors%20must%20act%20in,of%20reference%20of%20its%20committees. > accessed on 15 December 2023

[486] See Renee M. Jones and Michelle Anne Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight', (2012) 45(2) Vanderbilt Journal of Transnational Law 343 <http://ssrn.com/abstract=2050610 > accessed 2 November 2021

2006 mandates that they will be prosecuted and penalised for their actions. This can result in a sentence of jail with a maximum of ten years possible.[487]

If a director is found guilty of infractions or misconduct, the law in the United Kingdom recognises that he or she may be subject to imprisonment as a sanction. More precisely, anybody found guilty of insider trading on a summary conviction may face a jail term of up to six months and/or a fine up to the maximum amount allowed by law (Section 61 of the UK Criminal Justice Act 1993). Any individual charged and convicted of insider trading may potentially be fined up to the maximum amount allowed by law. In addition, the director faces a fine of money and/or a jail sentence of up to seven years upon conviction for an indictable offence, depending on how serious the offence was. In Section 61, this responsibility is described.[488]

In most cases, market abuse takes the form of either the dissemination of confidential information, often known as "insider dealing," or the dissemination of incorrect information, which is referred to as "market manipulation." If practices of this nature are allowed to go unchecked, there is a good chance that consumers will place less trust in the market. As a consequence of this, in order for lawmakers to combat this issue and regain control of the market misuse, offenders are typically punished through the use of a variety of different sorts of punishments, such as financial sanctions or jail.[489] In Section 118 of the Food Safety Modernization Act of 2000 (FSMA 2000), a list of nine different behaviours that are, provided was, by definition, indicative of market abuse. This conduct can be broken down into two categories: insider trading and market manipulation.

In the *Tribunal of Davidson and Tatham v FSA* [490] Paul Davidson, also referred to as "the plumber," was hit with a £750,000 punishment for market manipulation; however, the court overturned this decision. Most people agree that the fact that the case clearly establishes market exploitation as an illegal activity is the most important part of

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[487] The Fraud Act 2006, s.1,12
[488] Criminal Justice Act 1993, s 61
[489] See Derek French, Stephen Mayson, and Christopher L. Ryan, *'Company Law'* (37th edn., Oxford University Press, 2021) 362,367.
[490] [2006] FSMT Case 031

Davidson's imprisonment in the UK. The majority of individuals think this to be true. While insider trading was already deemed a criminal offence by the Criminal Justice Act of 1993, it was not originally made apparent that market manipulation, which is likewise illegal under the Financial Services and Markets Act of 2000, is also a criminal offence. This was done in order to clarify that the abuse of the market is a criminal offence.[491] But in the aforementioned case, the Tribunal declared that due to the gravity of the case, the outcomes achieved by civil standards would be equivalent to, if not the same as, those obtained by criminal standards.

In June 2015, the Chancellor of the Exchequer of the United Kingdom, George Osborne, made a statement in which he stated that the public has every right to wonder why, despite several scandals that have caused the country to suffer massive financial losses, so few people have been prosecuted. He was declared that he agreed with the governor that people who engage in fraudulent market manipulation and other financial crimes are criminals and should be prosecuted as such. Additionally, he declared that he agreed with the governor that everyone who engages in financial crime should be handled like a criminal.[492]

A director is prohibited from accepting a benefit from a third party if it is provided because of their capacity as a director under the Bribery Act of 2010. It is also against the rules for a director to receive a reward that is contingent on whether or not they participate in a certain activity.[493] This means anyone who is interested in conducting business in any capacity outside of the United Kingdom would need to get guidance on the subject. When it comes to the Bribery Act of 2010, it is vitally important that directors are aware of their responsibilities as well as the behaviour that may be expected of individuals who are permitted to represent them in matters pertaining to foreign commercial transactions.[494]

It would seem that no directors have been charged and convicted of accepting a bribe in

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[491] See Julian Connerty, 'Courts in Davidson Declare Market Abuse a Criminal Act [comments]' (2006) 25(7) International Financial Law Review 8
[492] *Davidson and Tatham v FSA* [2006] FSMT Case 031 at 43
[493]The Bribery Act 2010, ss 1,2,6,7 and 11
[494] Tahir Ashraf, 'Directors' duties with a particular focus on the Companies Act 2006' (2012) 54(2) International Journal of Law and Management 125

contravention of the Bribery Act of 2010 based on guidelines established in the past. However, two directors were found guilty of an offence under this section by a foreign public official in the Smith and Ouzman Ltd. case. On three counts, they were found guilty of dishonestly deciding to pay Mauritania's and Kenya's public officials in order to get company contracts in both nations.[495] It was determined that these payments, totaling £395,074, were against the terms of the Bribery Act of 2010. They faced the possibility of serving a prison sentence of up to one year's duration, at most.[496]

Due to modifications made to the director disqualification process, the Small Business, Enterprise, and Employment Act of 2015 will give foreign business behaviour more weight. An offence that occurred outside of the United Kingdom would generally tagged as an indictable offence under the jurisdiction of English, Welsh, or Scottish law, then the offender will be disqualified from competing in that sport. This will apply to any crimes that are in any way connected to the promotion, formation, management, or liquidation of a firm. During this time, judges will be allowed to take into consideration the behaviour of company directors in relation to international business when evaluating applications to have directors disqualified from their positions.[497] In the following paragraph, we will go over further details regarding disqualification orders.

In an analogous manner, in Bangladesh, various laws of Companies and other relevant Law, including as the Code of Criminal Procedure (CrPC) and the Penal Code (PC), carry with them the possibility of a criminal charge in the event that they are violated. Those who are found to have broken the law as directors run the risk of receiving a sentence of imprisonment if this is proven to be the case. According to Bangladeshi law, the only kind of criminal penalty that may be handed down to corporate directors is jail. This means that both disqualification and monetary fines are off the table (civil punishment). Company directors who are employed in Bangladesh run the risk of facing criminal prosecution if

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[495] See Serious Fraud Office (SFO), 'UK printing company and two men found guilty in corruption trial', (SFO, 2014)< http://www.sfo.gov.uk/press- room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found- guilty-in-corruption-trial.aspx > accessed October 30, 2021

[496] The Bribery Act 2010, ss 6,11, and 14

[497] See, Amy Smart, Omar Qureshi, 'Smith and Ouzman Ltd: two sentenced for foreign bribery' (February 2015, Lexology) <http://www.lexology.com/library/detail.aspx?g=bd2ead51-847d-47c5-b289-d4f5657efe8d.> accessed 27 November 2011

they are found guilty of nonviolent offences done for the purpose of financial gain (also known as fraudulent acts). These repercussions are applicable for an example of a prosecution under section 203 of the Companies Act 1994, if a director is found guilty of activities such as failing to produce papers and evidence in accordance with section 200 of the Act.[498] In addition to this, subsection 184(5) of the same act states that "If any person, being a director of a company, defaults in taking all reasonable to comply with the provision of this section, then he shall, in respect of each such offence, be punishable with fine which may extend to five thousand taka."[499] If any such person as is referred to in sub-section (7) of section 181 fails to take all reasonable steps to secure compliance by the company, as regards any accounts laid before the company in general meeting, with this section and with the other requirements of this Act as to in the accounts, then he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten times the amount of any gain or profit derived from the offending conduct. To this end, it is provided that a person shall not be sentenced to imprisonment for any such offence unless the offence was done intentionally.[500] However, in section 393 of the Companies Act in relation to the coznigence of the offence stated that "(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), -- (a) every offence under this Act shall, for the purpose of the said Code, be deemed to be non-cognizable."[501]

In addition, incarceration is sanctioned by Bangladeshi legislation, which specifies in a number of laws that infringing directors are subject to the possibility of receiving a prison sentence. In Bangladesh, for the first time ever, company directors have been held criminally accountable for their roles in the commission of corporate crimes in the case of Eusof Babu and Others v State.[502] This being the case According to the judgement of the majority, section 138 of the Negotiable Instruments Act of 1881 (NI Act) allows for the prosecution of three different types of people for the dishonouring of cheques. These three categories of people are as follows: the company that has committed the offence, every

[498] The Companies Act 1994, ss 200, 203
[499] Ibid, s 184(5)
[500] Ibid s 185(7)
[501] Ibid s 393
[502] 14 ADC (2017) 792, 68 DLR(AD) (2016) 298

person who has been in-charge of the company and responsible for the business of the company at the time of the commission of the offence, and director, manager, secretary or other When the violation was carried out by the firm, only the corporation itself can be prosecuted and penalised; neither of the other two types of persons can be held liable for the violation

However, it would be respectfully submitted here that the majority decision has set a precedent that even when the company is liable for committing corporate crimes, only the directors and other persons in the high in the hierarchy could be prosecuted, which may create problems in some situations. This is something that would be respectfully submitted here. For instance, in some situations, people who fall into this category might not have the financial ability to pay a significant amount of a fine that might be imposed in a criminal case. This problem might have been avoided if the company, as the primary offender, had been included as a necessary party in the legal proceeding.

In a summary, maintaining an insistence on prosecuting the corporation in addition to the top executives and management of the company for crimes committed by the company might have prepared the way for securing greater culpability on the part of the companies

6.6. Difficulties of Public Enforcement Actions

6.6.1 Company Law Is a Branch of Private Law

It is debatable whether a public authority should be prevented from initiating an enforcement action under any circumstances other than when it is in the public interest. It may be argued that business law is an entirely private area of law; but, if this is the case, then there should be very little in the way of public control. As a consequence of this, one could argue that because firms are regarded as private entities, any legal enforcement and legal solutions should also be kept private.[503]

There is a possibility that the general public does have an interest in this matter because public representatives and the government have the power to regulate the rights and activities of businesses. To put it another way, a concession made by the government enables businesses to

[503] Andrew Keay (n 351)

behave as if they were legal persons.[504] Therefore, it would appear that the only entity that is capable of monitoring and supervising the responsibilities of directors is a public body. In addition, the intervention of public authorities into matters of private law is permitted in the United Kingdom. The United Kingdom is a capitalist society, and there is a clear public interest in ensuring that organisations behave responsibly while taking risks. One decision that was made in the interest of public policy was the establishment of limited liability in 1885 by the Parliament of the United Kingdom. The state is obligated to conduct a review of limited liability because the selection of public policy generates widespread public interest. In accordance with Section 447 of the Civil Code of 1985, an informal investigation may be initiated in the event of any violation of any financial concessions.[505]

The introduction of regulations that prescribe what business directors are permitted to do and, as a result, limit the power of company directors when carrying out company operations is one of the primary criticisms levelled against public intervention. On the other hand, this does not imply that public intervention results in stronger prohibitions on directors, nor does it rule out the possibility of imposing additional duties on directors. Instead, attention has been put toward expanding enforcement that can be directed toward directors. This shift in emphasis has been made in recent years. According to the findings of a study conducted by Keay, the public is not overly involved in company law in the United Kingdom (UK), however in Australia there is a greater presence of involvement, which has led to a rejection of public enforcement.[506]

In the case, *Ailakis v Olivero*,[507] the Supreme Court of Appeal in Australia presented a number of arguments addressing the responsibilities of directors. It looked at these responsibilities as stemming from law, equity, and legislation, and it discovered that statute is what sets the scope of a director's duties as well as the requisite criteria for them. Consequently, statutes can be used to impose certain duties; nevertheless, it is important to note that it is not necessarily important for these duties to be of a public nature. This is relevant, for instance, to the obligation of appearing in court in response to a subpoena as well as the responsibility of looking after a kid. Instead, the responsibilities of a director are seen as belonging to the firm

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[504] See Michael Phillips, 'Reappraising the Real Entity Theory of the Corporation' (1994) 21(4) Florida State University Law Review 1064.
[505] See David Milman*., 'Governance of Distressed Firms*' (UK, Edward Elgar Publishing, 2013) 22
[506] Andrew Keay (n 351)
[507] (No 2) [2014] WASCA 127.

itself and are therefore subject to being policed by the business itself. Similarity, in *Foss v Harbottle*[508] stated that any remedy must work to vindicate the rights of the company, not the rights of individuals who owe duties to the company such as the directors. Therefore, the responsibilities that a director has toward the organisation in which they are employed are not regarded as being of a public nature.[509]

Moore is of the opinion that the structure for corporate governance legislation in the United Kingdom, despite exhibiting some notably contractarian characteristics, is fundamentally regulatory in character. This is despite the fact that the framework does display certain noticeably contractarian characteristics. It is possible to put corporate law within the area of private English law, but it is also possible to position it within the realm of public law. The analysis, on the other hand, suggests that it would be more appropriate to situate the legislation governing corporate governance inside public law rather than private law. Therefore, it should be understood to be an outcome-imposing or regulatory part of law, rather than the usual portrayal of it as an outcome-facilitating or contractual element. This is in contrast to the typical portrayal of it as an outcome-facilitating or contractual element. As a consequence of this, the legislation for corporate governance ought to be seen as a replacement for democratically decided divisions of power regarding corporate decision making in place of alternative allocations that tend to come through decentralised contractual determination.[510]

6.6.2 The Soft Law Vs Hard Law Debate

The principles of good corporate governance are applied in a variety of ways depending on where you are in the world. In some nations, compliance is mandatory, whereas in others, citizens are given the option to explain their actions or face penalties. Therefore, regulators and politicians need to determine the sort of legal change that is required before they may establish legal reforms. Therefore, the focus of this subparagraph is on determining whether or not soft rules have any efficacy when it comes to generating improved corporate governance.

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[508] (1843) 2 Hare 461.
[509] *Ailakis v Olivero* (No 2) [2014] WASCA 127 at 103.
[510] Marc T. Moore, 'Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism' (2014) 34(4) Oxford Journal of Legal Studies 693. For in depth, see Marc T Moore, '*Corporate Governance in the Shadow of the State'* (1st edn, London, Hart Publishing, 2013) 62-98

Ayres and Braithwaite are the ones credited for the development of responsive theory, which suggests that people, organisations, and business need responsive legislation. This is due to the fact that various industries will need for a variety of different forms of regulation. The idea that individual acts are promoted by a range of distinct stimuli serves as the basis for the notion of responsive behaviour. Therefore, in order to provide an adequate response to this situation, a regulatory body needs to have access to a wide variety of prospective enforcement measures.[511] A system that is based on self-regulation could be used to govern persons in the business world who are motivated to varying degrees by a sense of social duty. If the only factor that matters to companies is their bottom line, then a regulatory framework that is predicated on sanctions would be the best option.[512]

In the meantime, the forces that drive behaviour will shift and change throughout time. This makes it seem impossible for a regulatory body to find and address every instance of legal infraction. Therefore, it is absolutely necessary for government entities to have the capacity to encourage voluntary compliance with the law. Ultimately, the aim of responsive regulation is to encourage the highest possible degree of regulatory compliance.[513] When organisations are able to provide evidence of a "enforcement pyramid," this is more likely to be granted.[514] Because it can be challenging to provide a comprehensive definition of fraud, regulations frequently fail to adequately regulate the practise. The case of fraud is one illustration of this. Fraud is viewed as a means of carrying out a conduct that would otherwise be lawful rather than as a criminal offence. Whether or if there has been dishonest conduct in the activityis the most important factor in determining whether or not fraudulent behaviour is in compliance with the law. If it has, then the behaviour is in compliance.[515]

Both the UK Corporate Governance Code and the Bangladesh Corporate Governance Code have located the "comply and explain" requirement within their respective documents. Because

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[511] See Ian Ayres and John Braithwaite, '*Responsive regulation: Transcending the deregulation debate'* (Oxford, Oxford University Press, 1992) 4
[512] ibid
[513] George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22(2) University of New South Wales Law Journal <http://ssrn.com/abstract=923002> accessed 22 April 2022
[514] See Ian Ayres and John Braithwaite, '*Responsive regulation: Transcending the deregulation debate*' (Oxford, Oxford University Press, 1992) 35
[515] Stephen Copp and Alison Cronin, 'The failure of criminal law to control the use of off-balance sheet finance during the banking crisis' (2015) 36(4) Company Lawyer 99

of this, doing an analysis to determine whether or not this principle is operating in the appropriate manner is difficult. There is typically very little attention regarding instances in which businesses either do not comply with the code or have deviated from it without explaining.[516]

The Financial Reporting Council (FRC) published a report titled "Review of the Effectiveness of the Combined Code," in which it stated that a sizable portion of respondents—including principal investors and service providers thought that the corporate governance declarations of businesses only offered incredibly few facts. The specificity of the explanations that corporations offered when they did not conform to the Code was another object of criticism in this instance.[517] One respondent stated that it seemed as though the explanations provided lacked a substantial amount of integrity, and that companies adopt poor practise by communicating with shareholders before declaring a substantial infringement of the Code's principles. This was in response to a comment made by another respondent.[518] During this time, another responder stated that the explanations provided for departures from the Code have grown weak and somewhat uniform. Therefore, it is abundantly clear that the required level of voluntary compliance is not being realised at the current time. It is important to note that the FRC and other regulatory authorities do not have the responsibility of evaluating the responses of companies to the Code. The organisations review themselves to see whether or not their responses are sufficient. In the meanwhile, the markets and the shareholders have a responsibility to determine whether or not the response is appropriate, and if it is not, they have a responsibility to take action to compel the corporations to raise their Code compliance. To boil it down, if compliance is something that is genuinely wanted, then businesses should strive to respond in an efficient manner. Therefore, the goal of comply-or-explain is to empower shareholders so that they may evaluate the circumstances of the organisation and decide whether or not non-adherence is appropriate in that context.[519] Because of this, regulatory organisations would be able to determine whether or not these assertions are accurate and verify

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[516] Andrew Keay, 'Comply or Explain: In Need of Greater Regulatory Oversight?' (September 10, 2012) <http://ssrn.com/abstract=2144132> accessed 5 April 2022

[517] See FRC, 'Review of the Effectiveness of the Combined Code: Summary of the Main Points Raised in Responses to the March 2009 Call for Evidence' (July 2009) 37 < https://www.frc.org.uk/getattachment/2852d9a8-10ea-48d1-ac80-59d899207ec2/;.aspx > accessed 5 April 2021

[518] Ibid p.38

[519] Andrew Keay (n 351)

that any accounting are both completely thorough and comprehensive.[520] It appears that Bangladesh's legislators prefer mandatory over voluntary regulations, and this trend began after the passage of the 1994 Act.

6.6.3 The Cost of enforcement of director duties

It is evident that the people in the UK may be in favour of public authorities having more work to do inside the nation, even though these authorities are already overworked as a result of the Covid-19 pandemic, the global financial crisis, and the unsettling news about directors. On the other hand, in contrast to governmental enforcement, private enforcement cannot fully offer a system of securities regulation that is sufficient enough to function on its own. This is because meaningful private enforcement cannot be taken out due to the economic expenses of private measures like insider trading. When it comes to public action, an agency's ability to begin enforcement after a misdemeanour is committed is facilitated by more resources that allow for regulatory investigations. This is because of the distinction between felonies and infractions. This includes significant fines and repercussions financially.[521] Despite this, it is rather evident that the UK government is not supposed to use public cash for issues that should only concern creditors or company owners.[522] Even if a regulator is successful in recouping expenses from a director throughout the course of a legal proceeding, one may make the case that this will still have an impact on the public budget because it will call for public enforcement actions.[523]

In a manner that is analogous to that of the UK, Bangladesh is anticipated to lower the amount of money it spends on the civil service and refrain from increasing the amount it spends on public enforcement. The latter comes as a result of the fact that the responsibilities of directors need to be the duty of company members.

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[520] Ibid
[521] Howell E. Jackson and Mark J. Roe (n 311)
[522] Davies, Worthington and Hare (n 2) 542-543.
[523] Andrew Keay (n 351)

6.6.4 Political Influence

The level of political commitment in an area is directly correlated to the level of success in enforcing laws and regulations.[524] On the other hand, this may make it more difficult to enforce the duties of directors in the event that political resistance exists to openly penalising any legal infractions. On the other hand, this does not pertain to any private enforcement proceedings. To put it another way, in contrast to private claimants, governmental enforcement organisations have a degree of centralization, and as a result, they attract political control. Despite the fact that political control can play a role in ensuring that public enforcement is coordinated, there is a possibility that public enforcer entities will accept bribes. [525] Furthermore, research indicates that a company's performance may be enhanced if it has a political affiliation, for example, by engaging in official political activities. This is one of the ways that this relationship can manifest itself. This indicates that if a director is hired for political work, their reasons for being involved in politics, as well as the consequences of those actions, will be investigated. Companies that have ties to political figures frequently stand to benefit from favouritism in government policies and contracts, which can lead to an increase in earnings and an increase in share prices.[526]

It is highly unlikely that compliance policies protecting minority shareholders' concerns would change given the close ties between the politics and corporations.[527] In the United Kingdom, fighting corruption is the responsibility of a number of government agencies, including the Serious Fraud Office (SFO) and the National Crime Agency. Within the National Crime Agency (NCA), the International Corruption Unit was established in August 2015, as a component of the UK Anti-Corruption Plan. The International Corruption Unit is working around the world to combat severe bribery, corruption, and

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[524] See Ira M. Millstein, Shri G. N. Bajpai, Erik Berglof and Stijn Claessens, 'Corporate Governance and Enforcement' in Enforcement and Corporate Governance, Three Views Global Corporate Governance Forum', Focus 3, 2005 at 59 < https://www.ifc.org/wps/wcm/connect/226fcec8-e5ab-438b-ae9a-dcd1ecbe03c5/Focus_ENFCorpGov3.pdf?MOD=AJPERES&CVID=jtCwqW> accessed 30 October 2021

[525] Jonathan R. Hay and Andrei Shleifer (n 299)

[526] See Philip, Lawton, Yung, Boyce, 'Corporate political connection as a determinant of corporate governance in Hong Kong' (2012) 63(4) Northern Ireland Legal Quarterly 449.

[527] Supra n 575

money laundering.[528] Parlour has previous experience serving as a spokesperson for the United Kingdom on European Union projects dealing with anti-corruption legislation. He has advocated, using Hong Kong as an example, that corruption must be addressed democratically, and that the formation of an Independent Commission Against Corruption is the key to achieving success. This proposal is based on the idea that political action is necessary to eradicate corruption. Although it is unclear whether this would receive political approval within the UK and the EU, it does appear to be a viable solution.[529] Despite this, a lack of political will to execute the law is not necessarily linked to corrupt political practices in all cases. In point of fact, the hesitancy of the United Kingdom government to take action and launch legal actions against directors is due to the government's reluctance to spend public funds on matters that ought to be the responsibility of the business members. Despite the fact that the Bangladeshi government has decreased the amount of money it spends on public enforcement, political pressure is still pervasive. Even though there is legislation that prevents political factors from having an impact on company management, the state continues to invest in a variety of significant businesses. As a consequence of this, the government holds a major share of the company's equity and has also assumed a managerial position with somewhat unrestricted authority. The majority of businesses in which the government has made investments have significant financial backing, are effectively managed and resourced, and are among the most profitable corporations trading on the stock market.[530] Therefore, this indicates that despite political influence, company power is not exploited. As a result, this demonstrates that the power of the company is not abused, despite the fact that there is political influence.

