

FOCUS

Law and Our Rights

Director of an Insurance Company: To Be or Not to Be

By Barrister Khaled Hamid Chowdhury

But such dissection may deter the business community in general in investing money in the commerce sector. One cannot simply overlook the prevalent view that whatever the sanctions that may be imposed, those "all too known" and "evergreen" major defaulters of loans will remain untouched at the end of the day and the harsher consequences are meant for only those in the middle string. It is basic object to doing business to make profit and many such directors who invest their last coin in the business should not be deemed as having committed a villainous act by becoming as such. One also wonders why should the status of being married should lead to such disability.

In Bangladesh, the law relating to business of insurance is regulated mainly by the Insurance Act, 1938 and Rules made thereunder, i.e. the Insurance Rules, 1958. The Act was the first codification of insurance law and the preamble makes it clear that it was an Act to consolidate and amend the law relating the business of insurance. Part II of the Act contains a chapter under the heading 'Special Provision of Law' which comprise sections 45 to 52. This article proposes to discuss the recent epic of litigation generated on the application of section 48 which has had considerable effect on the business community in general. The issue concerns the restriction imposed on the appointment of the director of an insurance company.

Being an enactment of considerable life span of no less than 60 years, it is not surprising that the Insurance Act has undergone many changes since its inception to accommodate the changing views of our society and as the source of litigation concerns one such provision, the readers would be benefited to be made aware of such amendment.

The 1938 Act in its original form did not contain any restriction regarding the appointment of directors except that the original section 48B barred a director of an insurer to be a director of another insurer registered for the same class of insurance business. The Insurance (Amendment) Act 1990, amended the Insurance Act 1938 and substituted section 48B by new section 48B and inserted sections 48BB, 48BBB and 48BBBB respectively. Section 48B, as amended, retained the original restriction in sub-section (1) (a) but added other constraints in paragraphs (b) to (d). Accordingly, the new version declares that notwithstanding anything contained in any other law for the time being in force, a sponsor or director or the chief executive of a bank or a financial institution is barred from being a sponsor or director or the chief executive of an insurer (section 48B(1) (b); a person who is a member of the family of a sponsor or director of a bank or financial institution cannot act as a sponsor or director or of an insurer (section 48B(1) (c). It is interesting to note that the definition of a 'member of the family' can be found in section 2 (13AA) of the Act of 1938 which in turn was inserted by section 2 of the Ordinance XXV of 1970. This considerably wide ranging definition covers the husband or a wife, the dependent father, mother, brother or sister, or a minor son or unmarried daughter of that person. To give an example, the wife, an unmarried daughter or the dependent father of a director of a bank or financial institution cannot act as a sponsor or director of an insurer.

To somewhat allay the distorting impact of section 48B(1), subsection (2) provides that notwithstanding anything contained in sub-section (1), a sponsor, director or chief executive of an insurer carrying on insurance business immediately before the commencement of the Insurance (Amendment) Act, 1990, who is disqualified to be such sponsor, director, or chief executive under the said sub-section shall in the case of a sponsor, continue to be such sponsor and in the case of a director or chief executive, continue to be such director or chief executive of the said insurer till the expiry of his term as such. This essentially was aimed at providing some breathing period for those caught by the new provision before they would eventually lose their directorship. Section 48BBBB as inserted provides that the Chairman and Vice-Chairman of the Board of Directors of an insurer must be elected from amongst the directors of the insurer. Thus to be a Chairman or Vice-Chairman of an insurance company, one must be a director of the said company in the first place.

The majority of those who came under the hammer and could afford the top lawyers of the country decided to resolve the issue in the court of law and no less than 21 Writ Petitions were filed before the Hon'ble High Court Division and Rules were issued upon the State, represented by the Secretary, Ministry of Commerce to show cause as to why provisions of section 48B(1) (b) and (c) as amended by the Insurance (Amendment) Act 1990 should not be declared to be ultra vires the Constitution of Bangladesh and why memos issued on various dates by the Controller of Insurance on the basis of those provisions should not be declared to have been made without lawful authority and of no legal effect. Since all these Rules issued pursuant to these Writ Petitions involved common question of law, these were being disposed of by a single judgment delivered by the High

Court Division Bench comprising Kazi Ebadul Hoque J and A K Badrul Huq J and subsequently reported at 49 DLR (1997) 542. In this far-reaching judgement, the Hon'ble High Court Division, for reasons discussed below, discharged the aforesaid Rules. In other words, the petitioners lost their case as it was found that the amended provisions are intra vires the Constitution, i.e. within the powers conferred by our Constitutional provisions and that there had been no illegality in the impugned memorandums.

