

Members' Remedies in Bangladesh and the United Kingdom: Convergence and Diversity in Corporate Governance Regulations

Md. Khurshid Alam*

1. Introduction

The company law of every legal system is generally designed to recognize a corpus of corporate rights. And the most important part of this corpus relates to the rights of the members. As such, the company laws of both Bangladesh and the United Kingdom (UK) recognize some important rights of the members, and provide mechanism for remedying or redressing to the violation of these rights. In general, the remedies that are available to members under the Companies Acts of the respective countries are called statutory remedy of the members. There are, however, some other remedies which a member can seek to enforce a personal right (such as right to vote). These remedies are available under the guise of general law remedies of both the countries.

In respect of remedying the members, the Companies Act of Bangladesh and the UK has been grown with a considerable convergence. It is thus found that both of these legal systems have recognized a special type of corporate rights aimed at the protection of minority shareholders. Apart from this, the Companies Act of both the countries also provide for the mechanism of winding up of the company from the part of the members on the ground that it is 'just and equitable' to do so. There is, however, some point of divergences between the laws of the UK and Bangladesh regarding legal means and methods of remedying the members of a company.

It thus appears, for example, that the company law of Bangladesh offers an enlarged space for the protection of minority members' right by using the term 'prejudice' which creates a wider connotation compared to the term 'unfairly prejudicial' as used in the Companies Act of the UK. In contrast, the UK law may be found to offer more flexible condition of applying for the remedy against unfair prejudice by making not the specific number of share-holders but the control over the affairs of the company as the decisive or determining factor. This article which contains a comparative analysis of the legal regimes of the UK and Bangladesh regarding member's remedies does, however, shows that they share many points in common than they actually differ. In what follows, the article makes an attempt to examine and draw a comparison between the various remedies of the members under English and Bangladesh company law, and finally offers policy recommendations for corporate governance regulations.

* Professor, Department of Law, University of Dhaka.

General Principles of Members' Remedies under Company Law

Under common law, a company operates under majority rule. In other words, the governance of companies is generally based on the principles of majority rule. This does not, however, mean that the company law recognizes the tyranny of the majority. In turn, the company law recognizes as a corollary to the majority rule that there must be some protection for minority shareholders.¹In the words of Palmer: "A proper balance of the rights of majority and minority shareholders is essential for the smooth functioning of the company." The entire fabric of company law is thus founded upon two seemingly contradictory principles: i) respect for majority power, this being necessary to ensure effective management of the company; and ii) The protection of minority shareholders. Most of the corporate rights and remedies of the members are related to or originated from the objective of striking a delicate balance between these two principles, that is, safeguarding the company's legitimate business from being obstructed by tiresome complaining minorities on the one hand, and restraining unfair and wrongful acts which the majority can exploit to its own advantage thereby prejudicing the legitimate interests of the minority, on the other hand.²

In general, the company law is found to meet this end by providing the remedies that are available to individual members where there has been a breach of duty. However, the member's remedies are not limited altogether to cover the situations involving a breach of duty; it also involves the cases in which the majority shareholders are doing nothing illegal, but are conducting themselves in an "oppressive" manner by using their majority power to suppress the dissent. This kind of remedy is generally named as oppression remedy or remedy for the protection of minority. Thus, it is clear that members' remedies are available either in the case of breach of duty or in the case of oppression by the majority. Given this, the members of a company may generally be entitled to the following kinds of remedies under the jurisdictions of both Bangladesh and the UK:

- a) **Injunction Remedy:** A member may seek injunction to prevent a director, member or other person from contravening the provisions of the Companies Act. Roughly put, an injunction is an order of the court which requires a person to do or refrain from doing, a particular action. Under the company law, the

1 The majority rule means that those who control more than half of the votes on the board or at a shareholders' meeting – and indeed, those who command a good deal less than a majority of the votes but manage to exercise de facto control – thus have substantial power. In shareholding companies, shareholders normally vote according to the capital that they have invested in the company. One share equals one vote. Thus, in many jurisdictions, the determination of the majority control depends upon the number of share-holders.

court is usually given the power to grant an injunction to prevent a particular person from engaging in conduct that contravenes the Companies Act. For example, where a director breaches a duty to the company by continuing to take company funds, the court can grant an injunction preventing the director from doing so. Thus, a member can apply for an injunction where the interests of the members have been affected by the conduct contravening the Companies Act. Such injunction can apply to any sort of contravention—whether it leads to criminal penalties or civil remedies.

- b) **Oppression Remedy:** The member may take legal action to obtain any of a wide range of remedies for the oppressive conduct of the majority. The main rationale of this remedy is that being equipped with appropriate rights the minority shareholders will be able to defend them in the fight against “oppression”.³ In general, the oppression remedy allows the court to provide a remedy to a member where the court finds that the conduct of the company’s conduct is contrary or oppressive to the interests of the members as a whole. This kind of remedy does apply to all kind of companies, public and private, companies limited by shares and companies limited by guarantee. The test of whether a particular act amounts to an oppressive conduct is a question of fact. However, in order to prove oppressive conduct it is not necessary for the member bringing the legal action to prove that the directors acted dishonestly or with the intention of oppressing the members. It is the effect of the actions taken by the directors or majority members which may determine whether such actions are oppressive or not. In this respect, it is generally believed that an oppressive action brought by a member involves the court deciding the issue of oppression with reference to the breach of the reasonable expectations of the members. Some examples of reasonable expectations are exclusion from the management in the company, diversion of business opportunities, unfairly restricting dividends, an oppressive conduct of the board meeting etc.