There have been a number of instances in which the National Anti-Corruption Commission has been presented with a clear link to the politicians. The Commission's responsibility will

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[528] See the Official website of National Crime Agency (NCA), 'International Corruption Unit (ICU)', (NCA 2015) <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-corruption-unit-icu> accessed on 31 October 2021

[529] Richard Parlour, 'Bribery and corruption - an international update' (2013) 34(7) Company Lawyer 218

[530] Niaz Mahmud, Market capitalization: 10 companies dominate local share market, (Dhaka Tribune, 2020)< https://www.dhakatribune.com/business/stock/2020/10/03/market-capitalization-10-companies-dominate-local-share-markets accessed 31 October 2021

be to monitor the functioning of all aspects of the government, including how public business and orders are carried out.[531] Additionally, it will be responsible for the regulation of any illicit practices that may occur within the administrative and financial sectors. The Commission's goal is to assist in the improvement of practices within a country; however, its impact has not yet been sufficiently evaluated to make such a determination. This might be a sign that lawmakers in Bangladesh are more inclined to support public enforcement initiatives than private ones.

6.7 Conclusion

In contracts with the findings in Chapter 5, which discussed private enforcement, Chapter 6 discussed and analysed activities related to public enforcement. This chapter covered the second part of the study topic, which dealt with the degree to which Bangladeshi law may benefit by taking into account the duties provided by UK laws and the efficacy of public enforcement activities for guiding them. This chapter was separated into three different components. The first issue considered about public enforcers and the functions that they perform. The governmental ruling authorities in Bangladesh and the UK that have the authority to punish directors who have disregarded their duties were also covered in this portion of the chapter. Next, in the settings of Bangladesh and the United Kingdom, the potential measures that might be used by state authorities against a director who has violated his or her legal obligations. Finally, the impediments to public enforcement and included a comprehensive analysis of the effectiveness of directorial tasks in relation to public enforcement. Ultimately, this assisted the author in conducting a critical analysis of the current state of public enforcement.

[531] For more details, see the official site of the ACC < http://acc.org.bd> accessed 20 January 2021

Chapter 7: To What Extent Bangladeshi Law Can learn from the UK Law? Assessing A Reform Process and Its Consequences

7.1 Introduction

The aim of this thesis is to compare and contrast UK corporate law with a view to informing the future law reform of the Bangladesh Companies Act 1994 with respect to directors' duties. In the preceding chapters 2 and 3, we demonstrated certain points of convergence and divergence. In this chapter, the aim is to consider the extent of desirable legal transplantation needed to achieve crucial law reforms.[532] Specifically, the responsibility to prevent conflicts of interest, the duty of care, the duty to act in good faith and with respect for the company's overall interests, with a focus on corporate opportunities and self-dealing transactions, and the formal means of enforcement that is private.

In Bangladesh despite having the two separate amendments of the CA 1994 in 2020[533] and the CGC 2018, the comparison with the legal system in the UK has demonstrated that further progress can be made. In point of fact, the law should be drafted in such a way as to create encouragement for directors to conduct in an efficient and transparent manner by establishing legal liability on those who do not meet these criteria. It is impossible to accomplish this goal in an appropriate manner without first enacting legislative reform that updates company law to include clearly defined responsibilities for directors. In addition to this, a reliable and efficient private formal mechanism, for an example derivative action, needs to be implemented in order to ensure that commitments are not broken. [534] It is commonly held that finding a solution to this significant aspect of corporate law will improve the directors' ability to be held accountable and offer increased protection for the company as well as all of its shareholders, even those who hold minority shares often called and recognised as a minority shareholder.

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[532] See Socio-Legal discussion part in Chapter 2.
[533] The Companies (First Amendment) Act 2020 and The Companies (Second Amendment) Act 2020 of Bangladesh
[534] See Private Enforcement of Director Duties in Chapter 5

This chapter analyses the degree to which the Bangladeshi legislators may draw from the UK's experience and use it to their advantage to make improvements that have been identified in the abovementioned areas of the company law framework, which governs directors' duties. This can be done by turning to legal transformation through transplanting of the law. The research on comparative law indicates that legislative reform cannot be achieved through the importation and implement of legal concepts and regulations from one jurisdiction to another jurisdiction without considering the legislative environment and organisational framework in the host country. This is because the host country already has its own set of legal thoughts and regulations (in the present case, Bangladesh).[535] In the following study, special consideration will be given to the issue of whether or not newly imported regulations are in conflict with Bangladesh's internal legal system or its constitutional law, which is considered to be the country's supreme law.[536] The effectiveness and capability of the courts must also be considered to guarantee that legislation derived from the UK concerning the responsibilities of directors and the enforcement of their breach via litigation are capable of being incorporated within the current legal system.[537] The declaration highlights the significant role that enforcement plays in corporate governance, particularly with regard to the impact that laws and regulations have. This demonstrates that the efficacy of enforcement is the single most important aspect that plays a role in determining the degree of protection that is afforded to corporate investors. This highlights how important it is to have solid rules as well as effective methods for enforcing such restrictions in order to improve investor protection. The proclamation, in its core, places an emphasis on the necessity of robust regulations and efficient enforcement mechanisms in Bangladesh in order to strengthen investor protection.

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[535] See Hideki Kanda and Curtis J Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) The American Journal of Comparative Law 887

[536] Bangladesh has constitutional supremacy. The Constitution of the People's Republic of Bangladesh is the supreme laws of the land, often called mother of all laws. Article 26 of the Part III Fundamental Rights states that any laws or parts of laws inconsistent with fundamental rights shall be void. Article 26(2) of the Constitution specifically mentioned that - *"The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."*

[537] See Katharina Pistor and Chang Gang Xu, 'Fiduciary Duty in Transitional in Civil Law Jurisdictions Lessons from the Incomplete Law Theory' (ECGI - Law Working Paper No. 01/2002) 4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=343480 > accessed 29 June 2022.The authors argue that the courts should have the authority to establish and enforce fiduciary duties so that they can better fulfil the crucial function that they play in society.

The basic debate that is being presented is that it is required to transfer some particular legal principle and doctrine from the United Kingdom to Bangladesh legal framework, and it seems like it could be done with some adaptations to take into account the particulars of the Bangladeshi legal system. When legal transplantation for the directors' duties and enforcement in Bangladesh is being considered, It is crucial to remember that corporate governance rules should always aim to create a reasonable balance between power, which will allow directors to control their discretion, and responsibility, which will lower agency costs.[538] In addition, a number of significant factors will be considered during the process of deciding whether or not transplantation that is sanctioned by the law is conceivable. Among the reasons for this are the restricted function that market players now have as an extralegal system of accountability and the requirement to provide stronger safeguards for non-controlling shareholders against unscrupulous acts carried out by directors who could also own block shares. In addition, the markets only play a restricted role in the current context. The fundamental point that is being made here is that it is necessary to adopt certain specific legal principles and concepts from the UK to Bangladesh and With a few adjustments to accommodate the unique features of the Bangladeshi legal system, it is feasible to do so. This is the argument that is being presented here. When considering legislative change for Bangladeshi law of directors' duties and implementation, it is crucial to remember that corporate governance rules must always aim to play an appropriate balance between accountability (limiting agency problems) and authority (directors' liberty to enforce their authority). For this reason, it's crucial to keep in mind corporate governance regulation when contemplating legal reform for the obligations and enforcement of the Bangladeshi law of directors.

In terms of its organisation, this chapter first considered the arguments in favour of the reform in the context of formal transplantation in Bangladesh. Subsequently, it examined the controversy around the conflicting ideals of responsibility and authority. In the second part of this study, we investigate whether or not it would be possible to import some legal concepts from the United Kingdom, and we offer a reform agenda for the Bangladeshi law

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[538] Andrew Keay, *Board Accountability in Corporate Governance* (Abingdon, Routledge 2015) 261.

of directors' obligations and derivative actions.

7.2 Legal Transplants as a Legal Reform Strategy in Bangladesh: The Need for and Possibility of Success

It is possible that legal transplantation, which is a technique employed in this chapter to correct shortcomings in Bangladeshi law, is the most prolific source of legal development. The primary topic of discussion in this section will be the necessity of importing legal ideas from Western legal systems, in particular the UK. If this is the case, need to explain how legal transplants would be beneficial in a nation like Bangladesh.

7.2.1 Justifications for Legal Transplantation in Bangladesh

As previously stated in this thesis, from a philosophical perspective, it is at least possible for legal conceptions and laws to migrate beyond national borders.[539] This possibility has been discussed. It is feasible to argue there is still strong justification for legal transplanting of corporation law in the setting of Bangladesh. This is something that can be argued. The following are some of the most significant arguments in support of the concept that revising the law of directors' duties requires legal transplant to a substantial extent and is necessary.[540]

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[539] See chapter 5 and 6 of the Thesis

[540] The current legal system in Bangladesh can trace its origins back two hundred years to when the country was still a part of the Indian Subcontinent and was governed by the British. It is possible to trace its legal history all the way back to 1726, when King George I issued a charter to reform the judicial administration of the presidential towns of Calcutta, Bombay, and Madras. This event is considered to be the beginning of the country's modern legal system. During the time of the Mughal Empire, the British East India Company was responsible for establishing three presidential cities, acquiring settlements from the emperor, and introducing the British legal system. It was around this period that the British legal system was initially introduced to the subcontinent. This was the first successful legal transplant, and quite unexpectedly, it came from the legal system in England. Throughout its history, Bangladesh has been a fairly accepting jurisdiction for the practise of legal transplantation. See Rokshana Shirin Asa and Kazi Abdur Rahman, 'The Doctrine of Reception of Law and its Significance in Legal Development of Bangladesh' (2018) 21(11) IOSR Journal of Humanities and Social Science 10, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234153 > accessed on 10 March 2022

To begin, and as was mentioned earlier, [541] The Bangladeshi legislature has a long history of voluntarily adopting foreign laws, especially in the fields of business and commerce law. This practice amply illustrates the critical role that legal transplant plays in the process of legal transformation. [542] This demonstrates how this study is in line with the country's objective to modernise the company laws governing the nation's commercial organisation by using the legal transplant approach to increase the law of directors' duties. This is supported by the fact that this kind of transplantation is legal and developed.[543]

Second, because globalisation is expanding and the pressure brought on by competition is increasing, one could argue that nations have no choice but to move toward legal convergence by voluntarily adopting effective corporate rules and institutions. [544] This is because they are the only option available to them in light of these two factors. This is due to the fact that businesses that, in the present worldwide competition, are effectively operating under an efficient corporate governance structure will have an edge. [545] The intervention of the state in Bangladesh, as it has been in other nations in the area, has been primarily responsible for the establishment of corporate governance. This intervention has taken the form of legislation enacting legal principles and conceptions. [546] Amico's assessment is spot on: one of the main forces driving the government's goal of fostering a good corporate governance practice was the race among south Asian nations to become the centers of the continental financial system.[547]

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[541]State Legislation as a Source of Legal Obligations

[542] Law Commission, 'Bangladesh Approach to law reform' <http://www.lawcommissionbangladesh.org> accessed on 12 March 2022

[543] Bianca Karim and Tirza Theunissen, 'Bangladesh' in Dinah Shelton (ed) 'International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion' (Oxford University Press, 2011) 98-115.

[544] Franklin A. Gevurtz, 'The Globalization of Corporate Law: The End of History or a Never-Ending Story?' (2011) 86(3) Washington Law Review 475, 494. Mattei, who held the opinion that the competition to adopt more effective rules will result in the introduction of legal concepts from other countries, see Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14(1) International Review of Law and Economics 3

[545] Abdul Bayes, 'Bangladesh Vision 2041Institution Matters' (The Financial Express, 06 September 2019) <https://thefinancialexpress.com.bd/views/vision-2041-institution-matters-1567786054> accessed on 20 June 2022

[546] Pallab Kumar Biswas, 'Corporate governance reforms in emerging countries: A case study of Bangladesh' (2015) 12(1) International Journal of Disclosure and Governance (2015) 1

[547] See Ilias Bantekas, 'Transplanting English Law in Special Economic Zones in Asia: Law as Commodity' (2022) 17(2) Asian Journal of Comparative Law 305. According to Bantekas, the need to provide legal clarity and acquaintance to international investors, and also to provide a competitive

The legislative framework that governs the responsibilities of directors is not free of gaps and ambiguities, both of which have the potential to lower the directors' level of personal accountability as well as the quality of corporate governance as a whole. Because of this, it is sometimes important to include legal elements from well-established legal systems like as that of the United Kingdom in order to provide a sturdy business law framework that is able to resist the demands of ongoing competition. This is due to some areas of ambiguity and flaws having been recognised in the legal framework of directors' obligations, which, if abused, might diminish the availability of strong corporate governance practices. The reason for this can be found in the fact that certain areas have been identified.

It has been made abundantly evident that there is a need to standardisation and updating the rules and regulations in order to assist the government in achieving the objectives outlined in the 2041 Vision. [548] This is being done for the purpose of helping the government realise its goals. One of the most important changes should be aimed at lowering the high levels of uncertainty that now exist within the legal framework governing directors' responsibilities. [549] In reality, if a strong company law framework is created, the Bangladeshi government will have help in achieving its goal of making stock market investments more enticing to both domestic and foreign investors, within which improved board accountability towards shareholders, including minority shareholders, is a component. In this context, it seems like a smart and efficient technique to try to learn from the past mistakes and successes of other countries' legal systems that are already well developed.[550]

Third, the adoption of foreign business laws and structures on a voluntary basis by

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advantage over neighbouring countries, was the driving force for the adoption of English law in south Asia.

[548] The Government of Bangladesh has a prospective plan of Bangladesh 2021-2041, where it is clearly states the needs for reform to achieve the prospective plan known as Vision 2041 of Bangladesh. The Planning Commission of Bangladesh, 'The Making Vision 2041 in reality Prospective Plan for Bangladesh 2021-2041' (Government of Bangladesh General Economic Division, March 2020) < http://oldweb.lged.gov.bd/uploadeddocument/unitpublication/1/1049/vision%202021-2041.pdf > accessed on 01 September 2022

[549] ibid, p.15

[550] This line of reasoning is advanced by a significant number of legal authors in order to provide support for the adoption of legal transplants.; see, for example, Jorg Fedtke, 'Legal Transplants' in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Cheltenham, Edward Elgar Publishing 2012) 550.

Bangladesh in order to meet the country's economic objectives is likely to run across far less cultural opposition from the country that is hosting the adoption. [551] Cotterrell explains that "instrumental law" and "culturally based law." can be distinguished from one another. "culturally based law," is the opposite of "more informally connected" which itself is "instrumental law" with culture. [552] Cotterrell divides the legal system into four main categories of "community" in order to develop his theory of the link between legal sociology and comparative law: "instrumental community, traditional community, community of belief, and emotional community." Company law, the most significant subset of commercial law, is a part of the instrumental community of law, which includes laws that are not as closely associated with culture as, say, family law. The legal guidelines that control the instrumental community, such as corporate law, are based more on commercial interests over national feelings and customs in Cotterrell's words.[553] The flexible nature of common law, encompassing the general guiding principle, will enable effective the legal importation of certain western ideas into the legal environment of Bangladesh, given that corporate law is, for the most part, culturally neutral. This is so long as it is not expressly forbidden and is unlikely to encounter cultural resistance.[554] As a result of the numerous instances in which English matters have been referred to the honourable High Court Division judgement, Bangladesh's legal system is highly familiar with the corporation law system that is in place in England.

Fourth, as was discussed previously in chapter 2.2.2, despite the fact that the majority of companies trading on the Bangladeshi stock market have a structure Considering that the company is characterised by concentrated shareholding ownership, depending solely on block holders' oversight is unlikely to provide sufficient oversight and responsibility for directors. [555] This is despite the fact that the previous point was shown to be the case. In relation to the issue of directors' liability and power, the function of markets, on the other

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[551] See, for example, Roger Cotterrell, 'Is There a Logic of Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (London, Hart Publishing, 2001) 81–82.
[552] ibid, this line of argument is advanced by a substantial series of legal authors in order to provide support for the acceptance of legal transplants.
[553] Ibid, 81–82
[554] T.M. Shadman Shafiq, 'Comparison Between the Criminal and Civil Courts Systems of United Kingdom and Bangladesh' (2019) 2 International and Comparative Law Journal 147
[555] Corporate and Shareholding Structure of Bangladesh briefly explained in chapter 2

hand, tends to be unsuccessful most of the time. [556] Consequently, in designed to give shareholders including minority shareholders better legal protection from improper behaviour on the part of directors, it is necessary to have a comprehensive legal liability system in place (i.e., clearly defined duties for directors, in conjunction with efficient legal mechanisms that are available to shareholders). [557] Benefits for directors to act honourable and conscientiously would also be established under the measure, which would enforce a reasonable understanding of legal liability. Consequently, with the help of other legal systems, like the United Kingdom (UK), which has a sophisticated statutory system of directors' duties and derivative actions. It is possible to solve legal shortcomings and advance legal clarity in the implementation of the law by appropriating new legal notions and ideas in Bangladesh.

The above-mentioned discussion explains the method and approach of the benefits of the transplantation of legal reform in regards to the directors' duties from one jurisdiction to another jurisdiction. However, it should keep in mind that the blind copying of a set of rules from one jurisdiction to another jurisdiction is not going to be worked without carefully examining the host jurisdiction settings. Berkowitz and others provided evidence for this claim, stating that the recipient nation's receptiveness to foreign transplanted law determines the transplanted law's effectiveness there. According to this hypothesis, the transplanted law will be more receptive if it is adjusted to local conditions and/or transferred to a legal system that is familiar with the laws of the donor nation.[558] It indicates that the application of the transplanted law has already been taken into consideration, and as a result, the law is likely to be utilised in practice. This is because the regulation has been modified to guarantee that it complies with the legal requirements of the host nation.[559] Throughout the remainder of this chapter, In order to enhance the Bangladeshi structure of directors' duties, consideration will be given to Bangladesh's openness to adopting legal rules and norms that have been

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[556] The limited role of market mechanism in Bangladesh. See Sabrina Haque and Fahd George, (Beam Exchange, May 26, 2017) 'Market systems approaches and informal norms in the context of Bangladesh' <https://beamexchange.org/to_pdf/?url=/community/blogs/2017/5/26/market-systems-approaches-and-informal-norms-context-bangladesh/> accessed 2 November 2022

[557] In terms of company law, see, for example, the case of Re Cameron's Coalbrook Railway concerning fiduciary duties of directors, and the case of Foss v Harbottle concerning the derivative action. These cases date back to the 19th century.

[558] Ibid 180.

[559] Ibid 174

promoted for transplanting from the UK.

The next section will address a crucial matter of corporate governance laws, particularly the need to achieve an appropriate equilibrium between authority and responsibility, prior to evaluating the feasibility of legal transplantation:

7.3 Accountability v Authority: A Policy Issue

It is generally acknowledged that while creating a reform plan for a corporate governance clause related to the governing body, there must be some balance between the power bestowed upon directors and their responsibilities. This is a provision that deals with the board of directors.[560] Many people are under the impression that there will be a tension within these two significant ideals namely authority and accountability.[561] The belief that accountability systems, such as directors' obligations and the law of their implementation, may put a limit on the exercise of authority is where the dispute originates, as has been pointed out previously.[562] One of most outspoken critics of keeping the directors more accountable is Bainbridge, who believes that more accountability for the board of directors will usually lead to an ineffective decision-making method since effective decision-making requires the board to be exposed to less risk of independent review.[563] More responsibility, in Bainbridge's view, comes at a price: decision-making authority is transferred to shareholders or the legal system,[564] which could not possess the necessary skills to make business judgments.[565] Additionally, it is proposed that a fear of accountability will etherize appropriate and required board autonomy.[566]

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[560] Kenneth Arrow, '*The Limits of Organization'* (New York, W.W. Norton 1974) 68 –70; see also Michael P. Dooley, 'Two Models of Corporate Governance' (1992) 47(2) The Business Lawyer 461, 467

[561] Stephen M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97(2) Northwestern University Law Review 547, 574

[562] See Franklin A. Gevurtz, 'The Globalization of Corporate Law: The End of History or a Never-Ending Story?' (2011) 86(3) Washington Law Review 475, 494 515.

[563] Stephen M. Bainbridge, '*Director Primacy'*, (UCLA School of Law Law-Econ Research Paper No. 10-06, May 2010) 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615838> accessed 28 June 2022.

[564] Ibid

[565] Stephen M. Bainbridge, *The New Corporate Governance in Theory and Practice*, (Oxford, Oxford University Press 2008) 34–36.

[566] See HG Hutchinson, 'Director Primacy and Corporate Governance: Shareholder Voting Rights

In spite of this, it seems necessary to mention that there is a common opinion that directors should be held responsible for acting in a proper manner while still using their management discretion. [567] Other important values like "fairness, respect, and justice," according to Keay, must not be disregarded as they justify the expansion of responsibility onto the board of directors. [568] When Bainbridge says that a corporation law that concentrates authority might be more impactful, one may agree. In contrast, Keay's assertion that one should not overlook other important ideas may also be agreed upon. Making directors responsibly for their reckless use of position is something that even critics of reorienting the attention towards authority acknowledge. This is the case since the survival of any company depends on the governance system maintaining a sound balance among power and accountability. [569] Always keep in mind that the responsibility of the board is required in order to cut down on the costs incurred by the agency as a direct result of actions motivated by self-interest. [570] Moreover, not only do most scholars recognise the imperative need of board responsibility in the legal context of corporate governance, but there is also a school of thought that questions the compatibility of authority with transparency. In corporate governance, for example, Moore argues that, in contrast to common opinion, authority and accountability do not conflict.[571] In point of fact, the two ideas are phenomena that' mutually support' one another; [572] to put it another way, authority cannot be maintained if it is not accompanied by efficient accountability systems. [573] Similarly, Keay argues that this approach will only result in a reduction of unaccountable power, not a change in the overall degree of power, provided

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Captured by the Accountability/Authority Paradigm' (2004) 36(4) Loyola University of Chicago Law Journal' 1111, 1132.

