

## LAW opinion

# Regulating institutional investments for capital market development

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1996 Share Market Crash still remains as a bad memory for today's capital market regulators as well as the investors of Bangladesh. Over the last 8 years, the Government of Bangladesh has taken a number of regulatory measures to boost the capital market of the country. The Government even sought assistance from various international agencies to suggest necessary capital market reforms for Bangladesh. The main international agencies that have been working in the capital market reforms projects in Bangladesh today are : Asian Development Bank (ADB), the International Monetary Fund (IMF), The World Bank, the United States Agency for International Development (USAID) and the United Nations Development Program (UNDP). However, the capital market of Bangladesh is yet to make a steady growth. The investors are still very scared to return to the market as they have lost their confidence in the market and specially, the regulatory body after the 1996 incidence.

The Government recently realised that increasing the base for institutional investors would help the steady growth of capital market in Bangladesh. It is now believed that developing the institutional sources of capital in Bangladesh would in turn increase the demand for securities in the market. As a result, the capital market would revive with more active investor participation. Therefore, the Government has amended a number of relevant laws to facilitate increasing investments in capital market instruments by institutional investors.

For example, Section 27, Insurance (Amendment) Act 2000 restricted the mandatory investments limits of investment companies in government securities and government approved securities to only 30% of their total investable funds. Earlier the insurance companies in Bangladesh could invest their insurance funds only in Government and Government approved securities. In particular, the insurance companies used to invest their funds in National Savings Certificates (NSCs). However, since the reduction of interest rate on the NSCs, the insurance companies have been looking for alternative channel to make profitable investment. Therefore, after the enactment of Insurance (Amendment) Act 2000, the insurance companies are permitted to invest up to 70% of their funds into any other investments, including securities market products.

Similarly, earlier the private pensions and the provident funds were required to fully invest their funds into government securities only. However, the Section 20B Trusts (Amendment) Act 2000 permits private pensions and provident funds to invest up to 25% of their total investable funds into listed securities.

Having realised that the mutual funds are one of the major sources of capital that can be invested in securities market, the Government decided to promote floating of private mutual funds in the capital market. By formulating the Securities and Exchange Commission (Mutual Fund) Regulation 1997 and later replacing it by the Securities and Exchange Commission (Mutual Fund) Rule 2001, the Securities and Exchange Commission (SEC) encouraged private sector-sponsored mutual funds to operate in the securities market. As a result, the first private mutual fund (AIMS First Guaranteed Mutual Fund) was licensed in January 2000 and listed on the stock exchanges in May 2000. The second private mutual fund (Grameen Mutual Fund) was registered with SEC in August 2001.

All these recent regulatory measures were undertaken with a view to increasing the institutional investment in capital market. However, it is stated that even after making all of the above regulatory moves, securities market in Bangladesh still suffers from various setbacks. The market is yet to recover from the 1996 shock. Domestic investors continue to exhibit lack of confidence in the market, especially in the secondary securities market. Only a limited number of foreign investors is showing interest to venture the capital market of Bangladesh. It is estimated that from 1997 to July 2003 the total foreign investment in the initial public offerings in Bangladesh



stood at very poor level - on an average less than \$ 1 million a year. Currently, shares of a large number of listed companies are being traded far below face values at the two stock exchanges. According to market sources, as of July 2004, shares of 42.33% listed companies in Dhaka Stock Exchange and shares of 50% listed companies in Chittagong Stock Exchange are priced below par for long. It has also been reported that almost 50% of the brokerage houses at Dhaka Stock Exchange are currently remaining dormant.