3 In short, minority shareholder protection is a fundamental issue in corporate governance. Minority shareholders are those who not only hold a small amount of shares but are also non-controlling parties in a company. Shareholders' rights and the need for their legal protection result from the separation of ownership from control in the modern corporation. Shareholders, especially minority shareholders supply finance to companies but managers and majority shareholders have control of it, and due to human nature, are prone to misuse their rights. This implies the need for legal protection of minority shareholders. Moreover, strong protection of investors in general, and of outside investors in particular bring significant benefits to a state’s economy. Minority shareholder protection thus enhances both shareholder value and corporate competitiveness.

- c) **Class Right Remedy:** Variation of any rights attached to the shares of the member may amount to the violation of members rights. So the member can seek remedy to prevent such variation of the class rights.
- d) **Winding up Remedy:** The members of a company are entitled to seek to wind up the company on the ground that it is just and equitable to do so, or on the ground that the directors are acting in their own interest. It is an established principle of company law that it should allow the members of the company to choose to wind up the company voluntarily because of the fact that the company no longer serves useful purpose. The reasons of such failure from the part of the company may be many such as the deadlock of the companies' affairs, fraud or misconduct, breakdown in mutual trust etc. And all these reasons are usually found to constitute the just and equitable ground of winding up of the company.
- e) **General Law Remedy:** Apart from these statutory remedies, the member may seek some general law remedy. The general law remedies that are available to a member include i) the remedy to enforce a personal right of the member (such as the right to vote), where the directors or the majority members are attempting to take away this right, ii) A remedy against the violation of the limitation on majority voting power, etc.

One important point here is that all these remedies may be available under the company law either as member's personal claim or members' derivative claim. In the case of member's personal claim, these actions are brought about in a personal capacity because the member has a personal right or is affected individually. Thus, if such action is successful, the individual member will be entitled to receive the benefits of the order of the court. On the other hand, a derivative action is brought by a member but it is based on the legal action which the company is entitled to bring. In other words, derivative claim is an action brought by the member on behalf of the company. Thus, if the derivative action is successful, and the director is ordered by the court to pay compensation, the compensation is paid to the company and not to the individual member.

3. Members' Remedies under the Law of Bangladesh and the UK

3.1. Members' Remedies under the Law of Bangladesh: The Companies Act 1994

In Bangladesh, all types of remedies as described above are granted under the Companies Act of 1994 in one way or other. The availability of these remedies has not been described categorically, however. The Act thus deals with the issue of injunction remedy only incidentally. In section 248, the Companies Act provides for

the remedy of seeking injunction from the court to restrain further proceedings in any suit or proceedings against the company. According to this section, a company, any creditor or contributory (present and past member of the company liable to contribute to the assets of the company) may make an application to the court to restrain further proceedings in any suit or proceedings against the company. It further provides that such application must be made at any time after the petition for winding up of a company under the Act and before making an order for winding up the company, and the court may pass order accordingly on such terms as the court thinks fit.

Apart from this section, the Companies Act does not specifically provide for the injunction remedy to be available for the members. However, the Act allows the government to bring legal action seeking injunction as a remedy against the contravention of the provisions of the Act or against the breach of any duty in the conducts of the company's affairs. In this respect, section 203 provides the government with the power of prosecuting any person found to be guilty of any offence for which he is criminal in relation to company's affairs. Similarly, section 205 provides for the power of the government to bring proceeding for the recovery of damages in the repeat of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs or for the recovery of any property of such company, or body corporate, which has been misapplied or wrongfully retained.⁴ In respect of injunction remedy, it thus appears

4 The procedure of seeking such remedy is this: under section 195, any members (one-tenth of share-holder in case of company having share capital or one-fifth of members of the company having no share capital) may apply to the Government to appoint competent inspector to investigate the affairs of the company. On such application, the Government may appoint one or more competent inspectors to investigate the affairs of the company and to report thereon. On the conclusion of the investigation, the inspector shall make a final report in writing to the government. The Government shall forward a copy of the final report to the company at its registered office, and also to any other body, corporate, managing agent, or associate if dealt with in the report by virtue of section 199. The Government shall also furnish, at the request of the applicants for the investigation, a copy of the report to them (section 202). On receiving of report, if it appears to the Government that any person has, in relation to the company or in relation to any other body corporate, managing agent, or associate of other body corporate, managing agent, or associate of a managing agent whose affairs have been investigated, been guilty of any offence for which he is criminally liable, the Government may prosecute such person for the offence. When the Government has prosecuted any person, it shall be the duty of all officer and employees and agents of the company, body corporate, managing agent or associate, as the case may be, other than the accused in the proceedings, to give the Government all assistance in connection with the prosecution which they are reasonably able to give (section 203). The Government may cause to be presented to the court by the registrar a petition for winding up the company or an application for an order under section 233 (protection of minority

that the members are not personally entitled to bring legal action. Such remedies are available from the government's action on the behalf of the company. The wordings in section 205 "in the name of the company or body corporate" clearly indicates that the injunction remedy for the member does remain as a derivative claim, and the government is entitled to bring such claim on behalf of the company as a whole.

