

# *Investor Protection and Judicial Enforcement of Disclosure Regime in Bangladesh: A Critique*

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**Abstract** The effectiveness of any law largely depends on the clarity of legal provisions and the activity of their enforcement institutions. Securities law, which is inherently complex, must be unambiguous to be properly applied. Judges and lawyers dealing with securities litigation need to be trained properly to provide justice for the public. Laws governing initial public offerings in Bangladesh are ambiguous in many respects, and the judiciary lacks judges and lawyers sufficiently experienced in this area of law. As a result, judicial enforcement of disclosure requirements in prospectuses appears to have been a difficult task. The administrative enforcement of those requirements is not effective either. In such a situation, potential investors remain market-shy keeping the Bangladesh securities market moribund for years. This paper identifies the drawbacks of the existing mechanism of judicial enforcement of disclosure regime, and provides suggestions for their elimination.

## I. Introduction

The Bangladesh Securities Market has passed 50 years of its operation but still remains in its infancy. The market has been witnessing a serious lack of investor confidence since early 1997 following an unprecedented share scam in 1996. The government has been striving in vain to rejuvenate the ailing market by offering some pecuniary incentives to investors and issuers alike. As part of reforms accomplished thus far, the market watchdog imported the disclosure philosophy from developed economies without any changes being made in the prospectus liabilities and their enforcement regime. The governmental efforts thus largely ignore the issue of investor protection and wrongly emphasize ‘investor attraction’ whilst numerous studies<sup>1</sup> reveal that the former is more crucial than the latter for the

<sup>1</sup> For some of those studies, see R. La Porta, F. Lopez-De-Silanes & A. Shleifer, ‘What Works in Securities Law’ (Oct 2002) <http://post.economics.harvard.edu/faculty/shleifer/papers.html> (2 Dec 2002); R. La Porta, F. Lopez-De-Silanes, A. Shleifer & R. Vishny, ‘Investor Protection and Corporate Valuation’ (2002) 57

development of securities markets. As a result of such misplaced emphasis, the market, which is overly dominated by individual amateur investors, has been moribund for years. In order to restore investor confidence in the primary share market, both the existing legal provisions attracting liabilities for flouting prospectus requirements and their enforcement mechanism need to be reformed.

Law enforcement denotes the realization of the ends clearly stated or inherent in a given law. The judicial enforcement of law refers to the realization of those ends through the judiciary of a government. The benefit of a particular law depends on either its voluntary compliance, or its compulsory enforcement by competent authorities in an efficient manner. An analysis of transition economies shows that the effectiveness of legal institutions is much more important than the quality of the law in the books.<sup>2</sup> In other words, the quality of enforcement is more crucial than the legal texts. The quality of law enforcement refers to the efficacy of the judicial system in addressing the violation of law.<sup>3</sup> The effectiveness of any good law largely depends on the efficacy of its enforcement institutions.<sup>4</sup> A study of 49 countries selected from different legal systems worldwide demonstrates that effective law enforcement has a significant positive impact on the number of initial public offerings (IPOs).<sup>5</sup> The study concludes that countries having a poor record of law enforcement are disadvantaged in the development of their securities markets.<sup>6</sup> In analysing the recent corporate collapses in the United States (US) and Australia, Tomasic advocates strengthening the enforcement of corporate law to avoid future debacles.<sup>7</sup> In reality, companies alone are unable to replicate a good legal environment for investment mainly because of agency problems, that is, the well recognised conflict of interests between the corporate management and corporate shareholders. Both issuers and investors, therefore, depend on an efficient judicial system to maintain a balance of interests between the ownership of a corporation and its control.

*Journal of Finance* 1147; A. Shleifer & D. Wolfenzon, 'Investor Protection and Equity Markets' (2002) 66 *Journal of Financial Economics* 3; R. La Porta, F. Lopez-De-Silanes, A. Shleifer & R. Vishny, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3.

2 K. Pistor, M. Raiser & S. Gelfer, 'Law and Finance in Transition Economies' (2000) 8 *Economics of Transition* 325 at 356.

3 C. Leuz, D. Nanda & P. D. Wysocki, 'Investor Protection and Earnings Management: An International Comparison' (Aug 2001) MIT Sloan School of Management Working Paper No. 4225-01 at 28 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=281832](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=281832) (20 Dec 2001).

4 K. Pistor, 'The Standardisation of Law and Its Effect on Developing Economies' (2002) 50 *American Journal of Comparative Law* 97 at 129.

5 R. La Porta, F. Lopez-de-Silanes, A. Shleifer & R. W. Vishny, 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131 at 1143 and 1146.

6 *Ibid.* at 1149.

7 R. Tomasic, 'Current Development and Notes: Corporate Collapse, Crime and Governance- Enron, Andersen and Beyond' (2002) 14 *Australian Journal of Corporate Law* 1 at 55.

The Disclosure-Based Regulation (BDR) relies on *ex post* litigation instead of the *ex ante* prevention of the issuance of a defective prospectus. In a disclosure regime, judicial enforcement is crucial to protect investors from the misfeasance of other participants in the process of an IPO. It has been argued that issuers may find it rewarding to raise capital from the market following the historic lack of the enforcement of prospectus liabilities.<sup>8</sup> In practice, this has been happening in the Bangladesh IPO market.<sup>9</sup> The situation is so depressing that aggrieved investors submitted a memorandum to the Prime Minister describing the malpractice of issuers in raising corporate funds from the IPO market by using false and misleading information in their prospectuses.<sup>10</sup> Commenting on the situation in Bangladesh, the most prominent securities lawyer in the country pointed out that the enforcement of law is very loose and once the investors become victims of any defective prospectus, it would be difficult for them to avail themselves of the remedies.<sup>11</sup> The comments come true from the fact that none of the cases filed by the Securities and Exchange Commission (SEC) has been finally disposed of as yet.<sup>12</sup>

Clarity in the law of its purpose and purview, and the efficiency and honesty of the enforcement institutions are essential for the enforcement of any law. In respect of prospectus regulation, both are critically absent in Bangladesh. A recent study reveals that outdated laws and ineffective enforcement of existing laws are largely responsible for the non-participation of institutional investors in the Bangladesh securities market.<sup>13</sup> The judiciary suffers from a serious lack of public confidence.<sup>14</sup> Most of the violations of securities laws go without judicial remedy and such unfettered violations result in a severe lack of investor confidence in the market for IPOs.

An empirical study suggests that the protection of investors is the central goal of the enforcement of securities laws.<sup>15</sup> Except for self-

8 G. Golding, 'Underwriters Liability in Australian Securities Offerings' (1993) 11 *Company and Securities Law Journal* 401 at 404.

9 For details, see Shahnewaz & H. J. Hoky, 'Share Scandal: 15 Writ Petitions Pending' *The Daily Jugantor*, Dhaka (17 Aug 2002).

10 H. J. Hoky, 'Prime Minister's Interference Urged to Stop Irregularities of Listed Companies: Investor Submitted Memorandum' *The Daily Jugantor*, Dhaka (6 Nov 2002).

11 M. Zahir, *Company and Securities Laws* (University Press Limited: Dhaka, 2000) at 130.

12 H. Mahmud, 'The Regulatory Body in Question: SEC Runs Slow in Dealing with Cases Against Persons Involved in the Share Scam' *The Prothom Alo*, Dhaka (5 Jul 2004).

13 Z. Haque, 'The Capital Market and Its Problems' *The New Nation*, Dhaka (9 Jun 2000).

14 See, for details, M. Islam and S. M. Solaiman, 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh' 13 *Journal of Judicial Administration* (2003) 29-60.

15 For details, see R. Tomasic, 'Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures' (1993) 3 *Australian Journal of Corporate Law* at 192-229.

regulation, securities laws are usually enforced by two separate agencies, namely courts and government regulators.<sup>16</sup> The flaws that exist in the judiciary appear to have significant negative impacts on the disposal of securities cases in the country. This paper aims to examine aspects of the judicial enforcement of disclosure requirements in Bangladesh. It concludes, that the present judicial enforcement of the disclosure regime in Bangladesh is ineffective to protect investors in the IPO market and reforms in the existing regime are imperative. A securities market cannot be developed without honest and efficient courts.<sup>17</sup>

## II. Courts Dealing with Securities Cases in Bangladesh

Currently several ordinary courts deal with cases under securities law.