In this background, it is stated that the growth of institutional investments in capital market of Bangladesh has been far below the expectation. The market is still dominated by unsophisticated retail investors. Even after enactment of Insurance (Amendment) Act 2000 and Trusts (Amendment) Act 2000, the participation of insurance companies and pension and provident funds in the capital market remained very limited. (Asian Development Bank 2003)

It is stated that the Government is yet to reform, develop and strengthen the relevant sectors under an appropriate legal and regulatory framework. International organisations, like Asian Development Bank (ADB), have made quite a few recommendations to update the current regulatory regime of insurance industry and the pension and provident fund sector in Bangladesh. However, the Government is very slow to adopt such recommendations in their full capacity. Government also at times lacks regulatory prudence to properly encourage institutional investments in capital market. For example, according to a recent statutory order of the Department of Insurance, the insurance companies in Bangladesh are allowed to invest in the state-owned Investment Corporation of Bangladesh (ICB) funds and those floated by its subsidiaries. However, it is not understood why the insurance companies are still not allowed to invest in private mutual funds.

Since 2001, The World Bank has been providing necessary expert assistance to the Government to update the age-old Insurance Act of 1938 and finally prepared a draft Insurance Act 2004 for Bangladesh. However, the

Government has recently abandoned the draft act for the reasons it not being compatible with local needs of reform.

It is further stated that until the state-owned Investment Corporation of Bangladesh (ICB) is brought down to the level playing field with other private asset management companies in Bangladesh, there would remain an unfair competition in the market between public and private mutual funds and that would impede the growth of private mutual fund market in Bangladesh. ICB had been acting as the sole asset management firm in Bangladesh until November 1999. In order to develop an institutional base of the ICB and to bring it to a level playing field with private asset management companies the ICB (Amendment) Act 2000 was enacted.

Following the said act, ICB was restructured to create three new subsidiaries to carry out merchant banking, mutual fund operations and stock brokerage functions separately. The ICB subsidiaries are : (a) ICB Capital Management Ltd. (merchant bank); (b) ICB Asset Management Ltd. (manager of trusts and funds, including mutual funds); and (c) ICB Securities Trading Ltd. (Stock Broker and Securities Ltd.). Though these subsidiaries were formed, no asset was transferred to the ICB Asset Management Company. Besides, the parent ICB, which does not come under the regulatory framework of the SEC, continued to manage the existing mutual funds. Therefore, these funds can borrow unlimitedly without any quantitative restriction on their investments in a particular company, group or sector like the private funds. Also, in violation of the mutual fund rule, the ICB or the ICB Asset Management Ltd. does not publish net asset value or submit any report or pay any fees to the SEC. This, therefore, creates an unfair competition between public sector and private sector mutual funds.

It may also be stated that the SEC at times lacks regulatory insights in regulating financial products. For example, in August 2004, the SEC approved the prospectus for public float of an Islamic Mutual Fund by the state-owned ICB Asset Management Company. It is appreciated that approval to such Islamic mutual fund would encourage the institutional investment component in capital market. However, it is doubted that in a capital market where about 40% capitalisation is held by banks and financial institutions that are shariah non-compliant, how risk-free the portfolio of Islamic Mutual Fund would be constructed?

It is stated that to revive the dormant capital market of Bangladesh, the Government needs to channel in domestic large funds from their currently less-earning investment portfolios to better-earning financial products of capital market. Also, more private mutual funds should be generated to increase the institutional base for capital market. To have a prudent regulatory framework for encouraging institutional investment in the capital market, the Government and the capital market regulatory body, SEC should take the following regulatory measures immediately:

- = removing regulatory barriers to enable contractual savings funds (such as, insurance company funds, pension and provident funds etc.) to invest substantial amount of their collections into capital market instruments with better earning capacity;
- = enforcing a level playing regulatory measure for public and private mutual funds;
- = proper restructuring of ICB and making it more answerable and transparent; and
- = reforming current regulatory regime into one where more co-ordination is guaranteed among various regulators (SEC, the Bangladesh Bank, the Department of Insurance, Ministry of Finance, Ministry of Commerce, other concerned ministries etc.) who directly or indirectly influence capital market mechanism for institutional investments.

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## LAW event

### INTERNATIONAL CRIMINAL COURT A brief report on the third assembly of states parties meeting

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The 3rd meeting of the Assembly of States Parties (ASP) of the International Criminal Court (ICC) and Rome Statute (RS) was enormously significant not only for what happened during the meeting but for the fact that this was the first such meeting held away from the United Nations complex in New York, and the first in the ICC's Host Country and at the seat of the Court, The Netherlands.