[567] Keay (n 589) 264; see also Michael P. Dooley, 'Two Models of Corporate Governance' (1992) 47(2) The Business Lawyer 461, 467; and Brett McDonnell, 'Professor Bainbridge and The Arrowian Moment: A Review of The New Corporate Governance in Theory and Practice' (2009) 34 Delaware Journal of Corporate Law 139, 172

[568] Ibid, Keay 264

[569] cf Micheal P. Dooley (n 618) 467

[570] See Alessio Pacces, '*Rethinking Corporate Governance: The Law and Economics of Control Powers'* (Abingdon, Routledge 2012) 99; Micheal C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305, 313.

[571] Mark T. Moore, 'The (Neglected) Value of Board Accountability in Corporate Governance' (University of Cambridge Faculty of Law Research Paper No. 9/2015, February 2015) 3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566335> accessed 29 June 2022.

[572] Ibid 20

[573] Ibid 4

the law supports direct responsibility.[574] Keay concludes by suggesting that increased board responsibility amounts to little more than a verification on how its broad discretion are exercised.[575]

It can be emphasised, nonetheless, that if the reform plan that places more responsibility on directors' results in inefficient management and growth of the company's activities, then enacting a sound corporate governance law would go against the wishes of legal reformers.[576]

It is therefore crucial to remember that duties must be balanced in a way that allows for enough responsibility to fix mistakes without "destroying the genuine values of power" while creating any kind of corporate governance.[577] This seems to be the correct approach to take. This suggests that any new section for corporate governance must maintain an appropriate balance between authority and accountability, and cannot eliminate accountability at the expense of authority.[578]

Despite mentioned, the current equilibrium among authority and accountability in Bangladesh is not ideal in accordance with regulations governing the duties of directors and its execution. The overall system of director duties in Bangladesh is never in a formidable shape, and as a result, it is extremely difficult to adhere to. Legal reform in this area is necessary if the goal is to achieve the intended impact of making directors more legally accountable without deterring them from using their power to manage a company's business as efficiently as feasible.

7.4 The Reform of the Duties of Care and Loyalty by Way of Legal Transplantation

In this section, the focus is on the feasibility of translating norms and concepts from UK law

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[574] Andrew Keay (n 589) 268
[575] Ibid Andrew Keay 727–737. For more See Mark T. Moore, '*Corporate Governance in the Shadow of the State'* (Oxford, Hart Publishing 2013) 39
[576] Ibid Andrew Keay 273.
[577] Kenneth J. Arrow, *The Limits of Organization* (New York, W.W. Norton 1974) 77-78
[578] Brett McDonnell, 'Professor Bainbridge and The Arrowian Moment: A Review of The New Corporate Governance in Theory and Practice' (2009) 34 Delaware Journal of Corporate Law 139, 143 and 168.

to Bangladeshi law to remedy directors' duty of care deficiencies revealed throughout this thesis. The first thing that will be looked at in this part is whether or not the responsibilities of care and loyalty can be passed on to another person.

7.4.1 What makes codified directors' duties transferable?

Before implementing any legal reform, it is important to integrate it with the constitutional requirements since formalising foreign legal notions requires creating laws that fit the national system.[579] Before implementing any legal reform, it is important to integrate it with the constitutional requirements since formalising foreign legal notions requires creating laws that fit the national system.

This reasoning is compounded by the fact that Bangladeshi company law had indeed sought to established legal rules in enhancing the law regulating directors' duties, although there are still some areas of ambiguity and incompetency in the legal requirements of directors' behaviour and responsibility. For instance, since Bangladesh's first corporate law, the CA 1994, was passed in 1994, director self-dealing activities have been subject to regulations. Given the additional changes announced by the CGC in 2018, this is also true with regard to the requirement to act with integrity and to advance the interests of corporations. In this context, it makes sense to argue that the aforementioned regulations on the conduct and culpability of directors serve as excellent examples of how the concepts of justice and public interest are used to safeguard the interests of market participants. The most crucial lesson to learn from this is that legal transplanting is a process that is both acceptable and required in order to provide details and guarantee the best possible implementation of broad common law directives. This is so because the Companies Act just offers broad principles about the area of corporate law. It would seem unlikely that Bangladeshi laws and customs will be a barrier to the legal transplanting of directors' responsibilities standards in Bangladesh, given that the legal framework of corporate governance currently recognise directors' obligations of care and loyalty. This is as a result of the existing acknowledgment of directors'

[579] State Legislation (mainly on Corporate Laws of Bangladesh i.e., Company Act 1994, Bankruptcy Act 1974 and so others)

obligations of care and loyalty. It's also critical to remember that the proper application and implementation of the Anglo-American interpretation of directors' responsibilities depend on the existence of a highly advanced legal system. This is an essential thing to have in mind.

Pistor and Xu believe that courts should have the capacity to enact obligating them in order to provide closure for norms that are not well defined, such the duties of care and loyalty.[580] This is the best way to deal successfully with incomplete laws. Concerning the ability to make laws, the obligation of director duties is a branch of corporate law in which stated legal rules are frequently lacking in completeness and the standardisation of activities taken by directors is typically unachievable. [581] Because of this, a great deal of weight should be put on the function that courts perform in assigning ex post massive law-making authority to change deficient laws more extensively and efficiently.[582] This encompasses the power to interpret statutes, the ability to adapt to different conditions, and the ability to extend its applicability in different situations.[583]

It is not unusual to see judges in the common law tradition not only enforcing the law but also drafting it; in fact, the method of carrying out this duty is more familiar to the judicial system than the civil legal system.[584] In the UK, the law of equity is where fiduciary obligations first appeared,[585] However, the laws pertaining to fiduciary obligations have been adjusted to accommodate those who work in the corporate world. In order to bridge the gaps left by the company laws, it was necessary to incorporate some fair notions from trust law. However, as Kershaw noted in relation to the law of self-dealing activities, the legal precedent quickly diverged to produce "different fiduciary requirements for directors," [586] It is arguable that the substantial role played by the courts in the process of adjusting fiduciary

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[580] Katharina Pistor and Chenggang Xu, 'Fiduciary Duty in Transitional Civil Law Jurisdictions Lessons from the Incomplete Law Theory' (ECGI - Law Working Paper No. 01/2002) 4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=343480> accessed 29 June 2022.
[581] Ibid 6
[582] Ibid 17.
[583] Ibid 4
[584] See Mauro Cappelletti, 'The Law-Making Power of the Judge and Its Limits: A Comparative Analysis' (1981) 8(1) Monash University Law Review 15; John C. Coffee, 'Privatization and Corporate Governance: The Lessons from Securities Market Failure' (1999) 25 Journal of Corporate Law Studies 1, 27
[585] See L.S. Sealy, 'The Director as Trustee' (1967) 25(1) Cambridge Law Journal 83
[586] David Kershaw, 'The Path of Fiduciary Law' (LSE Law, Society and Economy Working Papers, 6/2011) 28 < http://eprints.lse.ac.uk/38173/1/WPS2011-06_Kershaw.pdf > accessed 29 June 2022

law to fit within the framework of the corporate environment is largely responsible for the evolution of fiduciary duties.

In addition, the neighbouring country of India is a useful point of reference because Bangladesh shares many parallels with India in terms of both its culture and its financial sector. In contrast, the exercise of the court's authority to make laws is handled rather differently in countries such as India, which has its own distinct legal system.[587] According to the findings of the investigation that was carried out throughout the Bangladesh chapter on the contribution of the judiciary, One major factor leading to the inadequately formulated norms of directors' obligations is that the Bangladeshi legal system has not been able to completely cover the statutory gap. It's probable that the claim that judges in Bangladesh are reluctant to use their authority to enact laws in areas not covered by the Constitution is true. Bangladesh has constitutional Supremacy,[588] because it is possible that they may not have appropriate experience in subjects pertaining to corporations.[589] This can be justified by the court's unwillingness to establish a precise bound for the obligation in a way that minimises agency costs that arise, for instance, from the exploitation of corporate possibilities while there is a statutory gap. This demonstrates the idea that in the absence of legislation, the court will not readily establish precise limits for the obligation of loyalty. Actually, it is feasible for a director to benefit from involvement in a conflict scenario if there isn't a legal ban against it.[590] In regards to underdeveloped fiduciary director duties framework Bangladesh does not hold any different position comparing to the neibouring jurisdiction. However, the neighbouring country, India introduced a new Company Act 2013 and incorporate some of the directors' duties into their statute.[591] In a broader sense, Bangladesh is comparable to

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[587] Mauro Cappelletti, 'The Law-Making Power of the Judge and Its Limits: A Comparative Analysis' (1981) 8(1) Monash University Law Review 15

[588] Article 7, The Constitution of Bangladesh, "*Supremacy of the Constitution 7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of, this Constitution.*
(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

[589] There is no specific requirement for commercial and corporate expertise for the appointment of judges. See. Ridwanul Hoque, "Constitutionalism and the Judiciary in Bangladesh" in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam" (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press, India, 2013) 613

[590] On many occasions judge of the court is reluctant to give judgment to fill the gap.

[591] Indian Company Act 2013, s 166 – *"Duties of directors. — (1) Subject to the provisions of this Act,*

other nations based on common law, in which judges typically have the tendency to apply and make the law;[592] to put it another way, the power to establish laws is essentially vested in the legislature, and the judicial branch's ability to exercise discretion in this area is extremely constrained.

It seems like the blind copying of UK directors' obligations standards into Bangladeshi legislation might not be successful since Bangladeshi courts have a propensity to be reluctant to play a proactive role of establishing clear advice on directors' power and responsibility. Specifically, this may be the case due to the fact that the standards were copied directly from the UK. This indicates that Bangladeshi judges, with their own current experience and training, would not have been equipped to handle with generally wide benchmarking as successfully as their UK equivalents, who are usually given broad latitude to create the rule ex post and, because of their skills and education, are more comfortable working with open-ended notions. As a result, the transfer of director responsibilities from the United Kingdom to Bangladesh is only possible if those responsibilities are modified so that they are compliant with Bangladesh's legal system. [593] This will help to ensure that Bangladeshi courts are able to effectively enforce the rules that were imported from the United Kingdom.[594]

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a director of a company shall act in accordance with the articles of the company.
(2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment
(3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
(4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
(5) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
(6) A director of a company shall not assign his office and any assignment so made shall be void.
(7) If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees."

[592] Bangladesh has Constitutional supremacy and it is the supreme Court of Bangladesh the highest court of the land who have the sole authority to give an explanation of Acts and statute. See Article 103(2) and 110, The Constitution of the Peoples Republic of Bangladesh. Moreover, Article 111 of the Bangladesh 1972 Constitution provides that the decision declared by the Appellate Division shall be binding on the High Court Division and the decision declared by either division of the Supreme Court shall be binding on all courts subordinate to it. Therefore, the statutory laws, secondary legislation and judgment laws or precedent along with customs and usage all are the sources of law in Bangladesh.

[593] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard (n 122)

[594] Katharina Pistor and Chenggang Xu, 'Fiduciary Duty in Transitional Civil Law Jurisdictions

7.4.2 Choosing Which Legal Concepts and Ideas to Transfer

The following four significant areas of the law regarding directors' duties need to be changed within the realm of Bangladesh, according to a comparison of the company laws of the United Kingdom and Bangladesh. Such as the duty to manage the firm with due care and attention, the obligation to behave in good faith in the best interests of the company as a whole, the duty to avoid taking advantage of corporate opportunities and the need to abstain from self-dealing transactions. This part looks at how Bangladeshi law may learn from UK law and to what measure. Specifically, We'll be discussing which UK laws and regulations can be applied, as well as the question of what adaptations need to be made to ensure that Bangladeshi courts properly enforce the law.

It is vital to keep in mind that any suggested legislative reform idea that results from an investigation of It may also be possible to modify directors' responsibilities through legal transplanting by adding requirements to the Bangladeshi CA 1994,[595] this can be done in two ways such as introducing new provisions or amending the existing provisions.

The CA 1994 might promote the suggested modification as necessary regulations by stating that Bangladesh, which has unsophisticated and inexperienced non-legal market systems, need obligatory corporate regulation, unlike the UK.[596] Consequently, corporate regulations' mandatory character would be crucial in filling the gap left by the lack of market responsibilities by giving shareholders the essential protection against hostile acts by directors.[597] Furthermore, the adoption of an obligatory company law model will guarantee that all enterprises must adhere to the suggested modifications. As a consequence, firms and shareholders doing business in Bangladesh will have more safeguards as well as more responsibility from directors. Lastly, establishing a mandatory law with clear guidelines and

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Lessons from the Incomplete Law Theory' (ECGI - Law Working Paper No. 01/2002) 4, 7-8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=343480> accessed 29 June 2022

[595] This is subject to one exception in relation to self-dealing transactions where the proposed reform shouldbe part of the CGC 2018.

[596] Troy A. Paredes, 'The Importance of Corporate Law: Some Thoughts on Developing Equity Markets in Developing Economies' (2006) 19(2) Global Business and Development Law Journal 401, 407

[597] Ibid 407

standards might result in increased legal certainty, [598] which the corporate sector can comprehend and, consequently, depend on the legal system to enforce the law consistently.

7.4.2.1 The Duty of Care

Although the CA 1994 does not state clearly that directors must perform conscientiously, this might be inferred implicitly from the connection between the director and the business as well as from certain legal requirements that the judicial system expects directors to follow in order to avoid responsibility. However, simply acknowledging, even tacitly, that the directors are responsible for exercising vigilance is not sufficient. Legislative action is necessary to establish credible and transparent guidelines for judges, attorneys, and directors, as the courts have not played a significant role in creating a clear and practical model of the duty of care. This will help to ensure that directors are held legally responsible for any negligence. Consequently, in line with Bangladeshi law, the standard for meeting the diligence requirement should be predicated not only on objective evaluation but also on subjective standards (i.e., a dual subjective/objective standard) that are expressed in unambiguous terms.

Because there is now a legislative and judicial gap, it is insufficient to presume that the conduct of directors will be assessed based on a "imaginary ordinary prudent director test" in order to formulate an objective criterion for the duty of care. This is because of the fact that the legislative and judicial vacuum. A requirement for the court to take into account the various duties and functions of the directors at issue should be specifically mentioned in Bangladeshi law, [599] much as it is in the UK Companies Act of 2006 (CA 2006). [600] This should be done within the context of the construction of an objective standard. It is important for Bangladeshi law to acknowledge that the care obligation is solely dependent on the

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[598] Troy A. Paredes, 'A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer' (2004) 45(3) William and Mary Law Review 1055, 1133–1134.; Mark J. Roe, 'The Institutions of Corporate Governance' (The Harvard John M Olin Discussion Paper Series No 488, 8/2004) 6-8 <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Roe_488.pdf> accessed 29 June 2022

[599] The Companies Rule 2000 is in place to follow by the Company Court, High Court Division, Supreme Court of Bangladesh. However, the rules are completely silence about the court's functions and approach in regards to the role and function of the directors as the parent Act is also silent.

[600] See The Company Act 2006, s 174(2)(a)

position that each director has been given for equity and justice considerations. Inability to implement such a framework is likely to increase the possibility of responsibility for the violation of fiduciary duty for non-executives, including independent directors, due to the application of an excessively stringent standard. This may deter really unbiased filmmakers from taking on director roles.[601]

When deciding whether or not the need of due care has been met, the court shall, in addition to using an objective standard, take into consideration the individual directors' levels of expertise, experience, and knowledge (i.e., adopt a subjective criterion). [602] It would be possible to ensure that highly experienced and qualified directors could not escape legal responsibility in circumstances where they do not perform with the reasonable diligence that an individual with their experience and qualifications would be required to perform if a subjective standard were to be embraced. This indicates that a higher standard of care will be expected of directors proportionate to the level of expertise they possess. It is possible that the incorporation of subjective factors into the process of deciding whether or not a responsibility to exercise reasonable care has been met will be warmly received by the business community as a whole, particularly with regard to companies that are listed. [603] It seems appropriate to acknowledge that directors should always be evaluated in proportion to the intensity of experience and expertise that can be anticipated of a person with their level of skills and knowledge, given that directors are typically selected for listed companies based on specific skills and experience. [604] To ascertain if directors are adhering to the regulatory framework that governs the duty of care, standards for optimal practise in the decision-making process[605] may be used as a benchmark when needed. As a result, it is of the utmost

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[601] Hoffmann (n 251) 196.
[602] This recommendation is based upon the UK standard for the statutory duty found in section 174(2)(b) of the CA 2006.
[603] Listed Company Director appointment trends and proceedings in Bangladesh has been changed recently. According to the Corporate Governance Code-2018, at least one-fifth of the total number of directors in the listed company's board shall be independent directors. They can hold less than 1% shares of the company. All listed companies, from now on, will require prior approval from the securities regulator to appoint independent directors in their boards. See The Business Standard (TBS News 13 January 2022) <https://www.tbsnews.net/economy/stocks/listed-firms-need-bsec-nod-appoint-independent-directors-357106> accessed 29 June 2022.
[604] A similar argument is put forward in relation to the UK law. see Rupert Reed (n 250) 172
[605] The new CGRs 2018 involves some provisions that need to be observed by directors and managers while managing the company. see, for instance, some conditions of the CGRs 2018. It is worth saying

importance to detail a (non-exhaustive) collection of legislative circumstances that together constitute the violation of such a duty. Not only will the court be substantially directed by these criteria, but also directors will be guided to successfully perform the duty of care by following these factors. This is because it appears that the Bangladeshi law should be able to determine whether or not directors have behaved in a reasonable manner. However, the Bangladeshi judicial system has certain inherited challenges that make it difficult to offer this level of fairness.

7.4.2.1.1 High Standard of Care: Judicial Response

As was covered in Chapter 4, there have been concerns voiced about the high likelihood that a court may evaluate corporate choices when a unique care standard is implemented. Establishing a behavioural demand criterion and assessing directors' accountability for a violation. Under the provisions of section 1157 of the Companies Act 2006[606] , the United Kingdom has taken measures to address this problem, one of which is to provide judges' discretionary authority to release directors from liability for breaching their obligation to their company. It should be emphasised that this provision will typically be taken into account in the context of a breach of the duty of care, despite the fact that the ambit of section 1157 is sufficiently expansive to encompass scenarios other than those involving

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that this CGRs that is intended to apply to unlisted joint stock companies, but it will be introduced as a set of non-binding rules.

[606] The Company Act 2006, s 1157 - *"Power of court to grant relief in certain cases*
(1) If in proceedings for negligence, default, breach of duty or breach of trust against—
(a)an officer of a company, or
(b)a person employed by a company as an auditor (whether he is or is not an officer of the company), it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.
(2) If any such officer or person has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust—
(a)he may apply to the court for relief, and
(b)the court has the same power to relieve him as it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.
(3)Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant (in Scotland, the defender) ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case from the jury and forthwith direct judgment to be entered for the defendant (in Scotland, grant decree of absolvitor) on such terms as to costs (in Scotland, expenses) or otherwise as the judge may think proper."

carelessness. In this section, we will be discussing the topic of a single high standard of care, and one of the questions that will be covered is whether or not the same legal concept can be successfully transferred into the setting in which it will be used. In this context, it is possible to assert that judicial relief of liability is not likely to be compatible with the criteria of Bangladeshi law for the following reasons: To begin, constitutional philosophical considerations do not align with the practice of giving judges the authority to absolve wrongdoers (directors) of responsibility for their actions.

Second, the adoption of a judicial remedy principle within the context of Bangladesh's legal system would result in a significant amount of confusion and uncertainty. Nothing in the research on corporate law in Bangladesh implies that rationality and care (or diligence) are two distinct notions, and that directors' culpability for breaching their duty of care is determined by using a higher threshold of care and diligence than reasonableness.

On the other hand, section 174 of the legislation of the United Kingdom aims to distinguish among the types of carelessness.[607] and what is considered unreasonable in accordance with section 1157. In this instance Hoffmann LJ stated that it is strange someone deemed guilty of negligence, which is defined as failing to exercise reasonable care can ever persuade a court that they behaved appropriately, according to."[608] Furthermore, when it comes to deciding whether or not to grant responsibility relief, the court in the UK has a great deal of leeway to exercise its discretion.[609] This is due to the fact that the application of fairness is a matter of subjective judgement.

The following demonstrates the high level of legal volatility associated with the judicial support principle: even after the director has satisfied the requirements for rationality and truthfulness, there remains a high level of legal variance. One thing to keep in mind is that the potential effects of the lack of access to legal remedies in Bangladesh shouldn't be

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[607] The Company Act 2006, s 174 stated that "*Duty to exercise reasonable care, skill and diligence (1)A director of a company must exercise reasonable care, skill and diligence.*
(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—(a)the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b)the general knowledge, skill and experience that the director has."
[608] *Re D'Jan of London Ltd* (n 665) 649.
[609] Andrew Keay (n 6) 527

exaggerated to the extent that they already are.

As long as the basic principles of guilt are settled, there is no persuasive need to accept judicial sanctions; in other words, this requirement has been satisfied. Recognizing that the responsibility of care offers a legal code of behaviour and an evaluation of the decision-making procedure,[610] irrespective of how the conclusion turns out, the court shall simply consider whether the directors took reasonable procedures to arrive at their judgement. This is because the duty of care provides a legal standard of conduct and review of the decision-making process. Even if the directors were unable to meet the high level of care, this does not necessarily result in the directors being held legally liable for the company's actions. The court will take into account whether the company has suffered any injury and if the directors bear any liability for any losses that have happened. While it's true that judges are not businessmen, they are obligated to possess legal knowledge, and they do have the ability to hear the facts presented by both sides and base their decision accordingly.

7.4.2.1.2 Legal Transplantation Reform Proposal

Because there is no provision in the Companies Perform of 1994 that requires directors to act conscientiously, the research[611] indicates that a new legislative provision should be placed into the Companies Act of 1994 that:

Lays down an overarching principle according to which each individual director is expected to carry out their duties with the appropriate amount of care and expertise. Defines the criteria for satisfying two standards objective and subjective for the obligation of care. To comply with the legal duty of care, this criterion must be met. It should also be mentioned that in order to fulfil the responsibilities of a director, a reasonably intelligent person must use their talent, expertise, and knowledge.

