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## Fighting Against Black Money by Offering Amnesty for Economic Development in Bangladesh: A Stigma Can Never Be a Beauty Spot

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**FIGHTING AGAINST BLACK MONEY BY OFFERING AMNESTY FOR  
ECONOMIC DEVELOPMENT IN BANGLADESH: A STIGMA CAN  
NEVER BE A BEAUTY SPOT**

*S M Solaiman\**

**ABSTRACT**

Black money is a global concern. However, black money has disproportionately affected Bangladesh. To combat the proliferation of black money in the country, successive governments of Bangladesh have offered amnesties to black money holders (BMHs) in contravention of the national Constitution, legislation, and international conventions. Nonetheless, responses to such incentives have been notably poor, mainly because the wrongdoers do not fear the superficial threat of law enforcement. This article examines the BMHs' responses to amnesties so far and explains the substantial harm caused by such discriminatory favors, including increases in corruption, the price of real estate, money laundering, deposits by Bangladeshis in Swiss banks, defaulted bank loans, and capital flights. To address these problems, this article makes several recommendations, including discontinuing amnesties, placing checks and controls on corruption, strengthening watchdog and law enforcement agencies, incentivizing whistle-blowers and the establishment of the Ombudsman's office, and establishing a new statutory body for the assessment of the performance of financial regulators. In addition, this article argues that effective measurements need to be undertaken to increase global cooperation, enhance public awareness, and stimulate social movement. These recommendations aim to improve the regulatory regime in Bangladesh in preventing black money, and they may also be suitable for other countries facing similar issues.

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## 1. INTRODUCTION

Money, by itself, has no color. It derives pigment from the sources that make it. Within this premise, while there is no universal definition of “black money,” it generally implies either income earned legally but hidden from tax authorities or money acquired through crimes such as bribery, homicide, and terrorism. The most common offenses are corruption, bribery, abuse of public office, securities fraud, embezzlement, human trafficking, extortion, and drug trafficking.<sup>1</sup> The United Nations (UN) has set forth 17 Sustainable Development Goals (SDGs) for the States to achieve by 2030.<sup>2</sup> Goal 16, in particular, emphasizes reducing corruption and illicit financial flows, which requires States at all levels to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”<sup>3</sup>

The UN recommends achieving these goals by substantially reducing corruption and bribery; reducing illicit financial flows; developing effective, accountable, and transparent institutions; ensuring responsive, inclusive, participatory, and representative decision-making; promoting and enforcing non-discriminatory laws and policies for sustainable development; strengthening relevant national institutions; and ensuring equal access to justice for all.<sup>4</sup> Accordingly, Bangladesh, a South Asian developing country, has adopted the SDGs and aims to attain them by 2030. However, the country’s SDGs trackers – set out by the Government of Bangladesh as of June 2021 – do not show any development or even commitment to reducing corruption and black money.<sup>5</sup> Such silence has led many to

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<sup>1</sup> Attiya Waris & Laila Abdul Latif, *The Effect of Tax Amnesty on Anti-Money Laundering in Bangladesh* 17(2) J. MONEY LAUND. CONTROL 243, 244 (2014).

<sup>2</sup> Biswajit Bandyopadhyay, *Indian Perspective of Anti-Corruption Institutions for Combating Corruption in Sustainable Development* 19(1) DELHI BUS. R. 85, 89 (2018).

<sup>3</sup> United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, <https://sdgs.un.org/2030agenda> (last accessed on June 19, 2021).

<sup>4</sup> *Id.*; Bandyopadhyay, *supra* note 2, at 89.

<sup>5</sup> Bangladesh Bureau of Statistics, *SDG Trackers—Bangladesh’s Development Mirror* [https://www.sdg.gov.bd/page/thirty\\_nine\\_plus\\_one\\_indicator/5#1](https://www.sdg.gov.bd/page/thirty_nine_plus_one_indicator/5#1) (last accessed on June 19, 2021).

wonder how Bangladesh will accomplish Goal 16 by the aspired timeline considering that corruption has not only been a critical problem since the nation's independence in 1971, but it has also contributed to Bangladesh's developmental stagnation over the years.<sup>6</sup> In fact, unfortunately, the levels of corruption in Bangladesh continue to rise.<sup>7</sup>

Corruption is a predominant source of illicit money in Bangladesh that eats away at economic development, impairs social balance, and smites national attainments. Augustine Nwabuzor, a scholar on the subject, describes corruption as a conduct that is "extractive in nature" with far-reaching effects on the global economy, ultimately warranting interdisciplinary measures to prevent its spread.<sup>8</sup> Within this realm, good governance is an important tool used to fight against corruption. Following the 1990 restoration of democracy in Bangladesh, after the ousting of the prolonged autocratic rule through a mass upsurge,<sup>9</sup> better governance was widely expected. But, due to the lack of political will, the successive governments frustrated the nation in terms of combating corruption.<sup>10</sup> In 2020, the government of Bangladesh granted a blanket immunity for "whitening" black money by suggesting to incorporate the money into the mainstream economy to generate more revenue and create more

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<sup>6</sup> Nurul Huda Sakib, *One Size Does Not Fit All: An Analysis of the Corruption Preventative Approach of the Anti-Corruption Commission (ACC) in Bangladesh*, 27(2) ASIAN J. POLITICAL SCI. 211, 211 (2019).

<sup>7</sup> Mahbubur Rahman Khan, *ACC Guidelines Can Help Prevent Systemic Graft in Government Offices*, DAILY STAR (Bangl.) (Mar. 5, 2021), at Opinion.

<sup>8</sup> Augustine Nwabuzor, *Corruption and Development: New and Initiatives in Economic Openness and Strengthened Rule of Law*, 59(1) J. BUS. ETHICS 121, 130 (2005).

<sup>9</sup> General Hussain Muhammad Ershad came to power through a bloodless coup in 1982 and remained in power until early December 1990 before he was ousted by an uncontrollable mass uprising. See Habib Zafarullah & Muhammad Yeahia Akhter, *Military Rule, Civilianisation and Electoral Corruption: Pakistan and Bangladesh in Perspective*, 25(1) ASIAN STUD. R. 73 (2001).

<sup>10</sup> See Mohammad Mohabbat Khan & Md. Shahriar Islam, *Democracy and Good Governance in Bangladesh: Are They Compatible?*, 5(1) MILLENN. ASIA. 23 (2014); Habib Zafarullah & Ahmed Shafiqul Huque, *Corruption and its Control: The Pursuit of Probity in Bangladesh*, CORRUPTION IN THE PUBLIC SECTOR: AN INTERNATIONAL PERSPECTIVE 59 (Krishna K. Tummala, ed.).

jobs; the effort failed to present a benefit to nations around the world.<sup>11</sup> Impunity has been highly criticized by many of Bangladesh's leading economists, legal scholars, business leaders, politicians, the Anti-Corruption Commission (ACC) Bangladesh, and the Transparency International Bangladesh (TIB).<sup>12</sup> Flouting all the denunciations, the government of Bangladesh has yet again incorporated the whitening opportunity into the Finance Act of 2021, which was legislated on June 20, 2021.<sup>13</sup> In fact, ninety-four percent of participants in an online poll considered this Act to be the legislation of corruption.<sup>14</sup> Despite public sentiment, successive governments in Bangladesh have been partaking in this practice for decades in violation of the national constitution, several pieces of domestic legislation, and international obligations.

Experts cannot pinpoint an exact amount of black money located in Bangladesh's informal or underground economy.<sup>15</sup> Some commentators have predicted the amount of black money to be around 37 percent of the gross domestic products (GDP) in Bangladesh,<sup>16</sup> while a study of the International Monetary Fund (IMF) revealed the number to be about 33.59 percent of the country's GDP between the

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<sup>11</sup> D.S. Sourav, *Undisclosed Income Can be Legalized by Paying 10% Tax*, DHAKA TRIBUNE (Bangl.) (May 22, 2021), at Business.

<sup>12</sup> See S.M. Solaiman, "Black" Money, "White" Owners, and "Blue" Tenants in the Bangladesh Housing Market, 23(2) J. FIN. CRIME 501 (2016).

<sup>13</sup> Shakhawat Hossain, *Bangladesh JS Passes FY22 Finance Bill with Money Legalisation Scope*, NEW AGE (Bangl.), June 30, 2021, at Bangladesh.

<sup>14</sup> The poll was conducted online by the most popular Bengali national daily, Prothom Alo, published on June 30, 2021, immediately after the passing of the *Finance Act 2021* (Bangl.) by the Parliament on June 29, 2021. The question was: "GM Quader has said that the opportunity to whiten black money is tantamount to legitimizing corruption—do you think so?" Mr G. M. Kader is the President of the main opposition party and the Deputy Leader of Opposition in the Parliament. Notably, only 5 percent responded saying "No," whilst 1 percent abstained from making any comment: PROTHOM ALO (Bangl.), June 30, 2021, at 1.

<sup>15</sup> The terms "informal economy," "underground economy," "hidden economy," "shadow economy," or "unrecorded economy" have been used as synonyms for the illicit economy.

<sup>16</sup> Waris & Latif, *supra* note 1, at 244.

period of 2004 and 2015.<sup>17</sup> Based on an inside analysis of the Finance Ministry, the then-Finance Minister of Bangladesh in 2013 stated that the total amount of black money was between 41 and 82 percent of the nation's GDP.<sup>18</sup> Though amounts differ, it can be said that huge sums of ill-gotten money are prowling in the country's underground economy and are being amassed through crimes and used for committing further crimes.<sup>19</sup> All projected amounts are certainly alarming. It is a deep-rooted problem in the country, and no government has ever demonstrated any firm commitment to the elimination of black money by stringent penalties. Rather, successive governments have rewarded BMHs with a sort of general amnesty almost every year, seeking economic development and prevention of capital flights. People have never accepted that plea for growth; instead, they are clearly opposed to such amnesties in Bangladesh.<sup>20</sup> The past Chairman of the ACC, reflecting on its five-year term ending in March 2021, admitted that "it is not worth our time denying that corruption in Bangladesh persists in a wider expanse."<sup>21</sup> Over the past nine years, irregularities have increased 16 times in four state-owned

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<sup>17</sup> Leandro Medina & Friedrich Schneider, *Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?* (Jan. 24, 2018, IMF, WP/18/17), <https://www.imf.org/en/Publications/WP/Issues/2018/01/25/Shadow-Economies-Around-the-World-What-Did-We-Learn-Over-the-Last-20-Years-45583> (last accessed on July 6, 2021).

<sup>18</sup> Asjadul Kibria, *White Paper on Black Money*, Financial Express (Bangl.), July 11, 2019, at Views. The GDP Of Bangladesh Was US\$324.239 Billion in 2020: Aaron O'Neill, Gross Domestic Product (GDP) in Bangladesh 2026 (Apr. 21, 2021), <https://www.statista.com/statistics/438219/gross-domestic-product-gdp-in-bangladesh/> (last accessed on June 21, 2021).

<sup>19</sup> Two high profile examples of this criminal conduct are: First, police recovered BDT20 crore (US\$2.410 million) from Lutfozzaman Babar (State Home Minister of the day) who received this large amount from the owner of a well-known Bashundhara Group of Industries in exchange for exonerating son (main suspect) of the said owner from the murder charge of killing a director of the same conglomerate: Z Ahsan, *Tk 20 Crore Bashundhara Bribe Recovered from Babar*, DAILY STAR (Bangl.), May 31, 2007. Second, Justice Surendra Kumar Sinha, former Chief Justice of Bangladesh, has been facing prosecution for committing embezzlement and laundering money, while he worked as the Chief Justice of Bangladesh: Md. Sanaul Islam Tipu, *Former Chief Justice SK Sinha, 10 Others Indicted in Money Laundering, Embezzlement Case*, DHAKA TRIBUNE (Bangl.), August 13, 2020, at Bangladesh.

<sup>20</sup> See Solaiman, *supra* note 12, at 502.

<sup>21</sup> Khan, *supra* note 7.

banks alone.<sup>22</sup> Apart from a few businesses, such as the real estate and stock market, the whole nation and its civil society, think-tanks, rights groups, and prominent citizens all overtly oppose this amnesty.<sup>23</sup> Nonetheless, amnesty remains commonplace in Bangladesh. As seen over the past decades, only a small number of BMHs legitimize their illicit money through these amnesties, while most black money remains black and is either laundered or spent to enjoy a luxurious lifestyle. Frequent amnesties stimulate corruption, tax evasion, money laundering, drug trafficking, and overall fortification of the black economy.<sup>24</sup> For example, a survey conducted by TIB found that 89 percent of people do not get services without paying a bribe.<sup>25</sup>

Paradoxically, the current government has declared a fight against corruption on the one hand and offered a whitening opportunity to BMHs on the other, though these two are mutually exclusive by nature. Before the enactment of the Finance Act 2021, the Finance Minister declared unwittingly that “the government would continue this until the undisclosed money is legalized fully.”<sup>26</sup> This is in contrast to the Finance Minister’s statement that the government has adopted a policy of “zero tolerance” against corruption.<sup>27</sup> It is also disheartening that the government sometimes recommends the withdrawal of corruption cases lodged by the ACC; however, it is encouraging that the Supreme Court of Bangladesh (High Court Division, hereinafter “HCD”) has reversed such acquittals through withdrawal and ordered that the case go to trial in December 2020.<sup>28</sup> Observers widely believe that the problem of political and

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<sup>22</sup> Mizan Chowdhury, *Forgery in State-Owned Banks in Four Years -31 Thousand Taka Looted*, JUGANTOR (Bangl.), March 4, 2021, at First page.

<sup>23</sup> Ibrahim Hossain Ovi, *Explainer: Black Money — What, Why and How*, DHAKA TRIBUNE (Bangl.), June 13, 2020, at Business.

<sup>24</sup> Waris & Latif, *supra* note 1, at 247.

<sup>25</sup> Jugantor Report, *TIB Survey: 89 Percent People Do Not Get Services without Bribe*, JUGANTOR (Bangl.) September 27, 2019; *see also* Badiuzzaman Bay, *Corruption has spread over the whole society*, DAILY STAR (Dec. 9, 2020), <https://www.thedailystar.net/opinion/interviews/news/corruption-has-spread-over-the-whole-society-2008101>.

<sup>26</sup> B.S.S., *Kamal: Black Money Whitening Scheme Will Remain*, DHAKA TRIBUNE (Bangl.), May 19, 2021, at Business.

<sup>27</sup> Kibria, *supra* note 18.

<sup>28</sup> M. Moneruzzaman, *Graft case withdrawal by govt 'naked interference'*, NEW AGE (Jan. 13, 2021), <https://www.newagebd.net/article/127090/graft-case-withdrawal-by-govt-naked-interference>.



bureaucratic nepotism is closely linked to black money. It unveils the government's lack of political will, which is key to reducing corruption.<sup>29</sup> Alongside political will, an effective anti-corruption movement enables the government to make effective laws and ensure their enforcement.<sup>30</sup> Scholar Douglass C. North underscores the need for an efficient legal system alongside a conducive institutional environment for anti-corruption institutions to have the capability to defuse corruption.<sup>31</sup>

This article aims to examine the legality, benefits, and detriments of the past amnesties offered to BMHs and concludes that such a practice goes against the constitutionally guaranteed equality before the law, contravenes anti-corruption and anti-money laundering (AML) laws, encourages proliferation of black money, stimulates dishonesty, effectively punishes honesty, and reduces tax revenues eventually harming the national economy and society at large. This article consists of five sections. Following this introduction in Section I, Section II analyzes the contraventions of laws and the State's international obligations by the amnesties offered to BMHs. Section III considers BMHs' responses to the amnesties granted since the country's independence and their impacts. Section IV discusses specific measures that need to be undertaken to prevent proliferation and exploitation of black money. Finally, Section V summarizes discussions and makes several recommendations.

#### I. AMNESTIES IN CONTRAVENTION OF THE NATIONAL CONSTITUTION, DOMESTIC LEGISLATION, AND INTERNATIONAL OBLIGATIONS

The government has the obligation not to offer such unconstitutional, discriminatory, unlawful, and unethical amnesties to BMHs in Bangladesh. First, such amnesties go against the core provisions of the Constitution of Bangladesh of 1972. For example, the

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<sup>29</sup> Jon S.T. Quah, *Evaluating the effectiveness of anti-corruption agencies in five Asian countries: A comparative analysis*, 4 ASIAN EDUC. AND DEV. STUDIES 143, 146 (2015).

<sup>30</sup> Sakib, *supra* note 6, at 229.

<sup>31</sup> See Douglass C. North, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

amnesty is discriminatory in that it allows the BMHs to pay only 10 percent tax to whiten their illicit money, whereas honest taxpayers are required to pay 25 to 30 percent tax on their legitimate incomes.<sup>32</sup> This discrimination directly contravenes Article 27 of the Constitution, which affirms that “[a]ll citizens are equal before law and are entitled to equal protection of law.”<sup>33</sup> This is a constitutionally guaranteed fundamental right of the citizens, which cannot be taken away by any ordinary legislation like tax or finance laws. As for the legal superiority of fundamental rights, Article 7(2) of the Constitution declares its supremacy and pronounces that the “Constitution is . . . the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”<sup>34</sup> Consistently, Article 7(1) provides that “[a]ll powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected *only under, and by the authority of, this Constitution*” (Italics added). “This implies that all law-making bodies, persons or authorities are proscribed from enacting any law which is inconsistent with, or repugnant to, the Constitution. It is therefore legally binding for Parliament to make law in compliance with the constitution.”<sup>35</sup> As a further guarantee of fundamental rights, Article 26(2) unequivocally prevents the State from making any law repugnant to these rights, providing that “[t]he State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.”<sup>36</sup> The provision of discriminatory tax treatment undermines the basic structure of the Constitution as held by the Supreme Court of India in *Mardia Chemicals v. Union of India*<sup>37</sup> because loyal taxpayers are being

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<sup>32</sup> Trading Economics, *Bangladesh Personal Income Tax Rate*, TRADING ECONOMICS, <https://tradingeconomics.com/bangladesh/personal-income-tax-rate> (last accessed on June 30, 2021).

<sup>33</sup> BANGL. CONST. pt. I art.7.

<sup>34</sup> BANGL. CONST. pt. I art. 7(2).

<sup>35</sup> M. Rafiqul Islam, *The Seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal*, 58 POL. QUARTERLY 312, 326 (1987).

<sup>36</sup> The word “Part” within the quotation refers to Part III of the Constitution consisting of Articles 26–47A.

<sup>37</sup> Abhinav Chandrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chems v. Union of India*, 2 INDIAN J. OF CONST. L. 179, 180–182 (2008) (noting that the Constitution of Bangladesh has generously

punished with higher taxes while their disloyal or dishonest counterparts are being rewarded with the amnesty and may pay a lower tax rate.

Apart from the fundamental right, the amnesty further contravenes Article 20(2) of the Constitution, which provides that the “State shall endeavour to create conditions in which, as a general principle, persons shall not be able to enjoy unearned incomes[.]”<sup>38</sup> Unlike Article 27, Article 20(2) is a fundamental principle of state policy, which is not directly enforceable under Article 8(2). However, the highest court of Bangladesh has arguably mandated the indirect enforceability of these principles. For example, in 1989, the Supreme Court of Bangladesh (Appellate Division, hereinafter “AD”) in a leading case, *Anwar Hossain v. Bangladesh*, pronounced that:

Though the directive principles are not enforceable by any court, the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. It is a protected Article [Article 8] in our Constitution and the legislature cannot amend this Article without referendum. This alone shows that the executive cannot flout the directive principles. The endeavour of the Government must be to realise these aims and not to whittle them down.<sup>39</sup>

Likewise, the Supreme Court of Bangladesh in *Kudrat-E-Elahi Panir v. Bangladesh* held that the fundamental principles of Articles 8–25 have to be applied in making laws.<sup>40</sup> Consistently, the Supreme

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borrowed from that of India, which is regarded as the established largest democracy in the world. Accordingly, there are great similarities between the fundamental principles of state policy, fundamental rights and provisions for their protection as enshrined in these two constitutions. This justifies the relevance and applicability of Indian judicial interpretations in understanding the corresponding provisions of the Constitution of Bangladesh).

<sup>38</sup> BANGL. CONST. pt. II art. 20(2).

<sup>39</sup> *Chowdhury v. Bangladesh*, (1989) 18 CLC 1, 61 (Bangl.) (referring to “directive principles” as the fundamental principles of state policy).

<sup>40</sup> *Kudrat-E-Elahi Panir v. Bangladesh*, (1992) 44 DLR 319, 346 (Bangl.).

Court (HCD) in *Farooque v. Government of Bangladesh* pronounced that the fundamental principles can be applied in interpreting the fundamental rights enshrined in the Constitution.<sup>41</sup> Moreover, Article 8(2) itself reads: "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens[.]"<sup>42</sup> Hence, both the wording of Article 8(2) and corresponding judicial interpretations of the fundamental principles of state policy clearly suggest that amnesties to BMHs violate the Constitution.

When Articles 7, 8, 20, 26 and 27 and pertinent judicial interpretations are read together, it can be persuasively argued that the laws offering amnesty to BMHs are unconstitutional, unfairly discriminatory, and therefore void. To substantiate this view further, the Supreme Court of India in *Musaliar v. Potti* held that discrimination with "an evil eye and unequal hand" is void *ab initio* in law.<sup>43</sup> Furthermore, regarding corruption, the Supreme Court of India in *Subramanian Swamy v. Manmohan Singh* observed that "[c]orruption devalues human rights, chokes development . . . and undermines justice, liberty, equality, [and] fraternity, which are the core values in our preambular vision."<sup>44</sup>

Alongside the Constitution, the legalization of black money through the granting of amnesties also manifestly contravenes several pieces of domestic legislation. For example, in providing a detailed definition of money laundering, s2(v) of the Money Laundering Prevention Act 2012 (MLPA2012)<sup>45</sup> stipulates that "money laundering" means:

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<sup>41</sup> (1996) 48 DLR 438 (Bangl.).

<sup>42</sup> BANGL. CONST. pt. II art. 8(2).

<sup>43</sup> *Musaliar v. Potti*, (1955) AIR 1956 SC 246 (India).

<sup>44</sup> *Subramanian Swamy v. Manmohan Singh and Another*, (2012) 3 SCC 64 (India).

<sup>45</sup> The Bangladesh Money Laundering Act of 2002 was initially supplanted by the Money Laundering Prevention Ordinance on April 15, 2008. Subsequently, the Ordinance was enacted with the title of the Money Laundering Prevention Act of 2009, which was repealed by the Money Laundering Prevention Ordinance of 2012, followed by the legislation of the Money Laundering Prevention Act of 2012. This Act has been further revised by the Money Laundering (Amendment) Act of 2015, as incorporated into the current Act in line with the international initiatives and standards.

- (i) knowingly moving, converting, or transferring proceeds of crime or property involved in an offence for the following purposes:
  - (1) concealing or disguising the illicit nature, source, location, ownership or control of the proceeds of crime; or
  - (2) assisting any person involved in the commission of the predicate offence to evade the legal consequences of such offence;
- (ii) smuggling money or property earned through legal or illegal means to a foreign country;
- (iii) knowingly transferring or remitting the proceeds of crime to a foreign country or remitting or bringing them into Bangladesh from a foreign country with the intention of hiding or disguising its illegal source;
- (iv) concluding or attempting to conclude financial transactions in such a manner so as to reporting requirement under this Act may be avoided;
- (v) converting or moving or transferring property with the intention to instigate or assist for committing a predicate offence;
- (vi) acquiring, possessing or using any property, knowing that such property is the proceeds of a predicate offence;
- (vii) performing such activities so as to the illegal source of the proceeds of crime may be concealed or disguised; and
- (viii) participating in, associating with, conspiring, attempting, abetting, instigate [sic] or counsel [sic] to commit any offences mentioned above.