The Article 112 of RS established an ASP with each State Party of the Statute and authorised those other States which have signed the Statute or the Final Act in Rome to attend as Observers. The Statute assigned the ASP management oversight of the ICC, consider and decide its budget, decide questions relating to non-co-operation and perform other functions consistent to the RS.

As signatory of the RS, Bangladesh was invited to submit credentials for its representatives at the third session. The Assembly also invited twenty-six other Non-State Parties to attend. Observers and Non-State Parties, though are allowed to participate in discussions, cannot vote. In fact, so far, ASP adopted, excepted elections, all decisions by consensus.

All key ICC officials, the President, the Prosecutor and the Registrar spoke before the Assembly. In addition, Dutch Foreign Minister spoke on behalf of the Host country. The President of the ICC, Judge Philippe Kirsch (Canada), in his presentation outlined progress made by the Court "from an inspiration to a functioning institution" and how it has commenced its judicial functions.

The Prosecutor, Dr. Luis Moreno-Ocampo (Argentine), said that he has opened two investigations, under Article 53 of the RS, and are analysing six situations, under Article 15 of the RS, located in four different continents. He, however, did not reveal details of the situations under analysis or even the locations. He has been investigating since December 2003 situation in Uganda and from March 2004, situation in Democratic Republic of Congo.

He said, in 2005, he expects to analyse eight situations, finish investigation in one case and the one trial to begin, subject to arrest of the accused, in early part of 2005. He plans also to investigate two other cases, one to finish by 2005 and to open two new situations in the middle of 2005. Accordingly, his hands appear already full.

Mr. Bruno Cathala (France), the Register of the ICC talked in detail, amongst others, practical steps taken and challenges ahead for the Court now being built. He introduced draft budget, later approved, amounting to 69.5 million euro out of which 66.5 was allocated to the Court itself while 3 million for funding the Secretariat of the ASP. After some cuts, the Assembly approved 2005 budget for 66 million euro.

Election of the Deputy Prosecutor for the ICC: The Prosecutor under Article 42 of RS forwarded three candidates to the ASP to elect one for the position of Deputy Prosecutor (Prosecution). The Prosecutor received 198 applications, mostly from State Parties (77%). Only 21 applications came from Asia, out of which, three were interviewed. The Assembly overwhelmingly voted in favour of Ms. Fatou Bensouda, former Attorney General and Minister of Law of Gambia. All three candidates appeared before a projection meeting organised by Women's Initiatives for Gender Justice and argued for their election. The Assembly swayed for gender and geographical reasons.

Trust Fund for Victims: The Board of Directors for the Trust Fund for victims that included Queen of Jordan and Bishop Desmond Tutu of South Africa submitted its report for the ASP's approval. It contained the Fund's Regulation, authority to set-up a Secretariat and its initial budget for 1.4 million euro.

Relationship Agreement between the ICC and the UN: The draft Relationship Agreement between the ICC and the UN was submitted. This Agreement is considered critical for the work of ICC, amongst others, in areas of exchanges of information, judicial assistance and co-operation on infrastructural and technical matters. The Agreement recognised responsibilities of UN under its Charter and the Court as an "independent permanent judicial institution". It agreed to respect each other's status and mandate. In addition to administrative co-operation, it dealt with access to UN Headquarters, UN Laissez-passer that ICC officials could use as valid travel document, testimony of UN officials before the Court and UN co-operation to Prosecutor's investigation.

Conditions of Service of Judges: The Presidency of ICC, under Article 49 of RS, submitted specific proposals on conditions of services and compensation, travel and subsistence regulations, pension scheme for the Judges and other elected officials of ICC. It covered various gaps in conditions of service of the Judges adopted in 2002 and included issues like residency, disability pension and child benefit.