### *i. A brief overview of the present courts system in Bangladesh*

The courts in Bangladesh are constitutionally divided into two broad hierarchies which include the Supreme Court of Bangladesh (Supreme Court) and the subordinate courts.<sup>18</sup> The Supreme Court is located in Dhaka, the capital city, whilst subordinate courts are in operation across the country based on administrative units. The Supreme Court is functionally separated from the executive, but, the executive and judicial functions are not completely separated at the lower judiciary. Magistrates are entrusted with the responsibility for adjudicating certain criminal cases specified in Schedule II of the Code of Criminal Procedure 1898 (CrPC 98) in addition to their administrative functions. The magistrates exercising judicial functions are constitutionally required to be controlled (in terms of posting, promotion and grant of leave) by the President in consultation with the Supreme Court.<sup>19</sup> In practice, the executive alone controls those magistrates. In several cases the Supreme Court has strongly asserted that controlling the magistracy by the executive without consulting the Supreme Court is unconstitutional.<sup>20</sup> Despite this, the executive continues to exercise its powers, weakening the fair exercise of judicial powers by the magistrates.

The courts are divided into two main categories: civil and criminal, with some additional courts and tribunals of special jurisdictions at

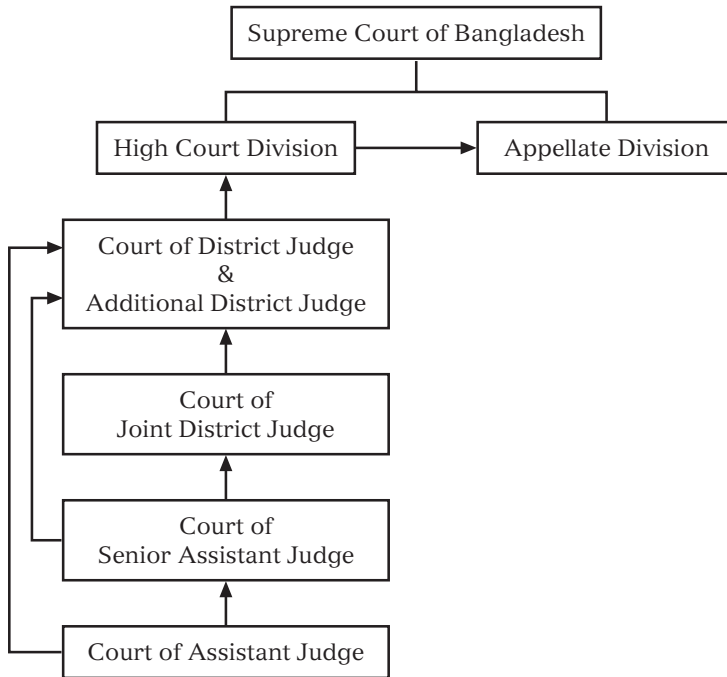
16 J. W. Hicks, 'Securities Regulation: Challenges in the Decades Ahead' (1993) 68 *Indiana Law Journal* 791 at 802.

17 B. Black, 'The Legal and Institutional Preconditions for Strong Stock Markets: The Nontriviality of Securities Law' in Organization for Economic Cooperation and Development (OECD), *Corporate Governance in Asia: A Comparative Perspective* (Paris: OECD 2001) 82.

18 Constitution of the People's Republic of Bangladesh 1972, Arts 94 & 114.

19 Constitution of the People's Republic of Bangladesh 1972, Art 116.

20 *Aftabuddin v Bangladesh* (1996) 48 DLR 1; *Rahman v Shahiduddin* (1999) BLD 291; *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82.

**Figure 1 Hierarchy of ordinary civil courts**

\*Arrows indicate appeals

various levels. These special courts have no jurisdiction over securities cases. The existing ordinary courts are shown in Figures 1 and 2.

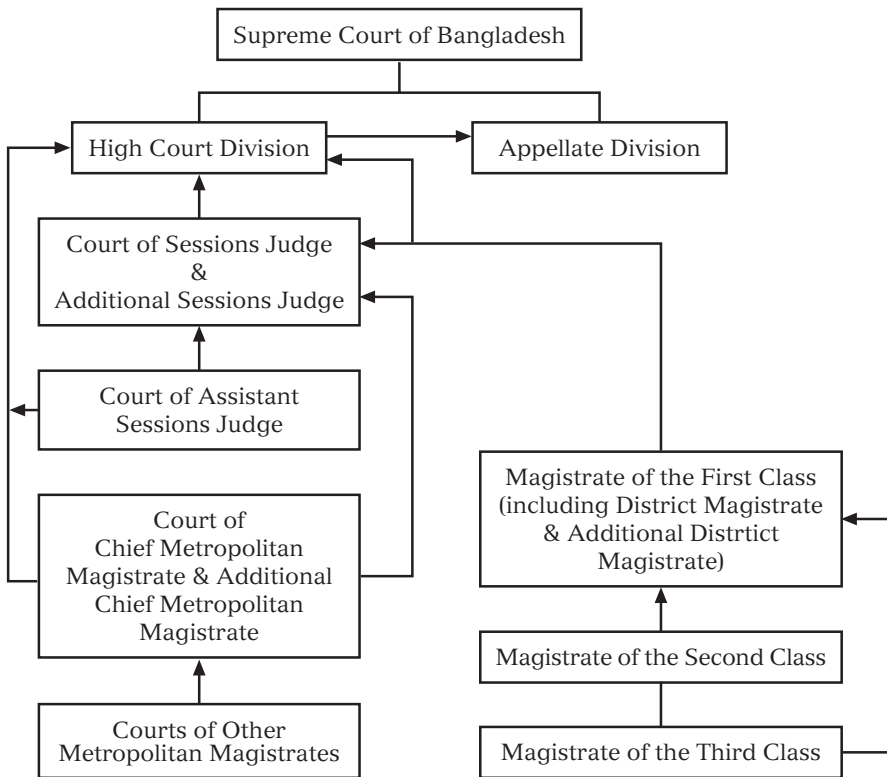
### ***ii. Need for an independent and experienced judiciary for the adjudication of securities litigation***

An independent and impartial judiciary is a cornerstone of justice. Providing justice under a particular law requires a clear understanding of it. Securities law literature is complex and technical and is not easily understood.<sup>21</sup> Special training and experience are necessary to deal with the complex cases. Weak judicial enforcement is therefore considered to be the most 'deceptive' impediment to the implementation of corporate laws.<sup>22</sup> If a judge lacks adequate knowledge, efficiency, integrity and honesty, it may result in miscarriage of justice.

21 J. H. Lorie, P. Dodd & M. H. Kimpton, *The Stock Market: Theories and Evidence* (2nd edn) (Dow Jones-Irwin: Illinois, 1985) at viii; E. T. McDermott, 'Defining Manipulations in Commodities Futures Trading: The Futures "Squeeze"' (1979) 74 *North-Western University Law Review* 202 at 205.

22 B. Black & R. Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 *Harvard Law Review* 1911 at 1926.

**Figure 2 Hierarchy of ordinary criminal courts**



\*Arrows indicate appeals

This may hinder justice in various ways, the most important of which are described below.

- (a) The law under which remedies have been sought may be unclear and ambiguous when identifying the persons who are liable for the contravention in question. A judge may dishonestly interpret such a vague law in a manner which gives advantage to the defendants or accused.
- (b) A law may have shortcomings in explicitly proscribing the disputed conduct of the defendants. If such a legal lacuna exists, a judge may afford an interpretation of the law with an intention to acquit the violators.
- (c) The remedies available in the legislation may not have been explicitly defined and judges may have a wide discretion to decide on the extent of penalties. In such a case, judges may adopt the minimalist approach and impose the lowest penalty allowed by law.

- (d) Inefficient case management by judges causes delay in the delivery of judgments. The disposal of the most significant cases may be delayed due to the backlog of ordinary cases. But a judge who is efficient in case management may give precedence to those cases, the disposal of which has considerable impacts on the securities market.
- (e) Judicial corruption may deprive the victims of justice. In civil cases, the victims may be deprived of compensation for their loss or damage resulting from their investment in a defective prospectus whilst in criminal cases, corruption may influence the acquittal of the violators of securities laws.
- (f) Corrupt judges may purposely appoint dishonest people to carry out investigations into certain cases. These investigations may significantly harm the merits of those cases.
- (g) In an adversarial system of trial, lawyers have an important role to play in the administration of justice. Experienced lawyers may assist the court in interpreting the securities law by presenting juristic arguments and citing the case law of other jurisdictions wherever appropriate. The lack of experienced lawyers dealing with securities laws deprives the bench of the assistance of the bar in disposing of securities cases.
- (h) Dishonest public prosecutors or lawyers may take money from both parties in a particular case and may refrain from playing their due roles against the wrongdoers during the hearing of the case.

Taking these implications of dishonest and inefficient judiciary for the administration of justice into account, it is obvious that the existence and operation of a judiciary free from all such flaws is needed for an effective investor protection regime in the IPO market.