A close reading of the above definition suggests that it leaves no room for the granting of amnesties to BMHs. Hence, the then-Governor of Bangladesh Bank, the central bank of the country, perfectly noted that “[e]nforcing the Money Laundering Act on one hand and allowing whitening of black money on the other are quite

contradictory. As such, it must be stopped.”<sup>46</sup> Beyond definition, s4 of the MLPA2012 makes money laundering an indictable offense, which can be punished with a jail term of at least four years but not exceeding 12 years and a fine equivalent to twice the value of the property involved in the offense or BDT 10 lac (US \$12,048), whichever is greater.

The comprehensive definition of money laundering under s2(v) and the significant punishment thereof imply that the offense is a criminal one.<sup>47</sup> Regardless, money laundering is on the rise, taking advantage of laxity in oversight, investigation, and enforcement. The Anti-Corruption Commission Act of 2004 (Bangladesh) (ACCA2004) is another piece of legislation that is starkly flouted by such amnesties. Affirming this view, Justice Sultan Hossain Khan asserted, while he was Chairman of the ACC, that “[i]t goes against the spirit of the constitution of Anti-Corruption Commission. This is self-contradictory.”<sup>48</sup> The provisions of amnesty virtually bury sections 26 and 23, and contradicts section 24 of the ACCA2004.<sup>49</sup> This is so because section 26 empowers the ACC to ask anyone to submit all necessary statements of their assets, while section 23 entitles the watchdog to investigate allegations if it chooses.<sup>50</sup> Section 24 ensures independence of the ACC by elucidating that “[s]ubject to the provisions of this Act, the Commissioners shall be independent in discharging their duties under this Act.” Hence, the ACC’s independence can only be restrained by this Act. Nonetheless, the whitening provisions overtly prevent the ACC from asking any question to BMHs who take advantage of the opportunity.

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<sup>46</sup> Rejaul K. Byron, *Immunity to Money Whitening May Go*, DAILY STAR (Bangl.) Nov. 26, 2004, <http://archive.thedailystar.net/2004/11/26/d4112601011.htm>.

<sup>47</sup> For the definition of a “truly criminal” offense, see *He Kaw Teh v The Queen* (1985) 157 CLR 523 (Austl.).

<sup>48</sup> Shamim Ahsan, *A Budget Without Direction*, STAR WEEKEND MAGAZINE (Jun. 24, 2005), <http://archive.thedailystar.net/magazine/2005/06/04/cover.htm>.

<sup>49</sup> Anti-Corruption Commission Act § 38 (Bangl.).

<sup>50</sup> § 26 provides that the “Commission may, by order in writing, direct that person to furnish statement of his assets and liabilities including any other information specified in that order in the manner prescribed by the Commission.”

Accordingly, section 19AAAA of the Income Tax Ordinance 1984 (Bangladesh)<sup>51</sup> as amended in 2020 provides:

(1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no question as to the source of any sum invested in securities by an individual assessee . . . shall be raised by any authority if the assessee pays tax at the rate of ten percent (10%) on such investment within thirty days from the date of such investment.<sup>52</sup>

Similar provisions exist in other sectors. For instance, there are provisions relating to the legalization of undisclosed movable or immovable property (§ 19AAAAA), investments in buildings or apartments (§ 19BBBBB), the purchase of bonds under Bangladesh Infrastructure Finance Fund (§ 19C), and the Economic Zones or Hi-Tech Parks (§ 19DD). All these special tax provisions effectually restrict the State's prospects of inquiring further into undisclosed or illicit cash or other property.

Bangladesh's core criminal legislation is the Penal Code of 1860 (PC 1860), which was enacted during the British colonial era, and which continues to apply with some minor modifications. The PC 1860, through sections 162, 163, 165 and 403, criminalizes the corrupt practices of public servants that detrimentally affects several public interests. Section 161 prohibits public servants from taking gratification, other than legal remuneration, and prescribes punishments, including imprisonment and potential fines.<sup>53</sup> Section

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<sup>51</sup> All sections of the Income Tax Ordinance referred to in this article are as of June 30, 2021.

<sup>52</sup> Emphasis added.

<sup>53</sup> § 161 provides: "Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

162 defines “gratification” as the act of corruptly or illegally influencing any public servant, the violation of which can be punished by a maximum of three years of incarceration, a fine, or both.<sup>54</sup> Section 163 criminalizes the taking of gratification for personal influence if done by a public servant.<sup>55</sup> A person involved in a legal proceeding can be found to be in violation of section 165 if he or she obtains information from a public servant without consideration. Section 403 stipulates that anyone, whether a public servant or not, who “dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

All these provisions succinctly criminalize any corrupt or dishonest receipt of financial gains in any form by a public servant. Nonetheless, many public servants take illicit property, cash or in-kind, with almost complete impunity, and they have been doing this for a long time. The whitening opportunities also contravene the Prevention of Corruption Act of 1947 (PCA 1947) (Bangladesh), a short piece of legislation deriving offenses from the aforesaid PC 1860. Section 3 provides that “[a]n offense punishable under sections 161, 162, 163, 164, 165A or 165-A of the Penal Code shall be deemed to be a cognizable offense for the purposes of the Code of Criminal Procedure 1898, notwithstanding anything to the contrary contained therein.”

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<sup>54</sup> § 162 reads as follows: “Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

<sup>55</sup> § 163 provides: “Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government or Legislature, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”



Section 2 of the PCA 1947 defines “public servants” broadly by encompassing public servants defined in section 21 of the PC 1860, employees of any state-owned enterprises, office bearers of local government authorities, “a Chairman, Director, Managing Director, Trustee, Member, Officer or other employee of any corporation, or other body or organisation constituted or established under any law.” Hence, the PCA 1947 effectually reinforces the application of the PC 1860 to corrupt activities. Without going into further detail, it can be noted that in addition to the contraventions of the aforesaid constitutional and statutory provisions, there are other laws and rules which are flouted by the amnesty in question. Some of these are *the Government Servants (Conducts) Rules, 1979* (Bangladesh); *the Government Servants (Discipline and Appeal) Rules 1985* (Bangladesh); *the Public Procurement Act 2006* (Bangladesh); and *the Public Service Act 2018* (Bangladesh). The transgression against law goes even further.

As mentioned earlier, the amnesties infringe upon international obligations of the State as well. For example, the amnesties contravene the United Nations Convention against Corruption of 2003 (UNCAC) to which Bangladesh has been a party since February 27, 2007.<sup>56</sup> The UNCAC covers five main areas of corruption that include preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.<sup>57</sup> The UNCAC requires each State party to take preventive measures against corruption in both the public and private sectors and also “to establish criminal and other offenses to cover a wide range of acts of corruption, if these are not already crimes under domestic law,” and the States are legally obliged to establish offenses concerning bribery of national public officials under Article 15 of the Convention.<sup>58</sup> The amnesties at hand blatantly

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<sup>56</sup> United Nations Convention Against Corruption, Oct 31, 2003, 2349 U.N.T.S. 41 (188 parties, including Bangladesh, had accepted it by Feb. 27, 2007).

<sup>57</sup> *Id.*

<sup>58</sup> Article 15: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue

violate these State obligations because they effectively decriminalize the conduct with special advantages being offered to those who are potentially offenders although their disputed conduct is required to be criminalized by this Convention.

The Universal Declaration of Human Rights of 1948 (UDHR) is regarded as the “Magna Carta”<sup>59</sup> for international human rights law. Article 7 declares that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Although the UDHR is not a legally enforceable instrument, it has profoundly influenced most of the national constitutions and several international instruments drafted since its inception in 1948.<sup>60</sup> Amongst those international instruments, the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) are directly relevant to the present context of discriminatory tax provisions. Providing a guarantee of equality before the law, Article 26 of the ICCPR enunciates that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground[.]” The ICCPR is a legally binding treaty for the ratifying countries, and Bangladesh ratified it on September 6, 2000.<sup>61</sup> The ICCPR thus applies to the discriminatory tax provisions.

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advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

<sup>59</sup> George J. Andreopoulos, *Universal Declaration of Human Rights*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights>.

<sup>60</sup> Nancy Flowers, *A Short History of Human Rights*, HUMAN RIGHTS HERE AND NOW, <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm> (last accessed on June 20, 2021).

<sup>61</sup> S. M. Solaiman & Abu Noman Mohammad Atahar Ali, *Rampant Food Adulteration in Bangladesh: Gross Violations of Fundamental Human Rights with Impunity*, 14 ASIA-PAC. J. HUM. RIGHTS L., nos. 1–2, 2013, at 29, 47.

As submitted to the Geneva Committee on the Elimination of Discrimination against Women in 2016, ICESCR and CEDAW bear on tax discriminatory treatment indirectly as amnesties contribute to the loss of tax revenue, which “deprives States of the maximum available resources that could be used to realize substantive equality, respect and protect all women’s rights, and progressively fulfil their economic, social and cultural rights, in accordance with their obligations under CEDAW and ICESCR.”<sup>62</sup> Observers add that “[t]ax abuse also has a more direct impact on the enjoyment of rights, insofar as it exacerbates inequalities and thereby runs counter to the principles of equality and non-discrimination.”<sup>63</sup> Professor Rehman Sobhan, one of the most renowned economists of Bangladesh and Chairman of the Center for Policy Dialogue, a national think tank, comments that “[o]ffering such whitening facility gives a wrong signal to the taxpayers,”<sup>64</sup> and the “money whitening process will sharply increase economic discrimination in the country.”<sup>65</sup> A former Chairman of the National Board of Revenue of Bangladesh (NBR) says that the opportunity discourages honest people to pay taxes as well as weakens the government’s right to collect taxes, effectively resulting in reduction in tax revenues.<sup>66</sup> Notably, Bangladesh is a party to both of these international instruments, and it ratified the ICESCR on October 5, 1998 and CEDAW on November, 6 1984.<sup>67</sup>

Further, the amnesties contravene the international money laundering control provisions. Articles 6–7 of the UN Convention against Transnational Organized Crime 2004 (UNCTOC) stipulate that every “State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences” concerning the

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<sup>62</sup> Alliance Sud, et al, *Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women’s Rights*, Submission to the Committee on the Elimination of Discrimination against Women (Nov. 2016), at 9, [https://www.cesr.org/sites/default/files/switzerland\\_cedaw\\_submission\\_2nov2016.pdf](https://www.cesr.org/sites/default/files/switzerland_cedaw_submission_2nov2016.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> FE Report, *Bubble in Market Apprehended as Tk 100b Legalized in Six Months*, FIN. EXPRESS (Bangl.), February 3, 2021, at Economy.

<sup>65</sup> Staff Correspondent, *Whitening Black Money: Don’t Give the Scope Next Fiscal Year—Experts Urge Gov’t*, DAILY STAR (Bangl.) February 3, 2021, at Back page.

<sup>66</sup> *Bubble in Market Apprehended as Tk 100b Legalized in Six Months*, *supra* note 64.

<sup>67</sup> Solaiman & Abu, *supra* note 61, at 47.

laundering of proceeds of crime to combat these crimes, while similar obligations are imposed on State parties to criminalize and prevent corruption under Articles 8–9. The whitening opportunities obviously encourage corruption and facilitate money laundering as alluded to earlier and will be further argued below. Bangladesh ratified the UNCTOC on July 13, 2011.<sup>68</sup> All these constitutional, statutory, and international obligations are deliberately avoided and flouted by an ordinary piece of financial legislation, the Finance Act, almost every year through amending the income tax law.

It is generally presumed that good intentions underlie all laws made by State authorities. However, this presumption is rebuttable, and in a democratic setup, the judiciary is entitled to determine the validity of any law made by the legislature or executive authorities of the same jurisdiction. In doing so, a competent court can consider, among other things, whether the law is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it,” as was held by the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*.<sup>69</sup>

Likewise, in 1803, the Supreme Court of the United States in *Marbury v. Madison* pronounced that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>70</sup> Scholar Anthony Okorodas spells out that “the intention of Parliament can only be determined by the courts by means of application of principles and rules of statutory interpretation.”<sup>71</sup> And in the context of the legislative powers of the Parliament of Bangladesh, “[t]he constitution vests Parliament with the power to make laws for Bangladesh.” This

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<sup>68</sup> United Nations Treaty Collection, United Nations Convention against Transnational Organized Crime [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mt\\_dsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=XVIII-12&chapter=18&clang=_en) (last accessed on June 20, 2021).

<sup>69</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 410 (Eng.).

<sup>70</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803)

<sup>71</sup> Anthony Ezonfade Okorodas, *The Role of Section 2(1) and (4) of the European Communities Act and Section 3(1) of the Human Rights Act in the Interpretation and Application of Primary Legislation: Impact on Judicial Attitudes to the Traditional Concept of Parliamentary Sovereignty* (Dec. 2008) (PhD thesis, on file with the University of Northumbria at Newcastle), <https://core.ac.uk/download/pdf/4148919.pdf>.

law-making power of Parliament is not unfettered but is subject to a condition of constitutionality. Thus, Parliament is not authorized to ascertain the constitutionality of its own acts.

The judiciary is entrusted to determine the constitutionality of an act passed by Parliament.<sup>72</sup> Accordingly, Articles 7 and 102 of the Constitution jointly empower the Supreme Court of Bangladesh to review the validity of laws made by the Parliament because “any competent court of law, especially the Supreme Court of Bangladesh, is empowered and competent to judge whether a particular act of Parliament is consistent or not with the constitution.”<sup>73</sup> In exercising this power, the Supreme Court of Bangladesh has nullified several pieces of legislation such as the Indemnity Ordinance of 1975 (Bangladesh), which prohibited the trial of the killers of Bangabandhu Sheikh Mujibur Rahman<sup>74</sup> and others in 1975,<sup>75</sup> and the Constitution (Sixteenth Amendment) Act 2014 (Bangladesh) regarding removal of judges of the Supreme Court by Parliament.<sup>76</sup> Therefore, if a legal challenge is launched with the Supreme Court of Bangladesh, it is likely that the Court will declare such amnesties invalid.

## II. RESPONSES OF BLACK MONEY HOLDERS TO GENERAL AMNESTIES AND THEIR IMPACTS ON THE ECONOMY

### A. Responses of Black Money Holders

Even though only a small amount of black money is legalized, amnesties can permit BMHs to pay a nominal 10 percent tax, with or without paying the actual tax in higher rates, while honest taxpayers must pay up to 30 percent tax for individuals and 40 percent corporate

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<sup>72</sup> Islam, *supra* note 35, at 326.

<sup>73</sup> *Id.* at 327.

<sup>74</sup> Bangabandhu Sheikh Mujibur Rahman, Father of the Nation and the first President of Bangladesh, was assassinated on August 15, 1975, along with most of his family members and associates. See *Sheikh Mujibur Rahman: Army officer hanged for murder of Bangladesh's founding president*, BBC NEWS (Apr. 12, 2020), <https://www.bbc.com/news/world-asia-52258557>.

<sup>75</sup> *Shariar Rashid Khan v. Bangladesh*, (1997) 49 DLR (HCD) 133 (Bangl.).

<sup>76</sup> *Idrisur Rahman v. Syed Shahidur Rahman*, (2005) 7 SCOB (AD) (Bangl.); see also Rezaul Karim, *Four could not even be traced*, DAILY STAR (Bangl.) Aug. 14, 2016, at Back Page.

tax. Responses are inextricably connected with the definition of black money. There is no uniform definition of black money, and it is described in different terms by different laws and authorities. As defined by the NBR, black money refers to that which is earned legally or illegally but not declared to the relevant government agencies, and therefore no tax is paid thereon.<sup>77</sup> Using “untaxed money” as a synonym for black money is not only erroneous but also a complete misrepresentation of its underlying concept as generally perceived. Commentators are critical of such a simplification of black money, which arguably waters down the seriousness of its inherent illegality by minimizing the difference between legally earned money and that which is criminally amassed through illegitimate means.<sup>78</sup> Commentators prefer reflecting the general perception of such money in its definition, focusing instead on the ways and means of accumulating it. This approach encompasses all potential offenses and morally degraded activities of different groups, including public servants, public and private organizations, private individuals, labor leaders, student leaders, and so on.<sup>79</sup> From an academic point of view, a more acceptable perception of such money:

[R]evolves around the concept of illegally obtained money through political and/or bureaucratic corruption, bribery at all levels of the government, semi-government, autonomous or semi-autonomous offices or organisations, money amassed by the businessmen through smuggling, black marketing, shady deals, profiteering, money amassed by labour leaders, student leaders, through extortions and, especially, money amassed by functionaries of the ruling government party and its various organs and their families, relatives and cronies.<sup>80</sup>

The government may at times deliberately turn a blind eye to the fact that black money already exists in the formal economy in

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<sup>77</sup> Waris & Latif, *supra* note 1, at 247.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

parallel with the underground economy. This can be easily observed when looking at the lifestyle and prosperities of BMHs. Expressing a similar view, some scholars state that such illicit “money circulates both in the formal economy and the parallel black economy, which tends to gain strength day by day at the cost of the formal economy, because black money naturally prefers activities relating to the black economy.”<sup>81</sup> Although successive governments since late 1975 have offered amnesties to BMHs, the public response was clearly insignificant because the amounts whitened and tax received so far are both small. Despite the government’s intention of setting deadlines, there are no punishments for BMHs who have not availed themselves of the opportunity. This is mainly because BMHs take for granted that the opportunity will continue for an indefinite period, and so they do not fear for the threat of punishment.

Consequently, both corruption and money laundering are on the rise, which is evident in the recent relegation of Bangladesh by the Transparency International (TI) in its corruption perception index. According to the 2019–2020 Index report, Bangladesh has fallen to 12th from the earlier 14th position in the bottom among 180 countries in 2018–2019.<sup>82</sup> As analysts comment, the larger amount of black money is siphoned off overseas, the less is saved as fixed deposits, and the rest is spent on maintaining a rich lifestyle by BMHs.<sup>83</sup> Against this backdrop of abortive regulation of black money, the government offered unprecedented incentives to BMHs as a budgetary measure for the 2020–2021 fiscal year. To this effect, the Finance Minister’s pronouncement was exotically invading and overriding when he stated in his budget speech:

Regardless of the provisions of any other prevailing law of the land, individual taxpayers will be allowed to disclose *any type of undisclosed* house property including land, building, flat, and apartment between

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<sup>81</sup> *Id.*

<sup>82</sup> Helal Uddin Ahmed, *Graft Ranking Goes Down*, FINANCIAL EXPRESS (Feb. 3, 2021), <http://thefinancialexpress.com.bd/public/views/graft-ranking-goes-down-1612364403>.

<sup>83</sup> Rejaul Karim Byron, *Record Tk 10,220cr Black Money Legalized in Jul-Dec*, DAILY STAR (Bangl.), Jan. 5, 2021, at Business.

July 1, 2020 and June 30, 2021 on paying tax at a particular rate on per square metre of the said asset. Individual taxpayers will *also be able to make any disclosure of undisclosed cash, bank deposits, savings certificates (Sanchayapatra), shares, bonds or any other securities between 1st July 2020 and 30th June 2021 on paying taxes at a rate of 10 percent on the value of the said declaration; and no authority including the income tax authority can raise any question on such declarations [Italics added].*<sup>84</sup>

Despite the complete impunity for legalising black money, the response was lukewarm.<sup>85</sup> The responses of BMHs are shown in the Table below as reported by the NBR.<sup>86</sup>

Financial Year	Black Money Whitened in BDT Crore	Black Money Whitened in Million US\$ (approx.) US\$@BDT83	Total Tax & Penalty Taxes (where applied) Received in BDT Crore	Total Tax & Penalty Taxes (where applied) Received in Million US\$ (approx.)
1971-1975	2.25	0.271	0.19	0.023
1976-1980	50.76	6.116	0.81	0.098
1981-1990	45	5.422	4.59	0.533
1991-1996	150	18.072	15	1.807
1997-2000	950	114.458	141	16.988
2001-2007	827	99.639	102	12.289
2007-2009	1,682	202.651	911	109.759
2009-2013	1,805	217.470	230	27.711

<sup>84</sup> Helal Uddin Ahmed, *Whitening Black Money*, FINANCIAL EXPRESS (Bangl.), Jan. 13, 2021, at Views (emphasis added).

<sup>85</sup> *Whitening Money*, FINANCIAL EXPRESS (Bangl.), Feb. 5, 2021, at Editorial.

<sup>86</sup> Saddam Hossain Imran, *Hidik to Show Hidden Money*, JUGANTOR (Bangl.), Feb. 7, 2021, at 1; Fazlur Rahman, *Scope to Legalize Black Money Indefinitely: Kamal's Plan Draws Flak from Economists*, DAILY STAR (Bangl.), May 21, 2021, at Business.



2013-2020	11,107	1,338.193	1,073	129.277
2020-2021 (Jul. 2020- Mar. 2021) <sup>87</sup>	14,295	1,722.289	1,439	173.373
1971-2021 (March) Total	<b>30,914</b>	3,724.581	<b>3,916.59</b>	<b>471.858</b>

Since Bangladesh's independence in 1971, a total amount of BDT 30,914 crore (US \$3,724,581) has been whitened by paying approximately BDT 3,916.59 crore (US \$471,858,000) to the state coffer. The triviality of the amount whitened thus far can be compared with the GDP ratio. The GDP of Bangladesh was US \$8.993 billion in 1970, which grew to US \$324.239 billion in 2020.<sup>88</sup> As per the country's Ministry of Finance, the size of the underground economy is between 41 and 82 percent of its GDP,<sup>89</sup> whereas the total amount whitened over the past 50 years is only approximately US \$3.724 billion.

The above Table vividly portrays that BMHs remain largely unmoved by the frequent or regular declaration of amnesty for them. This is so because most of them reasonably believe that the cosmetic threats of punishment for nondisclosure or non-whitening of their assets will not be enforced, nor do they wait for such an opportunity to be declared every year, which has already been a repetitive and routine inclusion in the yearly budget. A brief answer to explain the poor response regarding such amnesties is that BMHs do not care about the threat of punishment as they have found no reason to fear. This assertion was affirmed in fiscal year 2007–2008 when the army-backed non-party caretaker government was able to persuade BMHs to make disclosures, resulting in the legalization of the highest amount of ill-gotten money until June 2020, although the offer on that occasion was more conditional and less attractive compared to previous ones.

<sup>87</sup> The opportunity was much wider for FY2020–2021, so this amount (BDT14,295) includes the prices of the BMHs' wealth shown in the form of cash, fixed deposit receipts, saving certificates and shares. Rahman, *supra* note 86.

<sup>88</sup> World Bank, *GDP (current US\$)—Bangladesh*, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=BD>.

<sup>89</sup> Kibria, *supra* note 18; O'Neill, *supra* note 18.