Code of Professional Conduct for Counsel: The Presidency also submitted a proposal for a Code of Professional Conduct for Counsel before the ICC. The document was prepared by the Registry of the Court in consultation with the Prosecutor. It covered whole range of issues oath, independence, secrecy and confidentiality, client counsel privileges, fees to disciplinary regime.

Election of Members of the Committee on Budget and Finance: The Committee on Budget and Finance that was established by the Assembly in 2002 also decided in its 2003 meeting to elect, in place of retiring ones, six members of the Committee on Budget and Finance.

Liaison Office in New York: The Registry submitted a report on establishment of a New York Liaison Office to work with the UN, State Parties and Non-State Parties, international and regional organisations, non-governmental organisations, and media organisations. The need for such presence in New York came out of recognition of this city's importance in international relations and diplomatic negotiations and for high level presence of representatives of most of the states of the world. Also it was felt that RS institutions must play and integrate its own distinctive role in international peace and justice by its presence in New York.

Special Working Group on the Crime of Aggression: The RS, under Article 5 (2) contained that the Court shall exercise jurisdiction over the crime of aggression after a provision defining the crime and its conditions are set out according to Articles 121 and 123. During Preparatory Commission meetings, and since, considerable discussions took place between the States. A Special Working Group was set-up, a unique mechanism, where all States who signed the Final Act of the Rome Conference and non-signatories and others joined in.

The Assembly had before it a report of an informal inter-session held in Princeton, New Jersey in USA, from 21-23 June 2004. The inter-session discussed various aspects of the crime including issues like jurisdiction, complementarity, admissibility, general principles of law, conditions under which the Court could exercise jurisdiction, compatibility with the UN Charter, investigation and prosecution and other matters.

Because of limited time available at this third ASP, the Assembly decided to devote a full day in next ASP to discuss the crime of aggression and the Chair of the Working Group Ambassador Christian Wenaweser of Liechtenstein proposed that further inter-session meetings could be held in future to continue consideration.

Bangladesh and the Assembly of States Parties: As an Observer of the Assembly, with right to be present and participate, and despite invitation to do so, Bangladesh chose not to be present, not only in the Assembly but also in the Special Working Group on the crime of Aggression. Bangladesh has not even sent its credentials to the Assembly as appears from the List of Delegations to the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC-ASP/3/INF.1)

Bangladesh also was absent, again, despite invitation, to the Inter-Sessional meeting of the Special Working Group on the Crime of Aggression held in Princeton, New Jersey, USA as appears from the list of participants annexed with the meeting's report submitted to the Assembly (ICC-ASP/3/SWGCA/L.1). While many other Asian and Arab States including India, Nepal others follow closely and contribute in discussions on the crime of aggression, Bangladesh is consistently absent in the development of this critical international norm.

Asian Delegates Meeting: In the traditional Asian Delegates meeting with the NGOs, delegates of Nepal, Japan, Mongolia, Laos, and East Timor attended.

New President of the ASP: The Assembly elected Mr. Bruno Stagno Ugarte, Permanent Representative of Costa Rica to the United Nations as the President of the Assembly's forth to sixth session beginning 2005 when current President H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini (Jordan) ends his term.

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## RIGHTS corner

# Torture and death in custody

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**H**UMAN rights are rights possessed by all persons irrespective of their language, religion, ethnicity, economic condition and different abilities. The Constitution of the People Republic of Bangladesh guarantees human rights for the citizens of Bangladesh. Rights to life and equality before law are basic human rights principles and the constitution also ensures it. Besides, Bangladesh has signed and ratified a number of international human rights convention. The government is accountable for the fulfillment of those rights mentioned in the conventions that Bangladesh ratified as state party.

### Definition of torture

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It has been defined in International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

### Human Rights Convention

Right to life and protection from torture have been stated in Article 3 & 5 of Universal Declaration of Human Rights (UDHR). "Everyone has the right to life, liberty and security of person", says Article 3 of UDHR. Article 5 asserts that no one shall be subjected to torture or to cruel, human or degrading treatment or punishment. What would be the case with a person charged with a penal offence?