The oppression remedy is available under the Companies Act of 1994 in the name of protection of minority as provided in section 233. The concept of minority shareholders' protection is introduced for the first time by the Companies Act 1994. This provision was absent in its previous Companies Act 1913. The necessary conditions and procedures of seeking an oppression remedy under section 233 are provided in section 195 of the Act. Under section 195 of the Companies Act 1994, the Government may appoint one or more inspectors to observe the affairs of the company and to look up whether the interests of the minority shareholders are well protected. Where the company is limited by share the members having at least one-tenth of the share issued may file an application for inspection. Where the company is not limited by share capital, the applicants must be at least one-fifth shareholders of the company. The grounds for application are set out under section 233 of the Act, which provides that subject to fulfilment of the conditions of the required minimum as specified in section 195 (a) and (b) any member or debenture holder of a company may either individually or jointly bring to the notice of the court by application that

- (i) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest; or
- (ii) the company is acting or is likely to act in a manner which discriminates or is likely to discriminate the interest of any member or debenture holder;
- (iii) a resolution of the members, debenture holders or any class of them has been passed or is likely to be passed which discriminates or is likely to discriminate the interest of one or more of the members or likely to debenture holder.

It thus appears that the Companies Act 1994 prescribes the procedure of seeking oppression remedy directly by the members. And procedures to be followed by an aggrieved member of a company in Bangladesh are described in section 233 that can be summed up as follows:

interest) or both. [Section 204] The report of the inspector shall be admissible in any legal proceeding as evidence of the opinion of the inspector in relation to any matter contained in the report. [Section 208]

1. Any members (one-tenth of share-holders in case of company having share capital or one-fifth of members of the company having no share capital) of a company may either individually or jointly file an application, specifying the reasons, to court. On receipt of the application, the court shall send a copy thereof to the board and fix a date for hearing the application.
2. After hearing of the parties present on the fixed date, if the court is of opinion that the interest of the applicant is prejudicially affected, it may make such order as prayed for or such other order as it deems fit.
3. Court can also direct to cancel or modify any resolution or transaction, or to regulate the conduct of the affairs of the company in future in such manner as is specified therein.
4. Where the articles or memorandum of the company is amended by order of the court, company cannot amend such article or memorandum without leave of the court and take any action inconsistent with order of the court.
5. When an order is made by the court, it is the duty of the company to inform in writing and send a copy of the order to the registrar within 14 days.
6. A company shall inform the Registrar in writing of the order of the court and send him a copy thereof within fourteen days from the making of an order under section 233. If the company fails to comply with the obligation under this sub-section, it shall be liable to a fine not exceeding one thousand taka.

It is of importance to note that under section 204 the Government may cause to be presented to the court by the registrar a petition for winding up the company or an application for an order under section 233 (protection of minority interest) or both.

The remedies against variation of shareholder's rights (class right) are provided in section 71 of the Companies Act 1994. Where the share capital of a company is divided into different classes of shares, section 71 protects the rights of holders of those classes of shares by requiring that for variation in their rights there should be a provision in the memorandum or articles of association authorizing the variation of the rights attached to any class of shares and these should be sanctioned by a special majority of the shareholders of that class. Any number of dissenting members holding at least ten percent of the issued shares of that class may, within fourteen days of the resolution, apply to the court to have the variation cancelled. Where any such application is made, the variation shall not have effect until it is confirmed by the court. After hearing the concerned parties, if the court is satisfied that the variation would unfairly prejudice the shareholders of the concerned class, it may disallow the variation. But if the court is not satisfied, it shall confirm the variation and the decision of the court on such application shall be final. After the

service of the order on the company, the company shall forward a copy of the order to the register.

Under the Companies Act of 1994, the members of a company are entitled to seek to wind up the company on the ground that it is just and equitable to do so, or on the ground that the directors are acting in their own interest. Under clause (vi) of section 41, the Act provides that a company may be wound up, if the Court is of opinion that it is just and equitable that the company should be wound up. In this respect, section 245 says that an application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributors, or by all or any of those parties, together or separately or by the Registrar. It further provided that— (a) a contributory shall not be entitled to present a petition for winding up a company, unless— (i) either the number of members is reduced in the case of a private company, below two, or, in the case of any other company, below seven; or (ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder.⁵

Apart from these remedies, the Companies Act recognizes the general law remedies to be available to the members. Right to inspectionsignifies an important example of such general law remedies of the members. Under section 115, the companies are required to keep a register in which particulars of all such contracts or arrangements shall be entered and which shall be open to inspection by any member of the company at the registered office of the company during business hours. According to the section 115(4) (5), the register shall be open to the inspection of any member of the company without charge and of any person on payment of ten taka or such less sum as the company may impose for each inspection. If any inspection required under this section is refused or if default is made in complying with sub-section (1) or (2) of this section, the company and every officer of the company who is knowingly and willfully in default shall be liable to a fine of five hundred taka. In the case of any such refusal, the Court, on application made by the person to whom inspection has been refused and upon notice to the company, may by order, direct an immediate inspection of the register.