Outlines a variety of circumstances that would qualify as a violation of the suggested regulatory duty of care in a manner that is not exhaustive. This shall specifically include the

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[610] David Kershaw (n 242) 455

[611] Md Khurshid Alam, 'Appointment and removal of Company Directors in Bangladesh and the United Kingdom: Convergence and Diversity' (2013) 24(2) Dhaka University Law Journal 1

inability of the directors to practice the mandatory rationality in managing the affairs of the company.

7.4.2.2 The Affirmative Duty to Act in The Best Interests of The Corporation

According to what was covered in the previous chapter, Bangladeshi law has a problem in which An incorrect and strict threshold of obligation replaces the positive duty, which establishes the legal norms of behaviour and for examining a choice itself.[612] This problem causes Bangladeshi law to suffer from the problem described above. It would appear that the Obligation is not written to take into account two essential elements, namely (i) acting in good faith and (ii) acting in the interests of the company. This implies that the directors' mental states have no bearing whatsoever on determining what is in the best interests of the corporation. This gives the court the ability to, at least in principle, put itself in the directors' shoes and decide what is best for the corporation. That being said, there is a significant chance that directors may be held personally accountable for a violation, and the worry that this could result in additional responsibility would have a detrimental effect on the profitability of the company.[613]

Section 172(1) of the CA 2006 contains a more suitable criterion for determining adherence to the affirmative obligation of loyalty, where the court is prohibited from questioning the judgement of directors because of good faith.[614] When deciding whether or not an

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[612] David Kershaw (n 242) 455.

[613] Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Harvard University Press 1996) - Gifted individuals who have a higher worry for their own personal liability could also choose not to take a directorship. The reality that perhaps the court will make its determination ex post regarding whether or not a decision had, in fact, benefited the interests of the company after the fact and with the best of intentions is likely to make this problem far worse.; *Regent crest plc (in liq.) v Cohen & Anor* (n 920) 515, where The court made it clear that it was aware of the potential for using hindsight bias.; Gainan Avilov and others, 'General Principles of Company Law for Transition Economies'(1999) 24(2) Journal of Corporate Law Studies 190, 284 -There will be managerial decisions that are fruitful, but there will also be decisions that are not. If directors can be held accountable for mistakes made in hindsight, they will avoid making decisions that carry a high level of risk. Therefore, rather than considering whether or not a decision is beneficial to the company's interests, the court ought to analyse compliance with the constructive duty of loyalty depending on the state of minds of the directors. In order to accomplish this goal, loyalty and good faith cannot be treated as two independent concepts.

[614] see also Ross Grantham, 'The Content of the Director's Duty of Loyalty' (1993) (Mar) Journal of

organisation has complied with the requirement outlined in section 172, the courts in the UK use a subjective standard in which directors' utmost believe will be considered. It is important to keep in mind that if the standard for the duty of good faith in the United Kingdom were to be transplanted into the United States, It could be challenging to prove that directors violated section 172 of the CA 2006. This is made even more confusing by the fact that it is quite difficult to challenge the argument made by the directors that what was done was what they truly considered to be in the best interest of the company.[615] It really should be noted that even though the obligation is subjective (i.e., based on the directors' mental state), this does not mean that the court must accept the directors' statement that they functioned in fairness without challenging it, especially if the evidence contradicts the directors' claim.[616]

Since the only need for the obligation provided in section 172(1) is that the director acted responsibly, one may argue that the bar for such a statutory duty safeguards directors' capacity to exercise commercial responsibilities rather than subjecting them to more legal responsibility. This is due to the fact that the court must resort to the subjective test in order to determine whether or not the director acted in good faith. Nevertheless, Bangladesh ought to place an emphasis on guaranteeing directors' accountability for their own misdeeds. [617] This is despite the fact that protecting directors' authority is still crucial and ought to be included in any corporate governance law. Therefore, a combination of subjective and objective standards should be employed in the process to determine whether directors have breached their duty to act in good faith and in the best interests of the company.[618] This should be the preferred approach. This is a crucial component of the test's objective character. It is crucial to remember that the "honest belief of directors" is the main objective factor and that there should be no evaluation of the "quality of the directors' judgement itself"

The approach that has been suggested can be defended by arguing that the utilisation of a wholly subjective criterion, which has a tendency to favour objectivity over subjectivity

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Business Law 149, 154 who said that the two components of UK business law did not have a clear separation between them.; Andrew Keay, 'Good Faith and Directors' Duty to Promote the Success of their Company' (2011) 32(5) Company Lawyer 138, 139 – 140.

[615] Andrew Keay (n 6) 128-129.

[616] For more details, see ibid 134–136.

[617] See Chapter 4 Evaluation of Director Duties

[618] Rosemary Teele Langford and Ian M. Ramsay, 'Directors' Duty to Act in the Interests of the Company: Subjective or Objective?' (2015) (2) Journal of Business Law 173, 175–176

when evaluating the behaviour of an individual, is more common. A combination of subjective and objective evaluations appears to be the most effective way to create a balance between power and responsibilities. The most important point is this. The directors' subjective opinions are being given a lot of importance, which implies that on the one hand, their management freedom is being properly recognised and on the other that they are the ones in the greatest position to decide what is in the best interests of the firm financially. Actually, because of this theory's subjectivity, directors often have more leeway without having to worry about their business decisions being rigorously evaluated by the courts.[619]

When talking about the directors' duty of loyalty under Bangladeshi company law, which is to act in the overall best interests of the company, one of the most important questions to ask is whose best interests the business should be run in. This makes it easier to assess if the directors have violated their duty of loyalty. It was covered in the chapter before this one on Bangladeshi business law, the pertinent legal provision can be found,[620] has employed the ambiguous and mysterious term "interests of the company," which might include the conflicting interests of several corporate stakeholders. Ferran seems to be on the right and stated it involves "prioritising" a variety of interests, which conflict with one another, notwithstanding the ambiguity and uncertainty surrounding the specific meaning of what is meant by such a statement.[621]

In the same spirit as in the United Kingdom, the legislative definition of loyalty responsibilities in Bangladeshi law ought to do away with the connection to the "interests of the company" in support of a clearer interpretation of the interests that ought to be served. To be more specific, it ought to be emphasised that directors should largely administer the businesses for the advantage of the shareholders. Shareholders have the primacy when it comes to giving fair attention to other parties than non-shareholders. This viewpoint can be defended on the grounds that shareholders have the most "marginal risks of the [company],"

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[619] Ibid, 181

[620] The Companies Act 1994 stated these duties in a piecemeal fashion. There is no set principle enshrined in this Act. However, section 229 states for facilitating arrangements and compromises and section 294 states about the power of liquidator to accept shares, etc as consideration for sale of property of company stated about these obligations.

[621] Eilis Ferran, *Company Law and Corporate Finance* (Oxford, Oxford University Press 1999) 125

[622] which means that the company should be managed primarily with the shareholders' best interests in mind because they are the ones who have the most "residual claims" to the company's income. [623]

It is important to note that this does not imply that these organisations interests are not safeguarded; rather, it indicates that the extent of protection accorded to those interests by the applicable company law is insufficient. Furthermore, if the law took a pluralist stance, it might result in the same flaw that the term "interests of the company" highlights: it would give directors broad latitude to weigh conflicting interests, which would make it harder for shareholders to keep an eye on directors and, ultimately, lessen their accountability.[624]

According to Hansmann and Kraakman's point of view, in order to amass an overall higher level of societal wealth, it is necessary to ensure that directors are firmly obligated to the interests of shareholders.[625] When section 172(1) of the Bangladesh CA 1994 specifically compels directors to consider objectives other than those of shareholders when determining the positive obligation., it does not seem essential for the Bangladesh CA 1994 to embrace the attitude of the UK CA 2006. This is especially true in light of the arguments that have been presented thus far. In reality section 172(1) functioning as nothing more than educate directors on the necessity of having regard for the interests of non-shareholders.[626] The law in Bangladesh, much like the legislation in the UK, somehow doesn't grant any stakeholder with the authority to initiate a "liability proceeding," aside from shareholders against directors for wrongs committed against the company.[627] With all of this in mind, it can be

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[622] Frank H. Easterbrook and Daniel F. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Harvard University Press 1996) 91

[623] Ibid 37–91.

[624] Eilis Ferran, *Company Law and Corporate Finance* (Oxford, Oxford University Press 1999) 124.

[625] See Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439, 442, 449, who say that Contrary to the interests of shareholders, the constituents of organisations that do not possess shares may have their rights protected by contracts or other restrictions. It should be noted that the Bangladeshi CA 1994 does not require corporate constituents, other than shareholders, to select their representatives on the board of directors; this is a clear example of the tendency of Bangladeshi law towards the protection of shareholder wealth.

[626] John Bird's statement in Alistair Alcock, The Rt Hon the Lord Millett, Michael Todd KC, *Gore-Browne on Companies* (45th edn, Bristol Jordans 2009) Ch 15 [10A].

[627] It would appear that the most fundamental issues with Bangladesh's corporate governance continue to centre on concerns related to issues such as transparency, accountability, the function of the board of directors, the duties and responsibilities of directors, shareholders' rights, and the protection of minority

said that because the Bangladeshi CGRs 2018 have not made any reference to the requirement for giving non-shareholder interests fair attention as a guiding principle, such a declaration would be adequate to fulfil section 172s of the English Company Act 2006 educational intent.[628]

7.4.2.2.1 Legal Transplantation Reform Proposal

Based on the investigation the findings suggest that due to the absence of a section mandating directors of the company acted with integrity in the CA 1994, a provision must be incorporated to the CA 1994, which is: by this overarching idea, each director is held to the standard that they will always behave in good faith and the most advantageous manner for the firm as a whole (the formulation of the responsibility to act in the general interests of the company, to which the need to act in good faith is related).

To determine whether or not a person has complied with the offered legislative obligation, there ought to be both a subjective and an objective criterion. The criterion for compliance should require that each director acts in a manner that, to the best of their knowledge, serves the company's interests, and this should be a requirement. Considerations that are objective as well as the context in which the belief was held ought to be taken into account in order to ascertain whether or not an honest belief held by a director may be considered reasonable.

As a result, the article stipulates that directors must run the business in a manner that, to the best of their knowledge and ability, is advantageous to the shareholders as a whole, while also taking into account how rational it is for them to hold such a belief. This criterion would establish that directors are obligated to operate the company in a manner that is in the best interest of shareholders as a whole when conducting business.

shareholders.

[628] The CA 2006, s 172 (duty to Promote Success of the company).

7.4.2.3 Corporate Opportunities

It was demonstrated previously, the Bangladeshi legal framework on corporate opportunity is inadequate. Because of this, there aren't many restrictions on how much directors may use a great opportunity in person while they're on the board.[629] Even with the recent advancement, the law governing corporate opportunities is still in its infant stages, and there have been no known judicial instances for researchers to examine. This is paired with the reality that CGCs 2018 suffers from major inadequacies, which may raise questions as to whether a provision such as this represents a law that is functional and suitable in practice.[630] While the proposed law creates the restriction of appropriating corporate opportunities as a preliminary step, it fails to determine the parameters of corporate opportunities adequately and appropriately.[631]

The existing legal framework does not provide clear criterion for the court, that is both feasible and efficient for establishing whether or not a violation of the corporate opportunities. Furthermore, there is no provision made for a disclosure need for directors, nor is there any provision made for permission by the business. In addition, it is still unclear whether directors would be responsible for losses of the company or whether they would also be required to disgorge any profits gained if a lawsuit was brought by the company or a shareholder under the CGCs 2018 for the exercising of a corporate opportunity.[632] This is due to the fact that it is unclear whether or not the directors would be accountable for the improper exploitation of a business opportunity. In addition to this, the idea of such an obligatory clause is only required for businesses that are already listed on the Bangladeshi stock market. Because of this, the law that governs the great majority of joint stock firms is left to be ambiguous and lacking in its ability to oversee directors' slavery of business prospects.

In the next subsections, several substantial modifications to the existing regulation of

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[629] "Corporate Opportunity" in Bangladesh is not legislated in strict sense. However, there are bars for the directors to disclose his interest in any proposed contract, which can treat as "corporate opportunity". See The CA 1994 s 130.
[630] See, Corporate Governance Code 2018, condition 5(6)
[631] Ibid, condition 5
[632] There is no such clear provision for this disclosure in the CGC 2018

corporate prospects are recommended. These modifications are recommended with reference to the observation of the United Kingdom (UK). The purpose of these alterations is to draught legislation that is both practicable and efficient, and it is possible that they will be included in legislative modifications to the CA 1994. These alterations are being made with the intention of drafting legislation that is designed to draught legislation that is meant to draught legislation that is viable and effective.

7.4.2.3.2 Creating an Authorisation Procedure

The CGC 2018 does not include an authorization method that would permit directors to take advantage of an opportunity after receiving approval either from the board of directors or the owners. In the event that all potential sources of contention were eliminated, there would be a heightened focus on regulation, at the price of the competent body's ability to use its own judgement.[633] If the legislation decides to implement an authorization process, it will, in addition to shifting the equilibrium to more authority,[634] reduce the stringency of the no-conflict approach and offer directors permission to take advantage of opportunities after receiving clearance from the corporation. Furthermore, a regulation that prohibits participating in a conflict scenario while still enacting a permission procedure might be seen as a balance between efficiency and justice, both of which are significant values that ought to be taken into account in any provision pertaining to corporate governance.[635] As a result, the proposal might be that Bangladeshi law should not adopt a policy of absolute ban, but rather should permit directors to take advantage of an opportunity, but only after gaining the consent of the company. This would be consistent with the previous point.

In this regard, the UK Companies Act 2006 makes it abundantly clear that, with regard to public companies, a conflict of interest involving Unless otherwise allowed by the company's articles of organisation, a business opportunity requires authorization from the shareholder.

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[633] Andrew Keay, 'The Authorising of Directors' Conflicts of Interest: Getting a Balance?' (2012) 12(1) Journal of Corporate Law Studies 129, 136
[634] Ibid
[635] See ibid, 137

This is the case even if the company's constitution do permit authorisation by the board.[636] With regard to the modification of Bangladeshi law, there should be a provision that makes it obligatory for directors who want to exercise this opportunity personally to get authorization from the shareholders.

It should be made abundantly clear in the law that regulates corporate opportunities that if directors of a company take advantage of a chance to make money without getting approval from the general meeting, will be treated in violation of duties and the company may seek compensation for this exploitation of the position. This provision should be made clear in the law that regulates corporate opportunities.

7.4.2.3.3 Legal Transplantation Reform Proposal

According to the findings of the research, a significant amount of UK regulations may be transplanted into Bangladeshi legislation, which is relevant when taking into account the prospect of importing the approach taken by the United Kingdom to corporate possibilities. It is possible to make a number of significant enhancements of the existing rules of corporate opportunities which is governed through the CGRs 2018, and they should be included in the legislative adjustments that are made to the CA 1994.[637] In point of fact, establishing the responsibility to prevent conflicts of interests in the framework of corporate possibilities independent of the CA 1994 is improper. This is due to the fact that directors have a considerable obligation to the company in the form of fiduciary duty, and one of the most important components of this duty is to avoid conflicts of personal interest. This is the reality as the CA 1994 does not contain a provision that requires directors of joint stock companies to refrain from taking advantage of corporate opportunities, a new statutory article needs to be added to the CA 1994 to regulate this issue. In the event that this proposed item is violated, the appropriate response is to hold a director liable for any profits that were made as a result of unlicensed exploitation.

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[636] See section 175(5)(b) of the CA 2006.
[637] The CGC 2018 is not only applicable to companies listed in the Bangladeshi Market but also only 'Comply or explain' basis. See preamble of the CGC 2018.

7.4.2.4 Transactions Involving Self-Dealing

In both jurisdictions UK and Bangladesh, failing to comply with the disclosure and approval requirements would be considered a breach of the duty of loyalty. One of the most significant areas of Bangladeshi law that has benefited from legal growth of the CA 1994 and the CGC 2018 is the regulation of self-dealing activities. Because of this reform, there is now greater legal certainty in the way the legislation is applied, which has, as a result, increased the directors' accountability to both the firm and its shareholders. Despite this, there is still need for change in order to guarantee a stronger level of protection for shareholders' interests.

The CA 2006 specifies certain circumstances in which it is obligatory for directors to obtain authorisation from the shareholders in statutory meetings. On the other hand, Bangladeshi law makes it an absolute necessity for directors to reveal their conflicts of interest to the board of directors and get prior clearance from the general meeting. A suggestion from the board might be included in such an authorization process. In addition to this, directors are obligated to seek the consent of the general meeting at least once each year in order to renew their authorization. The current researcher is of the opinion that it is quite improbable that the methodology used in the United Kingdom self-dealing transactions can be implemented into the legal system in Bangladesh.

According to the information presented earlier, the Bangladeshi context calls for a more robust legal protection for shareholders against abuses committed by insiders.[638] It would appear that a law in Bangladesh that only requires directors to disclose their interests to the board with the default requirement of the board's approval is likely to give a good opportunity for directors (who could be block holders) to engage in more self-dealing transactions that may not benefit the company. This is because the law only requires directors to disclose their interests to the board with the default requirement of the board's approval. In addition, there is a possibility that impartial directors cannot be relied upon to arrive at objective decisions on the authorization of a transaction in which one of their fellow directors has a personal

[638] Troy A. Paredes, 'Importance of Corporate Law: Some Thoughts on Developing Equity Markets in Developing Economies' (2006) 19(2) Pac McGeorge Global Business and development Law Journal 401, 405–408.

stake. This raises the question of whether or not such directors can be trusted. One of the primary issues regarding approval by the board is the possibility that it may contribute to the adoption by the directors of "a culture that is based upon reciprocity".[639] Davies and Worthington point out that it is difficult to find evidence of illegal practices like "you scratch my back and I'll scratch yours" and prove their legitimacy in a court of law.[640] Even though Bangladesh has adopted the institution of independent directors, it is unclear whether or not these directors, as was emphasised before, are able to make independent decisions that are free from the influence of those who picked them as well as the social connections they may have.[641] This method is embedded for generations in regards to the self-dealing transactions Therefore, the current authorisation process for engaging in self-dealing transactions according to section 131 of the CA 1994 ought to be preserved.[642]

Although it was suggested earlier that the current approval process used in Bangladesh should be kept, it is recommended that this be done with some modifications. This thesis identifies the approval of self-dealing transactions as the key problem, and it is important to note why this is the case. It is not entirely clear, despite the fact that Bangladeshi regulation makes it very clear that contentious directors are not allowed to vote,[643] whether or not participants related to directors i.e. family members are required not to participate for the voting process.[644] The minimum threshold stated in section 130 of the CA 1994 in regards to the related party transactions. This is because section 130 of the CA 1994 mandates that directors disclose any indirect interests in a transaction with the company.[645]

The issue that may be posed relates to the acceptable explanation of the notion of family

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[639] Andrew Keay, 'The Authorising of Directors' Conflicts of Interest: Getting a Balance?' (2012) 12(1) Journal of Corporate Law Studies 129, 142.
[640] Davies, Worthington and Hare (n 2) 340.
[641] The appointment, functions and qualification are clearly mentioned in the CGC 2018. Most of the appointment has been done through social and family connection. It is almost impossible to ignore the influence of the recruiter from the company.
[642] The Companies Act 1994, s 131
[643] Ibid
[644] This is due to the fact that the rule that demands approval from directors who are objective should be construed narrowly so as to exclude family members of directors who serve on the board as well, despite the fact that these individuals may not have any direct stake in the conflict scenario.
[645] CA 1994, s 130 Disclosure of interest by director in respect of contract etc.

members in Bangladeshi culture.[646] In the context of businesses that have been awarded a premium listing, the term "directors' associates" refers to members of the board members immediate families who are not eligible to take part in voting at general meetings. [647] It is interesting to note that the concept of a familial relationship under UK law, particularly under section 253, is substantially identical to the term that was approved by the CGC in 2018.[648]

The authors believe that only listed firms should be subject to the proposed regulatory regulation that mandates that self-dealing transactions be approved at general meetings without considering the votes of concerned directors' families. This viewpoint is supported by the observation that the membership of the general meetings of some unlisted firms consists solely of members of the founding family. Because no shareholder would be able to vote on self-dealing activities, if the new measure were to be implemented to unlisted firms, it would be challenging to win approval by the general meeting.

7.4.2.4.1 Legal Transplantation Reform Proposal

If legal transferability was handled in the UK, it is possible that the law of self-dealing transactions in Bangladesh may take some cues from that country regarding the permission process by shareholders. The study supports applying the relevant legal rule only to listed companies, hence the following regulations should be implemented by introducing a single item to the CGCs 2018 rather than the CA 1994:

(i) Members of concerned directors' relatives who are not also directors must abstain from voting in any self-dealing activities that are brought up for discussion at the general meeting of shareholders.
(ii) Article 1 of the CGC 2018 defines "relatives," and it is crucial that families be interpreted in accordance with this description.

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[646] See The CA 1994, s233
[647] Listing Rule, Financial Conduct Authority (FCA) <https://www.handbook.fca.org.uk/handbook/LR.pdf> accessed 30 July 2022.
[648] Ibid, LR Appendix, relevant definitions (App 1.1.1).