The only reason for that historic response was exerting a credible threat to punish the BMHs after the expiry of the offer period. It is a matter of great regret that the Prime Minister of the immediate predecessor of this caretaker government herself whitened BDT 1.33 crore (US \$160,240) on August 6, 2007 by paying BDT 33.87 lac (US \$40,807) as a penalty in addition to taxes.<sup>90</sup> More reprehensibly, the immediate past Chief Justice of Bangladesh is currently facing trial for alleged corruption and money laundering.<sup>91</sup> The record of fiscal year 2007–2008 has been broken by the amount whitened in response to the blanket offer of amnesty for fiscal year 2020–2021, which can be attributed to two factors. First, the offer made through the Finance Act of 2020 (Bangladesh)<sup>92</sup> is unprecedentedly generous in terms of its wider scope of investment, and no question could be asked about the source of money. Second, and perhaps more importantly, both national and international lockdowns triggered by Covid-19 prevented BMHs from flying overseas with the money. The government is taking credit in such a success, forgetting these two extraordinary driving factors. In this regard, Professor Moinul Islam, a national award recipient economist, prudently explains that money laundering has also slowed down due to the pandemic, which has led to a big jump in the display of undisclosed funds in the current financial year. Once the pandemic is under control, capital smuggling will start in full swing again.<sup>93</sup>

Although no one has ever shown any instances of attaining national economic prosperity by allowing BMHs to whiten their illicit possessions, the successive governments, in support of these amnesties, have always accentuated two points: achieving national economic development and preventing money laundering or capital flights. These are arguably poor excuses for the hidden, real reason – the government's failure in preventing corruption and money laundering. Whatever the actual reason, the impacts of such impunities are destructive as these contribute to increasing corruption,

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<sup>90</sup> *Khaleda "Whitened White Money,"* DAILY STAR (Bangl.), May 11, 2010; Waris & Latif, *supra* note 1, at 248.

<sup>91</sup> Tipu, *supra* note 19.

<sup>92</sup> See the Finance Act of 2020 (Bangl.), §§ 16–19 in particular.

<sup>93</sup> See Moinul Islam, *Stopping Capital Smuggling Requires Sincerity in Curbing Corruption*, BONIK BARTA (Bangl.), June 16, 2021, at Editorial.

committing serious violent crimes, financing terrorism, punishing honest taxpayer, declining revenue in the long run, exposing the country's shallow securities market to volatility, driving out honest income earners from the property market, widening the gap between the rich and the poor, and harming the nation. Discussions of some of these negative impacts ensue.

### B. Increase in Corruption

There is a unanimous view that defining corruption by use of a single concept is a difficult task because it is "a complex and transversal phenomenon."<sup>94</sup> Corruption is defined as the "misuse of entrusted power or responsibility for any private benefit of self or others."<sup>95</sup> As articulated by the UN, "[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."<sup>96</sup> Corruption has increased ominously in Bangladesh. Critics blame the government's flawed policy of indemnifying the money launderers and heartening them by offering whitening opportunities, which contributes to increased corruption and serves as a stimulus for prospective wrongdoers.<sup>97</sup>

Corruption is sometimes classified into two categories: petty and grand. The former refers to corrupt practices by low level government officials, while the latter denotes illegal activities of high level public servants and politicians committing such acts usually for larger amounts of money.<sup>98</sup> Some scholars explain that grand corruption occurs at the highest levels of government "often at the behest or blessings of the powers" and that such treacherous conduct typically remain unchallenged, and wrongdoers are exonerated from

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<sup>94</sup> Dulce M. Santana Vega, *The Fight against Corruption in Europe: Lights and Shadows*, 55 J. CRIMIN. & CRIM. L. 242, 242 (2017).

<sup>95</sup> Kempe Ronald Hope, Sr., CORRUPTION AND GOVERNANCE IN AFRICA: SWAZILAND, KENYA, NIGERIA 2-3 (2017).

<sup>96</sup> United Nations Convention Against Corruption, Oct 31, 2003, 2349 U.N.T.S. 41.

<sup>97</sup> Zafarullah & Huque, *supra* note 10, at 63.

<sup>98</sup> See, e.g., Arvind K. Jain, *Corruption: A Review*, 15 J. ECON. SURV. 71, 73 (2001).

potential legal sanctions.<sup>99</sup> Grand corruption is particularly pervasive in that it is committed by high-ranking public officials who regard themselves above the reach of law, believing that they may freely engage in corrupt practices.<sup>100</sup> This happens in violation of the concept of the supremacy of law, which is an integral element of the “rule of law.”<sup>101</sup> Corruption is said to be intertwined with the supremacy of law because those who consider themselves above the law are likely to disobey it.<sup>102</sup> Many scholars thus argue that “[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law.”<sup>103</sup>

Petty corruption, though it typically involves small amounts of money, has substantial ramifications for the economy and the public.<sup>104</sup> As many as 72 percent of the people in Bangladesh believe that government corruption is a big problem ultimately halting economic progress. In March 2021, the past Chairman of the ACC stated, “it is not worth our time denying that corruption in Bangladesh persists in a wider expanse.”<sup>105</sup> The increase in corruption can be perhaps best reflected in the TI’s yearly reports of the Corruption Perception Index (CPI) on Bangladesh as cited earlier, which demonstrates an upward trend in corruption in Bangladesh. The TI uses a scale of 0 to 100 in determining the scores, meaning that 100 is the least corrupt and 0 is the most corrupt. Bangladesh’s score in the 2020 CPI released on January 28, 2021, 2020 was significantly worse than the previous year.<sup>106</sup> Further, its standing is deplorable not only in the global list but also in Asia. Amongst eight South Asian countries,

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<sup>99</sup> Zafarullah & Huque, *supra* note 10, at 62.

<sup>100</sup> John Mukum Mbaku, *Corruption and Democratic Institutions in Africa*, 27(2) TRANSNAT’L L. & CONTEMP. PROBS. 311, 367 (2018).

<sup>101</sup> For a brief outline of the “rule of law,” see Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 THE JUDGES J. 4 (2007); Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT’L L. 293 (2009).

<sup>102</sup> Mbaku, *supra* note 100, at 367.

<sup>103</sup> American Bar Association (ABA), *What Is The Rule of Law* (2018), at 5 (quoted in Mbaku, *supra* note 100, at 369). For a scholarly discussion of “grand corruption,” see Hazel S. Gray, *The Political Economy of Grand Corruption in Tanzania*, 114 AFRICAN AFFAIRS 382 (2015).

<sup>104</sup> Mbaku, *supra* note 100, at 327.

<sup>105</sup> Khan, *supra* note 7.

<sup>106</sup> Transparency International, *Corruption Perceptions Index 2020* (2020), <https://www.transparency.org/en/cpi/2020/index/nzl> (last accessed on June 30, 2021).

Bangladesh is ranked the second-most corrupt country defeating only war-torn Afghanistan; among all Asian countries, Bangladesh is ranked the fourth lowest, performing better than only Cambodia, Afghanistan, and North Korea.<sup>107</sup> It is obvious that existing BMHs will continue to make such money, which will stimulate others to follow suit, if such a regulatory laxity persists. Instead of threatening to not extend further amnesty, the incumbent Finance Minister in a pre-budget speech declared that the scope to legalize black money will remain in place indefinitely.<sup>108</sup> Such an assurance can only instigate and inspire accumulation of black money, rather than any legalization thereof. This is what is happening in practice, which is adding misery to the lives of honest taxpayers in different ways. One manifestation of this harm is the unaffordable housing market in Dhaka.

### C. Driving Out Honest Income Earners from the Property Market

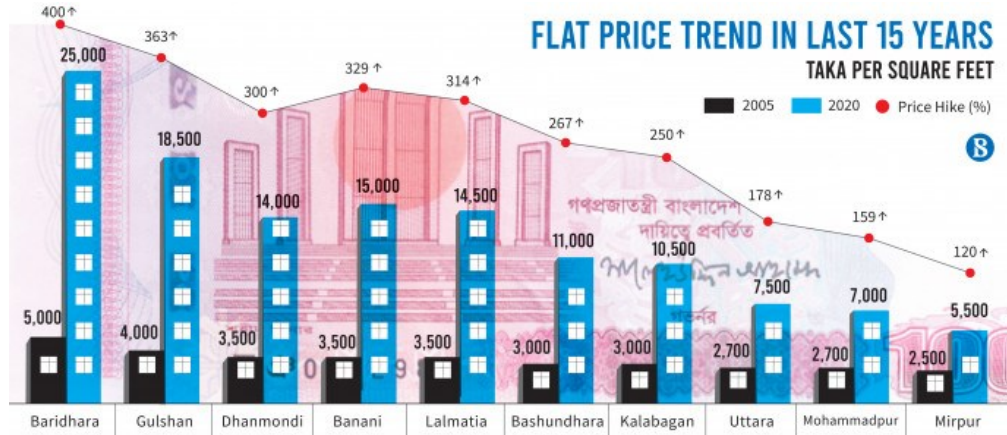
Housing is a problem in Dhaka because of unreasonably high prices, widely believed to be driven by black money. Over the past 15 years, the prices of residential apartments located in different areas of Dhaka are displayed in the Figure below:<sup>109</sup>

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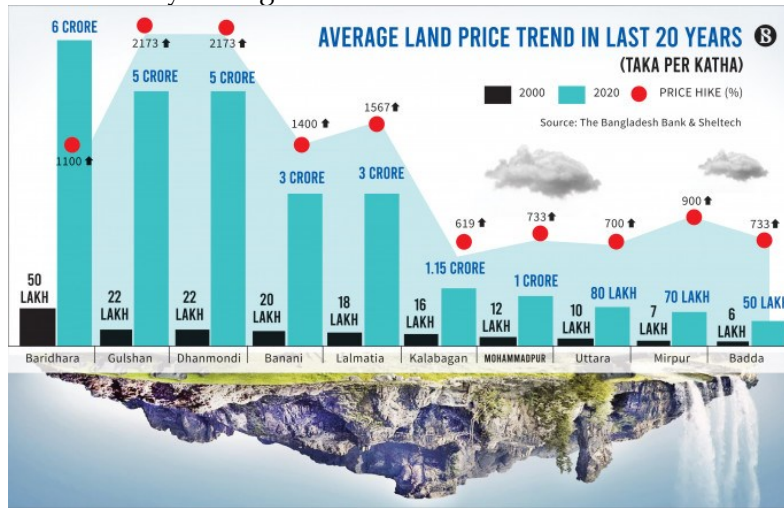
<sup>107</sup> *Id.*; *Bangladesh Slips 2 Steps in Corruption Index, Second-Worst in South Asia*, DHAKA TRIBUNE (Jan. 28, 2021), <https://www.dhakatribune.com/bangladesh/2021/01/28/bangladesh-ranks-12th-among-most-corrupt-countries>.

<sup>108</sup> Rahman, *supra* note 86.

<sup>109</sup> Abbas Uddin Noyon, *Apartment Price Rides on Scarce Land*, BUSINESS STANDARD (Feb. 28, 2021), <https://www.tbsnews.net/companies/real-estate/apartment-price-rides-scarce-land-208966>.



The average price for land is even more frustrating as demonstrated by the Figure that follows.<sup>110</sup>



These unjustified upward trends in real estate prices effectively push honest buyers out of the market, which is exclusively dominated by BMHs. This is evident from the fact that, after the declaration of an excessively generous amnesty in June 2020, most of the ready-for-occupants flats in Dhaka had quickly been sold out at a higher price, and the real estate businesses are now experiencing rising

<sup>110</sup> See *id.*

demands for apartments and flats.<sup>111</sup> Around 2,000 flats were sold between November 2020 to January 2021, and reportedly for which at least BDT 5,000 crore (US \$602.410 million) of black money came to the housing market.<sup>112</sup> Intriguingly, the public servants are the dominant clients for those houses.<sup>113</sup> Given the exorbitant property prices in the most popular suburbs of the capital city, commentators argue that honest taxpayers will be compelled to rent from dishonest owners to survive, which will make the rich even richer at the cost of unfair and unjust suffering of honest people and their families.<sup>114</sup> Money laundering is giving a further boost to corrupt practices. Expert scholars argue that a close nexus exists between corruption and money laundering because proceeds of corrupt activities can be cleaned up without any stigma of illegality, and laundering is one of the favorite means of doing it. This connection is termed an “incestuous relationship” between two evils.<sup>115</sup> In quest of the truth in this construction, the following section depicts the money laundering scenario in Bangladesh.

#### D. Increase in Money Laundering

Money laundering, as defined by GFI, is “the process of disguising the proceeds of crime and integrating it into the legitimate financial system.”<sup>116</sup> Money laundering denotes a process or a technique by which launderers clean up their “dirty money” accumulated from illicit activities to camouflage the origins of the money with the intention to make them appear to have derived from

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<sup>111</sup> Jagaran Chakma, *Ready Flats Almost Sold Out—Amnesty to Black Money Mainly Paves the Way*, DAILY STAR (Mar. 21, 2021), <https://www.thedailystar.net/business/news/ready-flats-almost-sold-out-2064093>.

<sup>112</sup> *Id.*

<sup>113</sup> Badrul Alam, *Booming Real Estate Business Even During Lockdown— Most of the Buyers are Government Employees*, BONIK BARTA, at 1 (June 17, 2021).

<sup>114</sup> See Solaiman, *supra* note 12.

<sup>115</sup> Nadim Kyriakos-Saad, Gianluca Esposito & Nadine Schwarz, *The Incestuous Relationship Between Corruption and Money Laundering*, 83 *Dans Revue Internationale De Droit Pénal* 161, 161-62 (2012).

<sup>116</sup> Global Financial Integrity, *Money Laundering* (May 26, 2021), <https://gointegrity.org/issue/money-laundering/>.

lawful sources.<sup>117</sup> The International Monetary Fund (IMF) defines it somewhat differently by describing that the commission of money laundering “requires an underlying, primary, profit-making crime—such as corruption, drug trafficking, market manipulation, fraud, or tax evasion—along with the intent to conceal the proceeds of the crime or to further the criminal enterprise.”<sup>118</sup>

Money laundering is on the rise in Bangladesh as revealed from the Basel AML Index 2020, which ranked it 38th among 141 countries,<sup>119</sup> recording a worsening move by seven places from its position in 2019.<sup>120</sup> More alarmingly, as disclosed in the annual report of Bangladesh Financial Intelligence Unit (BFIU), the number of reports on suspicious financial transactions and activities pertaining to money laundering has risen around 64 percent during the 2017–2018 financial year compared to that of the preceding year.<sup>121</sup> The BFIU annual report records that the total number of suspicious transaction report (STR) together with the suspicious activity report (SAR) was 3,878 in fiscal year 2017–2018 as opposed to 2,357 reports in fiscal year 2016–2017.<sup>122</sup> Correspondingly, Global Financial Integrity (GFI)—a Washington-based think tank—provides an account of massive amounts of laundered money of BDT 530,000 crore (US \$63.859 billion) from Bangladesh during 2005–2015, and it estimates that more than BDT 50,000 crore (US \$6.024 billion) is being siphoned off every year

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<sup>117</sup> I. Nyoman Gede Sugiarta & I. Putu Astawa, *Money Laundering in the Perspective of Local Culture and Banking Law in Indonesia*, 59 J.L. POL'Y & GLOBALIZATION 79, 79 (2017).

<sup>118</sup> IMF, *Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT)* (last visited on April 11, 2021), <https://www.imf.org/external/np/leg/amlcft/eng/>.

<sup>119</sup> Basel Institute on Governance, *Basel AML Index: 9th Public Edition Ranking Money Laundering and Terrorist Financing Risks around the World* (2020), [https://baselgovernance.org/sites/default/files/2020-07/basel\\_aml\\_index\\_2020\\_web.pdf](https://baselgovernance.org/sites/default/files/2020-07/basel_aml_index_2020_web.pdf). (last visited on June 22, 2021).

<sup>120</sup> Mohsin Bhuiyan & Mursalin Hossain, *Money Laundering Risk Increases in Bangladesh*, BUS. STANDARD (July 23, 2020).

<sup>121</sup> BFIU FY18 REPORT — *Suspicious Financial Transaction Rises 64pc*, New Age (May 15, 2019) [hereinafter *BFIU*], <https://www.newagebd.net/article/72433/suspicious-financial-transaction-rises-64pc>. (Reports subsequent to this one are not publicly available. However, the Basel AML Index 2020 affirms further deterioration).

<sup>122</sup> *Id.*



from the country.<sup>123</sup> The Executive Director of TIB comments that a lack of “political will” is contributing to increasing money laundering.<sup>124</sup> Criminals generally launder the proceeds of crime because they may have difficulties in using the money in a legitimate way as they are unable to explain the source of that money. Once such proceeds are laundered, they become difficult to distinguish between the legally earned money and that wangled from illegitimate sources, thus criminals can use the money safely without detection.<sup>125</sup> Moreover, the host countries of the laundered money may not ask about sources at all. However, the main sources of the money laundered as underlined by the authorities in Bangladesh are corruption, drug trafficking, and human trafficking.<sup>126</sup>

Money laundering can be committed by transferring the illicit money directly or by using trade invoices. Trade-based money laundering (TBML) is a popular means of committing this offense. The Asia-Pacific Group on Money Laundering defines TBML as being “the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their origins.”<sup>127</sup> Misinvoicing is the prime tool used for committing TBML. The GFI identifies four primary reasons for trade misinvoicing: (i) money laundering as the first and foremost reason for which criminal and corrupt officials hide their offenses generating the disputed money; (ii) evading tax and custom duties by underreporting the value of goods and services underlying the invoice; (iii) claiming tax incentives from the destination of laundered money as a number of countries offers lucrative tax benefits to local exporters taking advantage of which dishonest exporters tend to over-reporting their exports; and (iv) avoiding capital control as many countries put restrictions on incoming and outgoing amounts of capital.<sup>128</sup>

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<sup>123</sup> Abbas Uddin Noyon, *3,358 People Whiten Untaxed Money*, BUS. STANDARD (Nov. 30, 2020).

<sup>124</sup> Iftekharuzzaman, *Money Laundering Goes on Because of a Lack of Political Will*, BUS. STANDARD (June 8, 2021).

<sup>125</sup> Global Financial Integrity, *supra* note 116.

<sup>126</sup> Waris & Latif, *supra* note 1, at 244.

<sup>127</sup> Global Financial Integrity, *Trade Misinvoicing* (Apr. 11, 2021), <https://gfin integrity.org/issue/trade-misinvoicing/>.

<sup>128</sup> *Id.*

Eventually, money laundering with respect to trade misinvoicing is certainly the falsification of trade documents to masquerade the punishable truth underlying the transaction, and to enable the counterpart international trader to ostensibly legitimize the possession of the property shifted.<sup>129</sup> Trade misinvoicing is a useful means on which launderers rely to commit the primary crime, and then they deliberately hide the illegality attached to the laundered property through a series of subsequent transactions.<sup>130</sup> Adebayo Iyanda argues that the motivations of trade misinvoicing should be considered “predicate offenses to enable prosecutors to bring additional charges of money laundering against the fraudulent operations of commercial businesses.”<sup>131</sup> Iyanda adds that money laundering is illegal because somewhere at the origin, movement or use of the money underlying a given transaction broke laws.<sup>132</sup> The offense of money laundering is constituted as soon as the true nature of the transfer of funds from one country to another is concealed and the assets transferred are proceeds of a crime.<sup>133</sup> The true nature of ill-gotten property obscured in a bid to make it seem licit.<sup>134</sup> As recognised by the European Union (EU), the proceeds can be of any types of property encompassing:

...that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.<sup>135</sup>

The illegal practice of misinvoicing misrepresents the price or quantity of imports or exports by accumulating money in foreign jurisdictions to participate in tax evasion, avoid customs duties, and

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<sup>129</sup> Adebayo E. Iyanda, *The Role of Misinvoicing in the Money Laundering Cycle*, 3 J. ANTI-CORRUPTION LAW 144, 168 (2019).

<sup>130</sup> *Id.* at 158.

<sup>131</sup> *Id.* at 161.

<sup>132</sup> *Id.* at 150.

<sup>133</sup> *Id.* at 153-54.

<sup>134</sup> *Id.* at 157-58.

<sup>135</sup> DIRECTIVE 2014/42 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, Paragraph 11 of the Preamble, 2021 O.J. (L 127) 39.

transfer illicit money.<sup>136</sup> This ill-practice is executed by manipulating the customs invoices or other incoming customs documents, such as receipts, bills of lading, bills of sale, titles, and export certificates.<sup>137</sup> Apart from professional traders, criminals also make use of misinvoicing to launder the proceeds of their crimes.<sup>138</sup> Regardless of the actual motivation, the process of misinvoicing embroils money laundering in that illegal activities are disguised by layers of transactions engineered to make property appear legitimate.<sup>139</sup> These narratives correspond to the traditional theory of a money laundering scheme, which essentially necessitate the existence of prohibited profits preceding the perpetration of money laundering.<sup>140</sup>

In Bangladesh, the description of money laundering provided in s2(v) of the MLPA 2012 conforms to the definitions elucidated above. Also, trade misinvoicing is a critical concern in Bangladesh because 80 percent of the total amount of money laundering is committed in the manner reminiscent of international trades.<sup>141</sup> Bangladesh does have money laundering legislation in place since 2002. Nonetheless, a huge amount of money is siphoned off to foreign destinations every year mainly because of a lack of enforcement of the law. The finance minister recently stated that the government will amend the law to identify money launderers,<sup>142</sup> although many of the known launderers remain untouched.<sup>143</sup> The ACC is in operation alongside AML and anti-corruption laws, but the watchdog has failed to act fruitfully to meet people's expectation, as admitted by its

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<sup>136</sup> Iyanda, *supra* note 129, at 146 (internal citation omitted).

<sup>137</sup> Iyanda, *supra* note 129, at 147 (internal citation omitted).

<sup>138</sup> Global Financial Integrity, *supra* note 127.

<sup>139</sup> Iyanda, *supra* note 129, at 157-58.

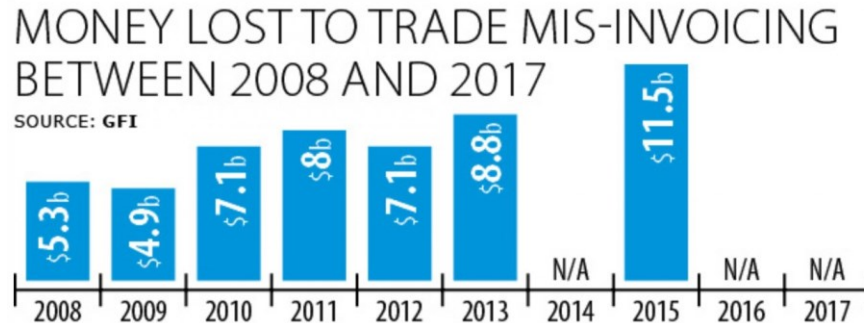
<sup>140</sup> *Id.*

<sup>141</sup> Mosharraf Hossain Bhuiyan, *Analysis - Money Laundering a Major Obstacle to the Economic Development of the Country*, BONIK BARTA (July 29, 2020).

<sup>142</sup> Mohsin Bhuiyan & Muhammad Nafis Shahriar Farabi, *Bangladeshi Individuals' Deposits in Swiss Banks Rise 62% in 2020*, BUS. STANDARD (June 17, 2021), <https://www.tbsnews.net/bangladesh/bangladeshi-individuals-deposits-swiss-banks-rise-62-2020-262540>.