5 According to this section, the Registrar shall not be entitled to present a petitions for winding up a company— (i) except on the ground from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under section 195 or, in a case falling within section 204, it appears that the company is unable to pay its debts; and (ii) unless the previous sanction of the Government has been obtained to the presentation of the petition:

3.2. Members' Remedies under the Law of the UK: The Companies Act 2006

Under the UK company law, there are two major legal tools available to shareholders: a derivative claim and an unfair prejudice petition. Though the remedies may overlap, nevertheless they serve different goals. Derivative action is focused on breaches of strict legal duties owed by the directors to the company, while unfair prejudice remedy is granted when the unlawful conduct of the controllers or even lawful conduct, but in breach of some informal agreements, unfairly prejudices a shareholder. The main statutory provisions regarding derivative claims and proceedings by members are now contained in Part 11 (sections 260 to 269) of the Companies Act 2006, and the provisions on protection of members against unfair prejudice are contained in Part 30 (section 994 to 999) of the Act. These Rules for the form, procedure for presentation, service and return of the petition to be used in connection with an application to court in England and Wales are contained in the Companies (Unfair Prejudice Applications) Proceedings Rules 2009/2469.⁶ Apart from this, the shareholders do have a number of statutory rights particularly in relation to alterations to the company constitution, unilateral variation of class rights attached to shares, prevention of ultraviolet dealings by directors amongst others.

Derivative Claims

It is a well-established principle that the proper claimant in an action for a wrong that is alleged to have been done to the company is the company itself; and if the alleged wrong is a matter which it is confident that the company could settle itself then no individual [shareholder] may bring an action. This is called the rule in *Foss and Harbottle* ((1843) 1 Hare 461 (Chancery)). But there is an exception to this rule which recognized that the shareholders in a company acting alone or as a group are permitted to pursue a claim that is vested in the company but that if they are successful, the shareholders will obtain a remedy for the benefit of the company and not directly to themselves. The Companies Act of the UK recognizes this kind of remedy in the name of derivative claim. Two conditions must be fulfilled for the derivative claim to be successful: the wrongdoers must have been in control of the company and they must have committed a wrong. The wrongdoers need not own 51% of shares to control the company (*de iure control*).

⁶ These Rules make provision for the form, procedure for presentation, service and return of the petition to be used in connection with an application to court in England and Wales under the Companies Act 2006 section 994 or 995 (application for order on grounds of unfair prejudice). They revoke the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 (S.I. 1986/2000), subject to a transitional provision for petitions commenced before 1st October 2009.

The derivative action has been recently redesigned and put on a statutory basis in the Companies Act of 2006.S. 260–264 CA 2006. The new Act allows the derivative claim to be raised not only when the directors have committed a fraud but also in the case of negligence. The procedure for bringing the derivative claim consists of two steps. Firstly, a member of the company bringing a derivative action must apply to the court for permission to continue with the action. The court will allow continuance of the claim if the member can establish a *prima facie case* – by providing sufficient evidence of fraud (or negligence) or when the court finds it appropriate to continue with the claim. Thus, the court has a large discretion whether to continue with a derivative claim. Section 260(3) provides that a derivative claim may be brought only in respect of a cause of action arising from an actual or a proposed act or omission involving negligence, default, breach of duty, or breach of trust by a director of the company.

Protection against Unfair Prejudice

The Companies Act 2006 gives specific statutory protection to shareholders against unfair prejudice. A shareholder may apply to the court by petition on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its shareholders generally or some of them (including at least the applicant), or that any proposed act or omission of the company would be so prejudicial. Under Section 994(1) of the Companies Act 2006, a company shareholder may petition the court for an order protecting him from unfair prejudice on the ground:

- (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of shareholders generally or some part of its members (including at least himself), or
- (b) that an actual or proposed act or omission of the company, (including an act or omission on its behalf), is or would be so prejudicial.

If the petition is successful the court has wide powers to order redress for a minority shareholder who has suffered unfair prejudice (CA 06 s.996). Among other things the court may make an order:

- regulating the conduct of the company's affairs in the future,
- requiring the company to refrain from doing or continuing an act complained of, or to do an act it has omitted to do,
- authorizing civil proceedings on behalf of the company, as appropriate,
- providing for the purchase of the shares of any shareholder by other shareholders or by the company itself.

In practice, the remedy that is most often sought under a Section 994 Petition is that the other shareholders buy their shares for a fair value. However, this is not the only potential outcome of a Petition because the court has complete discretion as to the remedy it grants. As an alternative, it may make an order that the minority shareholder purchases the majority shareholding. It can order repayment of any monies found to have been wrongfully taken out of the company by those in control of it and, as a last resort, the court has the power to wind up the company on just an equitable grounds. Examples of unfair prejudice include failure to give accurate accounting information, serious mismanagement, diverting business to another company in which the minority have no shareholding, co-option by the board of a director who has been overwhelmingly rejected by the shareholders, or a demonstrably incompetent member of a controlling family remaining in charge of a company despite protestations by the minority shareholders.