7.5 Private Enforcement Action Reform: The Transplanting of Derivative Actions

As was discussed in Chapter 5, the enforcement of breaches of directors' obligations through litigation brought on by shareholders has been generally inefficient and inoperable in Bangladesh due to statutory deficiencies. This is the case for a number of reasons. Under Bangladeshi corporate law framework, the statutory general meeting is given the authority to begin legal action to the directors who have violated the law in some way. The fundamental issue is that the law does not offer any other legal remedy, which empower shareholder to exercise company's legal rights in the event that the company was unable to pursue the legal action because, among other things, the wrongdoer controlled the above-mentioned meeting. This is the core of the problem. The law of derivative actions in Bangladesh, which can be found in article 233 of the CA 1994[649], which can be tagged as complex and uncertain.[650]

Consider the judicial method as a removal of directors in the general meeting, [651] as well as the public enforcement, [652] having some drawbacks, this suggests that it cannot replace the necessity of a sound system of derivative actions within the overall system of enforcement for breaches of directors' duties. It's possible that it's accurate to argue that the derivative action, like other accountability systems, might have some associated costs. There is a possibility that a shareholder will engage in abusive behaviour by initiating a legal proceeding in order to serve his own benefits rather than the benefits of the company. [653] It's possible that some people are worried that the derivative action would put directors in a position where they face a large risk of responsibility, which may make them less willing to take risks. [654] Nevertheless, the implementation of a derivative action that is easily available in Bangladesh may be justifiable for a number of different reasons. In exchange for this, the

[649] The Companies Act 1994, s 233
[650] Ibid
[651] Ibid s 106, Removals of Directors
[652] See Public Enforcement Chapter 6
[653] Reisberg (n 8) 83.
[654] Ibid 49

court will have additional opportunities to expand both their professional knowledge and the criteria for determining whether or not compliance has been met. In addition, in contrast to section 233, [655] the derivative action would provide direct relief to the firm while also giving indirect relief to shareholder constituencies and other constituencies that are not shareholder constituencies. This is the case if they are permitted to do so. [656] Bringing a derivative claim is frequently considered a useful method to lower agency costs and a good strategy to prevent directors who feel they may be sued for breach of duty, even in companies with a single dominant shareholder. [657] It is really possible for the minority shareholder to use the derivative claim to enforce the director's duty to act for the benefit of the corporation as a whole, rather than just one particular shareholder class.[658]

7.5.1 Considerations in Support of The Feasibility of Derivative Action Transplants

As was noted earlier on in this chapter, it is essential to make certain that the country that is receiving the imported regulation does so in an appropriate manner.[659] To be more explicit, one had to evaluate whether the Bangladeshi jurisdiction possesses the essential components that are necessary for the effective transplantation of the derivative action. Two positive aspects that will be taken into account in the following discussion are as follows:

To begin, the derivative action is a mechanism that necessitates the participation of shareholders who are sufficiently motivated to launch the legal action. In this regard, it is important to emphasise from the very beginning that the ability to litigate in front of a court is a fundamental entitlement of each citizen or permanent resident of Bangladesh. This is a

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[655] The Companies Act 1994, s 233

[656] Harald Baum and Dan W. Puchniak, 'The Derivative Action: An Economic, Historical and Practice-oriented Approach' in Dan W. Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge, Cambridge University Press 2012) 14

[657] Ibid

[658] Ibid

[659] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47(1) European Economic Review 165. 174. The authors define 'receptivity' as 'the country's ability to provide significance to the adopted law,' which is an interesting take on the concept.

constitutionally protected right that must be upheld by the government.[660]

One further thing to keep in mind is that going to court to settle a dispute is an unavoidable consequence of the social and economic shifts that Bangladesh has experienced over the course of the last few decades. This is something that Bangladeshis do. As a result of Bangladesh's recent social and economic development, individuals in the country's society now engage in a diverse array of business connections with one another. It is commonly believed that a party to any economic relationship should fulfil his or her responsibilities towards the other party and carry responsibility for the failure to do so. If this is not done, the relationship is considered to be in breach of contract. It is a standard procedure in the world of business for the party that has been harmed to file a lawsuit against the party that has been careless in front of the court. This is supported by the fact that figures compiled by the government have shown an increase in the number of cases involving civil or commercial disputes. Typical courts are the ones in charge of hearing cases involving money and finances. On the other hand, in modern times, alternative dispute resolution is becoming an increasingly common practice. According to the sources within the judicial system, there has been a rise in the number of financial matters that have been brought before the courts. There has been a recent uptick in the number of lawsuits filed in Bangladesh, which may be indicative of an increasing willingness on the part of individuals to initiate legal action against others in order to assert their legal rights. [661] This could be interpreted as a significant indicator that non-controlling shareholders are actively using derivative actions to safeguard their interests against the company's board.

Second, when contemplating the reform of derivative actions, one can have doubts about the capacity of the Bangladeshi judicial system to manage the potential rise in derivative lawsuits that would follow the implementation of the proposed change. Generally speaking, this debate can be broken down into three parts: (i) the insufficient knowledge, experience, and training of Bangladeshi judges; ii) the protracted length of legal proceedings; and iii) the

[660] The Constitution of the Peoples Republic of Bangladesh, Part III Fundamental Rights.

[661] See the Statistics of Case from Anti-Corruption Commission (ACC) ,<http://acc.org.bd/site/page/780b12f1-c279-44c4-bc3c-f3e6da436f3d/পরিসংখ্যান> accessed on 20 August 2022

inconsistent nature of court rulings and interpretations.[662] Even while such worries can be justified to some degree, we shouldn't give them too much weight because there are several important signs that the justice system is gradually moving in the direction of being more effective. After the recent judicial reform that created specialist business courts, the government is responsible for hiring judges with proper training and commercial expertise. [663] A candidate for the job of judge is often required to hold a higher education degree, in addition to meeting a variety of other qualifications that vary with the specific position being applied for and the kind of court being applied for. [664] Competence, academic specialisation, and experience are likely to be given the most weight when determining judge assignments for specialised courts. These are also the three characteristics that are most likely to be considered. Judges for specialised courts that deal with commercial issues have been receiving training through a variety of seminars and workshops that have been held recently. In addition, the establishment of specialised courts, such as the company bench, which is part of the High Court Division of the Supreme Court of Bangladesh, is anticipated to make a significant contribution to the development of the judges' expertise in the adjudication of disputes arising from a specific area of the law. This is due to the fact that judges in these courts frequently deal with issues pertaining to this particular area of the law. In light of all of this, it is acceptable to presume that judges in commercial courts have a certain level of experience that enables them to cope with the complexities of corporate matters. [665] This assumption can be supported by the evidence presented above.

When it comes to the inconsistent legal precedent and rulings in Bangladesh, there will likely never be a unanimous ruling on cases involving derivative claim with comparable facts. This is because Bangladesh's legal system has a history of inconsistent judicial decisions. In spite of this, the gravity of such a problem will be significantly mitigated as a result of the

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[662] See Ridwanul Hoque, 'Courts and the adjudication system in Bangladesh: in quest of viable reforms' in Jiunn-Rong Yeh and Wen-Chen Chang (eds) *Asian Court in context* (Cambridge, Cambridge University Press, 2014) 447-486; Md Awal Hossain Mollah, Independence of judiciary in Bangladesh: an overview, (2012) 54(1) International Journal of Law and Management 61

[663] A number of reforms has been suggested and are in process. See 'Judicial reforms crucial for business-friendly environment'(The Dhaka Tribune, 03 April 2021) <https://archive.dhakatribune.com/business/2021/04/03/judicial-reforms-crucial-for-business-friendly-environment > accessed on 20 August 2022

[664] See Part 4 of Chapter 1 of the JL 2007 and Rules for Selection of Judges.

[665] Markus Zimmer, 'Overview of Specialised Courts' (2009) 2(1) International Journal for Court Administration 46

establishment of business courts. If the legislative branch makes the choice to create specialised courts as the initial judicial instance, it will do so with the goal of enhancing the overall justice of the decisions reached by the judicial system. However, experts rather than general judges should staff the appellate courts so that the law may achieve better consistency and certainty in the understanding of a specific area of the law. This is the only way this can be accomplished.[666] In terms of Bangladeshi law, it would appear that the Bangladeshi legislature seeks to achieve both of the following goals: an improvement in the quality of court judgements, as well as a high degree of uniformity and predictability in the interpretation of commercial legislation. In addition, if the judiciary in Bangladesh were to broaden its policy on the disclosure of judicial decisions, this would also contribute to a more consistent and predictable application of the law.

In light of what has been said thus far regarding worries about the competence of the Bangladeshi judicial system, it is possible to make the case that such worries have a tendency to be overblown. Considered as a stepping stone toward a more effective and ethical judicial system is the reform that has been taking place recently in the judicial system. To put it another way, the analysis presented here reveals that worries regarding the capabilities of the Bangladeshi judiciary are typically not sufficient cause for opposing the establishment of a successful derivative action system in Bangladesh. In addition, it is important to keep in mind that the beginning of any derivative lawsuit will be subject to certain procedural regulations that are designed to curb the number of malicious claims that are filed.

7.5.2 Which Legal Notions and Ideas Will Be Implemented?

The purpose of this section is to define the prerequisites and circumstances that must be met before a shareholder can file a derivative action. In order to address the shortcomings brought up in Chapter 5 of this thesis, we shall develop the components of a derivative action remedy by first determining the extent to which Bangladeshi law can learn from the legal system of the United Kingdom. An workable derivative claim mechanism is crucial to be in place; however, this may not make that it is necessary to develop a derivative action that puts

[666] Ibid

directors at a high risk of legal liability and hurts the company's interests. This is something that should be kept in mind. It is also important to keep in mind that any reform agenda that is recommended as a consequence of an investigation into whether or not legal transplantation is possible ought to take the shape of obligatory regulations that are to be included in the CA 1994.[667]

7.5.2.1 The Phenomenon of The Wrongs and The Redress Sought

It has been suggested that Bangladeshi law does not formally recognise the concept of a derivative action in the same sense that is in the UK. One of the most significant issues with section 233 of the CA 1994 is a shareholder can only action if he aggrieved personally. As a consequence of this, any relief will flow directly to the shareholder in the event that there is a successful claim.[668] In contrast, the law of the United Kingdom makes it abundantly apparent that derivative action must be commenced as a result of harm done to the firm, and any financial gain made as a consequence of the litigation must be paid to the company. Because of the reasons that are presented in Chapter 5 of this thesis, one of the essential components of the offered transplant is the suggestion of a derivative action.

A proceeding that may be the focus of the company's action launched in compliance with section 233 of the CA 1994 should be the basis for the suggested derivative action. As was described earlier, this will encompass any misbehaviour that was committed while managing the company that was detrimental to the interests of the company. In accordance with the legal system of the UK, directors have the potential risk of being named as defendants in derivative lawsuits when breach are committed against the company. This is due to the fact that implementing such a change would make the already high likelihood of filing action against directors even more likely. It is possible that talented persons will be dissuaded from taking directorships as a result of this. This should be accomplished by designing a system that strikes the right balance between the two competing priorities.

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[667] Troy A. Paredes, 'A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer' (2004) 45(3) William and Mary Law Review 1055, 1074 and 1085

[668] The CA 1994, s 233 put bars on the minimum shareholdings of not less than one tenths of the issues shareholdings of the company.

As a result of the fact that derivative lawsuits are filed in response to wrongs committed against the company, the plaintiff ought to be able to pursue solely business remedies.. This may take the shape of, among other things, compensation, the return of ill-gotten gains, or the cancellation of the self-dealing transaction.[669] With this modification, CA1994 acts would be brought into conformity with the legal systems of other jurisdictions, such as the UK.

7.5.2.2 Should the Claimant Be Compelled to Seek Authorisation From The Court to Pursue the Claim?

In the UK, shareholders have the ability to sue negligent directors through a derivative action. However, in order to proceed with the claim, they are necessary to first acquire the authorization of the court. As was described earlier, the fact that the United Kingdom has chosen to take this approach demonstrates how seriously the legislative body of the United Kingdom views the issues that are involved with putting the decision to litigate in the hands of the board of directors or the shareholder body. In point of fact, court engagement in the process of derivative litigation can bring about a number of benefits, one of which is an increased likelihood of independent decision-making. There are a number of potential issues that could arise if either the general meeting or the board of directors were given the authority to make this choice. One potential answer to these issues could be to take the method outlined here. However, this does not necessarily imply that judicial participation in the decision about the derivative action would fit completely within the framework of Bangladesh's legal system. The authorization method in the UK is fraught with difficulties and ambiguities, which raises questions about whether or not a similar approach could work in Bangladesh.[670] Giving the authority to make this choice either to the general meeting or the board of directors is fraught with potential complications, which, in principle, might be avoided by taking the

[669] Self-dealing transaction in CA 1994

[670] Hans C. Hirt, 'The company's Decision to Litigate Against Its Directors: Legal Strategies to Deal with the Board of Directors' Conflict of Interest' (2005) (Mar) JBL 159, 165–166.; Arad Reisberg, 'Judicial Control of Derivative Actions' (2005) 16 International Company and Commercial Law Review 335, 338. See also, James D. Cox, 'The Social Meaning of Shareholder Suits' (1999) 65(1) Brooklyn Law Review 3, 4

method outlined above. However, this does not necessarily imply that judicial participation in the decision about the derivative action would fit completely within the framework of Bangladesh's legal system. The authorization method in the UK is fraught with difficulties and ambiguities, which raises questions about whether or not a similar approach could work in Bangladesh.

Although it is expected that the court will consider the likelihood that a claim will be successful during the first stage of the proceeding in the UK, the process of proving a prima facie case is not entirely clear. As stated earlier,[671] Establishing a prima facie case is a simple process for a shareholder. However, this doesn't say even if there isn't a good chance of success in the following phase. As a result, people have questioned whether or not the court should proceed to the first stage, which would involve conducting the prima facie investigation, due to the higher costs and the increased amount of time that would be wasted during such an investigation.

In recent case *Client Earth-v-Shell Plc [2023] EWHC 1897 (Ch)*, it was the first climate-related derivative action against a board of directors under the UK Companies Act, and the first English case targeting corporate directors personally for a company's energy transition strategy. To protect companies from speculative claims, such actions can only proceed with the permission of the court. The court is required to dismiss the application for permission to bring a derivative action if it appears that the application itself and the evidence filed in support of it do not disclose a *prima facie* case for giving permission. The English court dismissed the claim.

Also is *McGaughey & Davies v. Universities Superannuation Scheme Limited [2022] EWHC 1233 (Ch); [2023] EWCA Civ 873* the similar approach has been taken by the English court. Academic members of the University Superannuation Scheme (USS), one of the biggest private occupational pension plans in the UK, filed a lawsuit against it. Despite USS's objective of being carbon neutral by 2050, the academic scheme participants claimed that the company's

[671] David Gibbs, 'Has the Statutory Derivative Claim Fulfilled Its Objectives? A Prima Facie Case and the Mandatory Bar: Part 1' (2011) 32(2) Company Lawyer 41, 43. This might address the reluctant approach by the count in term of prima facie case.

management had violated their fiduciary obligations by failing to have a divestment plan for fossil fuel assets. On behalf of the firm, the academics requested authorization to proceed with the proceedings, arguing that the company had suffered a loss as a result of the directors' refusal to divest. Nevertheless, authorization to pursue the claim was denied by the High Court in August 2022 and the Court of Appeal in July 2023. The courts ruled that the claimed violations of the directors' duty did not establish a prima facie case of harm to the corporation.

One such issue that could be a source of contention is the process that must be followed before authorization is granted. Without conducting at least some investigation into the merits of the case from a legal standpoint, the court is unable to arrive at a reasonable conclusion regarding whether or not the claim would be to the company's advantage. [672] People have been made aware, meanwhile, that in certain UK situations, the authorization stage has evolved into mini-trials; [673] As to the Law Commission's proposal, this is something that need to be prevented.[674] With considering the above, there is a good chance that this process would develop into mini-trials and a thorough examination of the evidence, leading to protracted hearings, should the need that the court's consent be requested be implemented in Bangladesh. This would be a result of the adoption of the requirement that the permission of the court needs to be obtained. This is a fair issue, and a shareholder may be dissuaded from filing a genuine derivative claim because the permission procedure is both expensive and time-consuming.

7.5.2.3 The Standing Requirement for The Plaintiff

According to section 233 of the CA 1994, the only people who can pursue legal actions on behalf of a corporation are the shareholders. This restriction is similar to the one that exists in the UK. [675] In the Bangladeshi legal framework anyone can file a lawsuit on the ground of public interest, even without being a shareholder of the company, which is subject to approval

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[672] The Law Commission, *Shareholders Remedies: Consultation Paper* (No.142, 1995) para 16.22 <http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp142_Shareholder_Remedies_Consultation.pdf> accessed 23 July 2022
[673] cf Keay and Loughrey (n 770) 154.
[674] The Law Commission, *Shareholders Remedies: Consultation Paper* (No.142, 1995) para 16.22 < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc246_Shareholder_Remedies.pdf > accessed 23 July 2022
[675] See The CA 2006. s 260(1)

from the High Court Division, Supreme Court of Bangladesh. [676] It would appear that Bangladeshi law, like its counterpart in the United Kingdom, does not prohibit shareholders from bringing a lawsuit on behalf of the company in relation to an action that occurred before they became shareholders. [677] This is the case even though the shareholders were not involved in the original action. Neither the United Kingdom Criminal Procedure Act of 2006 nor the Bangladeshi Criminal Procedure Act of 1994 need a plaintiff to have been in possession of stock at the time of the offence. The fact that the plaintiff was not a shareholder at the time the illegal activity took place should not be sufficient grounds for the law to absolve directors of responsibility for their actions.

It could be argued whether Bangladesh should establish a sophisticated statutory form of derivative action. In the UK CA 2006 allow the beginning of derivative actions after the satisfaction of a minimum ownership threshold.[678] To protect a company against frivolous legal action is one of the primary reasons why there should be a minimum shareholding requirement. [679] To put it another way, because significant shareholders have adequate interests in filing derivative action in comparison to individuals with lesser shareholding ownership, it is unlikely that considerable shareholders will launch meritless cases. [680]

When it comes to listed corporations, however, if minimum shareholding ownership is required (for example, a barrier of 5 or 10 percent), one could argue that the derivative suit is very less accessible for minor shareholders. This is because the threshold will be set at 5 or 10 percent. Although it is not uncommon to discover a listed business in Bangladesh in which a block holder owns the lion's share of the firm's stock, the number of block holders in each company is so low that, in the most extreme case, it is possible to count them on one hand using only the fingers. Because of this, tens of thousands of shareholders will essentially be denied the opportunity to file a claim. The high threshold requirement poses a risk in that

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[676] Bangladesh has different approach such as Public Interest Litigation in High Court Division of the Supreme Court of Bangladesh.
[677] The CA 2006, s 260(4)
[678] See Martin Gelter (n 289), 858–859, who reported the German law's adoption of the demand requirement as a procedural rule of derivative action.
[679] Hans C. Hirt, 'The Enforcement of Directors' Duties in Large Companies: Reassessment of the Rule in *Foss vHarbottle* and Analysis of Reform Proposals with Particular Reference to German Company Law' (PhD thesis, University of London 2002) 251.
[680] Martin Gelter (n 289) 856

it might prevent the filing of cases that are in the public's best interest.[681]

As a matter of fact, a shareholding requirement is essential, all the more so when one considers the fact that neither the existing Bangladeshi law nor any of the proposed reforms incorporate the court procedure model used in the UK for permission to sue derivatively. In Bangladeshi law, there is no provision for a "loser pays costs to rule," hence the necessity of a threshold may also be required as a means of regulating the flow of derivative actions.[682] This may be essential. Furthermore, the negative effect that a basic shareholding barrier has on the effectiveness of derivative actions a crucial aspect of sound corporate governance will be mitigated by reducing the barrier to one percent or even lower. To sum up, the legislation should clearly allow shareholders to consolidate their shares in order to meet the minimal criterion for ownership.

7.5.2.6 A Recommended Approach to The Shareholder's Good Faith

When a shareholder feels that the company has been wronged in any way, they may file what is known as a derivative action in order to obtain corporate remedies. This indicates that the firm will benefit from the litigation that is brought about by the use of derivative claims. To claim the derivative action in the UK one of the factor is the claimant's good faith.[683] This is because the court will view the applicant as acting in the company's best interest. Regarding Bangladesh, given that there are no cases that are relevant to this topic. The issue at hand concerns the manner in which the Bangladeshi court ought to respond to the allegations that shareholder plaintiffs lacked good faith in their actions.

At the hearings of instances involving derivative actions, one of the defences that defendant directors could issue is that the plaintiff shareholder did not act in good faith. To assess whether or not someone is acting in good faith, it is necessary to consider the unique set of conditions and facts surrounding the specific instance in question. This is something that

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[681] cf Hans C. Hirt (n 778) 252.
[682] In Bangladesh the Judicial practice is not in line with the custom and practice of the UK in particular cost matter. Bangladeshi judges hardly order costs.
[683] Section 263(3)(a) of the CA 2006.

must constantly be kept in mind. In regards to the derivative claim, an investigation of the shareholder's motivations and intentions for launching the derivative action is conducted in regard to the good faith problem. [684] When using the "good faith" criteria outlined in section 263(3)(a) of the CA 2006 in the United Kingdom, it is important to take into account both ulterior motives and collateral goals. [685] There are two different possibilities that could play out in Bangladeshi courts: To begin, in order to demonstrate good faith, the circumstances surrounding the interaction must be devoid of any hidden agenda. [686] The second possibility is to disregard the presence of a collateral purpose and instead concentrate on the primary goal of the claim. [687] The primary justification for the implementation of such a strategy is to ensure that a defendant director will not be able to absolve themselves of responsibility for the damage caused to the company. Good faith is given a broad interpretation, this may preclude the beginning of legitimate legal proceedings. It is also important to keep in mind that the defendant director is the one who is responsible for shouldering the responsibility of establishing the shareholders' lack of good faith. This is done to deter speculative accusations and keep inquiries about the shareholders' good faith from taking up too much time during hearings.[688]

7.5.2.7 Legal Transplantation Reform Proposal

To answer the topic of how Bangladeshi law might learn from UK law on the formulation of circumstances and criteria that should be fulfilled in order for a shareholder to file a derivative action, it would seem that substantial change through legal transplanting is a feasible alternative. Consequently, in terms of controlling the initiation of derivative proceedings, the following amendments to the CA 1994 are required: (i) The privilege of

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[684] Regarding the claim that there is an independent obligation to act in good faith, see, for example, M Eisenberg, 'The Duty of Good Faith in Corporate Law' (2006) 31(1) Delaware Journal of Corporate Law 1; as an argument in favour of the view that the obligation to act in good faith is not a distinct obligation, see, for example Leo E. Strine and others 'Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law' (2010) 98(3) Georgetown Law Journal 629

[685] See, for example, *Singh v Singh* (2013) EWHC 2138, at [22]; *Hook v Sumner* (2016) BCC 220, 235. For further details, see Julia Tang, 'Shareholder Remedies: Demise of the Derivative Claim?' (2012) 1(2) UCL Journal of Law and Jurisprudence 178, 192–193.

[686] Ibid, Julia Tang 193

[687] Ibid, 196.

[688] The identical suggestion can be found in the published company law material in the UK., Ibid, J Tang 195.

initiating a derivative action should never be employed for any reason other than to rectify a wrong that has been committed against the corporation, (ii) Only a qualified shareholder—defined as someone who holds minimum 1 percent of the company's equity—can initiate a derivative action on the company's behalf., (iii) The qualifying shareholder is required to inform them company of his or her intention to suit the directors in a derivative capacity, and the firm is required to respond within the allotted time frame. The fact that the firm has chosen not to sue does not prevent derivative litigation from taking place; however, the court should be made aware of the reasons the company has chosen not to suit and should take these taking into account, (iv) An authorization of the act that is the subject of the complaint will be used as a defences against a derivative action, (v) It is not prohibited from suing directors in a derivative capacity if the wrongdoing has been ratified, (vi) If the alleged wrongdoing and the sought-after relief are both appropriate for a derivative action, then the fact that another type of remedy is also available will not prevent a derivative action from being brought, even if that other type of remedy is available, and (vii) In assessing the veracity of claims regarding a shareholder's good faith, the possibility of other collateral benefits that a plaintiff shareholder might obtain is irrelevant, as long as the corporation will gain from the shareholder's claim, and there is no solid, convincing proof to back up the claims of taking factors into account.