The petitioners included directors of Pragati, Janata, Karnafully, Phoenix, People's, Green Delta, Eastern, Eastland Insurance Companies Limited. Most of them faced the prohibition as their husbands were also directors of banks while others were sons or daughters of directors of banks. Some of them also petitioned as they faced disqualification for themselves being directors of banks. Memos were also issued upon a number of directors pursuant to section 48BBBB as they continued to act as Chairman of the insurance company despite not being a director of the said company.

Most of the petitioners alleged that as they had become a director of the concerned insurance company before the 1990 enactment in accordance of the articles of association of the relevant insurance company incorporated under the Companies Act and that such company obtained the certificate of registration in accordance with section 3 of the Insurance Act 1938, the had not incurred any disqualification under the then prevailing law. Therefore, they argued, the substituted provision had affected their rights to carry on lawful trade or business and such prohibition was arbitrary, discriminatory, irrational and unreasonable and, as such, violative of the fundamental rights of the petitioners guaranteed under Articles 27, 31 and 40 of the Constitution.

The learned judge then proceeded on to discuss our Constitutional provisions in relation to their alleged violations by the said Act of 1990. Article 27 guarantees equality before the law and equal protection of law. It was observed by our learned Appellate Division in a case reported at 41 DLR (AD) 30 that

marily dealt with the functions and activities of banks, financial institutions and insurance companies and observed that all of these institutions and companies deal with people's money and provide capital for trade, commerce, business and industries by granting loans or by making investments. The board of directors of the said institutions have complete control over the money in the hands these institutions and the same assumes the character of capital when falling in the hands of businessmen by way of loans from these institutions and are invested by them in the trade for earning profit. The learned judge viewed that in a modern welfare society, as opposed to a laissez-faire society, reasonable restriction or control is imposed on any individual or a group, firm or company in entering into, conducting or continuing with any trade, profession, occupation or business in public interest. To elaborate these findings, the learned judge quoted from the decision of the US Supreme Court in the case of West Coast Hotel Company v Parrish (300 US 379) where it was observed that the Constitution does not recognise absolute and uncontrollable liberty to contract as it is subject to protection of law against the evils that menace the health, safety, morals and welfare of the people. This decision was influenced by the impact of the great economic depression of the thirties faced by the people of the United States following which a large number of legislations were enacted imposing reasonable restrictions on the freedoms guaranteed under the 5th and 14th amendments of the US Constitution. The outcome of this leading case, which overruled other decisions taking a contrary view, was that reasonable restraint can be imposed by enacting law on the rights and liberties of an individual in the larger interest of the society.

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concerned insurance company when there was no disqualification on the part of a sponsor or director of a bank or other financial institution to become director of an insurance company and, as such, disqualification imposed by the amended provisions of section 48B was an unreasonable restriction on the fundamental right of the petitioner to carry on trade, profession, business and the right of the petitioner to property in the investment made in the company and also the right to form association under Article 38 of our Constitution. Finally, petitioners in two of these Rules contended that, each of them was elected the Chairman of the Board of Directors of the concerned company in accordance with the articles of association of that company by the directors of that company before section 48BBBB came into force and therefore, no retrospective effect to this section can be given to disqualify the petitioner from acting as such. Besides, each of them alleged violations of fundamental rights as guaranteed by our Constitution as described above.

In reply to these allegations, the State contended that the amendment in question had been made with a view to controlling monopoly of capital which is not only detrimental to the interest of the economy of the country but also destructive of initiative for the economic growth or progress of the nation. Such amendment would go a long way to prevent accumulation of capital in the hands of one family or group of persons closely related to each other. Thus the State's contention was that such prohibition in no way violates those provisions of our Constitution as alleged by the petitioners. It was further argued that the prohibition abolished discrimination and provided all citizens equal opportunity of participating in trade or business. The impugned amendment was made on the basis of the recommendation of Insurance Industry Commission 1988 in public interest for ensuring mass participation in the field of banking, insurance and financial institutions.