Just and Equitable Winding-Up

The most extreme instrument of remedying or resolving shareholders' disputes under the UK law is the winding-up order.⁷ By winding up, the company is dissolved and its remaining assets are divided up between the shareholders. Because winding up is a last resort, ending the existence of the company, the courts will not order a company to be wound up if there are other instruments available nor if the petitioners are acting unreasonably. Since S. 994 CA of 2006 provides a wide variety of instruments that are at the court's disposal it seems that winding will be used rarely.

Remedies available by seeking Injunctions

According to section 955, if the High Court or, in Scotland, Court of Session is, on the application of the panel, satisfied that there is a reasonable likelihood of willful contravention, by a person, of rule-based requirement or that a person has contravened a rule based requirement or a disclosure requirement, the court may make such order as it thinks fit to secure compliance with the requirement. The section also mentions that a person has right to seek an injunction only in the above cases.

According to Section 1239, the Secretary of State may, by resolution, impose obligation upon anybody designated by order under section-1252 or upon any person with whom arrangement was made by one or more recognized supervisory bodies, or by anybody designated by order under section 1252, with respect to the keeping

7 This remedy originates in partnership law. If the partners cannot reach an understanding court dissolves the partnership.

of the register. Such obligation is enforceable on the application of the Secretary of State by injunction.

Under section 1254, when it appears to the secretary of State that any action, proposed to be taken by anybody designated by order under Section 1252, would be incompatible with community obligation or any other international obligations of the UK, the Secretary of State may give directions to such body. Such directions shall be enforceable by injunction. The information right may be enforced by an application for injunction.

Remedies against the variation of class right

The rights of a class of shareholders of accompany, having share capital, may be varied in according with the provision of the articles or with the consent of the shareholders of that class. The consent, required for the variation of class right, must be of holders of at least three-quarter in nominal value of the issued share of that class or a special resolution passed at a special general meeting of the holders of that class sanctioning the variation. The amendment, of the provision concerning variation of class right contained in articles, is treated as variation of those rights.⁸ The variation of the class rights includes their abrogation.⁹

One or more of the non-consenting holders of the fifteen percent of the issued shares of the class may, within 21 days of giving consent or resolution, apply to the court to have the variation cancelled. When such an application is made, the variation has no effect until it is confirmed by the court. After hearing the parties, if the court is satisfied that the variation would unfairly prejudice the shareholder of that class, it may disallow the variation. But if the court is not so satisfied, it will confirm the variation. The decision of the court will be final.¹⁰

In case of company having no share capital, the rights of a class of members may be varied in according to the provision of the articles, or the written consent or resolution of members of that class. Fifteen percent of the non-consenting members of the concerned class may, within 21 days of giving consent or resolution, apply to the court to have the variation cancelled. If the court is satisfied that the variation would unfairly prejudice the members of that class, it may disallow the variation

8 Variation of right attached to a class of shares means that all changes to the articles that modify the statutory contract needs special protection. It means that the principle of majority rule will be limited.⁸Right attached to a class of share is interpreted as the protection afforded to the minority shareholders.⁸The UK Companies Act 2006 incorporates the provision for variation of right attached to a class of shares to cover cases where the articles of the company do not contain the provision for variation.

9 [Section-630]

10 [Section-633]

*and where the court is not so satisfied, it may confirm the variation. The decision of the court will be final.*¹¹

Right to inspection

Under the UK Company law, every company must keep separate registers of directors' service addresses and their residential addresses as part of their statutory registers. The public has a right to inspect the former but not the latter. Only the Service Address is shown on the public record; the residential address is only available to certain government bodies, including the police, revenue and custom, and credit reference agencies. However, both registers are open to inspection by members of the public and so the public can obtain information about the directors either from companies' house or from the companies registered office..

In addition, the UK law requires a company must, within the period of 14 days from (a) a person becoming or ceasing to be a director, or (b) the occurrence of any change in the particulars contained in its register of directors or its register of directors' residential addresses, give notice to the registrar of the change and of the date on which it occurred. In the same way the UK law requires the register must be open to the inspection— (a) of any member of the company without charge, and (b) of any other person on payment of such fee as may be prescribed. If default is made in complying with subsection (1), (2) or (3) or if default is made for 14 days in complying with subsection (4), or if an inspection required under subsection (5) is refused, an offence is committed by— (a) the company, and (b) every officer of the company who is in default. A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale.