### **Honesty of the judges in Bangladesh**

Unlike other officials, judges are expected to have 'special technical education' and intellectual expertise, as well as exceptionally high moral standards.<sup>23</sup> A person having impeccable integrity can demonstrate personal independence which is a fundamental requirement for the administration of justice. However, institutional independence is equally important. A lack of judicial independence be it personal or institutional erodes public confidence in the judiciary. These requirements are essential for building this confidence which is regarded as the main impetus for the administration of justice.<sup>24</sup> Referring to the continual erosion of this confidence, a recently retired Chief Justice of

23 M. L. Volcansek, *Judicial Misconduct: A Cross-National Comparison* (Florida: University Press of Florida, 1996) 131.

24 S. Shetreet, 'Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends' (1986) 11 *International Legal Practitioner* 38 at 39.

Bangladesh observed that the country's judiciary is losing the confidence of the common people that it once enjoyed.<sup>25</sup>

The higher judiciary is closely involved in maintaining discipline in the subordinate courts. In *Khatoon v State of Bihar*, it was observed in India that in a hierarchical judiciary, the higher courts usually control subordinate courts to avoid deviations from the higher standard of judicial behaviour, preventing damage to public confidence in the judiciary.<sup>26</sup> In Bangladesh, the HCD is empowered to supervise and regulate the subordinate courts under Article 109 of the Constitution. But the honesty of Supreme Court judges has been questioned on several occasions in recent years. For example, Mr Latifur Rahman, a judge of the HCD, has been found guilty of engaging in a telephone conversation with General Ershad, a former President who was involved in the *Janata Tower* graft case. During that conversation, the judge was reportedly offered a bribe. The judge replied that he would consider the case sympathetically.

In May 2002, Mr N K Chakavarty, a judge of the HCD, had to relinquish his position when the Chief Justice refused to reappoint him following allegations of corruption.<sup>27</sup>

The recent removal of a HCD judge reinforces the truth of allegations of corruption practised by judges. On 20 April 2004, Justice Syed Shahidur Rahman was removed for taking a bribe and fixing bail for an accused.<sup>28</sup>

Apart from the above allegations against judges of higher judiciary, the dishonesty of the judges of lower judiciary has contributed enormously to the erosion of public confidence in courts. A survey conducted by Transparency International Bangladesh showed that 88.5 per cent of households agreed that it is almost impossible to get quick and fair judgment from courts without money and influence. The survey also revealed that 63 per cent of the households who are involved in litigation had to pay bribes to the court officials.<sup>29</sup> Another survey conducted by Transparency International Canada revealed that 97 per cent of households think that the judiciary is corrupt.<sup>30</sup> Recently, the Law Minister himself publicly posed the question: why should the people keep their confidence in the judiciary? The Minister asserted that corruption has infiltrated the judiciary.<sup>31</sup> Recognizing the truth of the assertion, Justice Mostafa Kamal, a former Chief

25 A. K. F. Huq, 'Judiciary Is the Last Pillar of Our Hope' *The Independent*, Dhaka (20 Dec 2001).

26 (1979) Cr L J 1045.

27 Z. Ahsan, 'Political Preference in Appointment of Judges Alleged' *The Daily Star*, Dhaka (26 May 2002).

28 'High Court Judge Removed for Taking Bribe' *The New Age*, Dhaka (21 Apr 2004).

29 Transparency International Bangladesh, *Corruption in Bangladesh Surveys: An Overview* <http://www.ti-bangladesh.org/docs/survey/overview.htm> (22 Jun 2002).

30 Transparency International Canada, 'Corruption in Bangladesh: An Overview' <http://www.transparency.ca/Readings/TI-F01.htm> (22 Jun 2002).

31 'Infiltration of Corruption into Judges Cannot be Denied' *The Daily Jugantor*, Dhaka (21 Aug 2002).



Justice, opined that '[c]orruption has entered the judiciary and open discussion on corruption in the judiciary should not be stopped in the name of contempt of court'.<sup>32</sup>

Recent events have also demonstrated unhappiness with the judiciary. The Bar Association recently protested against the appointment of a judge (equivalent to a district judge) to a labour court, because of his alleged corruption in his previous workplace.<sup>33</sup> In another case, many colourful posters were put up across the district against the District and Sessions Judge alleging widespread corruption by the judge.<sup>34</sup> The local Bar Association supported the allegation and also blamed some lawyers for collaborating with the judge.<sup>35</sup> Supporting these impressions of corruption, the US State Department Report 2001 on Bangladesh also notes that criminals have not been punished, because of corruption among the judges of the lower courts.<sup>36</sup> The US State Department also reiterated in its country reports for 2002 and 2003 that the lower judiciary 'suffered from corruption'.<sup>37</sup> Over the last few years, the tenure of a number of judges of subordinate courts have been dismissed or terminated on the grounds of corruption.<sup>38</sup>

Although an honest judiciary is fundamental to provide investors with meaningful remedies against their grievance,<sup>39</sup> the above discussion demonstrates the lack of such judiciary in Bangladesh.

### Independence of the judiciary

The lower courts are the courts of first instance in trying securities cases. There are strong allegations that the lower judiciary in Bangladesh is impeded in functioning independently because of the direct influence of the executive. The executive frequently interferes with the

32 'Contempt Law Should Not Bar Open Discussion on Corruption in Judiciary' *The Independent*, Dhaka (19 Oct 2002).

33 The Chittagong District Bar Association protested the appointment of Mr Abdur Rashid Mian to the First Labour Court of Chittagong. For further details, see 'Ctg Lawyers Boycott First Labour Court' *The Independent*, Dhaka (9 Sept 2002).

34 'Posters on the Walls against the District and Sessions Judge of Sariatpur' *The Daily Janakantha*, Dhaka (23 Sept 2002).

35 'Lawyers to Boycott Court at Sariatpur from Today' *The Daily Star*, Dhaka (16 Nov 2002).

36 US Department of State, *Country Reports on Human Rights Practices in Bangladesh*, (4 March 2002) at 11; <http://www.state.gov/g/drl/ris/hrrpt/2001/sa/8224.htm> (10 Apr 2002).

37 *Country Reports on Human Rights Practices in Bangladesh 2002* (31 March 2003), US Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2002/18309.htm> (17 Dec 2003); *Country Reports on Human Rights Practices in Bangladesh 2003* (25 February 2004), US Department of State <http://www.state.gov/g/drl/rls/hrrpt/2003/27944.htm> (29 Aug 2004)

38 For example, Mr S M Badrul Islam was dismissed from his office of a Joint District Judge of Dhaka in July 2000, after the charge of misconduct and corruption was proved against him: Ministry of Law, Justice and parliamentary Affairs, Justice Section – 3, Order No Justice–3/1–D–5/95, 17 July 2000.

39 Black (2001) above n17 at 64.

judiciary in defiance of Articles 109,115,116 and 116A of the Constitution.<sup>40</sup> Because of this, Justice Kamal argues that the Bangladesh judiciary will not be acceptable at home and abroad unless it is separated from the executive.<sup>41</sup>

The separation of judiciary from the executive has become one of the few issues on which national consensus has been achieved. In December 1999, the AD in *Secretary, Ministry of Finance v Hossain* issued a 12-point directive for the virtual separation of the judiciary from the executive.<sup>42</sup> The court directed the executive to implement the verdict within a stipulated time. Unfortunately, the executive did not implement the rulings, except for the one which dealt with financial remuneration for the judiciary. Instead of enforcing the landmark verdict, the executive has sought and obtained the 20 extensions. Thereafter the Court refused to grant further time and expressed dissatisfaction at the progress towards the implementation of its directives.<sup>43</sup> The directives are yet to be implemented.<sup>44</sup>

Such a subservient judiciary has failed to keep up the view that the 'Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, people will always remain a focal point of concern' of the court in performing its functions as observed by the Supreme Court in *Farooq v Government of Bangladesh*.<sup>45</sup> As a result, the judiciary has been the subject of continually diminishing public confidence. A 2002 survey revealed that 92 per cent of households are not satisfied with the present judicial service.<sup>46</sup> The Chief Justice publicly conceded that the entire judiciary is now under more scrutiny than ever before.<sup>47</sup>

The Bangladesh judiciary is not independent: it is under the control of the executive. Procrastination in relation to separating the judiciary and the executive casts a considerable doubt as to the bona fide intention of the Government to foster an impartial and independent judiciary. A subservient judiciary is unhelpful for the enforcement of the disclosure regime. Independence of the judiciary is crucial for securities cases which involve wealthy and politically prominent individuals, who are in a position to use political influence. The judiciary can delay a particular trial by initiating miscellaneous petitions without genuine

40 US Department of State (2002) above n. 36 at 1, see also the judgments of the cases referred to in above n. 20.

41 'Contempt Law' (2002) above n. 32.