<sup>143</sup> See TBS Report, *No List of Money Launderers. Really?*, BUS. STANDARD (June 9, 2021), <https://www.tbsnews.net/features/panorama/no-list-money-launderers-really-257983>.

erstwhile Chairman. The extent of TBML from Bangladesh can be evidenced by the GFI Report below.<sup>144</sup>



A study of GFI titled “Illicit Financial Flows to and from 148 Developing Countries: 2006-2015,” released in January 2019, uncovered that around US \$5.9 billion was laundered from Bangladesh in 2015 through trade misinvoicing.<sup>145</sup> The GFI added that a total of US \$81.74 billion has been laundered over a period of 11 years starting in 2005.<sup>146</sup> These figures confirm an upward trend in such proscribed transactions when compared with the 2017 report of GFI.<sup>147</sup> The foregoing shows the link between corruption and money laundering in that money laundering increased with the escalation in corruption. Experts spell out that “corruption embracing collusion, conflict of interest, and money laundering may remain hidden from the eyes of the common people who do not perceive or experience its immediate impact, but their ramifications run through the body-

<sup>144</sup> Star Business Report, *Capital Flight through Trade Mis-Invoicing Staggeringly High*, DAILY STAR (Mar. 5, 2020) <https://www.thedailystar.net/business/news/capital-flight-through-trade-mis-invoicing-staggeringly-high-1876546>.

<sup>145</sup> Jasim Uddin, *\$81.74b Siphoned in 11 Years from Bangladesh*, NEW AGE (Jan. 29, 2019), <https://www.newagebd.net/article/63160/8174b-siphoned-in-11-years-from-bangladesh>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

politic.”<sup>148</sup> Money laundering is directly related to depositing money in overseas accounts in some instances. Swiss banks are a popular destination to that end.

#### E. Increase in Deposits by Bangladeshis in Swiss Banks

Many Bangladeshis deposit their black money in Swiss banks. These deposited figures are noteworthy, as demonstrated in the Table below covering from 2004 to 2019.<sup>149</sup>

Year	Deposited in Crore of BDT	Deposited in Millions of US\$ (approx.) US \$ @BDT83
2004	365	US\$43.976
2005	863	US\$103.976
2006	1,106	US\$133.253
2007	2,187	US\$263.494
2008	952	US\$114.699
2009	1,326	US\$159.760
2010	2,100	US\$253.012
2011	1,355	US\$163.253
2012	2,038	US\$245.542
2013	3,311	US\$398.516
2014	4,539	US\$546.867
2015	4,977	US\$599.639
2016	5,883	US\$708.795
2017	4,288	US\$516.627
2018	5,498	US\$662.410
2019	5,367	US\$646.627
2020	5,203	US\$626.867

<sup>148</sup> Zafarullah & Huque, *supra* note 10, at 62 (internal citation omitted).

<sup>149</sup> Shawkat Hossain, *Why and How to Siphon off Money*, Prothom Alo (Bangl.), July 12, 2020, at Economy (information from 2004-2019); *see also* Trade Desk, *Bangladeshis Deposited BDT 5,203 Crore in Swiss Bank*, Prothom Alo (Bangl.), June 18, 2021, at Economy (information for 2020 only).

The amounts of money flying from Bangladesh to Swiss banks recorded in the above Table show mostly an upward trend, and all figures individually are very large, given the size of the country's economy. The amount sent out in 2008 reconfirms that the "fear-factor" works, as evidenced by the highest amount whitened and the lowest amount, since 2006, deposited in Swiss banks. However, the amounts deposited in 2020 are slightly low due to the worldwide pandemic lockdown during which an increased amount was whitened locally.

The money laundered or deposited in Swiss banks is primarily generated by offensive conduct, which includes "looting" public deposits from local banks under the guise of loans by influential borrowers. A recent US study on the effects of local public corruption on lending finds that such "corruption exerts a negative and significant effect on lending in the US."<sup>150</sup> Corruption does reduce transparency and performance of firms.<sup>151</sup> The section that ensues focuses on the black money accumulated through borrowing from banks in Bangladesh, leaving several financial institutions in a critically unsustainable condition owing large amounts of defaulted loans.

#### F. Increase in Defaulted Loans

Capital flights and defaulted loans are inseparably connected to each other in the context of Bangladesh.<sup>152</sup> The current government deserves much appreciation for notable successes in several sectors, which have been overshadowed by the manifested failure in the banking sector. A few people have miserably "looted" almost all state-owned banks in the country. The situation is that money goes out from banks but does not come back, let alone receiving interests on those

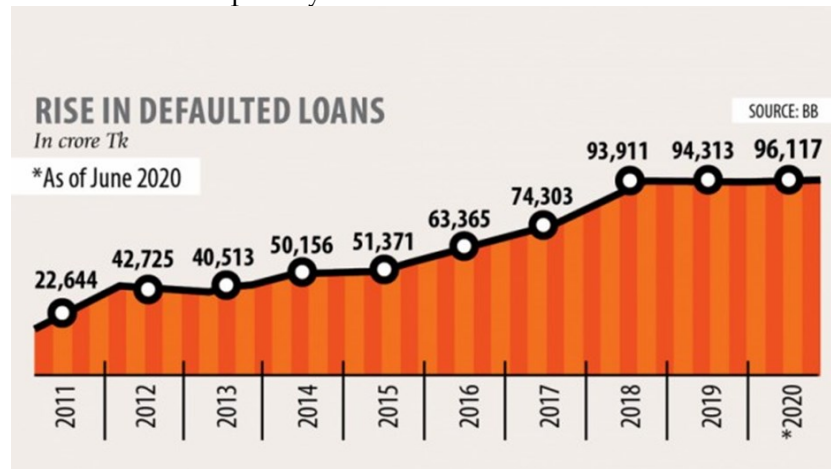
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<sup>150</sup> Theodora Bermpei, Antonios Nikolaos Kalyvas, & Leone Leonida, *Local Public Corruption and Bank Lending Activity in the United States*, 171 J. BUS. ETHICS 73, 95 (2021).

<sup>151</sup> See Nishant Dass, Vikram Nanda & Steven Chong Xiao, *Public corruption in the United States: Implications for Local Firms*, 5 REV. CORP. FINANCE STUD. 102 (2016); Nerissa C. Brown, Jared D. Smith, Roger M. White & Chad J. Zutter, *Political Corruption and Firm Value in the U.S.: Do Rents and Monitoring Matter?*, 168 J. BUS. ETHICS 335 (2021).

<sup>152</sup> Islam, *supra* note 93.

loans. The government has kept those banks running by feeding stimulus from taxpayers' money as life-saving injections. The sum of the defaulted loans in the banking sector has increased by 417 percent against a 312 percent increase in the amount of credit during 2009-2019.<sup>153</sup> A lawmaker, raising this issue in Parliament, stated that directors are taking money from banks, laundering millions of BDT, and also sending money abroad through hundi, which contributes to the awfully high amounts of defaulted loans.<sup>154</sup> TIB blames central bank failure, political interference, and the influence of businesspeople on the vulnerability of financial institutions.<sup>155</sup> The gradual rise of the defaulted loans are portrayed below.<sup>156</sup>



The *exponential* surge in defaulted loans occurred in Bangladesh at a time when such loans are decreasing in other Asian countries, as shown below.<sup>157</sup>

<sup>153</sup> *Defaulted Loans Rise by 417pc Since 2009: Study*, NEW AGE (Sept. 22, 2020), <https://www.newagebd.net/article/116978/defaulted-loans-rise-by-417pc-since-2009-study>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Reining in Loan Default: Central Bank Now 'Ineffective'*, DAILY STAR (Sept. 23, 2020), <https://www.thedailystar.net/frontpage/news/reining-loan-default-central-bank-now-ineffective-1965825>.

<sup>157</sup> News Desk, *Rates of Defaulting Loans Decreasing All Over the World, Increasing in Bangladesh*, AMADER SOMOY (June 18, 2019).

Country	Rates of Defaulted Loans in Percent	Country	Rates of Defaulted Loans in Percent
Bangladesh	11.87	China	1.8
India	9.3	Nepal	1.7
Pakistan	8.2	Malaysia	1.5
Sri Lanka	3.4	Singapore	1.3
Thailand	3	Japan	1.1
Indonesia	2.5	South Korea	0.7
Philippines	2.1	Hong Kong	0.5
Vietnam	1.9	Taiwan	0.2

Bad loans continue to escalate further. As per the central bank data, the total defaulted loans jumped to BDT 95,085 crore (US \$11.456 billion) as of March 31, 2021 from BDT 88,283 crore (US \$11.035 billion) as of December 31, 2020.<sup>158</sup> Expressing frustration regarding this increase, Dr AB Mirza Azizul Islam, a high profile economist, comments that the surge of toxic loans is so high even after underreporting, and adds that the deterioration can be attributed to the fact that “the defaulters have been awarded with policy support one after another . . . When the defaulters are provided with so many scopes to remain as regular borrowers without making payments, why would they repay their loans?”<sup>159</sup> The executive director of the country’s Policy Research Institute opined that the reason for such an increase in the first quarter of 2021 is “the expiry of the regulatory embargo on downgrading loans in December 2020, however, he also predicted that such loans are set to increase even further in the coming months.”<sup>160</sup> Almost all critiques point towards the undue incentives offered to the defaulters, one of which is waiving interests instead of

<sup>158</sup> H.M. Murtuza, *Defaulted Loans Surge by Tk 6,802cr*, NEW AGE (June 16, 2021), <https://www.newagebd.net/article/140874/defaulted-loans-surge-by-tk-6802cr>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



confiscating their assets.<sup>161</sup> An account of such waivers by eight state-owned commercial and specialized banks shows that they alone have waived BDT 3,203 crore (US \$386 million) over a period of five years ending in 2016.<sup>162</sup> Showing even more generosity to the loan defaulters, the amount of waived interests was BDT 3,400 crore (US \$409.6 million) for the subsequent two years (2017-2018).<sup>163</sup>

A culture of loan defaults has developed over the years mainly because of government favors for these wrongdoers.<sup>164</sup> It can be reasonably believed that these undue favors have contributed to the erosion of public confidence in the governance system.<sup>165</sup> The government is so sympathetic to defaulters that the central bank issues a circular by allowing them to get their credit rescheduled at low interest rates as well as offering new loans to the defaulters. The circular was legally challenged, and the Supreme Court of Bangladesh (HCD)<sup>166</sup> halted that the circular to grant new loans to the defaulters and observed that “giving such privilege to loan defaulters is tantamount to feeding snakes with milk and banana” and that the circular creates scope of laundering BDT 100,000 crore (US \$12.048 billion).<sup>167</sup> The Court further adds that the central bank is discriminatorily making genuine businesspeople pay 14 to 15 percent interest.<sup>168</sup> Notably, thousands of crores of borrowed money are being laundered and defaulters are hiding overseas,<sup>169</sup> and most of these defaulters are reported to be laundering borrowed money with the

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<sup>161</sup> Golam Maula, *Customers Take the Opportunity of Interest Waiver, the Loan Money is Not Recovered*, BANGLA TRIBUNE (Sept. 22, 2018, 10:13 AM), <https://www.bangla-tribune.com/245021>.

<sup>162</sup> *Id.*

<sup>163</sup> Staff Reporter, *10 Thousand Crore Interest Waiver in Ten Years*, BONIK BARTA (May 29, 2019).

<sup>164</sup> See Murtuza, *supra* note 158.

<sup>165</sup> See generally Leslie Holmes, *CORRUPTION: A VERY SHORT INTRODUCTION* 62 (Oxford Univ. Press 2015).

<sup>166</sup> *HC Halts Privilege to Loan Defaulters*, DAILY SUN (May 22, 2019, 12:00 AM), <https://www.daily-sun.com/arcprint/details/394197/HC-halts-privilege-to-loan-defaulters/2019-05-22>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Money Laundering Big Problem for Country: ACC*, NEW AGE (Mar. 11, 2021), <https://www.newagebd.net/article/132310/money-laundering-big-problem-for-country-acc>.

help of directors appointed on political consideration and top executives of state-owned banks.<sup>170</sup> A former deputy governor of Bangladesh Bank remarked that “[d]efaulted loans are rising as the government and the central bank are persistently encouraging defaulters,” and added that such an encouragement is unprecedented in the world other than Bangladesh.<sup>171</sup> This is happening in a situation where almost all of the state-owned banks are suffering from minimum capital shortfalls.<sup>172</sup> Banks are supposed to maintain 10 percent capital against their risk weighted assets, and in accordance with s13(7) of the Bank Company Act 1991 (Bangladesh), such a shortfall in capital is punishable, though no punitive action has been noticed thus far.<sup>173</sup> Hence, an inference can be plausibly drawn that corruption and money laundering are contributing to the ruination of state-owned financial institutions. The black money is also being used to purchase second homes in other countries.

#### G. Increase in Capital Flights and Buying Second Home Overseas

Many Bangladeshis buy their second homes overseas, but where does the money for such purchases come from? The NBR Chairman in 2019 disclosed that less than one-third of potentially eligible taxpayers pay taxes.<sup>174</sup> The immediate past Chairman of the

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<sup>170</sup> See *id.*; *Laundering Tk 236 Crore: ACC sues 23*, DAILY STAR (Nov. 27, 2020), <https://www.thedailystar.net/backpage/news/laundering-tk-236-crore-acc-sues-23-01725>.

<sup>171</sup> A.K.M. Zamir Uddin, *Defaulted Loans Hit All-Time High*, DAILY STAR (Nov. 28, 2019), <https://www.thedailystar.net/business/news/defaulted-loans-hit-all-time-high-1832884>.

<sup>172</sup> H.M. Murtuza, *Capital Shortfalls in 10 Banks Hit Tk 28,950cr in Dec-End Quarter*, NEW AGE (Mar. 1, 2021), <https://www.newagebd.net/article/131520/capital-shortfalls-in-10-banks-hit-tk-28950cr-in-dec-end-quarter>.

<sup>173</sup> *Id.*

<sup>174</sup> Shah Husain Imam, *Two-Thirds of Eligible Taxpayers Evade Tax, NBR Boss Tells Seminar*, FIN. EXPRESS (Apr. 16, 2019), <https://thefinancialexpress.com.bd/economy/two-thirds-of-eligible-taxpayers-evade-tax-nbr-boss-tells-seminar-1555387650>.

ACC termed this “a shame of the nation.”<sup>175</sup> Only one percent of people pay tax, and Bangladesh also lags far behind the neighboring countries in terms of tax-GDP ratios.<sup>176</sup> According to the World Bank, Nepal has the highest tax-GDP ratio in South Asia at about 19 percent, followed by Bhutan 16 percent, India 12 percent, Sri Lanka 11.6 percent, Pakistan 11 percent, Afghanistan 9.9 percent and the Maldives 9.1 percent.<sup>177</sup> Unfortunately, the tax-GDP ratio in Bangladesh is only 8 percent which has dropped to 7 percent due to Covid-19, pushing the country to the situation of 14 years back.<sup>178</sup>

In such a tax-payment scenario, many Bangladeshis are paradoxically making their second homes in Asia-Pacific countries.<sup>179</sup> Their list includes corrupt government officials, politicians, bank-insurance owners, middle-tier businessmen and construction contractors.<sup>180</sup> Though far behind others in terms of paying taxes, Bangladesh ranked third amongst all the countries participating in the “Malaysia My Second Home (MM2H)” project till 2016.<sup>181</sup> A total of 4,135 Bangladeshis have taken part in the MM2H project. That number falls after Chinese and British citizens’ purchase of Malaysian homes.<sup>182</sup> Perhaps more strangely, Bangladeshis have developed a posh suburb in Toronto, called “Begum Para” (Wives’ Suburb), a place where the residents are dominantly wives (Begum), and ‘Para’ means Suburb.<sup>183</sup> Wives and children of many Bangladeshi millionaires live in luxurious houses there, and their husbands stay in Bangladesh for

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<sup>175</sup> *Only 1.2mm Pay Income Tax Return*, DAILY SUN (Feb. 17, 2020), <https://www.daily-sun.com/arcprint/details/462757/Only-1.2mn-pay-income-tax-return/2020-02-17>.

<sup>176</sup> Jasmin Uddin, *Nation’s Tax-GDP Ratio Lowest in South Asia*, NEW AGE (Apr. 4, 2021), <https://www.newagebd.net/article/134383/nations-tax-gdp-ratio-lowest-in-south-asia>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Monjurul Islam, *Bangladeshis are Building a Second Home in Asia-Pacific*, BONIK BARTA (Jan. 20, 2020).

<sup>180</sup> *Only 12 Lakh People Pay Taxes, It’s a Shame*, BONIK BARTA (Feb. 17, 2020).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> “*Begum Para*” in Canada: ACC for List of Officials Who Own Houses, DAILY STAR (June 18, 2021), <https://www.thedailystar.net/backpage/news/begum-para-canada-acc-list-officials-who-own-houses-2113121>.

work until retirement. The expatriate Bangladeshis of Toronto protested alleged money launderers demanding legal actions against them.<sup>184</sup>

As disclosed by the current Foreign Minister of Bangladesh, based on the government's secret information, "most of the houses there have been purchased by government officials." Some are retired Bangladeshi government officials, while others are serving officials, and those officials have surpassed politicians in buying houses there.<sup>185</sup> Incredibly, one of those officials, Prashanta Kumar Halder alias PK Halder, has misappropriated at least BDT 10,200 crore (US \$10229 billion) from four non-banking financial institutions and has purchased properties and opened a business in Canada.<sup>186</sup> Interestingly, the Finance Minister does not have the list of money launderers although he recently asked Parliament opposition lawmakers for it.<sup>187</sup> The Supreme Court of Bangladesh (HCD) has asked for a full list of individuals who have bought homes abroad, but the ACC failed to provide such list.<sup>188</sup> It is widely believed that the government is reluctant to disclose the identities of such individuals in anticipation of political repercussion.

The foregoing discussions demonstrate that black money, even if whitened, goes mostly to unproductive sectors (e.g., housing, a small amount in share market, money laundering), which does not contribute to new employment opportunities. Instead, it causes securities market bubbles, which erode public confidence in the market and force investors to stay away from the market.<sup>189</sup> Therefore,

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<sup>184</sup> *Bangladeshis in Canada stage protest over money laundering*, BUS. STANDARD (Mar. 9, 2020), <https://www.tbsnews.net/bangladesh/corruption/bangladeshis-canada-stage-protest-over-money-laundering-53731>.

<sup>185</sup> Golam Mortoza, "Begum Para": Mostly Govt Officials Have Bought Houses in Canada, Says Foreign Minister, DAILY STAR (Nov. 20, 2021), <https://www.thedailystar.net/country/news/begum-para-canada-mostly-govt-officials-have-bought-houses-canada-says-foreign-minister-1998341>.

<sup>186</sup> "Begum Para" in Canada: ACC for List of Officials Who Own Houses, *supra* note 183.

<sup>187</sup> *No List of Money Launderers. Really?*, *supra* note 143.

<sup>188</sup> TBS REPORT, *If You Know, Give Names of Money Launderers to Us: Finance Minister*, BUS. STANDARD (June 8, 2021), <https://www.tbsnews.net/bangladesh/corruption/provide-us-names-money-launderers-if-you-know-finance-minister-257281>.

<sup>189</sup> Waris & Latif, *supra* note 1, at 251.

the government's claim to justify such amnesties is unfounded.<sup>190</sup> The truth is that black money normally circulates in both the formal economy and the underground economy,<sup>191</sup> which is evident in the activities of BMHs. One can hardly find economic development by offering amnesty in favor of BMHs. Rather, such action stimulates both honest and dishonest people alike to be corrupt. Hence, it is a "very bad system" as observed by Professor Muinul Islam, a well-known economist in Bangladesh.<sup>192</sup> Consistently, Zahid Hussain, a former lead economist of the World Bank's Dhaka office, admits that the government may be able to collect some revenues and get the amount invested in the short term by offering whitening opportunities.<sup>193</sup> He however asserts that the continuation of this offer for years will eventually reduce the revenue by discouraging honest taxpayers, and therefore he adds that such a practice is "not only unfair to honest taxpayers but also harmful for tax revenue mobilization and investment efficiency in the long run."<sup>194</sup>

Despite such logical arguments, the Finance Minister has recently declared that the amnesty will remain in place as long as black money exits.<sup>195</sup> Several leading economists have immediately lambasted such a blanket immunity and an advance license to both present and future BMHs, breaking the hearts of honest taxpayers.<sup>196</sup> These economists further add that "[w]e have lost at least twice the amount we have collected" and warned that it will lead to a collapse of the tax administration.<sup>197</sup> Some other businesspersons, economists, and activists have demanded discontinuation of the facility by arguing that "it goes against the spirit of tax justice, integrity, fairness and the constitution," and further add that "[s]uch an indemnity discourages honest taxpayers from paying tax while it rewards taxpayers who

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 247.

<sup>192</sup> Rejaul Karim Byron, Dwaipayana Barua & Md Fazlur Rahman, *Money Whitening Scope Does More Harm Than Good*, DAILY STAR (Jan. 8, 2021), <https://www.thedailystar.net/business/news/money-whitening-scope-does-more-harm-good-2024245>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Rahman, *supra* note 96.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

evade tax.”<sup>198</sup> Another distinguished economist and a member of the United Nations Committee for Development Policy, Dr Debapriya Bhattacharya, said that the whitening opportunities have diluted “the gravity of offenses that are being committed to evade tax or to have ill-gotten gains,”<sup>199</sup> while a former Chairman of the NBR stipulates that it debilitates the government’s right to collect taxes from its taxpayers.<sup>200</sup>

Hence, it is obvious that the indemnity should be discontinued, and the flow of black money must be controlled in the interest of the country. The generation of black money can only be stopped, at least to a large extent, by preventing commission of both the original crimes creating this money (e.g., corruption) and predicate crimes committed to utilizing the money (e.g., money laundering). Although Bangladesh has implemented some initiatives to halt the spread of black money, such initiatives are many times implemented unfairly. The discussions that follow explore certain measures that can be undertaken to effectively address the black money problem in Bangladesh and abroad.

### III. MEASURES MUST BE TAKEN TO PREVENT THE EXPLOITATION OF BLACK MONEY

#### A. Checking Corruption

A major source of black money is corruption, which is a ‘ubiquitous and deeply rooted’ problem in Bangladesh.<sup>201</sup> The extent of such a problem can be depicted by a recent interaction between a police officer and a judge’s wife. In this scenario, a police officer went to the home of one of Bangladesh’s Supreme Court justices to verify the passports of two of the judge’s daughters. The police officer requested a bribe of BDT 2000 (US \$24.10) from the judge’s wife. Subsequently, the officer was sued for offensive criminal conduct.<sup>202</sup>

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<sup>198</sup> Jasim Uddin, *Undisclosed Money -10,404 People Legalize Tk 14,459cr Untaxed Money in Bangladesh*, NEW AGE (May 30, 2021).

<sup>199</sup> *Whitening Black Money: Don’t Give the Scope Next Fiscal Year—Experts Urge Gov’t*, *supra* note 65.

<sup>200</sup> *Bubble in Market Apprehended as Tk 100b Legalized in Six Months*, *supra* note 64.

<sup>201</sup> Zafarullah & Huque, *supra* note 10, at 57.