Procedure to be followed by an aggrieved member of a company in the UK

1. A member of a company may apply to the court by petition for an order to protect his interest. The application may also be filed by the Secretary of State to the court in certain cases.¹²
2. If the court is satisfied that the petition is well founded, it may make such order as it thinks fit, or order to regulate the conduct the affairs of the company in future, prohibit alteration in article without leave of the court,

11 [Section-631, 634]

12 Sections 994,995 of (UK) Companies Act, 2006.

or authorize civil proceedings to be brought in the name and on behalf of the company by such person etc.¹³

3. Where the court has made any order relating to the alteration of the company's constitution, the company must deliver a copy of the order to the registrar within 14 days or within such period as extended by the court.¹⁴
4. Every copy of a company's articles issued by the company after the order is made must be accompanied by a copy of the order, unless the effect of the order has been incorporated into the articles by amendment.¹⁵

Procedure in respect of derivative claims by the members

1. A derivative claim may be brought by a member of a company in pursuance of an order of the court in proceedings for protection of members against unfair prejudice or in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Whether the cause of action arose before or after the claimant became member of the company is not material.¹⁶
2. The claimant has to apply to the court for permission to continue the derivative claim. The court can give permission, if the claimant can make a prima face case. Otherwise the court must dismiss the application.¹⁷
3. If the application is not dismissed, the court may give directions as to the evidence to be provided by the company, and may adjourn the proceedings to enable the evidence to be obtained.¹⁸
4. On hearing the application, the court may give permission to continue the claim on such terms as it thinks fit, or refuse permission and dismiss the claim, or adjourn the proceedings on the application and give such directions as it thinks fit.¹⁹
5. A member of the company may apply to the court for permission to continue the claim brought by the company as a derivative claim on the ground of abuse of the process of the court, failure to prosecute diligently and when it is appropriate for the member to continue the claim as a derivative claim.²⁰
6. In giving permission the court must take into account the good faith of the member, the promotion of the success of the company, whether the act or

13 Section 996 of (UK) Companies Act, 2006.

14 Section 998 of (UK) Companies Act, 2006.

15 Section 999 of (UK) Companies Act, 2006.

16 Section 260 of (UK) Companies Act, 2006.

17 Section 261 of (UK) Companies Act, 2006.

18 Section 261 of (UK) Companies Act, 2006.

19 Section 261 of (UK) Companies Act, 2006.

20 Section 262 of (UK) Companies Act, 2006.

omission was authorized by the company before it occurs or ratified by the company after it occurs, whether the company has decided not to pursue the claim, the circumstance under which the act or omission could be ratified, and whether the act or omission gives rise to a cause of action that the member could pursue in his own right.²¹

7. Another member of the company may apply to the court for permission to continue the claim brought by the company or any other member as derivative claim.²²

Derivative proceeding in Scotland

1. A member of a company may raise proceedings in respect of any actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Whether the act or omission arose before or after the applicant became a member of the company is not material.²³
2. In order to raise a proceeding, the member must have to obtain leave of the court. The application for leave of the court must specify the cause of action and the summary of the fact on which the derivative proceeding is to be based. And the court may give permission, if the application and produced evidence make a prima facie case. Otherwise the court will refuse the application.²⁴
3. The proceeding shall not affect the right of a member of a company to raise a proceeding to protect his own interests and obtain a remedy on his own behalf and the power of the court to make an order under section 996(2)(c).²⁵
4. A member of the company may apply to the court to be substituted for the company in the proceedings raised by the company, and for the proceedings to continue in consequence as derivative proceedings, on the ground of abuse of the process of the court, failure to prosecute diligently and when it is appropriate for the member to be substituted for the company in the proceedings. Court can grant permission only if the application and the produced evidence make a prima facie case. Otherwise the court will refuse the application.²⁶
5. Another member of the company may apply to the court to be substituted for the claimant in the action on the ground of abuse of the process of the court,

21 Section 263 of (UK) Companies Act, 2006.

22 Section 264 of (UK) Companies Act, 2006.

23 Section 265 of (UK) Companies Act, 2006.

24 Section 266 of (UK) Companies Act, 2006.

25 Section 265 of (UK) Companies Act, 2006.

26 Section 267 of (UK) Companies Act, 2006.

failure to prosecute diligently and when it is appropriate for the member to be substituted for the company in the proceedings. Court can grant permission only if the application and the produced evidence make a prima facie case. Otherwise the court will refuse the application.²⁷

6. If the application is not refused, the applicant must serve the application on the company. And the court may make an order requiring evidence to be produced by the company, and may adjourn the proceedings on the application to enable the evidence to be obtained, and the company is entitled to take part in the further proceedings on the application.²⁸
7. On hearing the application, the court may grant the application on such terms as it thinks fit or refuse the application, or adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.

Divergence and Convergence between the Laws of Bangladesh and the UK

The Companies Act of both the UK and Bangladesh recognize special type of corporate rights aimed at the protection of shareholders. The major points of the divergence and convergences between the law of the UK and Bangladesh can be summed up as follows:

- Both laws recognize that the Court has wide discretionary power to make such order as it thinks fit. Both laws converge on the following points regarding the Court's power: i) the Court has the power to give direction to amend the constitutions of the company; ii) if any amendment is made in the articles of company in pursuance of the order of the court, the company cannot alter them without the leave of the court; iii) the company has to inform and deliver a copy of the order of the court to the registrar within 14 days; iv) the court has power to give direction to regulate the conduct of the affairs of the company in future.
- In respect of variation of class rights, the laws of both the country provide that on hearing of an application against variation, the court shall consider whether the variation would unfairly prejudice the concerned class of shareholders or members. Both laws in Bangladesh and the UK provide that the decision of the court in respect of variation shall be final. It is also provided that where an application is made against the variation, the variation shall not have any effect until confirmed by the court. Regarding inspection of register both laws provide remedy in case of refusal.
- Neither English nor Bangladeshi statutory law contains a definition of the minority or majority shareholder. Under the UK Law, the distinguishing factor between the two is the degree of control over the corporation. The number of

27 Section 267 of (UK) Companies Act, 2006 .

28 Section 267 of (UK) Companies Act, 2006.

shares owned is not decisive, even a shareholder owning a majority of shares may be a minority shareholder, if other shareholders are well organized and, thus, control the company. But under the Companies Act of Bangladesh, the number of shares owned is found as the decisive factor of determining the majority.