42 (2000) 52 DLR (AD) 82.

43 'Separation of Judiciary: SC Irked by Govt Plea for Repeated Time' *The Daily Star*, Dhaka (10 Nov 2004).

44 'Still Playing Around with HC Directives!' Editorial, *The Daily Star*, Dhaka (19 Jan 2005)

45 (1997) 49 DLR (AD) 1 at 15.

46 The World Bank in collaboration with others conducted the survey: see 'Survey on Quality of Service Delivery: Only 2pc Urbanites Satisfied with Police' *The New Nation*, Dhaka (24 May 2002).

47 'Work with Honesty: CJ Asks Lawyers' *The Independent*, Dhaka (5 Nov 2002).

grounds as has occurred in the share scam cases of 1997. The judicial role in dealing with the cases implies a 'disregard' for the law. In support of this view, the Law Minister in a public statement said that '... in our country there is a tendency of ignoring the law; especially those who are powerful in society who prefer to remain above the law'.<sup>48</sup>

For the effective enforcement of the disclosure regime, the institutional independence and personal honesty of the courts have to be ensured. Considering the urgency of judicial independence in Bangladesh, the World Bank Country Director reiterated the need for a judiciary effectively separated from the executive branch of the government.<sup>49</sup> Similarly, the September 2002 report of the United Nations Development Program (UNDP) submitted that separation of the judiciary should be effected.<sup>50</sup> Separation of the judiciary has become long overdue. But the executive is very reluctant to lose its influence over the judiciary—as a result, separation remains elusive.

### *iii. Experience of judges in dealing with securities litigation*

Education and training are two prerequisites which are imperative for achieving efficiency in any profession. A formal legal education is not compulsory for a person wanting to be a magistrate: a law degree is not a requirement even for a position of the judge of the Supreme Court.<sup>51</sup> However, law graduates are appointed as the judges of the courts of assistant judge, the lowest courts of the civil justice system.

Apart from the lack of a law degree, judges in general lack proper training. A UNDP study reveals that 80 per cent of judges and magistrates think that judicial officers should receive proper training to improve their efficiency.<sup>52</sup> The judges and magistrates are of the view that they do not have sufficient law books and that this situation should be remedied.<sup>53</sup> The UNDP study further shows that over the last 65 years (from 1931 to 1996) the efficiency of the courts has deteriorated to a significantly low level in Bangladesh.<sup>54</sup> A former president of the National Lawyers' Association commented that a shortage of trained lawyers and judges has left the judiciary in a vulnerable situation. He strongly asserted that '[t]here was a very good judicial system even under the British Colony, but now we don't

48 'Poor Governance, Corruption Cost Country Very Dearly: WB Country Director Tells Workshop in City' *The Independent*, Dhaka (15 Oct 2002).

49 *Ibid.*

50 United Nations Development Program (UNDP), *Human Security in Bangladesh: In Search of Justice and Dignity* (2002) Dhaka: UNDP at 77.

51 See *Constitution of the People's Republic of Bangladesh* 1972, Art 95.

52 UNDP (2002) above n. 50 at 76.

53 *Ibid.*

54 A. T. R. Rahman, 'Human Security in Bangladesh: In Search of Justice and Dignity—A Commentary' *The Bangladesh Observer*, Dhaka (16 Oct 2002).

have that situation because we are missing properly educated, trained, honest lawyers and judges'.<sup>55</sup>

The above assertion mirrors the need for the education and training of judges to deal effectively with the cases under 'ordinary' law. Securities law constitutes a relatively new and special branch of law and this needs a special and sophisticated consideration of all the relevant facts. Therefore, the judiciary needs to be experienced in the adjudication of complex securities issues in a timely way.<sup>56</sup>

A serious scarcity of case law regarding the violation of disclosure requirements implies that judges lack practical experience when dealing with cases under prospectus liabilities. Despite numerous allegations of violations of disclosure provisions, violators have not been sued or prosecuted on many occasions.<sup>57</sup> There has been only one major judicial decision in relation to the securities law to date. This decision just clarifies 'the preliminary procedure to be followed by the Securities and Exchange Commission' (SEC) before lodging a criminal case under the *Securities and Exchange Ordinance* 1969 (SEO 69). A lack of experience might have led the judge of the lower court to arrive at the wrong decision which was overturned by the Supreme Court.<sup>58</sup> This general lack of case law indicates that the practice of the judicial enforcement of securities laws is a relatively new or rare phenomenon in Bangladesh. Neither the bench nor the bar is experienced in handling securities cases because they hardly ever come before the courts. These weaknesses are unfavourable to investor protection in the IPO market.

## IV. Bars Dealing with Securities Litigation

### *i. Need for trained and experienced lawyers*

As an integral part of the judicial system, an honest and efficient Bar is a fundamental requirement for the enforcement of securities law.<sup>59</sup> So far, no law schools in the country teach securities law. Only the business schools and schools of economics include the study of securities markets on their curricula, and they teach the subject from the perspective of business and economics. Very few lawyers, however,

55 'Contempt Law' (2002) above n. 32..

56 See Tomasic (1993) above n. 15 at 225–26.

57 For some recent instances of alleged violations, see M. S. Rahman, 'AIMS Backs Down on Pledge to Underwrite Modern Food: Audited Accounts Differ from Prospectus Statement' *The Daily Star*, Dhaka (3 Jul 2000); T. I. Khalidi, 'IPO to Raise Tk 5 cr by Taiwanese Tiles Producers: Fu-Wang Conceals Information' *The Daily Star*, Dhaka (11 Feb 1998); M. S. Rahman, 'SEC Suspends Raspit IPO, Orders Special Audits: Auditor to be Selected by the Company' *The Daily Star*, Dhaka (15 Sep 2000); M. S. Rahman, 'Alleged Tax Evasion by Keya: SEC May Ask Co to Issue Public Notice' *The Daily Star*, Dhaka (15 Jun 2001). Examples are too many to be mentioned due to space constraints.

58 For details, see *Shinepukur Holding v Securities and Exchange Commission* (1998) 18 BLD (AD) 189.

59 See Black (2001) above n. 17.

have studied securities law overseas as part of their postgraduate course work programmes, and the majority of these have completed their courses on securities law in recent years. To the best of the writer's knowledge, no lawyers in Bangladesh have a degree or diploma exclusively in securities regulation.

Company law, on the other hand, partly deals with the disclosure requirements and prospectus liabilities. But even this is not taught extensively in any law school in the country. Company law, in most cases, is a part of a single subject designed to cover all mercantile or business laws. The law schools teach company law without emphasizing its importance in relation to the securities market. Law graduates in Bangladesh have little opportunity to carry out an in-depth study of company law unless they undertake a research degree. More importantly, no academics in the country presently have a higher degree in either companies or securities laws. Perhaps, this lack of interest in the field has ensured that securities laws remain unfamiliar to law students. Lawyers in Bangladesh are likely to be lacking critical knowledge of securities law.

### *ii. Honesty in legal profession*

The honesty of the Bar is crucial, especially in a common law jurisdiction which follows the adversarial system of trial. Recently, the role of lawyers has been the subject of public criticism. A survey by Transparency International Bangladesh shows that 16.3 per cent of households pay bribes to the opponents' lawyers.<sup>60</sup> The UNDP study mentioned earlier finds that a total of 70 per cent of the victims of crime are reluctant to seek remedies because of their concern about giving money to the public prosecutors who are legally paid by the Government.<sup>61</sup> Further, not all victims who initiate legal actions against offenders can continue with their cases. The UNDP study also mentions that a total of 52 per cent of litigants are reluctant to proceed with their cases due to the demand by lawyers for money in the name of the courts (bribes to be given to the courts) in addition to their fees.<sup>62</sup> In recent times, a new device of dishonest practice by lawyers has been unearthed. Some lawyers have reportedly forged the signatures of some judges of the Supreme Court and prepared fake bail orders to release their clients (convicts) from jails.<sup>63</sup> The extent of the lawyers' dishonesty seems to have caused public concern and prompted the Chief Justice to advise the lawyers to work with utmost honesty and sincerity to avert further erosion of public confidence.<sup>64</sup>

60 Transparency International—Bangladesh (2002) above n. 29.

61 UNDP (2002) above n. 50 at 70.

62 *Ibid.*

63 'Law-breaker Lawyer: Colleague Beaten for Freeing Convict on Bail Using Fake Documents' *The Daily Star*, Dhaka (13 Jun 2002). See also, 'Another Incident of Forgery for Bail from the High Court' *The Daily Jugantor*, Dhaka (26 Aug 2002).

64 'Work with Honesty' (2002) above n. 47.