<sup>202</sup> Bonik Barta Online, *Demand for Bribe in Passport Verification at Judge’s House, Police Imprisonment*, BONIK BARTA (Mar. 21, 2019).

Studies have shown that at least 65 percent of urban people and 68 percent of rural people have experienced the need to partake in bribery when seeking services from public authorities.<sup>203</sup>

Amid the difficulty in separating white and black money, institutions engaged in the prevention of corruption should be established, however, Bangladesh lacks the resources to develop such programs, ultimately resulting in the existence of inexorable black money.<sup>204</sup> Essentially, to control corruption, the government must require the creation of a strong anti-corruption regime tasked with protecting society from “this plague.”<sup>205</sup> Within this concept, no anti-corruption agency will be effective at combatting this evil without the government’s good governance, openness, and overall transparency.<sup>206</sup> In fact, both transparency and openness are believed to discourage individuals from indulging in corrupt activities.<sup>207</sup> More importantly, transparency and openness can strengthen “appropriate mechanisms of punishment within the legal, administrative, and electoral fields.”<sup>208</sup> Above all, the most important requisite needed to combat corruption is the political will of the government. In a comparative analysis of five Asian countries, Professor Quah found that the success of Singapore’s Corrupt Practices Investigation Bureau can be attributed to the political will and conducive policies of the national government.<sup>209</sup> Consistently, Mbaku suggested four requirements to control the spread of corruption: <sup>210</sup> (1) the State should inhibit public servants from engaging in corrupt activities and preclude them from working with impunity; (2) the State must have institutions, such as an independent press, that will act responsibly to assist enforcement agencies in the gathering of evidence against unlawful actors; (3) the judiciary must be an be independent and non-

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<sup>203</sup> Monwarul Islam, *Paradox of Growth and Corruption*, NEW AGE (Dec. 9, 2020), <https://www.newagebd.net/article/123781/paradox-of-growth-and-corruption>.

<sup>204</sup> Eresh Omar Jamal, *How Black Money Can and Cannot be Reduced*, DAILY STAR (July 24, 2019), <https://www.thedailystar.net/opinion/the-overton-window/news/how-black-money-can-and-cannot-be-reduced-1775890>.

<sup>205</sup> Kyriakos-Saad, *supra* note 115, at 169.

<sup>206</sup> Mbaku, *supra* note 100, at 360.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Quah, *supra* note 29, at 143.

<sup>210</sup> Mbaku, *supra* note 100, at 316.

corrupt body of government; and (4) the State must guarantee its citizens open and transparent communication to enable the people to serve as a check on the exercise of goof governance.<sup>211</sup> Mbaku adds that Northern European countries as well as the US and Canada have followed these four measures in dealing with corruption successfully.<sup>212</sup> His four points are worthy of consideration with respect to the extent of corruption in Bangladesh in strengthening its anti-corruption institutions.

#### B. Empowering the Anti-Corruption Commission

The ACC is popularly known as the “toothless tiger”<sup>213</sup> because of its manifestly limited success in fighting corruption within the borders of Bangladesh. The ACC was formed in 2004 under the ACCA 2004 to comply with “isomorphic pressure” from donors; thus, it has created a “mimicry movement.”<sup>214</sup> Policymakers in Bangladesh conceded to donors’ pressure and brought about cosmetic legal reforms without any genuine commitment to implement them.<sup>215</sup> This became evident when the ACC’s independence became limited through an amendment to the ACCA 2004 in 2013,<sup>216</sup> which required government approval for prosecuting public officials for alleged corruption. The Anti-Corruption Commission Act 2013 (Bangladesh) inserted section 32A into the ACCA 2004 requiring the ACC to obtain prior government “sanction” without which “no Court shall take cognizance of” corruption cases against those officials.<sup>217</sup> The then-

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<sup>211</sup> *Id.* at 315-16.

<sup>212</sup> *Id.* at 316.

<sup>213</sup> Nurul Huda Sakib, *Institutional Isomorphism of Anti-corruption Agency: The Case of Anti-corruption Commission in Bangladesh*, 5 CHIN. POLITICAL SCI. REV. 222, 223 (2020).

<sup>214</sup> Sakib, *supra* note 6, at 212.

<sup>215</sup> Sakib, *supra* note 213, at 247.

<sup>216</sup> The Anti-Corruption Commission (Amendment) Act 2013 (Act No. 80 of 2013) inserted s32A into the ACCA2004.

<sup>217</sup> Section 32A reads: “Subject to the provisions of section 32, the provisions of section 197 of the Criminal Procedure Code must be complied with in filing a case against a judge, magistrate or government employee under this Act.” So, s32A has be read with s197 of the Code of Criminal Procedure 1898 (Bangladesh). Section 197(1) provides: “197.(1) When any person who is a Judge within the meaning of section 19 of the Penal Code, or when any Magistrate, or when any public servant who is not



acting Chairman of the ACC reacted by stating that “[a]n unholy alliance has been instrumental in making the bill into a law.”<sup>218</sup> The amendment relied upon concepts incorporated into the colonial legislation of 1898, which is irreconcilable with 21st century rule of law and inimical to the government’s declaration of ‘zero tolerance against corruption.’<sup>219</sup> Therefore, in the interest of justice, the amendment should be repealed.

When an evil is deeply rooted, watchdogs must have long teeth to dig deep because a weak institution cannot succeed at hunting down corrupt people in an exceedingly corrupt environment. The culture of impunity and the drive against corruption cannot go together. As observed by the head of TIB, the ACC does have useful mandates to prevent and prosecute corruption, however, it needs to have the adequate capability, skills, and expertise to enhance its operations; not to mention that its honesty and integrity must be impeccable.<sup>220</sup> The functional weaknesses of the ACC are recognized widely, except for those whose views are politically or otherwise influenced. Hence, overhaul is needed to make the watchdog effective in its statutorily mandated roles.

A scholarly assessment of the ACC, based on empirical data in a TIB sponsored study, revealed that the watchdog needs to improve its performance. Its main challenges are winning people’s trust and confidence as well as overcoming several of its weaknesses.<sup>221</sup> The study found that the ACC enjoys a low level of public confidence and negative perception on its effectiveness.<sup>222</sup> To begin with, all

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removable from his office save by or with the sanction of the Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Government.”

<sup>218</sup> Salahuddin Aminuzzaman, Shahzada M Akram & Shammi Laila Islam, *Assessment of the Bangladesh Anti-Corruption Agency*, Dhaka: Transparency International Bangladesh 33 (2016), [https://www.ti-bangladesh.org/beta3/images/2016/fr\\_ccs\\_acc\\_16\\_en.pdf](https://www.ti-bangladesh.org/beta3/images/2016/fr_ccs_acc_16_en.pdf) (last visited on June 2, 2021).

<sup>219</sup> Kibria, *supra* note 18.

<sup>220</sup> Badiuzzaman Bay, *International Anti-Corruption Day – Corruption Has Spread Over the Whole Society*, DAILY STAR (Dec. 9, 2020), <https://www.thedailystar.net/opinion/interviews/news/corruption-has-spread-over-the-whole-society-2008101>.

<sup>221</sup> Aminuzzaman *et. al. supra* note 218, at 65.

<sup>222</sup> *Id.*

recruitments for the ACC should be impartial, fair, and transparent. This will generate greater public confidence in the watchdog. Woefully, the ACC's activities are not immune from allegations of corruption and irregularities, which need to be addressed first. Individuals who are entrusted with the responsibility to fight against corruption many times become quickly engulfed by the evil.<sup>223</sup> Metaphorically, they must arrive at the job with clean hands. The evil thorns should be picked up with a needle, however, if the needle itself is blunt then the thorns cannot be removed. In this regard, a former ACC senior official in 2016 disclosed the following in an interview:

According to my knowledge, only 2% of people in the commission are very wicked. You cannot make them good. And 2-3% of the people are sincere. You could not make them bad even if you wanted to. The rest of the people sail in the direction of the wind. Overall if the people of the top positions are corrupt, then all will be directed in that direction. Again, if they are decent, then others will be directed to goodness....<sup>224</sup>

The ACC's internal promotions of officials are alleged to be sold by ignoring merits.<sup>225</sup> The regulator has earned the reputation of being "an 'indemnity commission' in recent times because of such questionable actions," and there are allegations of government interference as well.<sup>226</sup> The predominant obstacle to its success is probably the lack of "political will" coming from the government. The credibility crisis also exists with respect to its operational impartiality. It is imperative for the ACC to overcome the prevailing public perception that it is a government body appointed to protect the government's political allies and punish its opponents.<sup>227</sup> The watchdog itself has seemingly erected an invisible fence "beyond which it is unsure, unable, reluctant, or fearful of going, depending on

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<sup>223</sup> Sakib, *supra* note 6, at 228-29.

<sup>224</sup> Sakib, *supra* note 213, at 245.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 244.

<sup>227</sup> Bay, *supra* note 220.

the identity, status or linkages of the individuals concerned.”<sup>228</sup> Firming this view, the Executive Director of the TIB asserts that the ACC “must break out of the dividing line it seems to have drawn for itself which prevents it from going beyond the small fries and bringing to justice the big fish, irrespective of their identity, status, and political or other linkages.”<sup>229</sup> It is widely believed that the ACC suffers from a considerable lack of neutrality as it is directly or indirectly influenced by political interference.<sup>230</sup> North underscores the need for an efficient legal system corresponding to a conducive institutional environment in which the anti-corruption institutions must have the capability to defuse corruption.<sup>231</sup> To succeed in the fight against corruption, the ACC must stay above personal, political, and operational impartiality.<sup>232</sup> It requires treating like cases alike without fear, favour, prejudice, anger, or bias.<sup>233</sup>

Addressing the credibility issue is important because holding a high level of public confidence is critical for a nation’s success. To this end, an empirical study on the ACC recommended implemented the following measures:<sup>234</sup> (1) effecting wider publicity of its activities to reach a greater number of people; (2) publicizing detailed statements regarding ACC officials’ income, assets, and liabilities on a regular basis; taking appropriate punitive actions against corrupt public representatives and high officials; and ensuring effective and timely investigation and expeditious trial of corruption cases.<sup>235</sup> It is important to note that corruption cannot be combated by corrupt people. The ACC should therefore compel all its high officials, including commissioners and their family members, to make wealth

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<sup>228</sup> *Id.*

<sup>229</sup> Iftekharuzzaman, *Corruption Perceptions Index 2020 -A Disappointing Performance Once Again*, DAILY STAR (Bangl.) (Jan. 29, 2021), <https://www.thedailystar.net/opinion/news/disappointing-performance-once-again-2035785> (the author is the Executive Director of the TIB).

<sup>230</sup> Sakib, *supra* note 6, at 211-12.

<sup>231</sup> *See* North, *supra* note 31.

<sup>232</sup> *See* Robert Gregory, *Political Independence, Operational Impartiality, and the Effectiveness of Anti-Corruption Agencies*, 4 (1) ASIAN EDUC. DEV. STUD. 125, 129 (2015).

<sup>233</sup> *Id.* at 129.

<sup>234</sup> Aminuzzaman et. al., *supra* note 218, at 67.

<sup>235</sup> *Id.*

statements; to date, the ACC has never done this.<sup>236</sup> The ACC is empowered to take internal measures against corrupt officials, but only a very few people have been punished thus far.<sup>237</sup> Fairness and justice must be established first within the regulatory body.

The ACC is a statutory body, and its chairman is appointed by the President of Bangladesh for five years based on the recommendation of a Search Committee headed by a senior judge of the Supreme Court of Bangladesh. ACC commissioners, including the Chairman, can be removed by the Supreme Judicial Council on the same grounds, and in accordance with the same procedures, as applies to the removal of judges of the highest court.<sup>238</sup> Hence, the commissions are well protected from any forceful and undue removal. As assessed by the TIB, the ACC's legal independence score of 78.57% was found to be the highest relating to legal independence, mandate, legal powers and the commissioners' terms of office and removal provisions.<sup>239</sup> Independence and impartiality are substantially assured under subsections 3(2)-(3) of the ACCA 2004, and section 24 further guarantees its operational freedom though it remains financially dependent on the government under section 25 of the ACCA 2004. Theoretically, the ACC has no accountability to any authority other than the Office of the Comptroller and Auditor General for reviewing its financial operations, as stated in section 6(3) of the ACCA2004.<sup>240</sup> All this sounds positive in theory, however, in practice, the independence and impartiality of its operations are not unassailable.

Experts view that its independence is more contingent upon the personal capacity of office bearers rather than the provisions of law in the book.<sup>241</sup> Also, the appointments of commissioners are conducted through a fair process even though there have been some allegations political considerations and lack of transparency.<sup>242</sup> Therefore, the upholding of political loyalties cannot be ruled out given the selectivity in certain prosecutions as explained with reference to

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<sup>236</sup> Sakib, *supra* note 213, at 245.

<sup>237</sup> *Id.*

<sup>238</sup> Anti-Corruption Commission Act, 2004 § 10(3) (Bangl).

<sup>239</sup> Aminuzzaman *et. al.*, *supra* note 218, at 32.

<sup>240</sup> Anti-Corruption Commission Act, 2004 § 6(3) (Bangl).

<sup>241</sup> Aminuzzaman *et. al.*, *supra* note 218, at 32.

<sup>242</sup> *Id.*

specific case studies in a research sponsored by the TIB.<sup>243</sup> Further, the ACC has to face bureaucratic procedures and may experience difficulties in obtaining essential documents and cooperation from authorities such as banks and the NBR.<sup>244</sup> Such a lack of cooperation is hostile to smooth functioning of the ACC. The ACC's accountability to an independent authority must be ensured to facilitate its impartial operations. To do so, it must overcome its frailty and uphold the spirit of independence and neutrality.

### C. Introducing Whistle-blower Rewards

Whistleblowing occurs when an employee discloses acts of wrongdoing committed by his or her colleagues to public authorities; conventionally, whistleblowing was seen to be an act of personal choice rather than one of obligation. As articulated by the UN Coalition, an act of whistleblowing exists when a person reports "on the illegal or immoral activities of an individual or organization."<sup>245</sup> Whistle-blowers refer to those persons who, at their own peril, are "motivated by a sense of personal, and/or public duty, may expose what they perceive as specific instances of wrongdoing, which may be within the private and/or public sector."<sup>246</sup>

Whistle-blowers often risk being disciplined or dismissed from their position as they pose a threat to individuals committing wrongdoings within an organization.<sup>247</sup> More importantly, whistleblowing is regarded as "one of the most effective ways of exposing, fighting and remedying corruption . . . they are essential for revealing wrongdoing and protecting the public interest."<sup>248</sup> A study focused on economic crimes revealed that whistle-blowers outperformed professional auditors in detecting frauds on private

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<sup>243</sup> *Id.* at 32, 34-35.

<sup>244</sup> *Id.* at 32.

<sup>245</sup> United Nations Coalition, Whistleblowing, <https://uncaccoalition.org/learn-more/whistleblowing/> (last visited June 24, 2021).

<sup>246</sup> George Gilligan, *Whistleblowing initiatives - are they merely secrecy games and/or blowing in the wind?*, 37, 37 (2003).

<sup>247</sup> M. Chigozie Onuegbulam, *Whistle Blowing Policy and the Fight against Corruption in Nigeria: Implications for Criminal Justice and the Due Process*, 8 NNAMDI AZIKIWE UNIV. J. OF INT'L & JURIS. 174, 177 (2017).

<sup>248</sup> United Nations Coalition, *supra* note 245.

corporations as the former were able to detect 43 percent of frauds while the latter was successful only 19 percent of the time.<sup>249</sup> Moreover, it evidences that “whistle-blowers are the single most effective source of information in detecting financial fraud.”<sup>250</sup> Arguing for whistle-blowers, Morehead asserts that whistleblowing is a “proven effective tool” to help detect wrongdoing earlier with less harm for the organizations, hence there is little reason not to make use of it.<sup>251</sup> Dworkin and Schipani reinforce the benefit of using whistle-blowers by stating that “[t]he fact remains that encouraging whistleblowing is an effective tool of transparency which has proven helpful in the US in fighting financial crime.”<sup>252</sup> Pahis underscored the need for offering incentives to insiders to sharpen anti-corruption drive in a corruption-prone country.<sup>253</sup>

This strategy is important because detecting corruption is generally difficult as the offense is usually committed secretly. It is generally accepted that whistle-blowers can play a powerful role in challenging corruption and transnational crimes. The need for whistle-blowers has increased in commensurate with the globalization and technological developments. Within this realm, Avi-Yonah viewed, “capital is much more mobile than labor” in the era of globalization.<sup>254</sup> Globalization has increased integration of markets and the technological developments have facilitated methods of instantaneous communications and financial transactions, which apply to both legal and illegal dealings.<sup>255</sup> These transactions are simple to execute but complex to guard against, resulting in significant weakening in the

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<sup>249</sup> National Whistleblower Center, *The Importance of Rewards*, <https://www.whistleblowers.org/the-importance-of-rewards/> (last visited June 6, 2021).

<sup>250</sup> *Id.*

<sup>251</sup> Terry Morehead Dworkin & Cindy A. Schipani, *Using Rewards to Stop Wrongdoing: A Comparative Perspective*, 41 THE CO. LAW. 71, 76 (2020).

<sup>252</sup> *Id.*

<sup>253</sup> See Stratos Pahis, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1943 (2009).

<sup>254</sup> Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575 (2000).

<sup>255</sup> *Id.*; Theo Nyreröd & Giancarlo Spagnolo, *Myths and Numbers on Whistleblower Rewards*, 15 REGUL. GOV. 82, 82 (2021).

regulatory ability to enforce rules against illegal contracts, which is evident especially in the cases of tax evasion and money laundering.<sup>256</sup>

Hence, stimulating the act of whistleblowing becomes a veritable means of combating corruption.<sup>257</sup> Whistleblowing, however, is a risky task in that the employer may take retaliatory measures against the whistle-blower for breaching common law duties of trust, loyalty, and confidence, which may lead to the dismissal of the whistle-blower from his or her position of employment.<sup>258</sup> There are some common law principles to protect whistle-blowers from dismissal based on the “public interest theory,” which was developed out of the “inequity rule” as an exception to the duty of trust, loyalty, and confidence.<sup>259</sup> Vice-Chancellor Wood articulated the theory in *Gartside v. Outram* in 1856:

The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me a confidant of a crime or a fraud, and be entitled to close my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.<sup>260</sup>

The doctrine is time honoured as the UK Court of Appeal in *Initial Services Ltd v. Putterill* consistently held that although an employee was under a duty not to disclose, information received in confidence in the course of his employment was subject to exceptions where the disclosure was justified in the public interest as in the cases of crime or fraud.<sup>261</sup> The Court added, referring to the information relevant to the case in particular, that “the information was such as in

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<sup>256</sup> See John Christensen & Sony Kapoor, *Avoidance, Tax Competition and Globalization: Making Tax Justice a Focus for Global Activism*, 3 ACCT., BUS., AND THE PUB. INT., 1, 2 (2004); Ian Roxan, *Limits to Globalisation: Some Implications for Taxation, Tax Policy, and the Developing World*, 1-47 (London Sch. Of Econ. Law Dep't., Working Paper No. 3, 2012).

<sup>257</sup> Onuegbulam, *supra* note 247, at 174.

<sup>258</sup> *Id.* at 175.

<sup>259</sup> Kaaren Koomen, *Breach of Confidence and the Public Interest Defense: Is It in The Public Interest?*, 10 QUEENSLAND UNIV. OF TECH. L.J. 56, 76 (1994).

<sup>260</sup> [1856] L.J. (Ch. Div) New Series 113, 114 (U.K.).

<sup>261</sup> *Initial Services Ltd v. Putterill and Another* [1967] 3 All ER 145, 145 (U.K.).

the public interest was not clothed with the protection afforded by law to confidence[.]”<sup>262</sup> Lord Denning in *Initial Services Ltd v Putterill*<sup>263</sup> stated that “[t]he exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always—and this is essential—that the disclosure is justified in the public interest.”<sup>264</sup> His Honour further resonated that “no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare.”<sup>265</sup>

The above information firmly establishes whistle-blowers’ protection in Bangladesh as per the common law.<sup>266</sup> Yet this is not to diminish the importance of ensuring the protection of whistle-blowers through statutory law. Appreciably, Bangladesh has already done so in 2011 through the Public Interest Information Disclosure Act of 2011, popularly known as the Whistleblower Protection Act 2011 (WBPA 2011). However, as reported in late May 2021, most public servants, right activists, lawyers, and even journalists remain ignorant of the enactment of such legislation.<sup>267</sup> More startlingly, a deputy director of the ACC, confirmed that they have received allegations of breach of the WBPA 2011, but they have not lodged any case thereunder.<sup>268</sup> A review of the WBPA 2011 suggests that the it is well drafted to protect whistle-blowers including, amongst others, officials in the public and private sectors and journalists from all types of civil and criminal

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 148.

<sup>265</sup> *Id.* (quoting *Annesley v. Anglesea (1743)* 17 State Trials, at 1223-46).

<sup>266</sup> For a discussion of different legal families, see Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMPAR. L. 1043 (2012).

<sup>267</sup> Zafarullah & Huque, supra note 10, at 67; Raisul Sourav, *Reviewing the Views - The Legal Protection of Whistleblowers*, DAILY STAR (Bangl.) (May 25, 2021, 12:00 AM), <https://www.thedailystar.net/law-our-rights/news/the-legal-protection-whistleblowers-2098373>. See also for lawyers’ ignorance of whistleblowers’ law, BSS, *Whistleblowers’ Act Ineffective Due to Lack of Publicity*, DHAKA TRIBUNE (Bangl.) (Apr. 23, 2018, 7:40 PM), <https://www.dhakatribune.com/bangladesh/law-rights/2018/04/23/whistleblowers-act-ineffective-due-lack-publicity>.

<sup>268</sup> *Whistleblowers’ Act Ineffective Due to Lack of Publicity*, DHAKA TRIBUNE (Bangl.) (Apr. 23, 2018, 7:40 PM), <https://www.dhakatribune.com/bangladesh/law-rights/2018/04/23/whistleblowers-act-ineffective-due-lack-publicity>.



cases, departmental proceedings, or any kind of action, punishment, discrimination, any measure prejudicial to financial, mental or social reputation, prohibition of demotion, transfer for harassment, and forced retirement or discriminatory treatment by employer to an employee.<sup>269</sup> Its section 9(1) imposes significant punishment for any contravention of the legislation, which may extend to imprisonment for a minimum term of two years, but not exceeding five years, or with fine or with both.<sup>270</sup> Further, section 9(2) provides that if the violator of the WBPA 2011 is a government employee, departmental actions shall have to be taken in addition to the punishment mentioned in section 9(1).<sup>271</sup> Section 3 contains an overriding provision confirming that the WBPA 2011 shall apply even if any other existing laws contradict.<sup>272</sup> Moreover, section 14 provides that if the allegations brought under the WBPA 2011 are proved on the basis of the information provided by a whistle-blower, the appropriate authority may award adequate rewards to him or her.<sup>273</sup>

Admittedly, the text of the WBPA 2011 has been carefully drafted upholding the true spirit of whistle-blowers protection and combating corruption, but its benefit has never been enjoyed by anyone though enacted a decade ago. Hence, all that is now needed is to organize its extensive publicity and strict enforcement. Supporting whistle-blower cautiousness, Fisher observes that “whistleblowing is not always unselfish and its revelations are not always accurate. As with other informants, the whistle-blower’s motives may be selfish or evil as well, and the information provided may be false or incomplete.”<sup>274</sup> It is not unlikely that some whistle-blowers may act maliciously to obtain a reward or work towards punishing others.<sup>275</sup> For a fruitful whistle-blower regime, an arrangement of concrete

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<sup>269</sup> *Public Interest Information Disclosure (Protection), Act 2011 § 5 (Act No. 6/2011)* (Bangl.).