- In Bangladesh, section 233 of the companies Act, 1994 mentions only “prejudicial” to one or more of its members or debenture holders. Whereas in the UK, section 994 of the companies Act 2006 mentions “unfairly prejudicial” to the interests of members generally or of some part of its members. The Bangladesh law differs from English law in that the law of the UK requires the applicant to show that the affairs of the company or the act complained of are likely to cause ‘unfair prejudice’ to the petitioners whereas the Bangladesh law speaks of only ‘prejudice’ to petitioner. This, in theory, means that the Bangladesh Court should be under less restraint in using the power under this section. Further, Bangladesh law permits an action to be brought when there is discrimination regarding the interest of any member or debenture holder.²⁹ Moreover, section 233 mentions the term “which discriminates or is likely to discriminate” whereas in the UK Law, section 994 does not mention the term.
- According to sections 233 and 195, one tenth of share-holders or one fifth of the members can apply for the protection. But in the UK law, according to section 994, any member of a company may apply to the court by petition for protection.
- In the UK law, according to section 994, the provisions of this part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company. But in Bangladesh law, section 233 does not mention such provisions.
- In the UK law, according to section 996, “... court may authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct”. But in Bangladesh law, the government is entitled under section 205 to bring civil proceeding in the name of the company.
- In the UK, according to section 996, a court may provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the

29 M Zahir, *Company and Securities laws* (The University Press Limited, 2005) 183.

reduction of the company's capital accordingly. But in Bangladesh, section 233 does not mention any such provision.

- In the UK, a representative of the deceased shareholder or member can apply for protection. But this position is not clear under the Companies Act of 1994.
- Under section 331, court may, in course of winding up a company, give relief on application of liquidator, creditor or contributory against misapplication of property, misfeasance or breach of trust. In the UK, under section 260, derivative claim under this chapter may be brought by a member of the company only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
- The UK law provides specific provisions regarding derivative claims and derivative proceedings. But Bangladesh law does not have any provision regarding derivative claims and derivative proceedings as it is in the UK. In contrast, the Companies Act of 1994 gives the government the power to bring legal action on behalf of the company in the moment of mismanagement in the company's affairs.
- In Bangladesh, any contributory may apply to court to restrain any proceedings only after petition for winding up a company and before the order of the court on such petition. But the UK law does provide a wider scope of such injunction remedy. In the UK, any person may claim injunction in respect of contravention of rule based requirement or disclosure requirement.
- In Bangladesh, the provisions, regarding variation of class right, are provided only in respect of company having share capital. But in the UK, the provisions, relating to variation of class right, are provided in respect of both companies having share capital and companies having no share capital. Moreover, Bangladesh laws provide that the class rights may be varied only according to the provision of articles and memorandum of the company and with the consent of the holders of the concerned class of shares. The UK laws provide that the class rights may be varied in according to provision of the article or with the consent of the holders of the concerned class of shares or members of the concerned class.
- In Bangladesh, the non-consenting holders of ten percent issued shares of the concerned class may, within 14 days of the resolution or consent, apply to the court to have the variation of the class rights to be cancelled. But in the UK, fifteen percent shareholders or members may, within 21 days of resolution or consent, apply to the court to have the variation cancelled.

Recommendations

- (i) In Bangladesh, the Companies Act of 1994 does not contain a comprehensive regime of member's remedies in the sense that it deals with the issues of remedying the members only incidentally, and not categorically. It is thus recommended that the Companies Act should provide specific chapter on "member's remedies" which will include derivative claims, oppression remedy etc. in a more comprehensive manner.
- (ii) According to the Companies Act 1994, the minority shareholders with at least 10 per cent of shares may take action against the company. In order to extent the ambit of this protection, the Act should allow a single member should have right to go to court for getting protection under section 233.³⁰
- (iii) In Bangladesh, section 233 of the Companies Act does not apply to any person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law. It is recommended that the Company law should provide provision so that section 233 must apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as this apply to a member of a company.
- (iv) The Companies Act 1994 does not incorporate the provision of damages in favor of affected minority shareholders. There must have provision in company law to pay damages where the aggrieved minority shareholders have suffered from financial loss. The complaining petitioners should have a right of recovery of litigation expenses from the company. So, this Act should provide provision for damages in favor of affected minority shareholders.
- (v) The Company law should provide jurisdiction to the Court so that Court the may have power to authorize civil proceedings to be brought in the name and