7.5.3 Derivative Action Funding

According to what is discussed in Chapter 5 of this thesis, the funding of the action and the question of whether or not the law includes provisions dealing with the issue are likely to have a significant impact on shareholders' judgments regarding whether or not to begin legal action.[689] When there is no mention of the problem of finance in the law, this could be a significant obstacle that prevents derivative actions from being brought. This could be a substantial issue. The law governing companies in Bangladesh is a good example.

[689] Arad Reisberg, 'Funding Derivative Actions: A Re-examination of Costs and Fees as Incentive to Commence Litigation' (2004) 4(2) Journal of Corporate Law Studies 345, 345 and 347.; Arad Reisberg, 'Derivative Actions and the Funding Problem: The Way Forward' (2006) (Aug) Journal of Business Law 445, 446

The discussion of the funding rule in the UK[690] it is the court discretion to order the cost of the cases.

In addition, the case law in the UK does not appear to have come to a conclusion regarding the claimant's financial condition rather courts own discretion. In contrast, in the case of Smith v. Croft court came to the conclusion that there is no need to issue an indemnification order if the plaintiff has sufficient funds to cover the costs of the litigation. [691] The court came to this conclusion so that it would not place an undue financial burden on the company. On the other hand, in the case of Jaybird v. Greenwood, the court expressed their disagreement with the notion and stated that they should take into consideration the financial situation of the derivative claimant. [692] Additionally, the financial capabilities in the court's discretion may deter affluent claimants from initiating derivative actions, according to one analyst. If the case succeeds, the firm receives financial rewards, while the claimant may receive "minimal" benefits.[693]

Therefore, in Bangladeshi law, the uncertainty associated with the approach taken by courts in the United Kingdom to the issue of indemnity orders may make it impossible to transfer the financing norm from the United Kingdom into the Bangladeshi jurisdiction. To put it another way, if the strategy used in the UK were to be used, it is absolutely necessary to define the limits of the discretion afforded to the court in the process of granting the order of indemnity costs. The Bangladeshi Court must fulfil certain obligations regarding derivative proceedings under which the firm has sought relief.

7.5.3.1 Legal Transplantation Reform Proposal

The research suggests that because the CA 1994 does not contain a provision that addresses this matter, a new statutory article needs to be added to the CA 1994 in order to regulate this matter in accordance with the following guidelines. This is something that should be taken

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[690] *Lesini v Westrip Holdings Ltd* (2010) BCC 420*,* 450; *Stainer v Lee* (2011) BCC 134, 148.
[691] *Smith v Croft* (1986) 1 WLR 580, 597.
[692] *Jaybird Group Ltd v Greenwood* (1986) BCLC 319, 327
[693] D D Prentice, '*Wallersteiner v Moir*: A Decade Later' (1987) Conv 167.

when considering adapting the UK derivative action financing mechanism to Bangladeshi law,: (i) The court has the authority to issue indemnification orders that force the business to pay derivative litigation expenses. These orders can and should be issued; (ii) The judge must issue indemnification judgments if it believes the derivative trial's specified requirements are met. If the court doubts the suggested restrictions, it won't issue orders; and (iii) The court must confirm that the statement is based on the matter at hand in the derivative claim.

For ease of reference based on the previously discussed reform proposal in chapters 7.4, 7.4.2,7.4.2.1.2, 7.4.2.2.1, 7.4.2.3.3, 7.4.2.4.1, 7.5.2, 7.5.2.7 and 7.5.3.1 the following table has been created. The table shows the legal issues in column one which have been addressed regarding the relevant Bangladeshi corporate law provisions mainly the Companies Act 1994 in column two and the proposed transplantations from the UK Company law mainly the Companies Act 2006 in column three.

Table 1 : An overview of the suggested regulations for using legal transplanting to change the pertinent legal problem in Bangladeshi law

Legal Issues	Relevant Bangladeshi law	Proposed transplantations
The duty of care	No express provision in the CA 1994, Companies Amendment (1st and 2nd) Act 2020 or in the CGCs 2018	A new section is to be inserted in the CA 1994 considering section 174 of the UK CA 2006.
The need to perform honestly for the company's benefit	No express provision in the CA 1994	A new section is to be inserted in the CA 1994 based upon section 172 (1) of the UK CA 2006 with adaptations.
Keeping one's interests apart while considering business prospects	Section 130 Disclosure of interest by director in respect of contract etc. No explicit provision in the CA 1994 apart from Section 130.	With modifications, a new provision based on section 175 of the UK CA 2006 is to be added to the CA 1994.
A rule prohibiting directors' families from casting votes during general meetings on deals involving self-dealing	No specific statutory scheme	A new section to be inserted in the CGCs 2018 based upon the UK LR 11.1.8.

transactions.		
Requirements for the initiationof derivative actions	Section 233 of the CA 1994 Minority Shareholder Protection rather than derivative action.	Amendments to section 233 based upon sections 260 (1) and 263 of the UK CA 2006 with adaptations.
Derivative actions Funding	No specific statutory scheme	A new section based on Rule 44.2 (a) of the UK Civil Procedures Rules is to be added to the CA 1994.

7.6 Conclusion

This chapter has shown that transplanting legal principles from the UK is necessary and largely achievable for reforming the director duties regime in Bangladesh. Transplanted ideas can fit and work fine in the Bangladeshi legal framework. However, this only applies if the imported rules and legal concepts are adapted to fit within the Bangladeshi legal system. This chapter examined which legal concepts from the UK can be applied to the institutional framework and regulatory regime of Bangladesh. This was done in light of the fact that there is a pressing need to increase director accountability without compromising the significant role that authority plays in the organisation. In addition to that, a plan to alter the legislation regarding the roles of directors was offered. This chapter also demonstrated that importing legal ideas from the UK is not only feasible but also workable for reforming the Bangladeshi law of directors' duties. With the caveat that the imported rules and legal concepts are appropriately modified to fit within the Bangladeshi legal framework. Furthermore, this chapter suggests that Bangladeshi law would be best served by adopting the United Kingdom's strict no-conflict approach to business opportunities. This is because Bangladesh follows the UK's stringent no-conflict policy. The suggested transfer of standards and examinations for the duty of care and the obligation to behave honestly and in the company's best interests is doable within the boundaries of Bangladesh's legal system.

Chapter 8: Conclusion

This study's main goal was to propose amendments to Bangladesh's legislative framework governing directors' obligations and derivative proceedings. These changes are intended to strengthen the legal protections afforded to companies and their shareholders, particularly minority shareholders, in the event that company directors engage in activities that are exploitative in nature. The research was carried out considering Bangladesh, and it is anticipated that putting these changes into action will assist in encouraging excellent corporate governance practises and the general expansion of the business climate in Bangladesh. When compared with the law that is in effect in Bangladesh at the present time, the research presented in this article proposes a novel framework that includes duties of care and loyalty that are more clearly and precisely defined, and which are supported by a derivative action that is easier to access. Gaining knowledge from the experience of relatively advanced legal systems, like the one in the United Kingdom, was the aim of this study. By holding those who failed to act with diligence and loyalty accountable, the law continued to play a crucial role in providing incentives for directors to behave with diligence and loyalty. This research sought to guarantee that directors were subject to an appropriate amount of responsibility and control. By offering a solution to the issues of ambiguity and inadequacy found in the examination of Bangladeshi legislation, this research attempted to guarantee that directors were held to an adequate standard of responsibility and oversight.[694]

This investigation led to the presentation of the claim that legal ambiguity and shortcomings in Bangladeshi law regarding the duties of care must be taken into account,[695] and the derivative action, along with a host of other factors, was the primary impetus behind the researcher putting out the reform in the form of a legal transplanting proposal. The need for such change is strengthened further by evidence that demonstrates the inadequacies of various monitoring and disciplining mechanisms that are part of the Bangladeshi corporate governance structure. These mechanisms are described in chapter 2, so you can read about them there. The study examined the suitability of foreign regulations within the framework of Bangladeshi legislation. This is

[694] For detailed discussion please see Chapter 4

[695] For the purposes of this thesis, two primary types of duties have been discussed. These are (i) the duty to act in good faith in the company's general interests and (ii) the duty to avoid conflict of interests, with a particular emphasis on the corporate opportunities and self-dealing transactions that were covered in the chapter before this one. Both of these duties have been discussed.

a consideration that involves making some adjustments to the foreign rules, if necessary, for them to fit properly within the new legal and institutional environment. The potential of translating particular legal concepts and regulations from Bangladeshi law to its UK equivalent was being looked into during the investigation. This is an essential precondition for Bangladesh to fulfil to be ready to properly receive foreign models and regulations.

In order for the researcher to accomplish the study objectives, the study had to be constructed so that it began with an obligatory basic overview of the regulatory system of the country that governs the operations of joint stock corporations (Chapter 1). This opening chapter's goals were to highlight the most important aspects of Bangladesh's legal system and to present an accurate grasp of Bangladeshi law, both of which would be expanded upon in the subsequent sections of the research project. It was suitably explored how the unique features of the Bangladeshi judicial framework set it apart from other judicial systems, including the common law nature of principles of legal origin and laws of foreign origin. It was important to note that the writing of rules, which would entail importing regulations with UK roots, could only be justified if the laws it created did not clash with the pre-existing legal system, that is, with constitutional supremacy. Bangladesh has constitutional supremacy, which is the supreme law of the land, and it is essential to note that constitutional supremacy was not violated by the laws produced by the drafting of legislation. It was crucial to highlight the adaptable character of Bangladeshi law from two different vantage points for the same reason. First, certain sections of the law, such as those dealing with corporations, have a tendency to provide general suggestions rather than specific regulations. This leaves room for the society at issue to adopt specific laws in accordance with its social and economic needs. Second, an essential foundation that paves the way for the implementation of innovative legal concepts is Bangladesh's adherence to the premise that the country will accept any and all worldwide best practises so long as those practises do not go against the Constitutional Law. A summary of the present legal framework for corporate governance, which consists of the main body of laws and public enforcers, was also included in the review (i.e., judicial institutions and regulators). A significant aspect of this chapter covered was the characteristics of Bangladesh's judicial system, which is relevant to the discussion in the following chapters. Additionally, it is worth mentioning that Bangladesh is a common law country and followed the judicial precedent principle effectively. In addition, Bangladeshi judges have a propensity to follow the law rather than make it, and they are strict in their adherence to the formal execution of written regulations.

In Chapter 2, the fundamental issues with the present management framework for directors in Bangladesh were assessed and discussed in detail in order to clarify the roles of public enforcers (such as courts and state institutions) and directors' obligations within the system as a whole. The main goal of this chapter was to clarify the reasons for the necessity of private action via derivative litigation and legislative reform of directors' duties in order to guarantee directors' responsibility for abuse of their authority. As previously stated, this area of the law is beset by legal uncertainty and shortcomings, which arise from either the lack of legislative acknowledgement or the unclear language used in the legislation, as well as the courts' passive role in addressing the legislative gap. This implies that the legal responsibility system, which is a crucial means of accountability, is less effective. Furthermore, it is thought that the liability framework has been widely accepted as a last choice in cases where market forces and other measures are insufficient to guarantee board responsibility. Thus, a major portion of this chapter was committed to demonstrating that the limitations and disadvantages of alternative systems of responsibility and monitoring in the Bangladeshi context further underlined the necessity to address shortcomings revealed in the law of directors' obligations and derivative actions.

The chapter examined four distinct responsibility methods in this respect such as block holder monitoring; internal shareholder proceedings at the general meeting; the role of independent non-executive directors; and the markets. The study argued that even though a concentrated ownership structure is prevalent in most companies that are listed on two stock exchanges, namely the Dhaka Stock Exchange and the Chottogram Stock Exchange, this does not underestimate the importance of sound company law in ensuring the accountability of directors towards shareholders or even towards non-controlling shareholders in the case where directors are under the control of block holders.

The study found that block shareholders in Bangladesh could well be motivated to supervise by a tiny chunk of stock, multiple block owners, or their identities, such as the state. Internal means of accountability accessible to shareholders at the general meeting (such as director removal) and the independent director institution function within limited restrictions, therefore an effective legal responsibility structure is still needed. This also applied to Bangladesh's underdeveloped markets and other systemic flaws. Nevertheless, this technique was used.

The legal doubt and deficiency declaration was written in Chapters 4, 7, and 9 by comparing

the Bangladeshi law of directors' duty and derivative action to UK law. This was done in order to compare and contrast the UK law with the Bangladeshi law. In Chapter 7, the research analysed the level of both power and clarity present in the current legislation in Bangladesh addressing directors' duty of care. Based on the findings of the comparative analysis, it was determined that this particular area of the law was clearer and more established in the UK in comparison to Bangladesh, particularly after the codification of the responsibility in the CA 2006 in the UK. There are several features of confusion around the fundamental nature of this responsibility in Bangladesh because there is no statutory pronouncement on it and the courts have a virtually non-existent role in addressing the legal vacuum. The lack of Bangladeshi legislation addressing this obligation is the cause of this ambiguity. Bangladeshi legislation chooses to recognise the purely objective definition of responsibility, whilst UK law adheres to the objective/subjective norm. In Bangladesh, the criteria by which the acts of directors are evaluated are not entirely transparent: Is it a case of simple negligence or one of extreme negligence? The fundamental issue is that there is no defined boundary between the kind of conduct that are labelled gross negligence and those that are considered ordinary negligence.

Furthermore, it's unclear if the directors' degree of skill and understanding will be taken into consideration by the court in assessing whether or not they fulfilled their duty. If this is not done, it suggests that directors with a wealth of expertise have no legal incentive to act in a way that is consistent with what one could reasonably expect from someone with their degree of experience and knowledge. It is also uncertain if the Bangladeshi court recognises that the scope of the duty of care changes according on the position and activity that is allocated to the directors in issue in the lack of legislative and judicial direction. This is one more area where things are unclear. The study also found that, in comparison to the CA 1994, the modern CGCs 2018 have, in part, created the requirement that directors keep an eye on things, stay updated, and not depend only on the actions of others (e.g., directors). To conclude, this chapter looked at the impact of receiving a single high-quality treatment and how Bangladeshi and British legislation handle similar situations. Crucially, the study showed that, in contrast to Bangladesh's legal system, the legal system in the United Kingdom uses a tool (court release of responsibility) to allay directors' worries about a single, high standard of care. However, the study raised concerns about the legal certainty of the UK court's approach to liability relief, which were taken into consideration while analysing the feasibility of Bangladeshi change by legal transplantation. With a focus on how these duties are applied in the context of corporate opportunities and self-dealing transactions, the comparative study focused on the duties of

loyalty, specifically the obligations to act in good faith in the company's interests and the responsibility to avoid potential conflicts. Numerous discoveries were illuminated by this chapter, the most significant of which are explained in great detail in the succeeding paragraphs: First, it seems that the elements of the loyalty responsibility are not viewed as a single requirement, in contrast to the circumstances in the UK. These components include the duty to act in good faith and in the organization's best interest.

This indicates that there is no obligation to behave in the best interests of the corporation, which is directly connected to the necessity of acting in good faith. Due to this, the threshold of accountability for violating the obligation is erroneous; yet, this allows the court to conduct an impartial evaluation of whether or not the directors truly functioned in the company's best interests. Second, when it comes to whose benefits the business should be managed in, Bangladeshi law lacks defined rules that would indicate which competing interests should take precedence over others, in contrast to the law in the United Kingdom. There is a noticeable distinction here. The share holders' ability to keep an eye on the business has been weakened since directors have been given wide latitude to define the ill-defined concept of "the best interest of the company."

Thirdly, the investigation found that the area of directors' responsibilities pertaining to refraining from taking advantage of economic opportunities is absent from Bangladeshi law. This area of directors' responsibilities in Bangladeshi law is less developed than in UK law. In light of these facts, some have claimed that the legislation does not sufficiently guarantee directors' responsibility for wrongdoing, rendering the company and its shareholders helpless. Despite the fact that the CGCs 2018 have created a new regulation regarding corporate opportunities, there have been concerns expressed regarding the new regulation's soundness in terms of the level of legal certainty it offers and the degree to which it strikes the right balance between control and discretion.

Fourth, the study discovered that this territory of corporate law concerning directors' participation in self-dealing transactions was not developed by the recent reforms brought about by the Company Amendment Act 2020, Company (Second) Amendment Act, 2020, and the new CGCs 2018. This was the deduction made from the study's results. Comparative investigation, however, showed that Bangladeshi law restricts directors' participation in self-dealing activities more than UK law does. This is because directors are required by Bangladeshi

law to notify the board of any conflicting interests they may have and to obtain prior consent from shareholders. On the other hand, directors are not required by UK law to inform the board of any conflicts of interest. Because there was no explicit clause in the CA 1994 requiring interested shareholders other than board members to be excluded from voting, the research raised doubts about the effectiveness of shareholder approval in the Bangladeshi setting.

After examining directors' duty of care and allegiance, the study examined whether private formal enforcement is permitted by Bangladeshi law (Chapter 5). The chapter started off with an analysis of the function that public enforcement plays if breaches of directors' duties occur, particularly in light of the recent reform that was brought about by the Company Amendment Act 2020, the Company (second) Amendment Act 2020, and the CGCs 2018. According to the findings of the study, the function of public enforcement carried out by regulators has a tendency to be plagued by significant limitations. These restrictions form the cornerstone of the important role of private enforcement, which encompasses within the broader enforcement framework a manageable derivative action framework. As a matter of conscience, it is thought that the legislation should not only depend on the board or the general meeting to initiate the private enforcement action. This opinion is supported by the idea that the board or general meeting shouldn't be the only bodies empowered by law to initiate legal action.

Since the legislation does not provide a different legal remedy that would allow a shareholder to exercise the corporation's rights, it does not guarantee directors' adequate duty. It renders the directors' responsibilities even less efficient than they were before. The main problem in the Bangladeshi setting was that, despite study, the legislation did not provide an effective enforcement mechanism in the form of derivative proceedings that would have encouraged the legal protection of the business and its owners, particularly minority shareholders. This was the main issue. The legislation did not provide an efficient system of implementation if, among other reasons, the offender dominated the general meeting and the corporation was unable to pursue legal action. Significant issues and ambiguities were raised in regard to the UK derivative action structure and the regulations controlling the funding of derivative proceedings, despite the comparative study suggesting that British law was clearer and easier to access than Bangladeshi law. The UK derivative action framework and regulations were brought up in reaction to these issues and uncertainties. The study's conclusions indicate that the UK court was granted considerable latitude in managing the derivative claim, selecting whether to approve it, and determining indemnity cost orders. It was necessary to prove this

reality in order for it to be considered during the planning phase of changing the Bangladeshi law of derivative actions by the use of legal grafting. This is because the law gets increasingly vague hence more freedom the judge is granted. This is particularly relevant in places where the court might not have the necessary tools to make laws without the help of legislators.

In the final chapter of the research project, a discussion was held regarding the extent to which the law of Bangladesh may gain from the experience of the UK in order to alter the law of directors' duties and derivative actions in Bangladesh. This discussion took place in Chapter 7. To be more specific, an investigation was carried out to determine whether or not it would be possible to implement changes to Bangladeshi law through the process of legal transplanting. Keeping all of this in mind, the conclusion of the feasibility study that looked at the possibility of transplanting some norms and models from the UK into Bangladeshi law was that the following recommendations and proposals should be made regarding the reform of the legislation.

The research recommends that to formalize the responsibility of care in a form that reflects the use of dual objective and subjective standards for the duty of care a recommendation made in the Table in the preceding chapter a new statutory provision should be added to the CA 1994.

This would be done to express the idea that a defined duty of care is necessary. The need that the court take into account the different responsibilities and duties that have been assigned to the concerned directors should be explicitly mentioned within the context of the objective standard's construction. A (non-exhaustive) list of statutory reasons that will be considered for evaluating directors' compliance should be included in the business legislation. This will include having to take into account how well directors have watched, kept themselves informed, and depended on others. It is not advised to apply the United Kingdom model for the court release of liability based on the study's conclusions.

A specific statutory condition requiring directors to operate in a way they honestly think is in the shareholders' best interests as a whole should be added to the CA 1994 about the positive responsibility to act in good faith in the general best interest of the company. Given the affirmative need to behave in good faith in the company's best interests, this clause ought to be inserted. The requirement should be determined by the directors' true conviction, which will be assessed based on both subjective and objective criteria. It is suggested that the mention of the company's interests be dropped in favour of a more focused goal, namely the interests of

all shareholders. The specific reference to the proper consideration of the non-shareholder constituency provided in the legislative formulation of the responsibility is not supported by the current study.

One proposal from studies on the responsibility to avoid conflicts of interest is to regulate it in the field of business opportunity utilization to reflect the stringent no-conflict approach. This recommendation comes from the research that was conducted. It should also be mentioned that the circumstances surrounding the conflict situation should be considered irrelevant to the investigation of compliance with the responsibility to avoid conflicts of interests. This should be included as an extra statement. When discussing potential business prospects, it is important to keep in mind that the interests of the corporation should be understood to relate to any possibility of producing a profit. After getting 's consent, a director must get general meeting pre-approval to take advantage of an opportunity. This should happen. Additionally, the corporation must be entitled to the repayment of any unauthorised gains by statute.

The study does not recommend implementing the UK's self-dealing transaction authorization system elsewhere. Listed firms' CGCs 2018 shall prohibit interested shareholders (persons related to interested directors who are not board members) from voting on self-dealing transactions at general meetings. This should preclude concerned parties from voting on these deals.