Article 13 of UDHR deals with it superbly. The article states, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". International Covenant on Civil and Political Rights (ICCPR) also explains right to life in Article 6 (1), "Every human being

has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) clarifies the responsibility of states in Article 2, "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture". Therefore, there is neither scope for the justification of torture in any situation nor an order from a superior officer or a public authority will be invoked as a justification of torture. Let alone political unrest, torture can't be invoked during the state of war even.

### Constitutional safeguard against torture

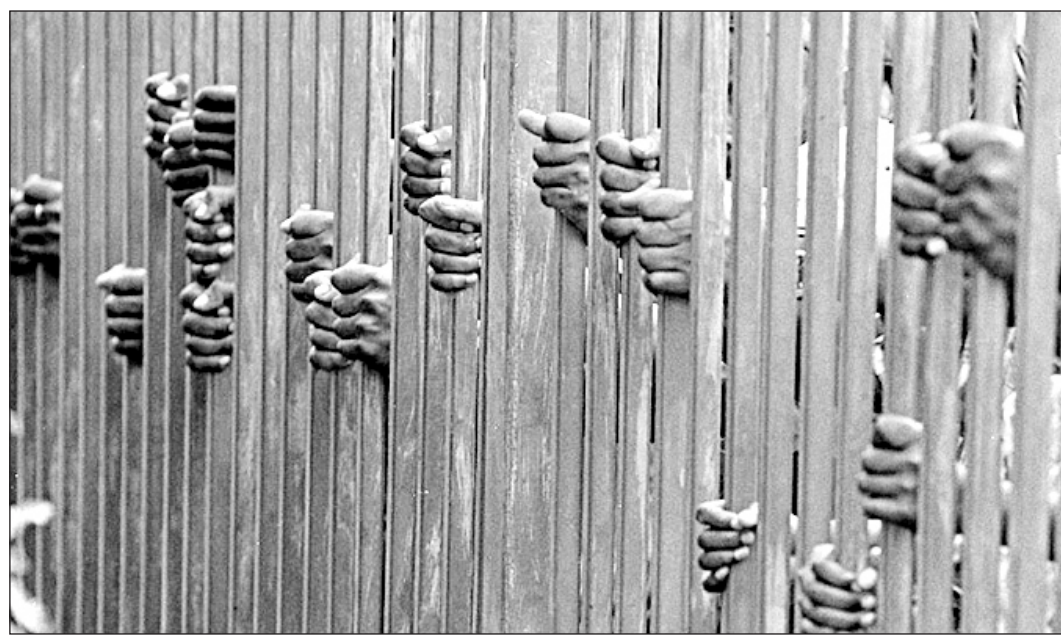
The Constitution of the People's Republic of Bangladesh provides safeguard against torture. Article 35 (5) of the constitution addresses it directly, "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment".

Moreover, a person accused of criminal offence has rights too. Right to an independent, impartial trial has been ensured for such persons articulated in Article 35(3)-"Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law".

### Context of Bangladesh

There are reports of alleged deaths in police custody every year in Bangladesh by human rights organisations. There are reports of death of 17 people in the newspaper after the formation of RAB in April 14, 2004 (The Daily Prothom Alo, September 16, 2004). Though victims were charged with penal offence, their rights to trial have been denied.

During an investigation, ODHAKAR found that Md. Sha Newaz Titu (30) was brutally tortured to death by RAB on August 4, 2004 at Choumohoni area under Double Mooring Thana in Chittagong. All the neighbours including children were witness to the immoral and brutal behaviour when RAB personnel entered into the house of Ziaul Alam where they demolished and



messed up the goods and furniture of the two floor of the house.

Children witnessed those incidents will not learn anything positive from the act of torture and cruel, inhuman and negligible treatment. "States Parties agree that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own"- as said in the Article 29 of UN Convention on the Rights of the Child (UNCRC). As Bangladesh ratified UNCRC, the government is accountable for the implementation of UNCRC and the torture incurred by law enforcing agencies in front of children certainly violates the rights of the children.

### Concluding remarks

Training of law enforcement personnel, civil or military,

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