<sup>270</sup> *Id.* §9(1).

<sup>271</sup> *Id.* §9(2).

<sup>272</sup> *Id.* §3.

<sup>273</sup> *Id.* §14.

<sup>274</sup> James Fisher, Ellen Harshman, William Gillespie, Henry Ordower, Leland Ware & Frederick Yeager, *Privatising Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 8(4) J. FINANC. CRIME 305, 310 (2001).

<sup>275</sup> For details, see Nyrreröd & Spagnolo, *supra* note 255, at 91-92.

incentives is warranted, as different from the imprecise hope for reward under the WBPA 2011.

#### D. Stipulating Whistle-blower Incentives

An effective whistle-blower incentive regime can be instrumental to avoid resource-constrained disadvantage of regulators in obtaining critical information in a cost-effective manner.<sup>276</sup> As explained above, whistleblowing is a risky action for the blowers, their colleagues, and their employers. Nonetheless, some people agree to become whistle-blowers to participate in “whistle-blower reward programs” or “bounty regimes,” which provide financial benefits to witnesses that provide critical information that may aid in the conviction of offenders.<sup>277</sup> The WBPA 2011 states that providing awards to whistle-blowers remains entirely at the discretion of “competent authority.” Not surprisingly, this provision does not incentivize many people to become whistle-blowers in Bangladesh where the practice is already not commonplace.

The rewards may be in the form of cash payments or in kind by protecting whistle-blowers against retaliatory conduct by the employer. The prevention of retaliation is important as a recent study finds that 69 percent of whistle-blowers reported to have lost their jobs or been forced to retire while 64 percent reported to have been blacklisted by other employers in their respective fields after having received negative performance evaluations from their previous employers.<sup>278</sup> Cash incentives are not yet common as only the United States has experimented with such rewards<sup>279</sup> even though financial rewards were first introduced by the False Claims Act of 1863—also called the “Lincoln Law”—to combat corruption in the procurement of military supplies.<sup>280</sup> Subsequently, in 1867, the Internal Revenue Services (IRS) pronounced a program of similar rewards with

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<sup>276</sup> *Id.* at 82.

<sup>277</sup> *Id.*

<sup>278</sup> See Tanya M. Marcum et al., *Blowing the Whistle in the Digital Age: Are You Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COM. L.J. 1, 4 (2019) (footnote omitted).

<sup>279</sup> Nyrreröd & Spagnolo, *supra* note 255, at 82.

<sup>280</sup> *Id.*

incentives that were broadened under the Dodd–Frank Act of 2010<sup>281</sup> for information on financial and securities frauds following the financial crisis triggered in 2007.<sup>282</sup> The United States is a pioneer in the area of whistle-blower laws.<sup>283</sup> This is true because American agencies believe that whistle-blower incentive programs are one of the most powerful tools to protect the government from fraud.<sup>284</sup>

Likewise, Canada introduced a whistle-blower reward program to address financial and securities frauds.<sup>285</sup> Along these lines, tax whistle-blowers have also presented success in the United States.<sup>286</sup> The Tax Court of the U.S. pronounced a rule on August 3, 2016 stating “that tax whistle-blowers were entitled to a reward based on monies collected in criminal fines and penalties.”<sup>287</sup> Some other countries—the United Kingdom, Hungary, and South Korea—have also implemented reward programs particularly for antitrust cartels.<sup>288</sup> Both South Korea and Canada have adopted laws similar to those in the United States and have achieved “tremendous success.”<sup>289</sup>

#### E. Current Whistle-blower Reward Laws Around the World

The National Whistleblower Center, an organization dedicated to the roles of whistle-blowers, noted that the best laws for such informers provide “a statutory guarantee” that such risk-takers will

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<sup>281</sup> Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, ch. 26 § 1731.8 (2010).

<sup>282</sup> Nyneröd & Spagnolo, *supra* note 255, at 85.

<sup>283</sup> National Whistleblower Center, *supra* note 249.

<sup>284</sup> The United States Department of Justice, *Assistant Attorney General Stuart Delery Delivers Remarks at American Bar Association’s 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement*, JUSTICE NEWS (June 5, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-stuart-delery-delivers-remarks-american-bar-association-s-10th>; see National Whistleblower Center, *supra* note 249.

<sup>285</sup> Nyneröd & Spagnolo, *supra* note 255, at 82.

<sup>286</sup> *Four-Year Campaign Results in Historic-Win for Tax Whistleblowers*, NATIONAL WHISTLEBLOWER CENTER, <https://www.whistleblowers.org/news/four-year-campaign-results-in-historic-win-for-tax-whistleblowers/> (last accessed on June 6, 2021).

<sup>287</sup> *Id.* (citing Whistleblower 21276-13W v Comm’r, 147 T.C. 121 (2016)).

<sup>288</sup> Nyneröd & Spagnolo, *supra* note 255, at 82.

<sup>289</sup> National Whistleblower Center, *supra* note 249.

receive a percentage of the pecuniary penalties recovered by prosecutors based on the disclosures at issue.<sup>290</sup> A 2021 empirical research argues in favor of whistle-blower rewards based on a simple cost-benefit analysis.<sup>291</sup> Legislation providing whistle-blower protections continues to expand globally as evident in the enactment of such laws in at least 59 countries with varying success.<sup>292</sup> The levels of success vary as many laws are still deficient in supporting effective whistleblowing, which warrants harmonization of laws by incorporating all vital features of successful whistleblowing regimes.<sup>293</sup> There are four key critical elements of the most successful whistle-blower laws. First, legal provisions should allow whistle-blowers to remain anonymous and keep their identities confidential while disclosing information on wrongdoings to the relevant authorities. This will help protect them from unfair retaliation by their colleagues or employers.<sup>294</sup> Second, a strategy offering both carrot and stick would work better to prevent irregularities. Carrots will induce insiders to disclose irregularities despite the well-known legal sanctions associated with wrongdoing. To this end, public declarations of financial rewards for whistle-blowers contingent on the successful outcome of prosecution is critical.<sup>295</sup> Third, whistle-blowers generally have concerns about reprisals. Thus, remedies should be guaranteed in anticipation of retaliatory measures. Employers or colleagues often take reactive punitive actions to discredit or otherwise punish whistle-blowers. To discourage these retaliatory actions, the best whistle-blower laws provide for a range of remedies: repaying the wages and benefits lost due to unlawful termination and providing compensatory damages to cover the time needed to find a new job, including out of pocket losses, damages for pain and suffering, and litigation

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<sup>290</sup> *Id.*

<sup>291</sup> Nyrreröd & Spagnolo, *supra* note 255, at 83, 85-86 (providing a good account of “design dimensions of reward programs”).

<sup>292</sup> National Whistleblower Center, *Best Practices in Whistleblower Law*, NWC, (last accessed on June 6, 2021) <https://www.whistleblowers.org/whistleblower-law-best-practices/>.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

costs.<sup>296</sup> Fourth, whistle-blowers can be given the opportunity to report through independent reporting channels.<sup>297</sup>

It is widely accepted that the existence of good whistleblowing laws leads to increased transparency and market integrity,<sup>298</sup> which are both beneficial for individuals and society at large. Rewarding those who genuinely blow the whistle is instrumental to the success of such laws. However, to ensure that we are rewarding the true contributors, the payment of rewards should be contingent upon the prosecutorial betting of the credibility of the whistle-blower's information, using the information to win the prosecution, and the decision of the court that the information provided by the whistle-blower was important for the successful conviction, which will reduce falsification by such informers.<sup>299</sup>

This reinforces the need for an effective whistle-blower program. However, the program must be well-designed and fit for the purpose depending on local needs because one-size may not fit all. Countries, like Bangladesh, wishing to have an effective legal regime should earnestly consider the necessary features of such laws in reviewing and drafting their laws, as the preceding discussions demonstrate. To ascribe certainty to the law about receiving useful dividends, an amendment to the reward provisions in the WBPA 2011 is in order. Law derives its intrinsic force from its enforcement potential. Law cannot benefit anyone unless it is voluntarily complied with, or efficiently enforced, by competent authorities.<sup>300</sup> This notion also applies to black money.<sup>301</sup>

#### F. Strengthening Enforcement of the Law

Law enforcement is critical for the realization of the ends stated or inherent in a particular law.<sup>302</sup> Katharina Pistor found in a study on transition economies that that the effectiveness of legal

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Nyneröd & Spagnolo, *supra* note 255, at 83.

<sup>299</sup> National Whistleblower Center, *supra* note 249.

<sup>300</sup> S. M. Solaiman, *Investor Protection and Judicial Enforcement of Disclosure Regime in Bangladesh: A Critique*, 34 COMM. L. WORLD REV. 229, 230 (2005).

<sup>301</sup> *See* Quah, *supra* note 29.

<sup>302</sup> Solaiman, *supra* note 300, at 230.

institutions engaged in the enforcement of laws is much more important than the quality of the law itself.<sup>303</sup> In a corruption context, Henry Carey, an American professor of political science, highly emphasized the enforcement of law as viable solution.<sup>304</sup> The idea of offering amnesty to BMHs intrinsically emanates from manifested failure in enforcement of laws. But strict penalty is the solution to the black money problem, at least in the context of Bangladesh, as proven over the past five decades. Experts spell out that “[t]he fear factor might generate far more benefit than what is gained through the special offer extended from time to time.”<sup>305</sup>

A non-political but army-backed short-lived caretaker government was able to whiten the largest amount of illicit money in the history during fiscal year 2007–2008 until 2020–2021 when the immediate past prime minister felt compelled to legalize her illicit cash paying penalty tax in addition to regular taxes. The only reason for that success was infliction of fear of enforcement of law. In the context of Bangladesh, experts argue that “the government, instead of offering a special facility to legalize black money, should go after the holders of the same. Based on intelligence work, the taxmen need to conduct raids to locate black money, confiscate it and mete out punishment to its holders.”<sup>306</sup>

A former NBR member recently remarks that the whitening opportunity provision was needed simply because of poor enforcement of laws.<sup>307</sup> Bangladesh does have legal regime to combat corruption and other offenses generating black money, though not flawless, as discussed earlier, but they are invisible in practice, and the successive governments became violators of those laws by offering amnesties. The responsible and accountable governance essentially

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<sup>303</sup> Katharina Pistor, Martin Raiser, and Stanislav Gelfer, *Law and Finance in Transition Economies*,

CID Working Paper Series 2000.49, Harvard University (2000).

<sup>304</sup> Norman P. Aquino, *American Professor Stresses Importance of Law Enforcement*, BUS. WORLD (Philippines) (Mar. 15, 2004).

<sup>305</sup> Shamsul Huq Zahid, *Black Money: Special Facility or Raids?* Financial Express (Bangl.) (June 17, 2021), <https://thefinancialexpress.com.bd/views/black-money-special-facility-or-raids-1623946738>.

<sup>306</sup> *Id.*

<sup>307</sup> *Bubble in Market Apprehended as Tk 100b Legalized in Six Months*, *supra* note 64.

entails the strict application of the rule of law.<sup>308</sup> Hence, law enforcement is a greater problem than the words of the law. This is so mainly because of undue political favoritism, bureaucratic corruption, and avoidance by the government to grand corruption. Pointing to enforcement weaknesses, opposition legislators lambasted the government at the parliament on June 7, 2021 for unabated capital flights as well as corruption. The deputy leader of opposition at the Parliament claims that those who are involved in massive financial irregularities are not facing any hurdle, whereas those who are making those illicit activities public are facing various problems.<sup>309</sup> In response, the Finance Minister asked the legislators to provide names of the money launderers, claiming that “he does not know” the names of such offenders.<sup>310</sup> By contrast, the government Financial Intelligence Unit (BFIU) has found evidence of 1,024 incidents of money laundering over the last five financial years and they have provided detailed information on those transactions to the relevant authorities of the government.<sup>311</sup> Some reported offenders have been prosecuted, but all are without any outcomes thus far. It is commonly believed that BMHs do not utilize these opportunities to whiten their ill-gotten assets simply because of a lack of enforcement against those who pay no heed to the government’s calls.<sup>312</sup> TI reports maintain that corruption is on the rise due to lack of visible punishment, and that political loyalists remain unharmed.<sup>313</sup>

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<sup>308</sup> Gregory, *supra* note 232, at 129.

<sup>309</sup> Staff Correspondent, *Lawmakers Call for Reining in Money Laundering*, Prothom Alo: Bangl. (June 8, 2021, 12:13 PM), <https://en.prothomalo.com/bangladesh/law-makers-call-for-reining-in-money-laundering>.

<sup>310</sup> Staff Reporter, *Finance Minister: No List of Money Launderers*, Dhaka Tribune: Corruption (Bangl) (June 7, 2021, 5:27 PM), <https://www.dhakatribune.com/bangladesh/corruption/2021/06/07/fin-min-no-list-of-money-launderers>.

<sup>311</sup> Staff Reporter, *1,024 Money Laundering Incidents Take Place in 5 Years*, The Daily Observer: National (June 8, 2021, 2:28 PM), <https://www.observerbd.com/news.php?id=316206>.

<sup>312</sup> *See generally* Rezaul Karim, *Graft Cases: Fines Hardly Recovered*, The Bus. Standard: Corruption (Feb. 18, 2021, 10:35 PM), <https://www.tbsnews.net/bangladesh/corruption/graft-cases-fines-hardly-recovered-204142>.

<sup>313</sup> Staff Reporter, *TIB Observes Int’l Anti-Corruption Day 2020, Demands Stern Execution of ‘Zero Tolerance’ Policy Against Corruption*, Transparency International Bangladesh (Dec. 09, 2020), <https://www.ti-bangladesh.org/beta3/index.php/en/activ>

The existence of laws has impact on all people in refraining from committing wrongs, nevertheless an offense is committed when one's resistance is overpowered jointly by high temptation and favourable environment. Such an environment is stiffened by laxity in enforcement. Hence, good strict enforcement records can bring home the law's desired objects. Referring to Caiden's research on success in combating corruption, Gregory states that:

It is hard to take issue with Caiden's ... assertion that among several key factors explaining the difference between those countries where corruption is "an incidental *fact of life*" and those in which it is "*a way of life*" is the "*Strict application of the rule of law without fear or favour by impartial judges*" in the former jurisdictions, which "needs to be enforced throughout the legal and criminal justice systems from top to bottom... [emphasis in original].<sup>314</sup>

Enforcement problems are multifaceted in Bangladesh. As an antipathetic to the much-disputed whitening opportunity, an expert Bangladeshi economist comments that "tax administration can't monitor properly. Even if it catches a tax-dodger, the case is settled through a corrupt means. As a result, the government is deprived of revenue."<sup>315</sup> This claim is evidenced by the information provided by the NBR itself, while the tax authority discloses that although tax return has been made compulsory for all tax identification number (TIN) holders with a few exceptions, most of them evaded filing their returns.<sup>316</sup> As per the NBR data, around 54 percent of the country's individual TIN holders (2.20 million out of 4.06 million TIN holders) submitted a return in fiscal year 2019-2020, and showing a slight

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ities/6219-tib-observes-int-l-anti-corruption-day-2020-demands-stern-execution-of-zero-tolerance-policy-against-corruption.

<sup>314</sup> Gerald E. Caiden, *Accounting for Success in Combating Corruption*, in *Different Paths to Curbing Corruption: Lessons from Denmark, Finland, Hong Kong, New Zealand, and Singapore* 189, 203-04 (Jon S T. ed., 2013).

<sup>315</sup> Byron et al., *supra* note 192.

<sup>316</sup> Jasmin Uddin, *Tax Returns Filing Rate Falling With Rise in TIN Holders*, *New Age: Business (Bangl.)* (Jan. 6, 2021), <https://www.newagebd.net/article/126461/tax-returns-filing-rate-falling-with-rise-in-tin-holders>.



improvement, only 47.5 percent submitted returns in the fiscal year 2020–2021, which constitutes only 1.44 percent of its 167.5 million total population.<sup>317</sup> It is important to note that there were at least 75,563 multimillionaire individuals, and the tax free threshold is only BDT 250,000 (US \$3012).<sup>318</sup>

Amid such a grim picture of individual taxpayers, the record of corporate tax returns is not pleasing either. As reported in May 2019, the data of the NBR and the Financial Reporting Council shows that there are a total of 1,65,500 companies registered with the office of the Registrar of Joint Stock Companies.<sup>319</sup> Of them, 1,11,000 did not submit tax return, and those returns that were submitted included 33,000 with “fraudulent audit reports” by forging the signatures of chartered accountants.<sup>320</sup> Another report claims that 12,187 companies have evaded taxes for a long time through audit report frauds, which have inflated the financial statements for bank loans and deflated profits to evade tax, as found by a high-powered taskforce formed by the NBR.<sup>321</sup> The taskforce discovered that 28,187 companies filed income tax returns in 2019. Of these, 16,000 companies have submitted “actual” audit reports, while the audit reports of the remaining 12,187 organizations submitted to tax office were “fabricated” to evade taxes.<sup>322</sup>

While auditors are obligated to check financial frauds, many of them have turned to be architects of such deceptions. For example, in 2020, three top auditing firms were held responsible by the country’s central bank for helping scam-ridden Crescent Group in committing

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<sup>317</sup> *Id.*

<sup>318</sup> Staff Contributor, *No Individual Tax for Income Below Tk3 Lakh*, The Daily Star: Business (June 11, 2020, 5:26 PM), <https://www.thedailystar.net/budget-2020-21-no-individual-tax-income-below-tk-3-lakh-1912693>.

<sup>319</sup> Jasim Uddin, *NBR Forms Taskforce to Bring All Registered COS Under Tax Net*, New Age: Bus. (Aug. 20, 2020, 11:28 PM), <https://www.newagebd.net/article/114049/nbr-forms-taskforce-to-bring-all-registered-cos-under-tax-net>.

<sup>320</sup> *Id.*

<sup>321</sup> Staff Contributor, *NBR to Strict On COS Audit Reports*, New Nation (July 31, 2020), <https://thedailynewnation.com/news/294494/NBR-to-strict-on-cos-audit-reports>.

<sup>322</sup> *Id.*

multidimensional offenses such as fraud and forgery.<sup>323</sup> Although Crescent Group is facing criminal charges, those audit firms received only show cause notice and suspension for a small term of 2–3 years from their specific services, despite their having violated the Bank-Company Act of 1991 and the PC1860.<sup>324</sup> Such loose enforcement cannot generate deterrence. Further, as of November 2021, only 78,000 companies out of 176,400 registered companies have “genuine” TINs, while the remaining companies have registered with the relevant office using “fake” TINs.<sup>325</sup> Evidence has been found that these fake reports were made in collaboration with dishonest income tax professionals (ITPs) mainly to evade tax.<sup>326</sup> The involvement of tax officials in irregularities has also been found in several internal investigations, however, they often go unpunished, which is regarded as one of the major reasons for the poor response of BMHs in whitening their assets.<sup>327</sup> The above-stated facts present an anarchistic nature of tax evasions, which shall have to be addressed without delay.

The evidence presented above implies the need for strengthening, amongst other things, tax administration. Typically there are three facets of tax administration. taxpayer registration, taxpayer audit, and tax collection. Enhancement of detection of tax frauds and punishment can be accomplished by improving all these three aspects.<sup>328</sup> Alm and Liu prescribe certain ways of doing this:

[I]ncreasing the number of audits, using more systematic audit selection methods (e.g., ‘scoring’

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<sup>323</sup> Jebun Nesa Alo, *When Auditors Shield Fraud Company*, The Bus. Standard: Corruption (Bangl.) (Aug. 10, 2020), <https://www.tbsnews.net/bangladesh/corruption/when-auditors-shield-fraud-company-117841>.

<sup>324</sup> *Id.*

<sup>325</sup> Doulot Akter Mala, *NBR Expects Big Rise in Corporate Tax Revenue*, The Financial Express (Bangl.) (Sep. 9, 2020, 9:35 AM), <https://thefinancialexpress.com.bd/economy/bangladesh/nbr-expects-big-rise-in-corporate-tax-revenue-1599621939>.

<sup>326</sup> See Doulot Akter Mala, *Some NBR Men Abet Influentials in Legalising Black Money*, The Fin. Express: Trade (Bangl.) (Oct. 12, 2020, 9:30 AM), <https://thefinancialexpress.com.bd/trade/some-nbr-men-abet-influentials-in-legalising-black-money-1602473984>.

<sup>327</sup> *See Id.*

<sup>328</sup> James Alm & Yongzheng Liu, *Corruption, Taxation, and Tax Evasion*, in E-Journal of Tax Research Vol.15, No.2 161, 173 (UNSW Business School, 2017).

methods), improving information sharing across governmental authorities, increasing penalties for tax cheating, applying these penalties often and consistently, publicising tax evasion convictions in the media as an alternative type of non-financial penalty, relying more heavily on source-withholding whenever possible, facilitating payments through the banking system, granting additional power for collecting delinquent accounts, and increasing taxpayer registration and identification via better use of third-party information.<sup>329</sup>

The above-quoted actions represent standard methods for strengthening enforcement mechanisms and these accord to a paradigm that considers the taxpayer to be a “potential criminal who must be deterred from cheating.”<sup>330</sup> Alongside improving tax administration, other avenues of unlawful conduct and irregularities shall have to be dealt with a strong determination demonstrating fairness, firmness, and propriety. It has to be ensured that the wrongdoers feel the full force of law without any discrimination. The areas of corruption, frauds, tax evasion, and other irregularities are publicly known in the country. Most of these wrongdoers include, but not limited to, public servants, businesses engaged in imports and exports, money launderers, loan defaulters, politicians, tax professionals, and accounting professionals. Those whose offenses are proved should be adequately punished and chastised, and others should be brought back to the right track to prevent further irregularities from occurring. This can be achieved by strict and fair enforcement of respective laws and by amending the laws where needed, as discussed earlier. The situation will obviously get from bad to worse, unless punitive measures are taken through enforcement of laws, regardless of anyone’s personal identity or position, be it official or political. For this, alongside the existing judicial and administrative institutions, further authorities may be established to facilitate expeditious enforcement and watch the watchers, as outlined below.

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<sup>329</sup> *Id.* at 173-74.

<sup>330</sup> *Id.* at 174.

### G. Establishing the Office of Ombudsman

An Ombudsman is typically charged with representing public interests by investigating and addressing complaints of misadministration or contravention of laws.<sup>331</sup> Lin and Hu define Ombudsmen as being “alternate dispute resolution practitioners that resolve individual complaints and use the outcomes of those resolutions to identify and rectify systemic problems.”<sup>332</sup> The office of Ombudsman is used in many countries worldwide in order to ensure increased transparency and accountability of public administration to the people.<sup>333</sup> Such an office can play a pivotal role to resolve citizens’ complaints against nepotism, misuse of powers, abuse of people’s rights, and malpractice in the public administration at all levels in Bangladesh.<sup>334</sup> The drafters of the Constitution prophetically envisioned the necessity of Ombudsman, as evident in its provision of empowering Parliament to establish the office of Ombudsman prevalent since its adoption in 1972. Article 77 of the Constitution reads that “Parliament may, by law, provide for the establishment of the office of Ombudsman . . . The Ombudsman shall exercise such powers and perform such functions as Parliament may, by law, determine, including the power to investigate any action taken by a Ministry, a public officer or a statutory public authority.”