The honesty of prosecutors is always emphasized to establish successful prosecutions. Referring to the unbecoming role of the prosecutors, the Law Minister publicly asserted that the appointment procedure for prosecutors is not transparent and their appointments are largely based on political consideration.<sup>65</sup> This implies that the present role of public prosecutors is not conducive to the fair administration of justice.

It would be difficult for the bench to administer justice without the honest, prudent and sincere cooperation of the bar. Lawyers are very much involved in the judicial system. Litigants depend on their lawyers to contest their case. A fiduciary relation exists between lawyers and their clients. The honesty of lawyers is essential for the benefit of their clients and to build up public confidence in the legal profession. Any deviation from the proper conduct of their role impairs their credibility with the public.

The Bangladesh Bar Council, the sole statutory regulatory body for lawyers, should take the necessary steps to ensure discipline in the legal profession. This can be achieved through transparency and accountability in the profession. The ethical conduct of lawyers has to be maintained in the interest of investor protection in the IPO market.

#### **IV. Delay in the Delivery of Justice and the Public Confidence Crisis in the Judiciary**

The right to a quick trial is guaranteed under Article 35(3) of the Constitution as a fundamental right in Bangladesh. But chronic delay has become synonymous with injustice and is a major systemic flaw in the justice system. Nearly one million cases were pending in different courts across the country as of June 2002.<sup>66</sup> To give an indication of the extent of the problem, the Law Minister argues that at the present rate, the existing courts would take as many as 86 years to dispose of these cases, even if no new cases are taken into account.<sup>67</sup>

Many cases have been pending for more than a decade. For example, in the *State v Deputy Commissioner of Shatkhira*, the HCD held that the detention of a minor boy, was illegal after he had spent 12 years in jail, suffering unspeakable inhuman treatment through no fault of his own, but because of mala fide action of some interested persons and administrative negligence of the Government.<sup>68</sup> This is not unusual in Bangladesh. A young man obtained bail from the court after serving 19 years in prison without any trial and no charge was

65 'Now the People More Cautiously Watch the Judiciary, Don't Destroy Confidence: Chief Justice' *The Daily Jugantor*, Dhaka (18 Aug 2002).

66 'Pending Cases Now Stand at 968,305: Settlement Will Need 86 Years' *The Independent*, Dhaka (1 Nov 2002).

67 'Traditional Litigation System Is Not Properly Responsive to Needs of People: CJ' *The Financial Express*, Dhaka (1 Nov 2002).

68 (1993) 45 DLR 643.

made against him until his bail hearing.<sup>69</sup> In another case, a person arrested on mere suspicion, without any specific allegation against him, was released after 23 years in jail without any trial. He managed to get released with the help of a human rights organization, which instituted a compensation suit on his behalf. The court took two years to decide the case and finally ordered compensation on 6 July 2002. He died on 7 May 2001.<sup>70</sup> Given such situations, a member of the Law Commission of Bangladesh observed that '[p]rayer for justice, the parties become part of a long, protracted and tortuous process, not knowing when it will end'.<sup>71</sup>

Delay in delivering justice is one of the elements which contributes to the erosion of public confidence in the judiciary. In *Daswani v HPA International*, the Indian Supreme Court expressed the view that a 'long delay in delivery of the judgment gives rise to unnecessary speculation in the minds of the parties to a case'.<sup>72</sup> In a landmark decision of the Indian Supreme Court in *Rai v State of Bihar*, Sethi J strongly asserted that 'Whereas justice delayed is justice denied, justice withheld is even worse than that'.<sup>73</sup>

A retired judge observes from his prolonged experience working with the judiciary in Bangladesh, that '[d]elayed justice is the means of inflicting injustice through the judicial system'.<sup>74</sup> Justice Naimuddin Ahmed, a member of the Law Commission, further observed that '[l]ike many other fields, values of the judges have also eroded. It is for them that the pending cases are being piled up . . .'.<sup>75</sup>

The Law Minister, a veteran lawyer, finds judges and lawyers to be equally responsible for the delay in the disposal of cases. He argues that 'the lawyers often seek time without any valid reason' and the judges grant their requests resulting in an inordinate delay in the delivery of justice generally.<sup>76</sup>

The examples discussed above tend to support the proposition that the chronic delay in the disposal of cases in Bangladesh has created a 'deadlock' in the administration of justice. The UNDP report reveals that 70 per cent of the victims of the violation of law are reluctant to seek legal remedies due to the uncertainty of the completion of trial.<sup>77</sup> More alarmingly, law enforcers themselves would normally attempt to

69 Z. Hossain, 'One and a Half Thousand Forgotten Detainees in Dhaka Jail' *The Prothom Alo*, Dhaka (3 Feb 2002).

70 See 'The Daily Star Dialogue on Arrest and Police Remand' *The Daily Star*, Dhaka (23 Jun 2002).

71 M. S. Alam, 'A Possible Way out of Backlog in Our Judiciary' *The Daily Star*, Dhaka (16 Apr 2000).

72 [2000] 1 LRI 686 at para. 3 (*per* V. N. Khare J) & AIR (2000) SC 775.

73 AIR (2001) SCW 2833 quoted in K. Singh, 'Delay in Pronouncing the Judgment' (2002) 89 *All India Reporter* 128 at 129.

74 M. Z. Islam, 'Delay in Justice Delivery' *The Daily Star*, Dhaka (25 Aug 2002).

75 'Rule on Retired Judge' *The New Nation*, Dhaka (28 Nov 2000).

76 'Contempt Law' (2002) above n. 32.

77 UNDP (2002) above n. 61.

shift the blame for their failure to maintain public order to the judiciary. The survey also states that 100 per cent of police personnel think that delay in the trial procedure is a cause of the lack of public confidence in the law-enforcing agency.<sup>78</sup> The problem has a considerable harmful effect on the securities litigation, and thereby on the IPO market in Bangladesh.

## V. State of Judicial Enforcement of Securities Litigation

Reports concerning securities litigation filed by and against the SEC since 1995 show that the filing of such cases began in 1997. Following the share scam of 1996, the SEC in early 1997 lodged a total of 15 cases on the basis of the report of the inquiry into the share scam. Up to 30 June 1998, there had been a total of 17 cases including the 15 mentioned above.<sup>79</sup> The number of cases had reached 52 by June 1999.<sup>80</sup> Because of the disposal of some minor cases, the number of cases pending decreased to 43 in June 2000,<sup>81</sup> but increased to 54 in June 2001.<sup>82</sup> As of June 2004, a total of 100 cases were pending in various courts.<sup>83</sup>

Over the years, only some minor cases, for example, a certificate case for the recovery of penalty imposed by the SEC, have been disposed of. To date, none of the above-mentioned 15 sensational scam cases has been finally adjudicated. Investors who lost their money during the 1996 share scam are still waiting for the penalties to be imposed on those responsible. Failure to convict and impose penalties on the offenders is regarded as one of the main reasons for the lack of public confidence in the market. Disposal of these cases is so important for the interest of the market that the SEC is in favour of disposing of the cases 'whatever be the judgments'.<sup>84</sup> No one can appreciate this assertion by the SEC, because it is the complainant of the cases. The regulator should have a firm commitment to win court verdicts that penalize the violators of securities law. It should be noted that merely disposing of the cases would not help restore investor confidence in the market. The situation may well be worsened if the real criminals are not punished. Having regard to the damaging effect of such court decisions on the public, the SEC should vigorously pursue and seek to punish offenders who have fraudulently taken

78 *Ibid.*

79 SEC, *Annual Report 1997–1998*, Dhaka at 49–50.

80 SEC, *Annual Report 1998–1999*, Dhaka at 98.

81 SEC, *Annual Report 1999–2000*, Dhaka at 47.

82 SEC, *Annual Report 2000–2001* Dhaka at 34.

83 SEC, *SEC Quarterly Review*, (Apr–Jun 2004), Dhaka at 20.

84 D. N. Saha, 'Hundred Days' Progress of the SEC: Audio-Visual Recording of AGMs, Quick Disposal of Cases Get Prominence' *The Independent*, Dhaka (19 Jan 2002).



away the life savings of investors and extensively damaged the securities market.

For the development of the market, the SEC has vowed on several occasions to dispose of the pending cases in a short time. The Chittagong Stock Exchange formally urged the Government to dispose of these cases quickly.<sup>85</sup> In a sense, the whole nation has been waiting to see the judgments of the scam cases 'where thousands of small and first-time investors lost their shirts'.<sup>86</sup> Despite an extreme erosion of public confidence in the market as well as in the judiciary, the pace of legal recourse against the violators of the securities law is very slow. The tardiness is evident from the following account of judicial treatment of the cases.