It is also argued that the required circumstances for a shareholder to launch a derivative action should be included in the list of adjustments that are proposed to be made to section 233 of the CA 1994. According to the findings of the study, the sole purpose for which a company should be allowed to initiate a derivative lawsuit is to right a wrong that has been committed against the company. It does not encourage adopting the model used in the UK, which requires the claimant to acquire the court's permission to continue the action. This is one of the models that is not recommended for legal transplant because of the cultural, political, economic and judicial differences, which are discussed in Chapter 2. In the UK, Qualified shareholders are those who hold at least one per cent of the total equity of the firm and are permitted to combine their holdings to satisfy the minimum shareholding criterion. For the action to be brought, qualified shareholders must be the shareholders who bring it. The firm should be notified by qualified shareholders of their intention to suit directors in a derivative action, and the directors themselves should react within a predetermined amount of time. The fact that the firm has

chosen not to sue should not stop the derivative lawsuit from proceeding; nevertheless, the court ought to be notified of the reasons why the company is choosing not to consider them.

Finally, the findings of this study, constitute a pioneering effort to address major lacunae in the legal framework of Bangladesh concerning the obligations of directors and derivative proceedings. The research not only scrutinizes the current state of corporate governance and corporate law framework in Bangladesh but also provides a comparative analysis with the well-established UK legal system. The original contribution lies in its substantive suggestions for legal reform, advocating for the transplantation of certain UK legal principles to enhance the efficacy of Bangladeshi corporate law.

The findings emphasise the need for a solid legal responsibility structure and underline the necessity of a full reform of the accountability framework associated with the directors. The study's exploration of legal transplants offers a strategic approach to modernising Bangladeshi law, shedding light on the feasibility of importing specific legal concepts while considering the unique institutional capacity and legal environment of Bangladesh.

Furthermore, the research identifies loopholes, uncertainties, and shortcomings in the existing corporate laws of Bangladesh, particularly in the enforcement of directors' duties. It highlights the need for a well-designed legislative framework that not only offers enough protection against dishonest behaviour on the part of directors but also bridges the gaps that exist across the oversight bodies.

The practical contributions of this study extend beyond academia, offering valuable insights for lawmakers, judges, and legal practitioners. The proposed reforms, rooted in the comparative analysis with UK corporate law, have the potential to shape future legislative changes in Bangladesh, promoting a more transparent, accountable, and investor-friendly corporate governance system. In essence, this research lays the groundwork for a nuanced and intelligible Bangladeshi law that aligns with international standards, fostering a conducive environment for both domestic and international business stakeholders.

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ANNEXURE: A

The Companies Act (Bangladesh), 1994

ANNEXURE: B

The Companies (First Amendment) Act 2020

ANNEXURE: C

The Companies (Second Amendment) Act 2020

Annexure A :

Selected Provisions of The Companies Act (Bangladesh), 1994

83. Statutory meeting and statutory report of company--(1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company; in this Act such meeting is referred to as "the statuary meeting".

(2) The Board of Directors shall, in accordance with the other provision of this Act, prepare a report, in this Act referred to as 'statutory report" and shall at least 21 days before the day on which the statutory meeting is not be held, forward the report to very member of the company:

Provided that if the report is forwarded later than the time as is required above, it shall notwithstanding that fact, be deemed to have been duly forwarded if any member entitled to attend and vote at the meeting does not object to such forwarding.

(3) The statutory reports shall set out the following namely--

(a) the total number of shares allotted, distinguishing the shares allotted as fully or partly paid-up, otherwise than in cash, and stating in the case of shares partly paid-up, the extent to which they are so paid up, and in either case, the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid; (c) showing under separate proper headings--

(i) an abstract of receipts of the company and of the payments made thereout up to a date within seven days prior to the date of the report;

(ii) the receipts of the company from the shares and debentures and other sources, the payments made thereout and particulars of the concerning balance remaining in hand;

(iii) any commission or discount paid or to be paid on the issue or sale of shares or debentures; and

(iv) an account or estimate of the preliminary expenses of the company;

(d) the names, addresses and occupations of the directors of the company and of its auditors; and also, if there be any, of its managing agent, manager and secretary. and the change, if any which have occurred in such names addresses in and occupations since the date of the incorporation of the company;

(e) the particulars of any contract which, or the modification or the proposed modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification of such contract;

(f) the extent, if any, due on calls from every director, from managing agent, every partner of the managing agent, every firm in which the managing agent is a partner, and where the managing agent is a private company, every director thereof;

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or sale of shares or debentures to any director, or to the managing agent, any partner of the managing agent, any firm in which the managing agent is a partner and, where the managing agent is a private company, to any director thereof.

(4) The statutory report shall be certified as correct by not less than two directors of the company, one of whom shall be the managing director where there is one.

(5) After the statutory report has been certified as required by sub-section (4), the Board of Directors the company shall, in so far as the report relates to the shares allotted by the company, the cash received in respect of such shares and the receipts and payments of the company, get it certified as correct by the auditors of the company.

(6) The Board of Director shall cause a copy of the statutory report certified as if required by this section to be delivered to the Registrar for registration forthwith, after copies thereof have been sent to the members of the company.

(7) The Board of Directors shall prepare a list showing the names, addresses and occupation of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the statutory meeting and to remain open and accessible to any member of the company during the continuance of the meeting.

(8) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not; but no resolution may be passed of which notice has not been given in accordance with the provisions of this Act.

(9) The meeting may adjourn from time to time and at any adjourned meeting, any resolution of which notice has been given in accordance with the provisions of this Act, Whether before or after the former meeting, may be passed; and the adjourned meeting shall have the same powers as an original meeting.

(10) If a petition is presented to the Court in the manner provided by Part V for winding up of the company on the ground of default in filing the statutory report or in holding the statutory meeting the court may, instead of directing that the company be wound up, give directions for the presentation of the report or for holding the meeting or make such other order as may be just.

(11) If default is made in complying with the provisions of this section, every director or other officer of the company who is in default shall be punishable with fine which may extend to five thousand taka.

(12) Nothing in this section shall apply to a private company.

102. Avoidance of provisions relieving liability of directors:--Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, hereafter in this section referred to as the said provision, for exempting any director, manager or officer of the company or any person, whether an officer of the

company or not, employed by the company as auditor from, or for indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void;

Provided that--

(a) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while the said provision was in force before the commencement of this Act; and

(b) a company may, in pursuance of the said provision indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgement is given in his favour or in which he is acquitted or in connection with any application under section 3 of this Act in which relief is granted to him by the Court.

103. Loan of Director--(1) No company, hereinafter in this section referred top as the lending company, shall make any loan or give any guarantee or provide any security in connection with a loan made by a third party to--

(a) any director of the lending company

(b) any firm in which any director of the lending company is a partner;

(c) any private company of which any director of the lending company is a director or member; or

(d) any public company, the managing agent manager or director where of is accustomed to act in accordance with the directions or instruction of any director of the lending company:

Provided that nothing in this section shall apply to the making of a loan or giving of any guarantee or providing any security by a lending company. if--

(i) such company is a banking company or a private company not being a subsidiary of a public company, or if such company as a holding company makes the loan or gives the guarantee or provide the security to its subsidiary; and

(ii) the loan is sanctioned by the Board of Directors of any company and approved by the general meeting and, in the balance sheet, there is a specific mention of the loan, guarantee or security, as the case may be:

Provided further that, in no case the total amount of the loan shall exceed 50% of the paid up value of the shares held by such director in his own name

(2) In the event of any contravention of sub-section (1) every person who is a party to such contravention including in particular any person to whom a loan is made or on whose behalf a guarantee is given to or security provided shall be punishable with the fine which extend to five thousand taka or simple imprisonment for six months in lieu of fine and shall be liable

jointly and severally to the lending company for the repayment of such loan or for making good any sum which the lending company may be called up to pay under the guarantee given or security provided by the lending company.

(3) this section shall apply to any transaction represented by a book debt which was from its inception in the nature of a loan or an advance.

104. Director not to hold office of profit--No director or firm of which such director is a partner of private company of which such director is a Director shall, without the consent of the company in general meeting, hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker.

Explanation:--For the purpose of this section, the office of managing agent shall not be deemed to be an office of profit under the company.

105. Sanction of Directors necessary for certain contracts--Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm or the private company of which he is a member or director, shall not erter into any contract for the sale, purchase or supply of goods and materials with the company.

106. Removal of directors--(1) The company may be extraordinary resolution remove any share-holder director before the expiration of his period of office and may by ordinary resolution appoint another person in his stead and the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director.

(2) A director so removed shall not be re-appointed a director by the Board of Directors.

111. Compensation for loss of office not permissible to managing or whole time directors or directors who are managers.--(1) Payment may be made by a company, except in the cases specified in sub-section (3) and subject to the limit specified in sub-section (4), to a managing director, or a director holding the office of manager or in the whole time employment of the company, by way of compensation for loss of office or as consideration for retirement from office, or in connection with such loss or retirement.

(2) No payment mentioned in sub-section (1) shall be made by the company to any other director.

(3) No payment shall be made to a managing or other director in pursuance of sub-section (1) in the following cases namely:--

(a) where the director resigns his office in view of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing director, managing agent, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;

(b) where the director regigns his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid.

(c) where the office of the director is vacated by virtue of any provision of this;

(d) where the company is being wound up, whether by or subject to the supervision of the Court or voluntarily., Provided the winding up was due to the negligence or default of the director;

(e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in, or gross mismanagement of, the conduct of the affairs of the company or any subsidiary or holding company thereof;

(f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

(4) Any payment made to a managing or other director in pursuance of sub-section (1) shall not exceed the remuneration which he would have earned if he had been in office for the unexpired residue of his term or for three years, whichever is shorter, and such remuneration shall be calculate on the basis of--

(a) the average remuneration received by him during the period of three years immediately preceding the date on which he acased to holdthat office; and

(b) where he held that office for a period of less than three years, the overage remuneration received by him during the period for which he held the office:

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before, or at any time within twelve months after, the date on which he ceused to hold office, if the assets of the company on the winding up after deducting the expenses thereof, are not sufficient to repay to the share holders the share capital including the premiums, if any, contributed by them.

(5) Nothing in this section shall be deemed to prohibit the payment to a managing director, or a director holding the office of manager, of any remuneration for service rendered by him to the company in any other capacity.

112. Payment to director, etc. for loss of office, etc. in connection with transfer of undertaking or property.--(1) No Director of a company shall, in connection with the transfer of the whole or any part of any undertaking or property of the company, receive any payment, by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement from the transferee of such undertaking or property or from any other person, unless particulars with respect to the payment proposed to be made by such transferee or person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approve by the company in general meeting.

(2)Where a director of a company receives payment of any amount in contravention of sub-section (1), the amount shall be deemed to have been received by him in trust for the company.

(3) Sub-sections (1) and (2) shall not affect in any manner the operation of section 111.

113. Payment to director for loss of office etc. in connection with transfer of shares.--(1) Where in connection with the transfer to any persons of all or any of the shares in a company, being a transfer resulting from--

(i) an offer made to the general body of shareholders:

(ii) an offer by or on behalf of some other body corporate with a view to the company becoming a subsidiary of such body corporate or a subsidiary of its holding company;

(iii) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise, of not less than one-third of the total voting power at any general meeting of the company; or

(iv) any other offer which is conditional on acceptance to a given extent; and as a result of such transfer a director of the company losses his office or retires therefrom he shall not receive any payment by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss of retirement from the company of the transferee or from any other person. Provided that on fulfilment of the requirements of the other provisions of this section, such director may receive such payment from the said transferee or other person.

(2) In the case referred to the proviso to sub-section (1) it shall be the duty of the director concerned to take all reasonable steps to secure that particulars with respect tot he payment proposed to be made by the transferee or other person including the amount thereof are included in or sent with the notice required to sent under section 112(2) to shareholders.

(3) If - (a) any such director fails to take reasonable step in pursuance of sub section (2); or

(b) any person who has been properly required by any such director to include the particulars referred to in subsection (2), in such notice or to send them with such notice or he shall be punishable with fine which may extend to five hundred taka.

(4) For the purpose of approving any payment referred to in the proviso to sub-section (1), the company shall call a meeting of the shareholders who were such holders on the date of the offer referred to that sub-section and also of the holders of the shares of the same class, in this meeting the person making the said offer or his nominee, and if the offerer is a company the nominee of such company or of any of its subsidiary shall not be called; and if the payment is approved in the meeting the director shall be entitled to receive it.

(5) If, at a meeting called for the purpose of approving any payment as required by sub-section (4), a quorum is not present and, after the meeting has been adjourned to a later date, a quorum is again not present, the payment shall, for the purpose of that sub-section, be deemed to have been approved.

(6) If - (a) the concerned director fails to comply with the requirements of subsection (2); or (b) the said director receives the payment referred to in the proviso to sub-section (1). before it is approved under sub-section (4). the payment shall be deemed to have been received by him in trust for any persons who have sold their shares as a result of the aforesaid offer, and the expenses incurred by him in distributing that sum amongst those persons shall be borne by him.

130. Disclosure of interest by director in respect of contract etc.-- (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, of his interest then exists, or, in any other case, at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement:

Provided that general notice that a director is a director or a member of any specified company or of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of there is sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding five thousand taka.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office off the company during business hours.

(4) Eery officer of the company who knowingly and willfully acts in contravention of the provisions of sub-section (2) shall be liable to a fine not exceeding one thousand taka.

131. Prohibition of voting by interested director.--(1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested, nor shall his presence count for the purpose of forming a quorum at the time of any such vote, and if he does so vote, his vote shall not be counted:

Provided that the directors or them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravences the provision of sub-section (1) shall be liable to a fine not exceeding five thousand taka.

(3) This section shall not apply to a private company:

Provided that where a private company is subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.

184. Boards report:-(1) There shall be attached to every balance sheet laid before a company in general meeting a report by its Board of Directors, with respect to-

(a) the state of the company's affairs;

(b) the amount, if any, which the Board proposes to carry to any resvere in such balance sheet;

(c) the amount, if any, which the Board recommends should be paid by way of dividend;

(d) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the balance sheet related and the date of the report.

(2) The Board's report shall, so far as is material for the appreciation of the state of company's affairs by its members, deal with any changes which have occurred during the financial years :-

(a) in the nature of the company's business;
(b) in the company's subsidiaries or in the nature of the business carried on by them; and (c) generally in the classes of business in which the company has an interest.

(3) The Board shall also be bound to give the fullest information and explanations in its report aforesaid on every reservation, qualification or adverse remark contained in the auditor's report.

(4) The Board report and any addendum thereto shall be signed by its Chairman if he is authorised in that behalf by the Board, and where he is not so authorised &, shall be signed by such number of director as are required to sign the balance sheet and the profit and loss account or the income and expenditure account, of the company by virtue of sub-section (1) and (2) of section 189.

(5) If any person, being a director of a company, fails to take all reasonable steps to comply with the provision of sub-section (1) to (3) or being the chairman, signs the Boards report otherwise than in conformity with the provisions of sub-section (4), he shall, in respect of each offence, be liable to fine which may extend to five thousand aka.

195. Investigation of affairs of company by inspectors:- The Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Government may direct-

(a) in the case of a company having a share capital, on the application of members holding not less than one-tenth of the shares issues;

(b) in the case of a company not having a share capital, on the application of not less than one-fifty in number of the person on the company is register of members;

(c) in the case of any other company, on a report by the Registrar undersection 193(5).

Protection of minority interest

233. Power of Court to give direction for protection interest of the minority. -(1) Subject to fulfilment of the conditions of the required minimum as specified in section 195 (a) and (b) any member or debenture holder of a company may either individually or jointly bring to the notice of the court by application that-

(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest; or

(b) the company is acting or is likely to act in a manner which discriminated or is likely to discriminate the interest of any member or debenture holder;

(c) a resolution of the members, debenture holders or any class of them has been passed or is likely to be passed which discriminates or is likely to discriminate the interest of one or more of the members or likely to debenture holder:

and pray for such order, as in his or their opinion, would be necessary for safeguarding his or their interest and also the interest of any other member or debenture holder.

(2) The Court shall, on receipt of an application under sub-section(1) send a copy thereof to the Board and fix a date for hearing the application

(3) If after hearing the parties present on the date so fixed, the Court is of opinion that the interest of the applicant or applicants has been or is being or is likely to be prejudicially affected for reasons specified in the application, it may make such order as prayed for or such other order as it deems fit including a direction-

(a) to cancel or modify any resolution or transaction ; or
(b) to regulate the conduct of the company's affairs in futute in such manner as is specified therin. (c) to amend any provision of the memorandum and articles of the company.

(4) Where by an order of the Court, any amendment is made in the memorandum or articles of the company, the company shall not, without leave of the Court, make any amendment therein or take any action which is inconsisten with the direction contained in he order.

(5) A company shall, within fourteen days from the making of an order under this section, inform the Registrar in writing of such order and send him a copy thereof, and if the company makes default in complying with this sub-section the company, and also every officer of the company who is in default, shall be liable to a fine not exceeding one thousand taka.

Annexure B Bangladesh Companies 1st Amendment Act 2020

কোম্পানী (সংশোধন) আইন, ২০২০

(২০২০ সনের ৭ নং আইন)

[২৫ ফ্রেব্রুয়ারি, ২০২০]

কোম্পানী আইন, ১৯৯৪ এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইলঃ-

সংক্ষিপ্ত শিরোনাম ও প্রবর্তন

১। (১) এই আইন কোম্পানী (সংশোধন) আইন, ২০২০ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২ এর সংশোধন

২। কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর ধারা ২ এর উপ-ধারা (১) এর দফা (ঠ) এর প্রথম শর্তাংশের "কোন দলিলে কোম্পানীর সাধারণ সীলমোহর অংকিত করা," শব্দগুলি ও কমা বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২৪ এর সংশোধন

৩। উক্ত আইনের ধারা ২৪ এর উপ-ধারা (২) এর "ও একটি সাধারণ সীলমোহর" শব্দগুলি বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৩১ এর সংশোধন

৪। উক্ত আইনের ধারা ৩১ এর "সাধারণ সীলমোহরযুক্ত" শব্দগুলি বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা

৫। উক্ত আইনের ধারা ৪৬ এর উপ-ধারা (১) এর "উহার সাধারণ সীলমোহর যুক্ত করিয়া" শব্দগুলি বিলুপ্ত হইবে।

৪৬ এর সংশোধন

১৯৯৪ সনের ১৮ নং আইনের ধারা ৭৮ এর সংশোধন

৬। উক্ত আইনের ধারা ৭৮ এর দফা (খ) বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৭৯ এর সংশোধন

৭। উক্ত আইনের ধারা ৭৯ এর উপ-ধারা (২) এর দফা (ক) বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৮৫ এর সংশোধন

৮। উক্ত আইনের ধারা ৮৫ এর উপ-ধারা (২) এর দফা (চ) এ উল্লিখিত "উহার সীলমোহর নতুবা" শব্দগুলি বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ১২৮ এর প্রতিস্থাপন

৯। উক্ত আইনের ধারা ১২৮ এর পরিবর্তে নিম্নরূপ ধারা ১২৮ প্রতিস্থাপিত হইবে, যথাঃ-

"১২৮। দলিল সম্পাদন।– কোম্পানী লিখিতভাবে যে কোন ব্যক্তিকে সাধারণভাবে অথবা যে কোন নির্দিষ্ট ক্ষেত্রে বাংলাদেশের ভিতর বা বাহিরে যে কোন স্থানে উহার পক্ষে দলিল সম্পাদনের জন্য উহার এটর্নী হিসাবে ক্ষমতা প্রদান করিতে পারিবে; এবং কোম্পানীর পক্ষে উক্ত এটর্নী কোন দলিলে স্বাক্ষর করিলে দলিলটি কার্যকর হইবে এবং কোম্পানীর উপর উহা বাধ্যকর হইবে।"।

১৯৯৪ সনের ১৮ নং আইনের ধারা ১২৯ এর প্রতিস্থাপন

১০। উক্ত আইনের ধারা ১২৯ এর পরিবর্তে নিম্নরূপ ধারা ১২৯ প্রতিস্থাপিত হইবে, যথাঃ-

"১২৯। কোন কোম্পানী কর্তৃক বাংলাদেশের বাহিরের কোন স্থানে কোন ব্যক্তিকে ক্ষমতা অর্পণ। - (১) কোন কোম্পানীর উদ্দেশ্যাবলী অনুসারে উহার কোন কার্য বাংলাদেশের বাহিরে সম্পাদনের প্রয়োজন হইলে এবং উহার সংঘবিধি দ্বারা কোম্পানী ক্ষমতাপ্রাপ্ত হইলে, বাংলাদেশের বাহিরের কোন ভূখণ্ডে, এলাকায় বা স্থানে কোম্পানী লিখিতভাবে যে কোন ব্যক্তিকে ক্ষমতা অর্পণ করিতে পারিবে এবং তিনি কোম্পানীর প্রতিনিধি বলিয়া গণ্য হইবেন।

(২) উপ-ধারা (১) এ উল্লিখিত প্রতিনিধিকে ক্ষমতা প্রদান সম্পর্কিত দলিলে এতদুদ্দেশ্যে কোন সময় উল্লেখ থাকিলে, সেই সময় পর্যন্ত অথবা, উক্ত দলিলে কোন সময়ের উল্লেখ না থাকিলে, প্রতিনিধির সহিত লেনদেনকারী ব্যক্তিকে প্রতিনিধির ক্ষমতা প্রত্যাহার বা অবসানের নোটিশ না দেওয়া পর্যন্ত, প্রতিনিধির ক্ষমতা বহাল থাকিবে।

(৩) উপ-ধারা (১) এ উল্লিখিত প্রতিনিধি প্রয়োজনীয় দলিল দস্তাবেজে তাহার স্বাক্ষরসহ লিখিতভাবে তারিখ উল্লেখ করিবেন এবং যে ভূখণ্ডে, এলাকা বা স্থানে স্বাক্ষর করা হইল সেই ভূখণ্ড, এলাকা বা স্থানের নাম উল্লেখ করিবেন।"।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২০৮ এর সংশোধন

১১। উক্ত আইনের ধারা ২০৮ এ উল্লিখিত "সীলমোহর দ্বারা প্রমাণীকৃত (authenticated) হইলে, উক্ত অনুলিপি, উহাতে" শব্দগুলি, কমাগুলি ও বন্ধনী বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২২৫ এর সংশোধন

১২। উক্ত আইনের ধারা ২২৫ এর "এবং তাহা কোম্পানীর সাধারণ সীলমোহর দ্বারা মোহরাঙ্কিত হওয়ার প্রয়োজন হইবে না" শব্দগুলি বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২৬২ এর সংশোধন

১৩। উক্ত আইনের ধারা ২৬২ এর দফা (ঘ) এর "এবং তদুদ্দেশ্যে যখন প্রয়োজন হয় কোম্পানীর সাধারণ সীলমোহর ব্যবহার করা" শব্দগুলি বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৩৪৭ এর সংশোধন