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the legislature may make classification of persons on a reasonable basis for the purpose of legislation and that such classification must have a reasonable nexus with the object that legislature intended to achieve. The question, then, was whether there was reasonable basis for classification of sponsors, directors and chief executives of banks or financial institutions or members of their families from rest of the people for disqualifying them from becoming sponsors, directors or chief executives of insurance companies and whether there was any reasonable nexus with the object to be achieved by making such classification.

The recommendation made by the Insurance Industries Commission observed that under Rule 4 of the Insurance Rules 1958, a sponsor of a bank could not be a sponsor of an insurance company. This object of preventing control of business in the hands of few persons was being frustrated by allowing the members of the family of sponsors of banks to become sponsors of insurance companies. Ebadul Hoque J observed that the legislature accepted this recommendation by imposing the said restriction. These institutions deal with people's money and provide capital for business etc. to other organisations. If the sponsors of an insurance company have control over majority shares then they are in position to control the annual general meeting of the company and can also elect directors among themselves to run the affairs of the company and this is precisely what happened in cases of the petitioners in most of these Rules. Dismissing the argument of the petitioner who is the wife of such sponsor/director to the effect that she is not dependent on her husband as she has independent business, the learned judge observed, "... in our society, almost all wives with few exceptions are dependent on their husband even for their sustenance. Very few of them have property or income of their own, is hardly free from the influence of her husband and both of them normally act in union to preserve and further their self interest" (at page 549).

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An English daily on last Sunday (January 18)

carried a report giving source to the human rights organisation and the police that "repression on women showed an increase in the country during the year 1997." It said, among plural ways of coercion, as many as 420 women were killed and 487 raped last year. Of these, more than 100 were killed following disputes over dowry, while 26 became victims of *fatwa*; and about 200 girls have reportedly received injuries from acid-throwing. The report further says that of the violated 487, 192 were minor girls.

If this is the circumstantial social kismet of the women, then Bangladesh is definitely undergoing a *famine of morality* — even after all sorts of efforts by the government, the police, the non-governmental organisations and, above all, the international "rights" agencies in putting an end of repression against women. The reported numbers could be the tip of a huge iceberg, as the human rights organisations, barring a few, almost depend on the country's print media to get a news on these subhuman events while documentation.

The report, however, did not mention the socio-economic status of women who were victims of the reported misdeeds, yet — taking past records of mistreatment of women, thereby making their lives more valuable than in the past, but the women are failing to find any guarantee for the security in the society — for example, at the workplaces, educational institutions etc. In today's busy urban streets or pastoral rural villages, women are seen going energetically and competently about their everyday business.

Despite the new attention given to this issue, domestic and sexual violence against women still remains as "one of the most serious and under-reported human rights violations in Bangladesh". But it is essential for every citizen, not just women, to break through the barriers of injustice, be they in national policies, preconceptions, or prejudices — to treat

every woman in uniform with dignity and respect and to measure up to the high ideals and laws, the authority concerned must hold accountable those who violate those laws through abuse of power or position, harassment, exploitation or discrimination.

There is little difference between violence in politics and violence at home. Both dishonour our human rights. Devastating effects of domestic violence on women, cause not only physical injury and mental illness, but also loss of their self-esteem. Human rights thrive when neither law, nor tradition, nor intimidation, nor simple ignorance — nor the fear of physical pain at home — bars women from speaking their truth from their hearts in public or at home. A battered woman often feels that she and only she is living out this particular nightmare. That loneliness is part of the shame that is part of the silence. But sadly, the numbers show how very common is that lonely woman's struggle. Violence at home cuts across all ages, race, education and class.

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There is nothing visibly wrong with the picture. But when some of those women go home at night, they live with fear. This fear is not of a natural disaster; they fear the very people — family members — whom they are supposed to depend upon for help and comfort. That is the trust-destroying fear

that attends every step of a victim of domestic violence.

For these women, home — most of the time — provides weak refuge; the law, little protection; and public opinion, even less empathy. Violence against women cannot be termed as "traditional"; it is "criminal". And that is why it's time the issue of violence against women is dealt by the activist-lawyers, as the law enforcement agents have already lost trust in this respect.

Committed work of lawyers is needed to develop far-reaching premeditation to stop domestic abuse — from training judges to creating networks to treat women who have suffered violence. But there are more to do. It's not that nothing has been achieved to this intent, for none of this progress would have happened if women themselves had not spoken out, demanded change, and forced their governments to respond to their needs had there been no support from the activist-lawyers. Likewise, the "prudent circle" must encourage the aggrieved women to make their voices heard, to join together in both community and national organisations, to press for change beneficial to all women.