### *i. The incidents of the share scam cases*

On 2 April 1997, executive director of the SEC lodged reports under s. 25 of the SEO 69 with the Chief Metropolitan Magistrate Court (CMM) Dhaka based on the report of inquiry.<sup>87</sup> The reports filed by the SEC executive director were basically the extracts of the report of inquiry.<sup>88</sup> The allegation against the accused was the contravention of s. 17 of the SEO 69 which prohibits, *inter alia*, fraudulent acts in relation to securities trading. Section 24 of the SEO 69 provides for penalties for flouting s. 17. The CMM immediately took cognizance of the offence under s. 24 of the SEO 69. Fifteen criminal cases were registered against some 42 high-profile people in 15 listed companies. The CMM directed the issuance of warrants for the arrest of the accused.

To avoid being arrested, the accused moved to the HCD on 3 April 1997 and obtained anticipatory bail, and then filed a criminal revision petition in the court of sessions, Dhaka, under ss. 435 and 439A of the CrPC 98. In the petition, the accused sought to set aside the order of the CMM. On 1 June 1997, the sessions judge found that the person who filed the reports to the CMM was not legally authorized to do so. He, therefore, made a reference to the HCD under s. 438 of the CrPC 98 for quashing the proceedings against the petitioners (the accused). The basis of this argument was that the SEC chairman alone, without any

85 'CSE Urges Reform of Capital Market' *The Independent*, Dhaka (21 Mar 2002).

86 'Emerging Stockmarkets: Revenge of the Innocents' *The Economist* (12-18 Apr 1997) at 74. See also 'The Bangladesh Stock Market: Slaughter of the Innocents' *The Economist* (7-13 Dec 1996) at 90-91.

87 Section 25 of the SEO 69 provides that no court shall take cognizance of any offence punishable under the Ordinance except on the report in writing of the facts constituting the offence by an officer authorised by the SEC. In fulfillment of this requirement, the executive director of the SEC filed the reports to the CMM court concerning the facts of the fraudulent acts, etc. allegedly committed by the accused of those cases.

88 *Shinepukur Holding Ltd v Securities and Exchange Commission* (1998) 18 BLD 61 at 62.

resolution of the Commission, advised the director to file the reports. The judge argued that the SEC chairman did not have the authority to empower the director to go to the court and that the decision to file the reports should have been made in a meeting of the Commission. The judge also asserted that the warrant of arrest against the accused rather than the summons was contrary to the law of criminal procedure.

On 9 December 1997, the HCD rejected the reference made by the sessions judge and upheld the decision of the CMM in relation to taking cognizance of and the issuing of the warrant of arrest.<sup>89</sup> The accused afterwards lodged leave-to-appeal petitions with the AD, and on 13 May 1998 the AD dismissed all the petitions and reaffirmed the decision of the CMM.<sup>90</sup> It took more than a year just to settle the maintainability of the 15 scam cases which are still pending. Whatever may be the reasons for the erroneous decision of the sessions judge (be it inexperience or influence etc.), it has just added to the backlog of securities cases. Special measures need to be considered to reduce the complexities associated with the trial of securities cases.

## VI. Special Court for Securities Cases

The previous discussion of the judiciary of Bangladesh suggests that the existing courts and Bars are generally inexperienced in dealing with securities cases. However, it is practically impossible to impart sufficient education and training to the members of the whole judiciary overnight. Nor is it possible for the judiciary to gather experience in respect of securities cases without the availability of a sufficient number of cases. There also exists a culture amongst the victims of the violation of the securities law to avoid courts for some plausible reasons as discussed earlier. In a situation of public confidence crisis, reliance on the existing courts for the efficient disposal of cases involving prospectus liabilities would be impractical. Nevertheless, the efficient judicial settlement of securities cases is such a vital issue that it cannot be compromised.<sup>91</sup> Moreover, emphasizing the need for proper courts, an empirical study argues that the first step for the development of securities market can be, *inter alia*, setting up honest courts.<sup>92</sup> Similarly, it is also argued that '[a] specialised court is ideal'

<sup>89</sup> *Ibid.* at 3.

<sup>90</sup> *Ibid.* at 195.

<sup>91</sup> See M. Gillen & P. Potter, 'The Convergence of Securities Laws and Implications for Developing Securities Markets' (1998) 24 *North Carolina Journal of International Law & Commercial Regulation* 83 at 123-24.

<sup>92</sup> B. S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 48 *UCLA Law Review* 781 at 848.

for the enforcement of securities law.<sup>93</sup> Another study shows that judicial enforcement contributes to developing securities markets only in countries that have an efficient judiciary.<sup>94</sup> The establishment of special courts or tribunals is therefore needed in Bangladesh having regard to the importance of a quick, fair and efficient administration of prospectus cases.

At present, there are a number of special courts in operation. For example, Financial Loan Courts, and Speedy Trial Courts. All of those courts were established with a common objective which is said to be ensuring expeditious trial. The special courts have significantly contributed to expediting the trial of cases under their respective jurisdiction. Therefore, another type of special court may be established for the trial of securities cases with judges who should be, *inter alia*, trained in securities law. Alternatively, the purpose of efficient and expeditious trials of such cases could have been served by establishing a separate bench in the existing court system. But such a recommendation would seem to be unworkable since the existing lower courts including the Courts of District and Sessions Judges operate in a system of a single bench with a single judge. Establishing separate securities courts as courts of first instance is a necessity which has been lately recognized by the SEC as well as the Minister concerned.<sup>95</sup> Initially, these courts could be set up in Dhaka and Chittagong, where the country's two stock exchanges are situated.

In the establishment of special courts for securities cases, some important concerns, such as the honesty and efficiency of the judiciary, are to be taken into account to avoid the problems that persist in the existing ordinary courts. In addressing the regulation of financial markets, a theory of incomplete law says that laws are 'intrinsically incomplete'. They argue that lawmakers cannot see, *a priori*, all future contingencies.<sup>96</sup> Because of this incompleteness of law, the judges need to find out the complementary provisions of a given law for its optimal enforcement. In addition, the complexities of securities cases call for an honest and efficient dealing with them as has been canvassed before. An honest and sophisticated judiciary is taken for granted in developed countries, but they are often partly or wholly non-existent in developing countries.<sup>97</sup> In view of the incompleteness of law, complex nature of securities cases, and the urgency of their

93 Black (2001) above n. 39.

94 La Porta *et al* (Oct 2002) above n. 1 at 35.

95 H. J. Hokey, 'Special Tribunal for Expeditious Trials of 53 Securities Cases Including Share Scam', *The Daily Jugantor*, Dhaka (23 June 2003).

96 For details, see K. Pistor & C. Xu, 'Incomplete Law: A Conceptual and Analytical Framework and Its Application to the Evolution of Financial Market Regulation' (2002) *Social Science Research Network* at 88; <http://ssrn.com> (15 Sept 2002).

97 Black (2001) above n. 39.

speedy disposals, there is a good argument for the provision of specialized courts for securities.<sup>98</sup>

### *ii. Composition of the Securities Courts*

As indicated earlier, the composition of Securities Courts requires the consideration of special characteristics of securities cases. The characteristics are: firstly, the 'complex, contradictory and confusing' nature of the cases;<sup>99</sup> secondly, the involvement of huge amounts of money; and thirdly, the power of the violators in terms of money and political influence. The consideration of these issues becomes more important when the courts are seen to be inefficient and corrupt. Money can play a prejudicial role in the trial procedure of securities cases if the courts lack honesty and integrity. Taking the above features of securities cases and the persistence of corruption in the judiciary into account, the judges of the securities courts should be appointed from amongst the persons not below the rank of a District and Sessions Judge.<sup>100</sup> These judges should be conversant with the securities law of the country as well as the relevant case law of the leading common law jurisdictions. Leading jurisdictions in this regard refer to those countries where significant development of securities laws has taken place as well as the neighbouring countries. In this respect, the judges should have access to the relevant case law of, *inter alia*, the US, the United Kingdom (UK), Australia, Canada, Malaysia and India, to enrich their knowledge of the proper application of securities laws. Special training should be arranged for those judges who are not adequately trained in securities laws.

### *iii. Jurisdictions*

The legislation creating the securities courts should clearly define the jurisdictions of the courts. The courts should have both civil and criminal jurisdictions. These will be the courts of first instance for all securities cases irrespective of the amounts of money involved in a case. The courts should be empowered to work out the highest compensation and penalties in all cases brought before them as provided in the applicable laws. For the sake of justice, the courts should also have powers to grant injunctive relief where necessary. However, apart from the judicial enforcement, the SEC, as well as self-regulators, will settle those disputes which fall within the ambits of their respective authorities.