³⁰ Section 233 read with section 195 means that the holders of minimum ten percent share in case of company having share capital and in case of company not having share capital one-fifth of the members are eligible to apply. While in England and Australia, any shareholder can apply. Bangladesh has followed the Indian principle and has restricted the right to apply to minimum ten percent shareholders presumably to avoid unnecessary litigations. In western countries the Court cost awarded to the winner are adequate and the loser will be faced with a heavy burden thus discouraging frivolous applications. In this country where Court costs are not awarded adequately any shareholder can start a series of litigations and caused the company a lot of troubles. However, this detracts from the main rationale behind the section, namely to protect the minority shareholders whatever the share holding may be.³⁰ It was held that unless the applicants are minority shareholders, i.e., less than fifty percent, they have no right to apply for the protection under this section. [Zahir, above n 29, 183-4].

on behalf of the company by such person or persons and on such terms as the court may direct.

- (vi) In Bangladesh, there is no legal mechanism of share buyback from the minority shareholders at a fair price where the minority shareholders reasonably believe that there is the chance of variance against their interest in the company. Section 233 of the Companies Act does not point out that the court may order the purchase of the complaining petitioner's share by other members or by the company.³¹The court shall have power to order the purchase of the complaining petitioner's shares by others or the company at a fair price. It is thus recommended that Company law should provide provision so that the Court has the power to provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.
- (vii) In Bangladesh, under section 203, no member has any right to prosecute directly any person; rather it is the discretionary power of the government to prosecute any person under that section. In addition, section 203 does not provide opportunity to prosecute by the member of the company even on the ground of abuse of the process of the court, failure of the government to prosecute diligently. It is recommended that Bangladesh law should provide opportunity to prosecute any person by any member of the company.
- (viii) In case of seeking injunction, the UK law provides wide scope whereas in Bangladesh, the scope this remedy is narrower. Like the UK, Bangladesh law should provide specific and wide areas where member can seek injunction in related to the company's affairs to prevent contravening any provision of the constitution of the company or acting in such ways which affect the company injuriously.
- (ix) In the UK, the variation of class right, are provided in respect of both companies having share capital and companies having no share capital. But In Bangladesh, the provisions, regarding variation of class right, are provided only in respect of company having share capital. It is recommended that Class rights protection should be provided to members of the company having no share capital.
- (x) Under Bangladesh law, the non-consenting holders of ten percent issued shares of the concerned class may, within 14 days of the resolution or consent, apply to the court to have the variation of the class rights to be cancelled. But

31 Zahir, above n 29, 194.

in the UK, fifteen percent shareholders or members may, within 21 days of resolution or consent, apply to the court to have the variation cancelled. Like the UK, Bangladesh law should provide fifteen percent of shareholders or members and 21 days or consent requirements.

- (xi) In case of variation of class right, in Bangladesh, the class rights may be varied only according to the provision of articles and memorandum of the company and with the consent of the holders of the concerned class of shares, whereas the UK law provides that the class rights may be varied in accordance with the provision of the article or with the consent of the holders of the concerned class of shares or members of the concerned class. Like the UK, Bangladesh law should provide provision so that the class rights may be varied in according to provision of the article or with the consent of the holders of the concerned class of shares or members of the concerned class.

Conclusion

In respect of remedying the violation of member's rights, the Company laws of Bangladesh and the UK share many concerns in common. Compared to the company law of Bangladesh, the law of the UK, however, offers a more comprehensive regime of protecting member's rights. Technically, it divides the remedy into derivative and unfair prejudice claims, thereby making the issue of member's right clearly loom within the language of the Act. Moreover, the recognition of the derivative claim and member's personal action to provide redress to the violation of rights has been a significant feature of the UK Companies Act. It allows any member of the company to bring legal action on the ground of unfair prejudice, and provides the mechanism of share buyback. By contrast, the Companies Act of Bangladesh does not contain any provisions allowing a single member to bring action for seeking oppression remedy. It does not also say about share buyback and member's derivative claim. In respect of injunction remedy, similar gap exists between the Act of the UK and Bangladesh: the Companies Act of the UK has categorically provided for the injunction as a remedy against the contravention of any provisions of the Companies Act, while the law of Bangladesh deals with this issue only incidentally. The Companies Act of both these countries also differs remarkably on the point of variation of class rights. However, the most important divergence between these two Act lies on the fact that the law of the UK requires the applicant to show that the affairs of the company or the act complained of are likely to cause 'unfair prejudice' to the petitioners whereas the Bangladesh law speaks of only 'prejudice' to petitioner. Thus, it appears that the Bangladesh Court should be under less restraint in using the power under this section. Further, Bangladesh law

permits an action to be brought when there is discrimination regarding the interest of any member or debenture holder.³² Moreover, section 233 mentions the term “which discriminates or is likely to discriminate” whereas in the UK Law, section 994 does not mention the term. Seen in this light of comparison, it is recommended that the Companies Act of Bangladesh should be reformed by following the current regime of the UK company practice with a view to offering a more effective and comprehensive regime of corporate remedies in Bangladesh.

32 Zahir, above n 29, 183.