It is always said that 'right' without 'remedy' is like fish out of water. Both right and remedy are therefore be needed to look at as an integral parts. Committed attention needs to be emphasised not only to recognise the "rights", but also the "nature" of the right and its enforceability. Here the role of the media becomes very important. There should be a close working coherence among the rights-activists (preferably lawyers), truly enlightened individuals, social services organisations and the pressmen corral to the cause. Because women here are always prone to fall victim and majority of them live below the subsistence level. And only due to the prohibitive cost of litigation, they

cannot even think of approaching the court of law, and are always deny themselves of justice. These all-the-time disadvantaged women do not know that to end their abysmal ordeal — individuals and groups can initiate public interest litigation already originated by the court.

Well, globally the situation has apparently improved. A case in point, for ready instance, is the UN Conference on Women, in Nairobi in 1985, the issue of domestic violence was a barely acknowledged undercurrent, but 10 years later, in Beijing, it was front and centre. It had made its way from the grassroots to the halls of power. Now the saner section of the society is acknowledging that domestic violence is not just an assault against a citizen — it undermines a country's social mindset.

Some of the western-hemisphere (though economically tagged as Third World) countries have taken some special measures in developing effective ways to protect women against domestic and sexual violence: Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, Nicaragua, Panama, and Peru have adopted new laws against domestic violence and rape. Most major cities and towns in Brazil have established special police offices to deal with violence against women, while Argentina have worked to incorporate domestic abuse issues in police training. Where there were laws, now those laws are tougher. Many other countries now have human rights ombudsmen with special offices dedicated to protecting the rights of women.

As long as women are held back from full participation in the lives of their countries by any means, including by the kind of violence women disproportionately suffer, ideals of equality will remain a far cry. So no woman, no girl, should have to live helplessly any longer under the shadow of any fear.

REVIEW

book

Glimpses of International Law

A Maiden Venture

by A H Monjurul Kabir



state's domestic jurisdiction, for example treatment of one's own nationals. This has had some recognition for individuals. They are now recognised as possessing some, albeit limited, international personality — for example, international organisations and individuals, in their relations with each other. Such a definition takes account of International Law's "youthfulness" and recognises that new actors may be required to participate on the international stage. States, although they remain the primary subjects of International Law, are no longer its exclusive subjects as they once were. International law was initially concerned exclusively with regulating interstate relations and then only in respect of diplomatic relations and the conduct of war. This is no longer true.

International Law has expanded both in terms of its subjects and content. Major problems of international concern have been tackled collectively by states. This has proved, for example, more resource effective than attempting individual state action. The consequence has been a proliferation in the number of international organisations in the years since 1945. Modern technology has brought states and their populations into closer and more frequent contact with each other, and rules have evolved to regulate such contact. The subject matter of International Law has correspondingly expanded, and International Law now has within its ambit issues which were traditionally regarded as being exclusively within a

state's domestic jurisdiction, for example treatment of one's own nationals. This has had some recognition for individuals. They are now recognised as possessing some, albeit limited, international personality — for example, international organisations and individuals, in their relations with each other. Such a definition takes account of International Law's "youthfulness" and recognises that new actors may be required to participate on the international stage. States, although they remain the primary subjects of International Law, are no longer its exclusive subjects as they once were. International law was initially concerned exclusively with regulating interstate relations and then only in respect of diplomatic relations and the conduct of war. This is no longer true.

The book is divided into 18 chapters according to subjects of the discussion. Some of the most fundamental issues like Origins of International Law, Sources of International Law, Subject of International Law, Recognition of States and Government of

Territory and Territorial Sovereignty, Jurisdiction of International Disputes and Maintenance of International Peace and Security, the Extent of Territory, State Responsibility, Use of Force, Human Rights, International Organisations etc are covered in a nutshell.

These areas are concisely discussed. Readers expecting detailed insight or analysis of the subject will not be aided much from this elementary and brief text book. Unfortunately, international legal and human rights issues and problems concerning Bangladesh are totally overlooked which is reasonably expected from the author. The author could eloquently add the Bangladesh context with regard to Recognition, State Succession, Treaties, Human Rights, International Organisations etc are covered in a nutshell.

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