The Parliament of Bangladesh has explicit powers, and an implicit responsibility, to create the position of Ombudsman with extensive powers to investigate corruption and irregularities by public authorities. Exercising this power, the Parliament enacted the Ombudsman Act of 1980 (OA 1980) to pave the way to establish an office of Ombudsman in Bangladesh.<sup>335</sup> The purpose of the OA 1980 is

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<sup>331</sup> Stephan Wilske, *International Arbitration and Its Dark Sides, in Particular Corruption: What Arbitral Institutions Could and Should Do to Tackle Such Unwelcome Issues*, 12 CONTEMP. ASIA ARB. J. 147, 165 (2019).

<sup>332</sup> Nuannuan Lin & Weijun Hu, *Systemic Issue Resolution in Two Dimensions: A Reflection Based on a Ten-Year Review of the Australian Financial Ombudsman Service*, 26 HARV. NEGOT. L. REV. 113, 113 (2020).

<sup>333</sup> Sheikh Mohammad Towhidul Karim, *The Ombudsman Act 1980: Redressing Administrative Grievances in Bangladesh*, 60(1) INT. J. LAW. MGMT. 172, 172 (2018).

<sup>334</sup> See *id.*

<sup>335</sup> The legislation has certain limitations and shortcomings. Discussions of this analysis go beyond the scope of this article. For a critical examination of the

“to provide for the establishment of the office of Ombudsman and to define his powers and functions.”<sup>336</sup> Consistently, it provides that “[t]here shall be an Ombudsman who shall be appointed by the President on the recommendation of Parliament . . . Parliament shall recommend for appointment as Ombudsman a person of known legal or administrative ability and conspicuous integrity.”<sup>337</sup> Correspondingly, the Parliament legislated the Tax Ombudsman Act of 2005 (TOA 2005), and the President appointed Mr Khairuzzaman Chowdhury as the country’s first ever, and obviously the last to date, Ombudsman who took office on July 9, 2006<sup>338</sup> for a four-year term.<sup>339</sup> Notably, it was enacted mainly heeding to the pressure of donor agencies including the World Bank, which threatened to revoke a donation of US \$200million.<sup>340</sup> Regrettably, the government did not make further appointments to the office.<sup>341</sup> Instead, the government repealed the TOA 2005 by the Tax Ombudsman (Abolition) Act of 2011 with immediate effect from June 22, 2011.

It is conceivable from the creation of such an office unprecedentedly in Bangladesh that the government realized the prevalence of massive irregularities in tax offices, although the government that made the law did not appoint anyone to the position.<sup>342</sup> At the beginning, it was a good initiative, though there were flaws in the TOA 2005, which could be easily remedied by the Parliament. Instead, the finance minister of the time (2011) said “I am astonished at how such an institution had been set up, which does not have any power. The judgment of the tax ombudsman depends on

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Ombudsman Act 1980, see Md. Masud Sarker & Md. Bayezid Alam, *Ombudsman for Good Governance: Bangladesh Perspective* 6(1) INT’L J. MGMT. SOC. SCI. 13, 20-21 (2010).

<sup>336</sup> *Headline of The Ombudsman Act, 1980* (Act No. 15/1980) (Bangl.).

<sup>337</sup> *Id.* §3.

<sup>338</sup> Swapan Kumar Bala, *Report on Complexities in the Income Tax Laws: A Quest for a Simpler Taxation System*, INT’L BUS. FORUM OF BANGL. (2009), <https://ibfb.org/upload/resource/RFILE20160218054904.pdf> (last accessed June 27, 2021).

<sup>339</sup> Tax Ombudsman Act, 2005, §5(2) (Act No. 19/2005) (Bangl.).

<sup>340</sup> Karim, *supra* note 333, at 173-174.

<sup>341</sup> *See* Tax Ombudsman Act §5 (A person can be a Tax Ombudsman for only one term—four years).

<sup>342</sup> Md Abdul Halim, CONSTITUTION, CONSTITUTIONAL LAW AND POLITICS: BANGLADESH PERSPECTIVE, 336 (CCB Foundation, 2006).

me.”<sup>343</sup> Conceivably, the finance minister referred to the provisions in sections 21 and 25 of the TOA 2005. Section 21(2) stated that if the NBR is unable to implement the recommendation(s), it will inform the Tax Ombudsman the reason(s) for non-implementation of the recommendation(s). The Tax Ombudsman will then bring such cases to the notice of the finance minister who may (i) direct the NBR to implement the Tax Ombudsman’s recommendation(s); (ii) request the Tax Ombudsman to reconsider his recommendation(s); and (iii) take such actions as he deems fit. Complementing section 21(2), section 25 provided that if the NBR or any person becomes aggrieved by any recommendation of the Tax Ombudsman, that Board or person may make an application to the finance minister through the appropriate authority within 60 days of making the recommendation and he shall give appropriate order on such application as he deems fit.

The aforesaid reason given by the finance minister of the time for the TOA 2005’s abolition is unjustified in that if the minister thought he had excessive authorities over the Tax Ombudsman, the government could easily amend the law as it enjoyed an absolute majority in the legislature at that time and to date. Further, one of the explicit reasons for the abolition was reported to be the Ombudsman not having “much work to do.”<sup>344</sup> This reason was unfounded too, as the Ombudsman himself disclosed in an interview after finishing his term, that “as per law he had taken cognisance of 1,000 plus complaints during his tenure although the number of complaints was a few thousands. He recommended remedial measures against 700 of them, and the NBR implemented all of them.”<sup>345</sup> So appreciable was the accomplishment of the sole Ombudsman ever, even though people were unaware of its existence.<sup>346</sup> In relation to the scrapping of the office, he referred to the recommendation of the Parliamentary Committee on the Ministry of Finance, which had recommended to

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<sup>343</sup> Star Business Report, *Tax Ombudsman’s Office No More*, DAILY STAR (BANGL.) (July 9, 2010), <https://www.thedailystar.net/news-detail-145974>.

<sup>344</sup> Nazmul Ahsan Kalimullah et al., *Parliamentary Ombudsman in Bangladesh: Overview and Recommendations*, 12 J. SE. ASIAN STUDIES 29, 37 (2013) (internal citation omitted).

<sup>345</sup> M. Abdul Latif Mondal, *Abolishing Tax Ombudsman’s Office*, DAILY STAR (BANGL.) (Sept. 19, 2010), <https://www.thedailystar.net/news-detail-154931>.

<sup>346</sup> *Id.*

strengthen the office of the Tax Ombudsman, and an online poll conducted by the nation's most popular English daily found that 75.4 percent did not support the cabinet decision to abolish the office of Tax Ombudsman.<sup>347</sup> Further research demonstrates that the actual reasons were contradicted by provisions of the TOA 2005 and a number of tax-related laws and rules, and that the costs associated the adjudication process by the Ombudsman were prohibitive.<sup>348</sup> The argument that it was cost prohibitive is untenable in that the government spent a total of only around BDT 10 crore (US \$1.205million) over its four year term, which presented considerable success in a completely new environment.<sup>349</sup>

In sum, the abolition was utterly unfair and unjust. The establishment of the office of Ombudsman should not be left to the government's discretion, but rather must be considered as a constitutional responsibility as well as a dire necessity. As Robert Laporte stipulated, both internal and external societies yearn for national development to call for increased participation, transparency, accountability, and rule of law globally and especially in Bangladesh.<sup>350</sup> The Ombudsman system is instrumental for good governance and is being currently used in many countries across the continents.<sup>351</sup> Establishing the office of Ombudsman has become as a pressing need in Bangladesh, given its appalling corruption records. Karim suggested immediate reintroduction of such an office with an independent person as Ombudsman for the protection of fundamental rights and promotion of social justice and equity of the people in Bangladesh.<sup>352</sup>

Going beyond the past, the present article recommends more than one Ombudsman to expeditiously deal with irregularities in different sectors, such taxation, banking, essential public services. Article 77 of the Constitution, as cited earlier, does not limit the

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<sup>347</sup> *Id*

<sup>348</sup> See Karim, *supra* note 333, at 174.

<sup>349</sup> *Tax Ombudsman's Office No More*, *supra* note 343.

<sup>350</sup> Sarker & Alam, *supra* note 335, at 13 (internal citation omitted). This article offers an analytical overview of the Ombudsman institution as a mechanism of good governance in Bangladesh.

<sup>351</sup> For a long list of countries using Ombudsman, see Sarker & Alam, *supra* note 335, at 15-16.

<sup>352</sup> Karim, *supra* note 333, at 182.

number of offices of Ombudsman; it depends on the parliament, and having more than one is not unprecedented. This recommendation is further substantiated below by referring to other countries. A single state may have more than one office of Ombudsman with the jurisdiction of specific area of public service, such as Tax Ombudsman, Financial Ombudsman, Fair Work Ombudsman, Small Business and Family Enterprise Ombudsman, as currently in place in Australia.<sup>353</sup> Given the extent of financial irregularities in many countries and the corresponding public outcry for justice, financial Ombudsmen are increasingly becoming an indispensable Alternative Dispute Resolution (ADR) mechanism which may be established in both public and private sectors.<sup>354</sup> The role of an Ombudsman has gradually evolved from a reliable safeguard against maladministration to an ADR practitioner.<sup>355</sup>

Many countries, both developed and developing alike, such as Egypt, Sweden, New Zealand, the UK, Canada, Australia, China and India, have established the office of Ombudsman.<sup>356</sup> India is the closest neighbor of Bangladesh with similar economic and cultural backgrounds. There is the office of Banking Ombudsman in India.<sup>357</sup> Notably, the administration and financial health of Indian banks are much better<sup>358</sup> than those in Bangladeshi state-owned banks which have been suffering from capital inadequacy, as noted previously. In addition, India has enacted the Lokpal and Lokayuktas

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<sup>353</sup> See Lin & Hu, *supra* note 332, at 119–23; Tess Hardy & John Howe, *Creating Ripples, Making Waves: Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman*, 39 SYDNEY L. REV. 471 (2017).

<sup>354</sup> Lin & Hu, *supra* note 332, at 114, 118.

<sup>355</sup> *Id.* at 118–23; see also Stephen Thomson, *The Public Sector Ombudsman in Greater China: Four Chinese Models of Administrative Supervision*, 39 U. PA. J. INT'L L. 435, 483 (2017) (discussing the role of the Ombudsman office across Greater China); see also Reserve Bank of India, *The Banking Ombudsman Scheme of 2006* (as amended up to July 1, 2017), Ref. CEPD. PRS. No. 6317 /13.01.01/2016–17 (June 16, 2017) (discussing the regulations and procedures governing the Banking Ombudsman Scheme in India).

<sup>356</sup> Lin & Hu, *supra* note 332, at 119–23.

<sup>357</sup> *The Banking Ombudsman Scheme of 2006*, *supra* note 355.

<sup>358</sup> See FE Bureau, *RBI Report 'Loan Growth Promising, Banks' Capital Base Unimpaired'*, FINANCIAL EXPRESS (May, 28, 2021, 4:30 AM), <https://www.financial-express.com/economy/rbi-report-loan-growth-promising-banks-capital-base-unimpaired/2260299/>.



Act of 2013, effective from January 16, 2014, which provides for the establishment of the institution of Lokpal, or Ombudsman, to inquire into allegations of corruption against certain public offices and functionaries including Prime Minister, Ministers, members of Parliament.<sup>359</sup> Pakistan, which has the reputation of lack of democratic governance, has also established the office of Ombudsman.<sup>360</sup> The European Union established the office of the European Ombudsman by the Maastricht Treaty (1992) giving the authority to deal with corruption and “cases of maladministration by European Union institutions, bodies, offices or agencies.”<sup>361</sup> The European Ombudsmen “have an essential role when it comes to ensuring transparency in the functioning of EU institutions, also investigating claims in cases of maladministration” in connection with abuse of power, refusal to provide information, or caused by incorrect procedures.<sup>362</sup> China, governed by authoritarian regimes, has also established the office of Ombudsman with the role of supervision of public offices, with jurisdiction over executive malpractice and “deficiency in government departments and non-governmental public bodies.”<sup>363</sup> Ombudsmen can carry out “direct investigations of their own volition” in addition to acting on the complaints received from various quarters including members of the public, private companies and government bodies.<sup>364</sup> It is appreciable that complaints so received in China are “not filtered by legislators, and each ombudsman conveys its primary substantive power through the making of recommendations with no general power to award remedies.”<sup>365</sup>

In Australia, the office of Ombudsman exists at both state and federal levels. The professed roles of the Office of the

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<sup>359</sup> Parliament of India, Compendium on Parliamentary Enactments (The Lokpal and Lokayuktas Act of 2013), (Issued on July 2015) (“The word ‘Lokpal’ etymologically means ‘protector of people.’ The term was coined as an Indian variant of the concept of ‘Ombudsman’”).

<sup>360</sup> Karim, *supra* note 333, at 174.

<sup>361</sup> Ottavio Marzocchi, *The European Ombudsman*, EUROPEAN PARLIAMENT (Apr. 2021), <https://www.europarl.europa.eu/factsheets/en/sheet/18/the-european-ombudsman>; *see also* Vega, *supra* note 94, at 260.

<sup>362</sup> Vega, *supra* note 94, at 260.

<sup>363</sup> Thomson, *supra* note 355, at 483.

<sup>364</sup> *Id.*

<sup>365</sup> *See id.*

Commonwealth Ombudsman are to safeguard the community in its dealings with the Australian Government and to oversee some of the private sector organizations.<sup>366</sup> The Commonwealth Ombudsman acts independently and offers free services of investigation and solution to unfair treatments by the Australian Government with anyone.<sup>367</sup> The office of Ombudsman is regarded as an integrity institution, which assists with safeguarding people against abuse of official powers, ensuing compliance with the relevant laws, policies and standards in Australia.<sup>368</sup> The office of Ombudsman confidentially deals with issues connecting with corruption and proffers significant values of conciliation, privacy, and problem-solving to the Commonwealth integrity framework.<sup>369</sup> The Ombudsman Act of 1976 in Australia empowers the office of Ombudsman to compel anyone to produce information and documents that a person possesses and to interrogate that person.<sup>370</sup>

For just and fair operations, Ombudsmen are to be independent persons who must have both individual and political independence in order to secure the benefit of such an office. As noted scholars Nuannuan Lin and Weijun emphasize, Ombudsmen ought to extend their operational focus from the examination of extra-system factors to the appraisal of their intra-system issues of concerns, which will help them discover the root causes of the systemic problems.<sup>371</sup> Lin and Hu further assert that “the unique role that Ombudsman offices can play in resolving systemic issues by identifying latent factors that permeate a system and give rise to a recurring pattern of failures alongside their more traditional role as ADR practitioners focused on dispute resolution.”<sup>372</sup>

All this reinforces the justification for having the Office of Ombudsman in Bangladesh. The Tax Ombudsman and the proposed

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<sup>366</sup> *What We Do*, COMMONWEALTH OMBUDSMAN, <https://www.ombudsman.gov.au/what-we-do> (last visited Sept. 17, 2021).

<sup>367</sup> *Id.*

<sup>368</sup> Grant Hoole & Gabrielle Appleby, *Integrity of Purpose: A Legal Process Approach to Designing a Federal Anti-Corruption Commission*, 38 ADEL. L. R. 397, 413 (2017); Ombudsman Act 1976 (Cth) § 15(1) (Austl.).

<sup>369</sup> Hoole & Appleby, *supra* note 368, at 413–414.

<sup>370</sup> Ombudsman Act 1976 (Austl.), §§ 9, 13.

<sup>371</sup> Lin & Hu, *supra* note 332, at 113.

<sup>372</sup> *Id.* at 118–119.

offices of Ombudsman for other financial services, if established, should operate in collaboration with the NBR, ACC and Bangladesh Bank to minimize, if not to eliminate, financial crime which has been cancerous and is eating away the country's expected economic growth, widening the gap between the "haves" and the "have-nots" and eroding socio-cultural values.

#### H. Promoting International Cooperation

Black money is a global concern, and most of the money is laundered overseas. The laundering of money is normally a transnational organized crime involving several jurisdictions with different legal standards.<sup>373</sup> Because of this international dimension of the offense at issue, international cooperation and coordination are imperative to effectively address this severe evil which has now assumed the appearance of pandemic. A 2009 study conducted by the United Nations Office on Drugs and Crime, showed that the amount of proceeds of money laundering per annum was equivalent to 2.7 percent of the global GDP, equal to about US\$1.6 trillion.<sup>374</sup> Gilmore suggested that three interconnected components of the international strategy are to be considered for combating money laundering, which are: (a) establishing preventive measures involving private-sector actors; (b) strengthening domestic criminal justice systems; and, (c) increasing levels of international cooperation.<sup>375</sup> A successful effort to reduce this offense requires the law to combat each step of laundering process, encompassing identification, pursuit, seizure, and confiscation or forfeiture of the assets laundered.<sup>376</sup> Since each of these steps generally takes place in different jurisdictions, which necessitates international cooperation to effectively prevent them from happening.

As explained earlier, a huge amount of black money flies to certain overseas destinations every year from Bangladesh. The

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<sup>373</sup> BARRY RIDER, KERN ALEXANDER, LISA LINKLATER & STUART BAZLEY, *MARKET ABUSE AND INSIDER DEALING* 148 (2d ed. 2009).

<sup>374</sup> Jose Maria G. Hofilena & Jason L. Sy, *Gone Without a Trace: A Re-Examination of Bank Secrecy Laws and Anti-Money Laundering Laws in Light of the 2016 Bangladesh Bank Heist*, 62 *ATENEO L.J.* 90, 128 (2017) (internal citation omitted).

<sup>375</sup> *Id.* at 128–29 (internal citation omitted).

<sup>376</sup> Rider, et al, *supra* note 373, at 148.

recipient countries may see an ostensible economic benefit for a short term, but they are harming themselves by allowing this money in the long run. This is so because the launderers are not ideally law abiding citizens of the countries where they were born in, they were educated and skilled at the expense of people's tax in most cases from primary to tertiary levels. Whilst they should have a sense of responsibility to pay back to their motherland as much as possible, they deliberately ruin the nation in contravention of law for personal gains. The elimination of this multi-facet problem of black money from any country, both the source of generation and opportunity of siphoning off must be obliterated. This eradication calls for cooperation between the home and host countries of the ill-gotten money. Most popular foreign destinations of Bangladeshi BMHs are Switzerland, Canada, Australia and Singapore, all of which are developed economies, and some of them often preach others about AML control, fairness, transparency and accountability. They all have strict AML laws in place for their own nations. Now a crucial question begs to be answered as to why they entice dishonest people from foreign countries to fly in with a specific amount of money without verifying their sources of income. The roles of these countries resemble a double standard. The problem does not seem to be too complex to overcome if the international communities show their willpower.

In terms of damaging effects of black money, no state is safe unless every state is safe. Money laundering is a major way of digesting black money by BMHs, whilst it is an international crime.<sup>377</sup> AML control nonetheless still remains an issue of national concerns.<sup>378</sup> Scholar Maria Bergström describes AML regulation as "a fascinating field that not only embraces various types of actors and interests, actions, and processes, but also faces challenges and shortcomings on a variety of levels and contexts."<sup>379</sup> Therefore, it warrants international cooperation, which should be developed and effected through a convention at the initiative of the UN. Admittedly, to address money laundering, the UN has already taken some measures, which include

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<sup>377</sup> See Selina Keesoony, *International Anti-Money Laundering Laws: The Problems with Enforcement*, 19 J. OF MONEY LAUNDERING CONTROL 130, 130–47 (2016).

<sup>378</sup> Maria Bergström, *The Many Uses of Anti-Money Laundering Regulation—Over Time and into the Future*, 19 GER. L. J. 1149, 1164 (2019).

<sup>379</sup> *Id.* at 1150.

the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,<sup>380</sup> the United Nations Convention against Transnational Organized Crime of 2000,<sup>381</sup> the Political Declaration and Action Plan against Money Laundering of 1988,<sup>382</sup> and the Naples Political Declaration and Global Action Plan against Organized Transnational Crime of 1994.<sup>383</sup> In addition, there are other supportive instruments, such as the United Nations Convention Against Corruption (UNCAC)<sup>384</sup> and the Financial Action Task Force on Money Laundering (FATF), an intergovernmental organization devoted to promoting policies for protecting the global financial system from the offenses of money laundering and terrorist financing.<sup>385</sup>

However, more needs to be done proactively in practice. The first thing which begs urgent action is a strong commitment by the international community that no state will allow black money and that they implement what they have agreed to do through the ratification of the aforesaid international instruments. All States must adhere to the core principle of international law of *pacta sunt servanda*, requiring adherence to legally binding agreements<sup>386</sup> and representing “an elementary and universally agreed principle fundamental to all legal

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<sup>380</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1982, 1582 U.N.T.S. 95 (ratified by Bangladesh on 11 Oct 1990).

<sup>381</sup> United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 (ratified by Bangladesh on 13 Jul 2011) (*See* art. 6–7).

<sup>382</sup> G.A. Res. S-20/2 (Oct. 21, 1998).

<sup>383</sup> G.A. Res. 49/159 (Feb. 24, 1995).

<sup>384</sup> United Nations Convention Against Corruption, Oct 31, 2003, 2349 U.N.T.S. 41 (188 parties, including Bangladesh, had accepted it by Feb. 27, 2007).

<sup>385</sup> Fin. Action Task Force, *About*, <https://www.fatf-gafi.org/about> (last visited June 11, 2021) (Bangladesh is not one of the 39 members, but FATF is committed to implementing its recommendations as an Asia-Pacific Group country); *see also* Hofilena & Sy, *supra* note 370, at 100 (describing the essential purpose of money laundering and how to deter it).

<sup>386</sup> For a discussion of “*Pacta Sunt Servanda*”, *see* I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law*, 83 AM. J. INT’L L. 513 (1989); Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT’L L. 775 (1959).

systems.”<sup>387</sup> It is not hard to scrutinize the validity of funds flown from overseas by host countries, nor is it difficult to combat the black money domestically, if the respective governments have the required political will. An exercise of a due diligence inquiry employing the national and international agencies should be sufficient to unearth the hidden sources of black money.

Preventing money laundering requires robust domestic laws.<sup>388</sup> A national law is drafted typically to protect its own interest, depending on the choice of lawmakers in most cases. Accordingly, Bangladesh has also enacted AML laws. However, those laws are likely to have been crafted to keep the interest of legislators safeguarded, a majority of whom are businesspeople.<sup>389</sup> Scholar Selina Keesoony finds that harmonization of the AML laws is necessary to create deterrence for actual or potential launderers,<sup>390</sup> which can be achieved through UN initiatives. To combat money laundering forcefully, the vicious act of laundering “must be recognised as a tangible threat in its own right,”<sup>391</sup> as “it constitutes a harmful criminal activity separate from the predicate offences.”<sup>392</sup>

International cooperation is imperative to combat money laundering.<sup>393</sup> First, all bank secrecy laws should be relaxed, information of suspicious deposits should be disclosed to the governmental agencies of the depositors’ home country, and banks should also ask foreign depositors about the source of the intended deposits. Amendments to the conservative banking secrecy laws are argued to be essential to weaken the money laundering opportunities,

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<sup>387</sup> Anthony Aust, *Pacta Sunt Servanda*, Oxford Pub. Int’l L. (Feb. 26, 2007), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449>.