<sup>98</sup> *Ibid.*

<sup>99</sup> See E. T. McDermott, 'Defining Manipulation in Commodities Futures Trading: The Futures "Squeeze"' (1979) 74 *Northwestern University Law Review* 202 at 205.

<sup>100</sup> District Judges are the most senior judicial officers in the lower judiciary. Thus these judges are more experienced than others as judges of courts of first instance. In addition, it is generally considered that these judges are relatively honest as compared with their junior colleagues.

#### ***iv. Trial procedure and timeframe***

The securities courts will follow the existing ordinary laws which are appropriate in adjudication procedures. However, the concept of ‘speedy trials’ should be applied in the adjudication of all cases, with the exceptions of ‘hard cases’ where more time is required.

The courts may be primarily given 120 days from the date of filing a case to the delivery of judgment. Subject to reasonable grounds, the Chief Justice of Bangladesh may extend the time limit for another 30 days. Finally, in ‘hard cases’, the Chief Justice may grant a further extension of 30 days. If the court in any circumstances failed to dispose of a given case within the above stipulations for any reason whatsoever, the case should be transferred to the special bench of the HCD (discussed below) without delay. The HCD would hear such ‘hard’ cases under its existing statutory original jurisdiction over company matters. However, pertinent laws may be amended in line with this proposal. The special bench should deliver its judgment within 45 days from the date of the transfer of the cases from the trial courts.

#### ***v. Appeal against the judgments of the securities courts***

A bench of the HCD is recommended to be designated for the purpose of securities cases. An appeal may be made against the judgment of the securities courts to this bench of the HCD within 30 days from the date of the delivery of judgment.<sup>101</sup> The judges of this bench should be sufficiently trained in securities law. At an early stage, judges for the special bench for securities cases could be selected from the HCD on the basis of some specific criteria. These criteria may include, *inter alia*, their knowledge of securities law, a good performance record to ensure professional efficiency, personal integrity and honesty. There should also be a specific time limit for the HCD like the court of first instance, say 45 days from the date of filing an appeal.

Appeals shall lie, subject to the leave of the court, to the AD against the judgments of the HCD. The decisions of the AD should be final. An appeal to the AD could be allowed within 30 days from the date of the judgment of the HCD. The AD would be required to deliver its final judgment 45 days from the date of lodging the appeal.

These might seem to be exceptional provisions for the settlement of securities cases in such a short period. In practice, it is quite possible—this is evident from some recent judgments under some ordinary, as well as special laws of the country.<sup>102</sup>

101 A 30-day period is a standard time for filing appeal in the courts in Bangladesh.

102 For example, the performance report of the Speedy Trial Courts established in early 2002 shows that in the first six months (April–September 2002), the courts disposed of 548 cases out of a total of 909 registered cases within 60 days in compliance with the Act: *The Daily Janakanth*, Dhaka (21 Sept 2002). Further, the

**vi. Ensuring independence and accountability of the judges of the securities courts**

It is, of course, difficult to ensure the independence and integrity of judges, but not unattainable. Judicial independence largely depends on the attitude of the executive branch of the government. First of all, the executive must have a firm commitment that it will not interfere with the functions of the courts. At the same time, the Government should be sincere in restraining judicial corruption. On the other hand, the personal determination of the judges appointed to the securities courts to ignore all irrelevant factors and to work independently with utmost honesty in dealing with securities cases is equally important.

Judicial independence is, indeed, essential to the dispensation of justice. But in reality, independence itself is not a panacea for justice. A recent trend is that the accountability of judges has significant implications for the balance between the judicial independence and impartial justice. In this regard, Shetreet strongly argued that '[j]udicial independence cannot be maintained without judicial accountability for failure, errors or misconduct'.<sup>103</sup> Despite the importance of accountability, it is beyond the scope of this article to work out a method for judicial accountability that can be applied in Bangladesh. However, to ensure judicial honesty in the enforcement of securities laws, some mechanisms may be suggested. These are:

- the periodic disclosure of assets owned by the judges;
- the disclosure of a judge's interests in the case on trial if there are any;
- subjecting judges to a number of sanctions which involve disciplinary action including dismissal as well as penal sanctions.<sup>104</sup>

In addition to the proposed measures applicable to all judges, some specific actions should be considered for the judges who will fail to conclude a trial within the stipulated time limits without plausible reasons. For example, the failure of a judge to deliver a verdict within the stipulated timeframe should entail a departmental investigation into the functions of the judge in relation to the given case. Under Article 109 of the Bangladesh Constitution, the HCD is entitled to carry out such investigations. Depending on the investigation report, disciplinary action should be initiated against the judge if a significant lack of honesty, sincerity and deliberate inefficiency is proved. Actions under ordinary municipal law should be taken if a dishonest practice is found in the investigation.

trials of the *Shihab* murder case and the *Trisha* murder case have been completed in 27 and 59 working days respectively from the date of framing charges (74 days from the date of occurrence): 'Judgment of Trisha Murder Case' *The Daily Janakantha*, Dhaka (3 Oct 2002) editorial.

<sup>103</sup> Shetreet (1986) above, n. 24 at 38.

<sup>104</sup> Gillen *et al.* (1998) above, n. 91.

As regards the accountability of the special bench of the HCD, the judges should be accountable to the Chief Justice. If the Chief Justice deems it necessary, the existing Supreme Judicial Council (SJC) may conduct an investigation into the apparent reasons for delay at the bench of the HCD.<sup>105</sup>

As a mechanism of investor protection, the above suggestions aim to deliver justice to the victims of the violation of securities laws through competent courts in the true sense. It is submitted that if these suggestions are implemented, at least an acceptable level of efficiency, independence and honesty in the administration of justice in securities cases can be achieved.

### VIII. Civil Suits by the Securities Regulator on Behalf of Investors

The SEC is not entitled to sue the violators of disclosure requirements for the recovery of loss or damage sustained by the investors on the one hand, and individual investors are generally either unable or reluctant to sue the wrongdoers on the other.<sup>106</sup> As a result, innocent retail investors remain uncompensated and wrongdoers go unpunished. Until recently, this was the case in the neighbouring countries of India and Malaysia. But they have already legally empowered their respective securities regulators to sue the wrongdoers for investors' compensation.<sup>107</sup>

There are good reasons for discouraging the filing of large amount of private litigation (litigation by individual investors) in emerging markets.<sup>108</sup> One of the major problems for the enforcement of civil liabilities in such markets has been the considerable weakness of the judiciary.<sup>109</sup> The civil courts lack trained judges and lawyers leading to high costs of private litigation. The other negative aspect is that corporate governance in emerging markets is so weak that minority shareholders do not have a basis on which to sue the corporate wrongdoers.<sup>110</sup> Having regard to these impediments, it is suggested that shareholders avoid civil litigation. The market in Bangladesh is a

105 Under Article 96(3) of the Bangladesh Constitution 1972, the Supreme Judicial Council (SJC) is a permanent body which consists of the CJ and two other next senior judges of the AD. One of the primary functions of the SJC is to inquire into the capacity and conduct about the allegations levelled against any judge of the Supreme Court.

106 Currently, there are no provisions for class actions in securities law in Bangladesh.

107 See for India, *Companies (Amendment) Act 2000* s. 16 and *Companies Act 1956* s. 62; for Malaysia *Securities Commission Act 1993* s. 155(1) and *Policies and Guidelines on Issue/Offer of Securities 1999*.

108 P. A. Wellons, 'Prototypes of Securities Regulation for Africa: Key Issues' Harvard Law School, CAER II Discussion Paper No. 47 (1999) (CD-ROM)(2000) at 53 (PDF).

109 *Ibid.*

110 Wellons (2000) above n. 108.

pre-emerging one where the above impediments are stronger as compared with many emerging markets. The inability and passivity of investors in suing wrongdoers are evident from the fact that after the market crash in 1996, the SEC filed only the criminal cases against the offenders, the investors themselves could not afford to lodge civil suits.

In developed markets, institutional investors usually play a significant role in enforcing the securities law. Wellons contends that it may be 'very inappropriate' to rely on the retail shareholders to enforce the law in an emerging or pre-emerging market which lacks 'the institutions to support private litigation'.<sup>111</sup> He also argues that the reliance of a regulator on investors to file private litigation 'recognizes that the securities regulator lacks the resources to police all securities markets itself'.<sup>112</sup> The lack of regulatory powers to sue the wrongdoers on behalf of the investors is therefore regarded as a weakness of the securities regulator.