১৪। উক্ত আইনের ধারা ৩৪৭ এর উপ-ধারা (৪) বিলুপ্ত হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৩৬৩ এর সংশোধন

১৫। উক্ত আইনের ধারা ৩৬৩ এর "এবং একটি সাধারণ সীলমোহর" শব্দগুলি বিলুপ্ত হইবে।

কোম্পানী (দ্বিতীয় সংশোধন) আইন, ২০২০

(২০২০ সনের ২৪ নং আইন)

কোম্পানী আইন, ১৯৯৪ এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮নং আইন) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইল:-

সংক্ষিপ্ত শিরোনাম ও প্রবর্তন

১। (১) এই আইন কোম্পানী (দ্বিতীয় সংশোধন) আইন, ২০২০ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২ এর সংশোধন

২। কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর ধারা ২ এর উপ-ধারা (১) এর দফা (খ) এর পর নিম্নরূপ দফা (খখ) সন্নিবেশিত হইবে, যথা:-

"(খখ) "**এক ব্যক্তি কোম্পানী**" বলিতে এমন একটি কোম্পানীকে বুঝাইবে যাহার শেয়ার হোল্ডার কেবল একজন প্রাকৃতিক সত্ত্বাবিশিষ্ট ব্যক্তি (natural person);"।

১৯৯৪ সনের ১৮ নং আইনে নূতন

৩। উক্ত আইনের ধারা ১১ এর পর নিম্নরূপ নূতন ধারা ১১ক সন্নিবেশিত হইবে, যথা:-

ধারা ১১ক এর সন্নিবেশ

"১১ক। **সীমিতদায় কোম্পানী সনাক্তকরণ (Indication of Limited Company)**।- এই আইনের অন্যান্য বিধানে যাহা কিছুই থাকুক না কেন, সীমিতদায় কোম্পানী নিম্নবর্ণিতভাবে সনাক্ত করিতে হইবে, যথা:-

(ক) সীমিতদায় পাবলিক কোম্পানীর ক্ষেত্রে উহার নামের শেষে "পাবলিক সীমিতদায় কোম্পানী" বা "PLC." শব্দসমূহ লিখিতে হইবে;

(খ) সীমিতদায় প্রাইভেট কোম্পানীর ক্ষেত্রে উহার নামের শেষে "সীমিতদায়" বা "LTD." শব্দ লিখিতে হইবে;

(গ) সীমিতদায় এক ব্যক্তি কোম্পানীর ক্ষেত্রে উহার নামের শেষে "এক ব্যক্তি কোম্পানী বা One Person Company বা OPC" শব্দসমূহ লিখিতে হইবে:

তবে শর্ত থাকে যে, ধারা ২৮ এর অধীন মুনাফা ব্যতীত ভিন্ন উদ্দেশ্য বিশিষ্ট সমিতি এবং ধারা ২৯ এর অধীন গ্যারান্টি দ্বারা সীমিতদায় কোম্পানীর ক্ষেত্রে এই ধারার কোনো কিছুই প্রযোজ্য হইবে না।"।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৩৮ এর সংশোধন

৪। উক্ত আইনের ধারা ৩৮ এর উপ-ধারা (৩) এর পর নিম্নরূপ উপ-ধারা (৩ক) সন্নিবেশিত হইবে, যথা:-

"(৩ক) শেয়ার হস্তান্তর দলিলে শেয়ার হস্তান্তরকারীর স্বাক্ষর নিম্নবর্ণিতভাবে নিশ্চিত করিতে হইবে, যথা:-

(ক) শেয়ার হস্তান্তরকারী সংশ্লিষ্ট পরিচালকের তালিকা, বার্ষিক মূলধনের বিবরণী, শেয়ার হস্তান্তর দলিল এবং শেয়ার হস্তান্তরের সপক্ষে প্রদত্ত হলফনামা রেজিস্ট্রারের দপ্তরে দাখিল করিবার পর সংশ্লিষ্ট শেয়ার হস্তান্তরকারীকে সশরীরে উপস্থিত হইয়া পুনঃস্বাক্ষরপূর্বক শেয়ার হস্তান্তরের সত্যতা নিশ্চিত করিতে হইবে;

(খ) শেয়ার হস্তান্তরকারী বিদেশি নাগরিক হইলে বা বিদেশে অবস্থান করিলে শেয়ার হস্তান্তরের সমর্থনে শেয়ার হস্তান্তর দলিল ও হলফনামা সংশ্লিষ্ট দূতাবাসের ক্ষমতাপ্রাপ্ত কর্মকর্তা কর্তৃক প্রত্যয়নপূর্বক প্রেরণ করিতে হইবে; এবং

(গ) শেয়ার হস্তান্তরকারী যুক্তিসঙ্গত কারণে রেজিস্ট্রারের কার্যালয়ে উপস্থিত হইতে না পারিলে নির্ধারিত ফি আদায় সাপেক্ষে রেজিস্ট্রার কর্তৃক কমিশন প্রেরণ করা যাইবে।"।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৮৫ এর সংশোধন

৫। উক্ত আইনের ধারা ৮৫ এর উপ-ধারা (১) এর-

(ক) দফা (ক) এর " চৌদ্দ" শব্দের পরিবর্তে "একুশ" শব্দ প্রতিস্থাপিত হইবে;

(খ) দফা (খ) এর "সভায়" শব্দের পরিবর্তে "সভার স্থান, সময়, তারিখ এবং" শব্দগুলি এবং কমাগুলি প্রতিস্থাপিত হইবে;

(গ) দফা (ঙ) এর প্রান্তস্থিত "।" চিহ্নের পরিবর্তে ";" চিহ্ন প্রতিস্থাপিত হইবে এবং অতঃপর নিম্নরূপ দফা (চ), (ছ) এবং (জ) সংযোজিত হইবে, যথা:-

"(চ) বিশেষ সাধারণ সভায় (Extraordinary General Meeting) গৃহীত সকল কার্যক্রম বিশেষ কার্যক্রম হিসাবে গণ্য হইবে:

তবে শর্ত থাকে যে, ডিভিডেন্ড মঞ্জুরি, বোনাস শেয়ার, অডিট রিপোর্ট অনুমোদন, পরিচালক ও নিরীক্ষকের প্রতিবেদন, পরিচালক পদে পর্যায়ক্রমিক অবসর এবং অডিটরগণের পারিশ্রমিক নির্ধারণ বিশেষ কার্যক্রম হিসাবে গণ্য হইবে না;

(ছ) বিশেষ সাধারণ সভায় আলোচ্য কোন বিশেষ এজেন্ডা যদি কোন দলিল দ্বারা সমর্থিত হয়, তাহা হইলে উহা পরিদর্শনের সময় ও স্থান নোটিশে স্পষ্টভাবে উল্লেখ করিতে হইবে; এবং

(জ) ন্যূনতম ৫% শেয়ার মূলধনের অধিকারী শেয়ার হোল্ডারগণ কোম্পানীর এজিএম/ বার্ষিক সাধারণ সভায় আলোচ্যসূচি (Agenda) প্রস্তাব করিতে পারিবেন।

১৯৯৪ সনের ১৮ নং আইনের ধারা ২৫৫ এর সংশোধন

৬। উক্ত আইনের ধারা ২৫৫ এর উপ-ধারা (৪) এর পর নিম্নরূপ উপ-ধারা (৪ক) সন্নিবেশিত হইবে, যথা:-

"(৪ক) কোন কোম্পানীর অবলুপ্তির কার্যক্রম শুরু হইবার পর পাওনাদারগণ তাহাদের প্রথম সভায় সরকারি লিকুইডেটর নিয়োগের বিষয়ে আপত্তি উত্থাপন করিতে পারিবেন।"।

১৯৯৪ সনের ১৮ নং

আইনের ধারা ২৬২ এর সংশোধন

৭। উক্ত আইনের ধারা ২৬২ এর দফা (ছ) এর পরিবর্তে নিম্নরূপ দফা (ছ) প্রতিস্থাপিত হইবে, যথা:-

"(ছ) কোম্পানীর পরিসম্পদ জামানত রাখিয়া প্রয়োজনীয় অর্থ সংগ্রহ করা এবং উহা ব্যয় করা এবং যে সকল ঋণদাতা উক্তরূপ অর্থায়নে সম্মতি প্রদান করিয়াছেন, তাহাদের ঋণ পরিশোধের ক্ষেত্রে অনিশ্চিত পাওনাদারগণের (unsecured creditors) উপর অগ্রাধিকার প্রদান করা;"।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৩২৭ এর সংশোধন

৮। উক্ত আইনের ধারা ৩২৭ এর উপ-ধারা (৩) এর পর নিম্নরূপ নূতন উপ-ধারা (৪) ও (৫) সংযোজিত হইবে, যথা:-

"(৪) যেই ক্ষেত্রে অবলুপ্তির আবেদন পেশ করিবার পূর্ববর্তী ছয় মাসের মধ্যে কোম্পানী কর্তৃক অথবা কোম্পানীর বিরুদ্ধে কোন ব্যবস্থা গ্রহণ করিবার উদ্দেশ্যে কোন অর্থ প্রদান করা হয় অথবা কোন মালামাল সরবরাহ করা হয় অথবা স্থাবর বা অস্থাবর সম্পত্তি হস্তান্তরের প্রাধিকার প্রদান করা হয়, সেইক্ষেত্রে আদালতের নিকট উপযুক্ত প্রতীয়মান হইলে উক্ত লেনদেন অকার্যকর ঘোষণা করিয়া পূর্বাবস্থায় ফিরাইয়া নেওয়ার আদেশ প্রদান করিতে পারিবে।

(৫) যেইক্ষেত্রে কোন কোম্পানী কর্তৃক অবলুপ্তির জন্য আদালতে দরখাস্ত পেশ করিবার পূর্বে কিংবা স্বেচ্ছায় অবসায়নের সিদ্ধান্ত গ্রহণের পূর্বে এক বৎসরের মধ্যে কোন সম্পদ হস্তান্তর করা হয় বা মালামাল সরবরাহ করা হয়, সেইক্ষেত্রে উহা বাতিল হইবে, যদি না উহা কোম্পানীর স্বাভাবিক কার্যক্রমের মধ্য দিয়া হইয়া থাকে কিংবা সরল বিশ্বাসে অথবা উপযুক্ত মূল্যের বিনিময়ে ক্রেতাকে দায়বদ্ধ করা হইয়া থাকে এবং যে ব্যক্তি বা কোম্পানীর

নিকট সম্পদ হস্তান্তর করা হইয়াছিল বা মালপত্র সরবরাহ করা হইয়াছিল সেই কোম্পানী বা ব্যক্তির নিকট হইতে লিকুইডেটর উক্ত সম্পদ বা মালপত্র পুনরুদ্ধার করিতে পারিবেন।"।

১৯৯৪ সনের ১৮ নং আইনে নূতন খণ্ড দশম-ক এর সন্নিবেশ

৯। উক্ত আইনের দশম খণ্ডের পর নিম্নরূপ নূতন খণ্ড দশম-ক সন্নিবেশিত হইবে, যথা:-

"দশম-ক খণ্ড

এক ব্যক্তি কোম্পানী গঠন, নিবন্ধন, পরিচালনা, ইত্যাদি

৩৯২ক। **এক ব্যক্তি কোম্পানীর স্মারক ও বিধি**।- এক ব্যক্তি কোম্পানীর স্মারক ও বিধি বলিতে তপশিল ৯ক এবং তপশিল ৯খ এ উল্লিখিত এক ব্যক্তি কোম্পানীর স্মারক ও বিধিকে বুঝাইবে।

৩৯২খ। **এক ব্যক্তি কোম্পানীর গঠন, ইত্যাদি**।- (১) একজন প্রাকৃতিক সত্ত্বাবিশিষ্ট ব্যক্তি, আইনানুগ যে কোন উদ্দেশ্যে, এক ব্যক্তি কোম্পানী গঠন করিতে পারিবে, এবং উহা করিতে চাহিলে, তাহার নাম স্মারকে উদ্যোক্তা হিসাবে স্বাক্ষর করিয়া এবং নিবন্ধিকরণ সংক্রান্ত এই আইনের বিধান মোতাবেক অন্যান্য ব্যবস্থা গ্রহণ করিয়া সীমিতদায় কোম্পানী গঠন করিতে পারিবেন।

(২) একজন প্রাকৃতিক সত্ত্বাবিশিষ্ট ব্যক্তি কেবল একটি এক ব্যক্তি কোম্পানী গঠন করিতে পারিবেন।

(৩) এক ব্যক্তি কোম্পানীর স্মারকে একজন মনোনীত ব্যক্তির নাম, উক্ত মনোনীত ব্যক্তির লিখিত সম্মতিক্রমে, উল্লেখ থাকিতে হইবে, যিনি একমাত্র শেয়ার হোল্ডার মৃত্যুবরণ করিলে বা কোম্পানী পরিচালনায় অসমর্থ বা অপ্রকৃতিস্থ হইলে উক্ত কোম্পানীর শেয়ার হোল্ডার হইবেন।

(৪) এক ব্যক্তি কোম্পানীর নিবন্ধনকালে উহার স্মারক, বিধি এবং নিবন্ধন বহিতে উক্ত মনোনীত ব্যক্তির লিখিত সম্মতি লিপিবদ্ধ করিতে হইবে।

(৫) উক্তরূপ মনোনীত ব্যক্তি নির্ধারিত পদ্ধতিতে তাহার সম্মতি প্রত্যাহার করিতে পারিবেন।

(৬) যদি উক্তরূপ মনোনীত ব্যক্তি শেয়ার হোল্ডারের পূর্বে মৃত্যুবরণ করেন অথবা অন্য কোন কারণে অসমর্থ বা অপ্রকৃতিস্থ হন, তাহা হইলে উক্তরূপ মনোনীত ব্যক্তির স্থলে অন্য কোন ব্যক্তিকে, তাহার সম্মতিক্রমে, মনোনীত করা যাইবে।

(৭) এক ব্যক্তি কোম্পানীর শেয়ার হোল্ডার উপযুক্ত মনে করিলে, তৎকর্তৃক উক্তরূপ মনোনীত ব্যক্তির স্থলে অন্য কোন ব্যক্তিকে, তাহার সম্মতিক্রমে, মনোনয়ন প্রদান করিতে পারিবেন।

(৮) এক ব্যক্তি কোম্পানীর শেয়ার হোল্ডার কর্তৃক মনোনীত ব্যক্তির পরিবর্তন সম্পর্কে বিধিতে উল্লেখ করিতে হইবে এবং নির্ধারিত সময় ও পদ্ধতিতে রেজিস্ট্রারকে অবহিত করিতে হইবে।

৩৯২গ। **এক ব্যক্তি কোম্পানীর শেয়ার মূলধন, ইত্যাদি**।- (১) এক ব্যক্তি কোম্পানীর-

(ক) পরিশোধিত শেয়ার মূলধন হইবে অন্যূন পঁচিশ লক্ষ টাকা এবং অনধিক পাঁচ কোটি টাকা; এবং

(খ) অব্যবহিত পূববর্তী অর্থ বৎসরের বার্ষিক টার্নওভার অন্যূন এক কোটি টাকা এবং অনধিক পঞ্চাশ কোটি টাকা।

(২) যদি এক ব্যক্তি কোম্পানীর পরিশোধিত শেয়ার মূলধন উপ-ধারা (১) এর দফা (ক) এ উল্লিখিত পরিমাণ হইতে অধিক হয় এবং বার্ষিক টার্নওভার উপ-ধারা (১) এর দফা (খ) এ উল্লিখিত পরিমাণ হইতে অধিক হয়, তাহা হইলে প্রয়োজনীয় শর্তপূরণ

সাপেক্ষে, এক ব্যক্তি কোম্পানীকে প্রাইভেট লিমিটেড কোম্পানী অথবা, ক্ষেত্রমত, পাবলিক লিমিটেড কোম্পানীতে রূপান্তর করা যাইবে।

৩৯২ঘ। **এক ব্যক্তি কোম্পানী নিবন্ধনের ক্ষেত্রে অনুসৃত পদ্ধতি**।- প্রাইভেট লিমিটেড কোম্পানীর ক্ষেত্রে প্রযোজ্য বিধি-বিধান, প্রয়োজনীয় অভিযোজন সহকারে, এক ব্যক্তি কোম্পানী নিবন্ধনের ক্ষেত্রে প্রযোজ্য হইবে।

৩৯২ঙ। **এক ব্যক্তি কোম্পানীর পরিচালক।-** (১) এক ব্যক্তি কোম্পানীর একমাত্র শেয়ার হোল্ডার উহার পরিচালক হইবেন।

(২) এক ব্যক্তি কোম্পানীর ব্যবস্থাপনার জন্য ব্যবস্থাপক, কোম্পানী সচিব এবং অন্যান্য কর্মচারী নিয়োগ করা যাইবে।

৩৯২চ। **এক ব্যক্তির কোম্পানীর সভা**।- এক ব্যক্তি কোম্পানীর পরিচালক অর্ধ পঞ্জিকা বৎসরে অন্যূন একটি পরিচালক সভা অনুষ্ঠান করিবে।

৩৯২ছ। **এক ব্যক্তি কোম্পানীর স্মারক বা বিধি পরিবর্তন।-** এক ব্যক্তি কোম্পানীর স্মারক বা বিধিতে কোন পরিবর্তন করা হইলে, উক্ত পরিবর্তন সম্পর্কে নির্ধারিত পদ্ধতিতে রেজিস্ট্রারকে অবহিত করিতে হইবে এবং এইক্ষেত্রে ধারা ১২ এর বিধানাবলি, প্রয়োজনীয় অভিযোজন সহকারে, প্রযোজ্য হইবে ।

৩৯২জ। **এক ব্যক্তি কোম্পানীর শেয়ার হস্তান্তর।-** এক ব্যক্তি কোম্পানীর সকল শেয়ার কেবল একজন প্রাকৃতিক সত্ত্বাবিশিষ্ট ব্যক্তির নিকট হস্তান্তর করা যাইবে এবং শেয়ার হস্তান্তরের ক্ষেত্রে ধারা ৩৮ এর বিধানাবলি, প্রয়োজনীয় অভিযোজন সহকারে, প্রযোজ্য হইবে।

৩৯২ঝ। **এক ব্যক্তি কোম্পানীর ব্যালান্স শীট।-** (১) এক ব্যক্তি কোম্পানীর ক্ষেত্রে কোন অর্থ বৎসর সমাপ্তির একশত আশি দিনের মধ্যে উহার আর্থিক বিবরণী দলিলাদিসহ সংযুক্ত করিয়া রেজিস্ট্রারের নিকট দাখিল করিতে হইবে।

(২) প্রতিটি ব্যালান্স শীট এবং প্রতিবারের লাভ-ক্ষতির হিসাব অথবা আয় ও ব্যয়ের হিসাব কোম্পানীর একমাত্র শেয়ারহোল্ডার পরিচালক কর্তৃক স্বাক্ষরিত হইতে হইবে।

৩৯২ঞ। **এক ব্যক্তি কোম্পানীর নিরীক্ষা**।- এক ব্যক্তি কোম্পানীতে নিরীক্ষক নিয়োগ ও নিরীক্ষা প্রতিবেদন সংক্রান্ত বিষয়ে এই আইনের সংশ্লিষ্ট বিধানসমূহ, প্রয়োজনীয় অভিযোজন সহকারে, প্রযোজ্য হইবে।

৩৯২ট। **এক ব্যক্তি কোম্পানী কর্তৃক ঋণ গ্রহণ ও পরিশোধ।-** এক ব্যক্তি কোম্পানী কর্তৃক কোন ব্যাংক বা আর্থিক প্রতিষ্ঠান হইতে ঋণ গ্রহণ বা পরিশোধের ক্ষেত্রে ধারা ১৫৯ হইতে ধারা ১৭৫ এর বিধানাবলী, প্রয়োজনীয় অভিযোজন সহকারে, প্রযোজ্য হইবে ।

৩৯২ঠ। **এক ব্যক্তি কোম্পানীর স্বেচ্ছাকৃত অবলুপ্তি।-** এক ব্যক্তি কোম্পানীর স্বেচ্ছাকৃত অবলুপ্তির ক্ষেত্রে এই আইনের সংশ্লিষ্ট বিধানাবলি, প্রয়োজনীয় অভিযোজন সহকারে, প্রযোজ্য হইবে।"।

১৯৯৪ সনের ১৮ নং আইনের ধারা ৪০০ এর সংশোধন

১০। উক্ত আইনের ধারা ৪০০ এর-

(ক) ""লিমিটেড" বা "সীমিতদায়"" চিহ্নগুলি ও শব্দগুলির পরিবর্তে "পাবলিক সীমিতদায় কোম্পানী বা PLC., বা সীমিতদায় বা LTD., বা এক ব্যক্তি কোম্পানী বা One Person Company বা OPC" প্রতিস্থাপিত হইবে; এবং

(খ) "অথচ সীমিতদায় সহকারে" শব্দগুলির পরিবর্তে "উক্তরূপ নাম বা শিরোনাম" শব্দগুলি প্রতিস্থাপিত হইবে।

১৯৯৪ সনের ১৮ নং আইনে নূতন ধারা ৪০১ক এর সন্নিবেশ

১১। উক্ত আইনের ধারা ৪০১ এর পর নিম্নরূপ নূতন ধারা ৪০১ক সন্নিবেশিত হইবে, যথা:-

"৪০১ক। **তথ্য ও যোগাযোগ প্রযুক্তি আইন, ২০০৬ এর প্রয়োগ**।- (১) এই আইনের অধীন সম্পাদিতব্য কোন কাজ নির্ধারিত পদ্ধতিতে ইলেকট্রনিক মাধ্যমে করা যাইবে এবং এইক্ষেত্রে, যতদূর সম্ভব, তথ্য ও যোগাযোগ প্রযুক্তি আইন, ২০০৬ (২০০৬ সনের ৩৯ নং আইন) এবং উহার অধীন প্রণীত বিধি ও প্রবিধান অনুসরণ করিতে হইবে।

(২) ইলেকট্রনিক মাধ্যমে সেবা প্রদানের জন্য সরকার ফি ধার্য করিতে পারিবে।"।

১৯৯৪ সনের ১৮ নং আইনে নূতন তপশিল ৯ক ও ৯খ এর সন্নিবেশ

১২। উক্ত আইনের তপশিল ৯ এর পর নিম্নরূপ তপশিল ৯ক ও তপশিল ৯খ সন্নিবেশিত হইবে, যথা:-