<sup>388</sup> Keesoony, *supra* note 377, at 130.

<sup>389</sup> Ahammad Foyez, *Businesspeople to Rule JS Again*, New Age (Bangl.), January 5, 2019, at Bangladesh. Businesspeople constitute 61 percent of the members of the current Parliament of Bangladesh, whereas the number was 34 percent in 1979.

<sup>390</sup> Keesoony, *supra* note 377, at 130.

<sup>391</sup> *Id.* at 144.

<sup>392</sup> NEIL BOISTER, AN INTRODUCTION TO TRANSACTIONAL CRIMINAL LAW 185 (2d ed. 2018).

<sup>393</sup> Adam Graycar, *International Cooperation to Combat Money Laundering in INTERNATIONAL AND TRANSNATIONAL CRIME AND JUSTICE* 299, 303 (Mangai Natarajan ed., 2d ed. 2019).

“striking a balance between the State’s interest to curb money laundering and the public interest to uphold bank confidentiality.”<sup>394</sup> It can be assured that strengthening AML laws with more teeth will not cause an end of bank secrecy laws, as these two sets of laws are mutually inclusive.<sup>395</sup> Moreover, discarding the bank secrecy laws altogether in support of strong AML law is not desirable; instead, a balance must be struck between the protection of depositors’ interests and prevention of illicit capital flights.<sup>396</sup> This is because weakening bank secrecy laws in order to strengthen AML rules may cause erosion of depositors’ confidence in the banking system, which may in turn weaken or destabilize the economy.<sup>397</sup>

Switzerland has pioneered the banking secrecy law to confront an economic downturn. The Swiss bank secrecy law begun in 1934 in the aftermath of the great recession of the 1930s under the Banking Act of 1934 (Switzerland), by which the country wanted to safeguard its ability to hide money within the country regardless of the source of such funds.<sup>398</sup> A breach of this confidentiality was made a criminal offense of any banker who disclosed the hidden information.<sup>399</sup> Since then other countries started following suit in imposing restrictions on disclosure of depositors’ information.<sup>400</sup> This secrecy is still maintained by many countries,<sup>401</sup> meaning they are facilitating corruption and financial crimes, although the 1934 situation is now non-existent. It is a welcome development that Switzerland has started to melt their rigidity by relaxing the secrecy requirement, thanks to international

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<sup>394</sup> Hofilena & Sy, *supra* note 374, at 140.

<sup>395</sup> *See id.*

<sup>396</sup> *Id.* at 138.

<sup>397</sup> *Id.*

<sup>398</sup> *See* Sébastien Guex, *The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy*, 74 BUS. HIST. REV. 237, 252 (2000).

<sup>399</sup> *Id.* at 244.

<sup>400</sup> Hofilena & Sy, *supra* note 374, at 93 (internal citation omitted) (these countries include Switzerland, Singapore, Luxemborg, Lebanon, and the Philippines).

<sup>401</sup> *See The Financial Secrecy Index*, TAX JUST. NETWORK, <https://fsi.taxjustice.net/en/introduction/introducing-the-fsi> (last visited June 11, 2021) (providing financial secrecy index and ranking of countries in 2020).

pressure.<sup>402</sup> Alongside Switzerland, Canada,<sup>403</sup> the U.S., and the UK<sup>404</sup> have also been popular destinations for BMHs in Bangladesh, although they claimed themselves to be examples of fairness, transparency, and accountability and solicit others to follow them.

Financial crimes at domestic and international levels cannot be permanently stopped without changing this secrecy law. Money laundering sometimes involves other serious offenses, such as drug trafficking and terrorism financing.<sup>405</sup> If the bank asks for the source of money before receiving the money for deposit, it can judge at the outset whether the money came from a valid source. Even if the provisions of such a disclosure requirement are simply put in place, they will still be helpful to some extent. In suspicious and dubious instances, the bank can make further queries from the potential depositors' home country, which in turn can check the depositors' tax records of the person and gather other intelligence. This single measure can reduce the offense of money laundering considerably.

Without going into details of the existing international legal regime for the prevention of black money flights,<sup>406</sup> it can be plausibly said that the aforementioned international instruments have failed to achieve the overarching goal of stopping money laundering and corruption at national and international levels. Although the legal frameworks exist at both levels, political will is lacking, arguably because of the host country's apparent financial benefit. Positive outcomes cannot be achieved through half-hearted initiatives, but only through a firm commitment to combating corruption and money laundering. Any sustainable improvement will remain unattainable,

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<sup>402</sup> Ray Flores, *Lifting Bank Secrecy: A Comparative Look at the Philippines, Switzerland, and Global Transparency*, 14 WASH U. GLOBAL STUD. L. REV. 779, 789–92 (2015).

<sup>403</sup> Sumon Afsar, *Permanent Immigration to Canada—Some Seeking Fortune, Some Others Fleeing with Looted Money*, DAILY BONIK BARTA (Bangl.) Jan. 18, 2020, at 1.

<sup>404</sup> Tasnim Mohsin, *United States-United Kingdom Still the Best Attraction for Temptation and Escape*, BONIK BARTA (Bangl.), Jan. 9, 2020, at 1.

<sup>405</sup> See Fabian Maximilian Johannes Teichmann, *Current Developments in Money Laundering and Terrorism Financing*, J. MONEY LAUNDERING CONTROL (2020) (discussing relationship between money laundering and terrorism financing).

<sup>406</sup> See generally Graycar, *supra* note 393, at 298–304 (discussing the existing international regime in detail).



unless international communities stand unitedly and firmly against black money.

I. Enhancing Public Awareness and Raising Social Resistance

Corruption is a social disease; hence a social remedy could be sought to prevent and cure it. Scholar John Mukum Mbaku postulates that “[i]f citizens can scrutinize the activities of civil servants and politicians; the latter would find it more difficult to engage in corruption and other forms of impunity. Such a process would enhance accountability and minimize corruption.”<sup>407</sup> One of the problems with black money is that BMHs are outwardly admired by the society they live in, just because of their wealth, yet they are also despised inwardly by many in the same society, who remain silent out of fear of retaliation. This is so because money is power, as is generally perceived. If society could overtly demonstrate its animosity towards the BMHs, then the wrongdoers would better realize that their actions for such money are wrong. Public denouncement will certainly be a useful deterrent, but the question is “who will tie the bell round the neck of the fat cat”? This is a major concern, because BMHs are powerful and have the ability to greatly harm others, particularly those who are honest and quieter than the noisy malefactors. Wrongdoers are small in number; therefore, they can be overpowered by social forces if all allies get organized. Younger generations of affected societies could take the lead locally by boycotting the corrupt people in all social functions, except for religious ones. The corrupt people should not be approached for any financial assistance, even for good causes, such as building mosques or schools.

For a national solution, student leaders should take initiative and mobilize people across the country to launch a nationwide movement, though these days, unfortunately, the integrity of many “powerful” student leaders<sup>408</sup> is tainted in Bangladesh by their

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<sup>407</sup> Mbaku, *supra* note 100, at 346.

<sup>408</sup> Many student leaders, particularly those who are associated with the political party in the government, are reportedly involved in collecting undue subscriptions from others, such as businesspeople, university administrators, construction contractors, etc.

pursuits of black money, which is another serious problem in itself. Thankfully, their number is again small, though they tarnish the image of larger student communities. Nevertheless, the movement against corruption can be organized by ordinary students, and social media platforms can be utilized to mobilize the public initially. Subscribing to this view, Yingling goes on to say that “[a]lthough civil disobedience has been traditionally justified as an appeal to majority trumping considerations, civil disobedience can also be justified as a corrective measure when democratic processes break down, even when majority-trumping considerations are absent.”<sup>409</sup> This movement should thus begin by boycotting all known dishonest candidates in elections at all tiers of governance as a silent protest, before standing firm against public servants who are subordinate to politicians. Regarding the modern governance system, some commentators view that members of a civic community should raise their voice for better public services, which will inform the public servants of their responsibility for civic duties.<sup>410</sup> Likewise, leading voice for human rights Amartya Sen commented that the engagement of citizens of a country energizes people with the opportunity and motivation to raise their voice against injustice and discrimination, and it also promotes human capabilities, uplifts fundamental freedoms, and overall makes contribution to improve well-being and quality of life of the people.<sup>411</sup> In the present context of Bangladesh, Sakib preaches that the movement against corruption in Bangladesh can be effectively carried out through rallying citizens at the grass-roots level.<sup>412</sup> He adds that “spontaneous participation from youth groups in raising awareness about corruption will provide more significant outcomes in society than waiting for isomorphic approaches to preventing corruption to work.”<sup>413</sup>

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<sup>409</sup> M. Patrick Yingling, *Civil Disobedience to Overcome Corruption: The Case of Occupy Wall Street*, 4 IND. J. L. & SOC. EQUAL. 121, 121 (2016).

<sup>410</sup> Sakib, *supra* note 6, at 214 (citing ROBERT D. PUTNAM, ROBERT LEONARDI, & RAFFAELLA Y. NANETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1994)).

<sup>411</sup> *Id.* at 214–15 (citing Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999)).

<sup>412</sup> Sakib, *supra* note 6, at 229.

<sup>413</sup> *Id.*

A recent successful event of social movements and mass street gatherings in Bangladesh took place in 2013, called the “Shahbag Movement” (referencing a famous street square in the capital city near the University of Dhaka), which concerned the national trial of a top war criminal in Bangladesh. The protesters mobilized around half a million of people overnight to advocate for increasing the war criminal’s sentence from life imprisonment to capital punishment, which effectively compelled the government to amend the law almost instantaneously by enacting a provision allowing for raising the level of punishment on appeal.<sup>414</sup> Accordingly, the war criminal was awarded the death sentence, which could not have been done without the unprecedented mass agitation not seen since Bangladesh independence in 1971.<sup>415</sup> The “Occupy Wall Street” movement is another recent international example of an apolitical social demonstration.<sup>416</sup> Therefore, students must first commit themselves to stop receiving black money and sincerely regard corruption to be an odiously wrongful act to be avoided at their work and in social engagements. This will provide them with a moral boost to get organized against black money and help them to launch a conscious, sensible, disciplined, peaceful and constructive movement across the country against the evil. Any type of violent movement must be avoided to demonstrate full compliance with the law of the land.

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<sup>414</sup> See Sanchari De, *Context, Image and the Case of the Shahbag Movement*, 10 CONTEMP. SOC. SCI. 364 (2015); Fahmida Zaman, *Agencies of Social Movements: Experiences of Bangladesh’s Shahbag Movement and Hefazat-e-Islam*, 53 J. ASIAN AFRICAN STUD. 339 (2018); M. RAFIQU L ISLAM, NATIONAL TRIALS OF INTERNATIONAL CRIMES IN BANGLADESH (Brill Nijhoff ed., 2019) (detailing the Bangladesh independence movement in 1971 and the trial of the war criminals in 2013).

<sup>415</sup> See Islam, *supra* note 415 (analyzing this trial).

<sup>416</sup> See Se Jung Park, Yon Soo Lim, & Han Woo Park, *Comparing Twitter and YouTube Networks in Information Diffusion: The Case of the “Occupy Wall Street” Movement*, 95 TECHNOL. FORECASTING & SOC. CHANGE 208 (2015).

J. Establishing a New Authority for Coordination and Performance Assessment of Financial Regulators

Bangladesh Bank, NBR, ACC, and the Bangladesh Securities and Exchange Commission (BSEC)<sup>417</sup> are the four major bodies engaged in the regulation of financial issues in Bangladesh, while the Bangladesh Financial Intelligence Unit (BFIU) provides intelligence reports. The BSEC is directly relevant because of black money investment in the market. An empirical study conducted in China argues that anti-corruption initiatives require multifaceted considerations that necessitate the regulatory mechanism to go beyond straight control measures directly against corrupt practices.<sup>418</sup> Regulatory bodies need to be creative in their actions from different angles, such as the acts of generation, places of preservation, heads of consumption, and ways of exportation of black money. Different bodies are tasked with the responsibilities of overseeing or controlling different aspects of the proceeds of corruption and other crimes. Financial issues are generally complex, which warrant a coordinated effort to make the regulation a success, and the accountability of each regulator must maximize regulatory fruition. Effective interactions between these regulators are necessary for accountability mechanisms to produce better anti-corruption outcomes.<sup>419</sup>

Putting in place an assessment body to hold different regulators accountable for their performance in the financial sector was recommended in Australia by the latest Financial Services Royal Commission, headed by the Commissioner, the Honourable Kenneth Madison Hayne AC QC, in its final report submitted in February 2019.<sup>420</sup> The Royal Commission discovered massive irregularities by some financial institutions.<sup>421</sup> In pursuance of the Royal Commission's

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<sup>417</sup> See generally, BANGLADESH SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov.bd> (last accessed July 5, 2021) (describing the composition, powers, and functions of the BSEC and pertinent laws).

<sup>418</sup> Hui Li, Ting Gong & Hanyu Xiao, *The Perception of Anti-Corruption Efficacy in China: An Empirical Analysis*, 125 SOC. INDICATORS. RSCH. 885, 901 (2016).

<sup>419</sup> Ankamah, *supra* note 412, at 492.

<sup>420</sup> ROYAL COMM'N INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY § 7.3 (2019), <https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-1-final-report.pdf>.

<sup>421</sup> See *id.* at 84–85.

recommendation 6.14, the Federal Parliament of Australia has enacted the Financial Regulator Assessment Authority Act 2021 (Australia) in June 2021<sup>422</sup> to establish a new authority named the Financial Regulator Assessment Authority (FRAA), a body tasked with assessing the effectiveness and capability of Australian Securities and Investments Commission (ASIC)<sup>423</sup> and Australian Prudential Regulatory Authority (APRA)<sup>424</sup> in discharging their respective statutory functions and meeting their statutory objects.<sup>425</sup> FRAA will consist of four members, including a Chair, to be appointed by a Treasury portfolio minister, and two others appointed members, whilst a fourth member is the departmental member, who will be the Secretary of the Department of the Treasury or a nominated Senior Executive Service (SES) employee.<sup>426</sup> Both APRA and ASIC will be subject to capability reviews at least once every two financial years by FRAA.<sup>427</sup> The FRAA will be tasked with complementing and expanding on the existing accountability mechanisms, which is currently applicable to ASIC and APRA. The FRAA will not review individual enforcement cases, rather it will provide systemic scrutiny over the enforcement by ASIC and APRA.<sup>428</sup> The object of the legislation is to provide for the independent assessment of the effectiveness of ASIC and APRA.<sup>429</sup> The key functions and powers of the FRAA include: (i) conducting biennial assessment of the effectiveness of ASIC and APRA and reporting to the Minister on their effectiveness;<sup>430</sup> (ii) the Minister can request FRAA to undertake capability reviews of either or both of ASIC and APRA and report to the Minister;<sup>431</sup> and (iii) the FRAA can undertake an assessment itself

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<sup>422</sup> Financial Regulator Assessment Authority Bill 2021 (Cth) (Austl.).

<sup>423</sup> See Australian Securities and Investments Commission Act 2001 (Cth) (Austl) (providing details about ASIC).

<sup>424</sup> See Australian Prudential Regulation Authority Act 1998 (Cth) (Austl) (providing details about ARPA).

<sup>425</sup> Explanatory Memorandum, Financial Regulator Assessment Authority Bill 2020 (Cth) ch. 1.3–1.5 (Austl.).

<sup>426</sup> Financial Regulator Assessment Authority Bill 2021 (Cth) §§ 5, 9–11 (Austl.).

<sup>427</sup> *Id.* §§ 12–13.

<sup>428</sup> See *id.* § 8.

<sup>429</sup> *Id.* §§ 3, 13.

<sup>430</sup> *Id.* §§ 12(1)(a)–(b), 14(1).

<sup>431</sup> *Id.* §§ 12(1)(c)–(d), 12(3).

or in response to the Minister's request on an ad hoc basis and report to the Minister on the effectiveness of both or either ASIC and APRA.<sup>432</sup> Bangladesh should establish such an authority to coordinate and assess conduct of NBR, ACC, Bangladesh Bank, and Bangladesh Securities Commission for better outcomes of the financial regulatory systems.

#### IV. CONCLUSION

Crimes are created by law criminalizing certain conduct for restoring and maintaining order in the society. Amnesties to deliberate transgressors of the law generate people's disregard for the legal system and erode public confidence in the whole governance system. This is what has happened in Bangladesh in relation to the profusion of black money, the control of which is of paramount importance to establish fairness and justice and to achieve Goal 16 of the SDGs. Law must be allowed to take its own course, and a crime should be punished in accordance with the spirit of the law which was in place at the time of its commission. Any failure in doing so or turning a blind eye to such offenses would be the failure of the State in enforcing the law, whilst offering amnesties in question amounts to not only breaking the law by its makers themselves through exculpating the offenders, but also effectively inciting them to commit further crime. Such dereliction of state duty would impair the rule of law and contribute to an irreparable ailment of lawlessness in the relevant areas, as is evident currently in the dominance of black money. After all, the mice will play when the cat is away. Corruption is such an influential factor that it prompts proponents of the free-market economy to rely more on the market itself, and because of the incompetence and corruption of government regulators, asserting "public interest" regulation would actually worsen the market malfeasances instead of helping to improve the situation.<sup>433</sup>

This article focuses on the illegality of amnesties offered to BMHs in Bangladesh and analyzes their harmful impacts on the economy, crimes, and honest taxpayers. The illegality has been shown through the violations of specific provisions of the Constitution, the

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<sup>432</sup> *Id.* §§12(3), 14.

<sup>433</sup> Andrei Shleifer, *Understanding Regulation*, 11 EUR. FIN. MGMT. 439, 440 (2005).

MLPA2012, the ACCA2004, the PC1860, and the PCA1947.<sup>434</sup> Besides, these amnesties also contravene certain provisions of *the* UNCAC, ICCPR, ICESCR, CEDAW and UNCTOC.<sup>435</sup> In investigating responses to, and impacts of, the amnesties in question, this article finds that the overall response of BMHs to these offers from 1971 to 2021 is frustrating because the wrongdoers do not care about the undue incentives. This is mainly because of a lack of fright, meaning the government has failed to inflict any reasonable amount of fear to persuade them to respond. Most of the black money is already in the market, and a huge amount of it is laundered overseas every year. Although no appreciable benefits have been found, there are several specific detrimental effects of such amnesties, as demonstrated in this article. These include a significant increase in: (a) corruption; (b) price of real estate (driving out honest taxpayers from the market); (c) money laundering; (d) deposits by Bangladeshis in Swiss banks; (e) defaulted bank loans causing minimum capital shortfalls to most of the state-owned banks which have been kept running by the government paid taxpayer money as stimuli; and (f) capital flights from Bangladesh—many of these BMHs have bought their second homes overseas.

Upon the above disheartening findings, this article seeks to work out the ways of punishing the dishonest, protecting the honest, preventing the proliferation and exploitation of black money, and overall, bringing the ill-gotten assets under control for the benefit of the nation. Particular measures that this article solicits to consider are precisely mentioned below. *First*, corruption must be checked strictly, and the amnesty should be discontinued immediately. The failed whitening provisions must be removed from the Income Tax Ordinance of 1984, and no further inclusion of those unfair and discriminatory provisions in violation laws should be contemplated. *Second*, the ACC needs to be enabled to reach out all corrupt people without any “no go area.” To do so, the ACC must be independent both personally and institutionally. Its internal corruption has

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<sup>434</sup> In addition to these laws, the whitening opportunities also contravene the Public Procurement Act 2006 (Bangl.) and the Public Service Act 2018 (Bangl.), as referred to briefly.

<sup>435</sup> CEDAW and UNCTOC are effectively flouted by the discriminatory tax treatment proffered by the whitening opportunities.

damaged its image, will continue to do so, and will ultimately result in complete erosion of public confidence in the commission, unless the dishonesty is eliminated from it. *Third*, insiders should be incentivized by offering statutorily specified worthwhile rewards and be guaranteed protection from all *ex-post* adversities in advance by legislation. *Fourth*, only a credible threat of enforcement of law can instill fear of punishment into wrongdoers. The enforcement of law is visibly weak, and consequently, wrongdoers take advantage. The current laxity in enforcement should be replaced with inevitability ensuring utmost neutrality. *Fifth*, establishing the office of Ombudsman as mandated by the Constitution is long overdue. The country's sole office of Ombudsman, Tax Ombudsman, has been unduly abolished just after the expiry of the initial four-year tenure of the first Ombudsman in 2010. The office of Tax Ombudsman must be restored, and two more should be established: one for the country's fragile banking sector, and the other for corruption in other sectors. *Sixth*, black money has been a global concern, hence, no country can perfectly control this money alone without useful cooperation from international communities. This article identifies the existing international framework pertinent to black money and finds that, while it works in theory, its fruits can be reaped only through extending cooperation in practice. To this end, the UN needs to take further initiatives to maximize global cooperation collectively against this evil. *Seventh*, public awareness and corresponding movement are critical. Article 7(1) of the Constitution pronounces that "[a]ll powers in the Republic belong to the people."<sup>436</sup> People can exercise this power lawfully in electing their representatives and peacefully protesting corrupt activities by anyone. Boycotting BMHs socially would also be useful, though not sufficient. This study recommends enhancing public awareness of the persistent abundance of black money and stimulating them to unite both locally and nationally, under the leadership of honest students, against generation and exploitation of black money. *Finally*, it recommends that a new authority for coordination and performance assessment of major financial regulators, including the ACC, the NBR, Bangladesh Bank, and the BSEC, be formed as a statutory body corporate, in conformity with the

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<sup>436</sup> BANGL. CONST. pt. I art. 7(1).



new body in Australia, the FRAA.<sup>437</sup> The proposed body can be called the “Bangladesh Financial Regulator Assessment Authority,” and its composition, powers, and functions can be defined in line with those of the FRAA from the Financial Regulator Assessment Authority Act of 2021 (Australia).

Culpability of humans cannot be entirely eradicated from any society forever. However, it can be minimized by law when the words of law correspond to the need of a given society, and enforcement thereof is efficient in terms of time, cost, and quality. Bangladesh does have laws to deal with different facets of black money, though some of them were made reportedly in response to the pressure from donor agencies. These laws are not perfect. However, the lack of political will, the dearth of enforcement actions, the lack of impartiality, and the deficiency in efficiency and honesty have overshadowed the legal loopholes. This article identifies some of these weaknesses and provides specific recommendations for improvement, having due regard to the saying that “a stigma can never be a beauty spot.” These recommendations aim to improve the regulatory regime in Bangladesh in preventing black money and may also be suitable for other countries facing similar issues.

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<sup>437</sup> FRAA is a well-considered creation of the Royal Commission 2017, which submitted its final report on February 2019. The report was influenced by the Commission’s own comprehensive investigations and existing research. FRAA is yet to be formed as the legislation received Governor-General’s assent on June 29, 2021. However, it will likely be established soon.