Finding a negative impact on the market from another point of view, Grundfest advocated the curtailment of civil suits by investors. He proposed that suits discourage people from investing in securities.<sup>113</sup> However, Seligman refuted the Grundfest's arguments and argued, *inter alia*, that '[p]rivate litigation performs a significant role in maintenance of investor confidence by enforcing the mandatory disclosure system'.<sup>114</sup> In response, Grundfest again defended his views and countered Seligman's arguments to justify the reduction of private litigation in relation to securities trading.<sup>115</sup> In the wake of such a debate in the US, both the Securities and Exchange Commission and the courts rapidly focused on the proposition that 'private securities litigation poses a serious problem'.<sup>116</sup> When responding to the perceived threats to the securities market,<sup>117</sup> US Congress enacted the Private Securities Litigation Reform Act 1995 to restrict the use of class actions.<sup>118</sup> In doing so, 'Congress concluded that too many shareholders' suits were designed to blackmail the issuing companies

111 *Ibid* at 40. In this respect, the term 'institutions' refers to, *inter alia*, institutional investors.

112 *Ibid* at 50.

113 For details, see J. A. Grundfest, 'Disimplying Private Rights of Actions Under the Federal Securities Laws: The Commission's Authority' (1994) 107 *Harvard Law Review* 963.

114 J. Seligman, 'The Merits Do Matter: A Comment on Professor Grundfest's 'Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority' (1994) 108 *Harvard Law Review* 438 at 440.

115 For details, see J. A. Grundfest, 'Why Disimply?' (1995) 108 *Harvard Law Review* 727 at 747.

116 *Ibid.* at 743.

117 See for details, Seligman (1994) above n. 114 at 438-57 and J. Seligman, 'The Merits Still Mater: A Rejoinder to Professor Grundfest's Comment, Why Disimply' (1995) 108 *Harvard Law Review* 748 at 750.

118 See M. P. Catina & C. M. Schmitt, 'Private Securities Litigation: The Need for Reform' (1998) 13 *St John's Journal of Legal Commentary* (1998) 295 at 297.



into settling out of court'.<sup>119</sup> In many countries, private civil suits concerning securities trading are unusual. For example, there is an extremely low private litigation rate in Japan.<sup>120</sup> Even in the UK, there is reluctance to provide investors with the right to private action.<sup>121</sup>

The above discussion on the practice of private litigation shows relying on investors to recover their loss by themselves is a regulatory weakness. The practice of commencing large number of court actions is detrimental to the market on two counts. First, it discourages investors from investing in securities; and secondly, the large numbers of litigation impose a considerable expense on the issuing company. A company belongs to the shareholders and any expenses of the company in turn concern the investors. The SEC should take responsibility for bringing the violators of disclosure requirements to justice and recovering compensation for investors. A proactive regulatory approach will foster better investor protection in the IPO market in Bangladesh.

### VIII. Summary and Conclusion

Protection of investors requires strengthening their legal rights and enforcing these properly.<sup>122</sup> The judiciary is the guardian of people's rights and 'courts play a central role in corporate governance' which primarily aims to protect external shareholders.<sup>123</sup> Despite the paramount importance of the enforcement of the legal rights of investors, enforcement records are very poor in Bangladesh. Many reasons have been identified for the trend of inaction against the violators of disclosure requirements. These are: a lack of experienced, efficient and honest judiciary; the erosion of public confidence in the present courts and Bars; chronic delays in the justice system; and a lack of regulatory powers to institute civil suits on behalf of investors.

It has been argued that it would be difficult to eradicate the above weaknesses from the existing court system. Establishing separate courts for securities cases has been suggested as a solution to the problems.

Although the operation of separate courts is not a popular practice, a 'different national context' requires a different securities law regime.<sup>124</sup> Some of the important factors that necessitate special measures are: the goals of securities law; the level of sophistication of securities markets and related institutions; the level of sophistication

119 Wellons (2000) above n. 108 at 52.

120 *Ibid.*

121 *Ibid.*

122 S. Johnson, 'Coase and the Reforms of Securities Market' (2002) 16 *International Economic Journal* 1 at 11; La Porta *et al.* (2000) above n. 1 at 15.

123 J. R. Macey, 'Contractual Freedom in Corporate Law: Articles & Comments; Courts and Corporations: A Comment on Coffee' (1989) 89 *Columbia Law Review* 1692 at 1694.

124 See Black *et al.* (1996) above n. 22 at 1920-29.

and credibility of legal institutions.<sup>125</sup> These aspects of national context for the variation of corporate or securities laws support the special judicial enforcement of law in the interest of the securities market in Bangladesh. The situation also calls for a strong protective approach to investors.

Generally speaking, the maximization of profits of the firm is the central goal of corporate law from the economic point of view. But the corporate law of emerging markets 'must address a broader set of goals'.<sup>126</sup> In emerging economies, corporate law should provide more investor protection, as compared to that provided in the developed economies.<sup>127</sup> The arguments for more protective measures in emerging or pre-emerging markets are based on the prevalence of special characteristics of those markets. These characteristics are the severity of informational asymmetries, less operational and economic efficiency of the markets because of the lack of standard professional services, the problematic enforcement procedure of law due to the weakness of courts and the paucity of experienced market participants.<sup>128</sup> Admittedly, all these characteristics exist in the Bangladesh IPO market. In addition to the above shortcomings, there are some other concerns about the judiciary.

In view of the present situation, the establishment of special securities courts is long overdue for the sake of justice in securities cases. However, simply establishing the courts will not be sufficient to address the problems. To facilitate the effective operation of the proposed courts, increased accountability of judges is essential, otherwise the proposed special courts will be engulfed in old problems which have necessitated the introduction of special mechanism for the judicial settlement of securities litigation. In Bangladesh, the practice of judicial accountability to protect the judiciary itself from the public confidence crisis is long overdue. More than ever before, the judiciary has in recent times lost its credibility to the public. In terms of the judiciary, public confidence should be considered to be an end in itself, whilst accountability can be seen as a means to that end.<sup>129</sup> The arguments for the separate courts also rely on the need for independent and impartial judicial decisions. Judges must be independent because an independent judiciary is essential for the effective judicial enforcement of securities laws.<sup>130</sup>

Lawyers are an integral part of the administration of justice. A need for special measures has been argued to ensure the ethical and professional conduct of lawyers. Central to these measures is the need for

<sup>125</sup> *Ibid.* at 1920.

<sup>126</sup> *Ibid.* at 1921.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.* at 1924.

<sup>129</sup> Shetreet (1986) above n. 24.

<sup>130</sup> See N. L. Wong, 'Easing Down the Merit-Disclosure Continuum: A Case Study of Malaysia and Taiwan' (1996) 28 *Law and Policy in International Business* 49 at 88.

the systemic regulation of lawyers by the existing statutory body and their respective associations. Imparting adequate legal education and training to the lawyers is also crucial.

Investors are either reluctant or unable to go to court for judicial remedies. As a result, the wrongdoers care little about flouting the law. Empowering the SEC to sue the violators of prospectus civil liabilities is an important issue for investor protection. Referring to several other jurisdictions, it has been argued that leaving the responsibility for the enforcement of civil liabilities with the investor alone is a regulatory weakness. The paucity of litigation, despite the allegations of the violations of civil liabilities, proves that asking investors who lose their meagre savings in the market to bring the wrongdoers to book is completely futile in Bangladesh. In response to similar circumstances, India and Malaysia have already amended their legislation to empower their securities regulators for the recovery of investors' loss or damage.

The enforcement of civil liabilities will not be sufficient to deter the offenders. Criminal liabilities should also be enforced with due emphasis. Recent cases in the UK and the US have precipitated a public demand for more vigorous enforcement of securities law. The people in these countries want greater use of criminal sanctions, with special emphasis on imprisonment.<sup>131</sup> Similar to civil liabilities, the importance of the enforcement of prospectus criminal liabilities also entails the operation of competent and efficient courts to penalize the offenders in the securities market.

Good laws and efficient courts minimize the unfair benefits to corporate managers and maximize the return to the external shareholders. The efficient judicial enforcement of securities laws provides investor protection and thus increases the availability of external equity finance essential for the development of securities markets.<sup>132</sup> The present judicial enforcement of prospectus liability has proved to be ineffective to protect investors in the IPO market in Bangladesh. In addition to judicial enforcement, the administrative enforcement of the securities law is a complementary mechanism to the whole enforcement regime. The issues of administrative enforcement may be the topic of another effort.

131 J. M. Naylor, 'The Use of Criminal Sanctions by UK and US Authorities for Insider Trading: How Can the Two Systems Learn from Each Other? Part I' (1990) 11 *The Company Lawyer* 53.

132 D. Lombardo & M. Pagano, 'Law and Equity Markets: A Simple Model' in J. A. McCahery, P. Moerland, T. Raaijmakers & L. Renneboog (eds), *Corporate Governance Regimes: Convergence and Diversity* (Oxford University Press: Oxford, 2002) 343.

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