

Legal Framework of Public Private Partnership in Bangladesh: *A Critical Review*

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ABSTRACT

The aim of this paper is to review and critique the applicable policy and laws in Bangladesh regarding infrastructure procurement and the private sector engagement in public infrastructure assets and service delivery. Public Private Partnership (PPP) have great role and effective contributions to the infrastructure development sector, which defines national development and investment results. So creating favorable policy, law and regulatory environment are necessary for the PPPs effective development, investment results, effective risk and debt management and equity management. This paper examines the legal basis for private sector participation in the provision of infrastructure and service delivery in Bangladesh by applying the legal method in combination with the comparative study. It provides an analytical overview of the major provisions of legislation relevant to the public private partnership covering infrastructure, maintenance, and financing rules in Bangladesh. The paper argues that the laws that underpin the control framework in Bangladesh are inadequate and concluded with some policy recommendations and directions for future research.

Keywords: public private partnership, legal framework, policy

1.0 INTRODUCTION:

Initial considerations on public - Private Partnership

Public private partnership (PPP) is a new legal ‘entrant’ (often referred to as legal institute) in the Government of the People's Republic of Bangladesh legal system. Unlike Bangladesh, in some countries the PPP has been regulated in positive law for more than two decades. In the European Union (EU) states, this legal institute has begun its legal life back in the 1990s.² In European Union, PPP is not distinguished as a unified legal institute. Consequently, there is not a single supranational law which either directly or indirectly combines the member states to apply the regulations associated to public-private partnership. Given the fact that PPP was actually initiated and now is being extensively applied in the EU countries, for example, UK, Germany, this institute could not escape the attention of its bodies. Hence, the European Commission implemented the Guidelines for successful PPP in 2003. The Guidelines serve as directions for defining the issues of key importance for successful understanding of this type of economic and legal linkage. The EU proposed noteworthy support to PPP by publishing Green Paper on PPP and community law on public contracts and concessions in 2004 (EUR-Lex, 2004). In the EU, PPP remains the most profitable form of economic activity in certain economic areas. This is reflected in sustainability of PPP as a legal institute for more than two decades, positive effects of its application and its spreading into legal systems of the countries which had not acknowledged it before. The preceding review on PPP logically lifts a question - what are the reasons for establishing PPPs? Before moving to theoretical definitions of PPP from the aspect of positive law, we have to answer this question first. “The principal aim of a PPP is to achieve value for money in the services provided while ensuring that the private-sector entities involved meet their contractual obligations properly and efficiently” (Grimsey and Lewis, 2002).

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² The UK is among the first states of the European Union to introduce a public-private partnership in the legal system in 1992 during the government of Conservative Prime Minister John Major called Private finance initiative.

PPPs have multiple objectives, including promoting infrastructure development, developing the local economy, reducing costs, increasing construction and operation efficiencies, and improving service quality by incorporating the private sector's knowledge, expertise and capital (Yuan et al., 2009). This partnership actually signifies a unique market operation which may be manifested in various forms within an extensive scope of public services. There is a state or local government ordering services on one side and a private company providing services on the other side.

Some characteristics of PPP make this relationship rather complex. First, the aims of service providers are different from those of their clients – public authorities. Second, when the public and private parties agree to assist, they have to develop adequate planning, supplying and supervising practices, moreover organizational schemes and payment methods. These adequate planning and managing practices should lead to the achievement of goals that justify the establishment of PPP and their mutual interests. For private subjects this relationship with public sector partner represents an economic endeavor aimed at gaining financial profit out of this business activity. The benefits of public sector cannot be measured as the benefits gained through a business activity. The realization of public sector goals is based on the activities that are presumed to bring realistic progress in achieving the public interest. The activities commenced by the partner from the public sector in order to achieve its goal can be divided into several elements: defining an adequate legal structure that will deter the private sector party from wrongdoing, securing minimum risk in performing the activities of general interest, ensuring successful application of the PPP enabling the realization of social goals since the responsible state that invests the budget resources into this partnership, must pay attention to the elements of social justice. Organs of state, particularly, the government, the chief subject of economic policy (the constituent part of the state's national policy) must ensure that the entire process of the establishment and implementation of PPP is transparent, and that adequate control mechanisms are set up by the state, non-governmental organizations and the general public.

2.0 OBJECTIVES AND METHODOLOGY

2.1 Objectives of the Study

The overall objective of this study is to review the existing policies, strategies, and PPP laws in Bangladesh and to discuss and assess some legislation that included in the PPP framework in the provision of infrastructure, maintenance, and financing rule in Bangladesh. Specifically the objectives of this study are to:

1. Recommend some policies and provisions for cost-effectiveness of PPPs taking in consideration competition law and policy as well as consumer protection and other regulatory policies that may be relevant for the framework for PPPs.
2. Identify the necessity to conduct an audit on the appropriate procurement issues that arise from existing practices in PPPs and to propose suitable legal, policy and structural reforms that should inform the adoption of PPP framework in Bangladesh.

2.2 Methodology

The nature of this study is exploratory rather than testing any hypothesis, since existing research on this issue is not adequate. An exploratory study aims at gaining familiarity with a phenomenon or to achieve new insights into it. Some relevant literatures on Bangladesh as well as global perspectives have been written which focused the positive impacts of the PPP in Bangladesh. These literatures have been written logically.

There is little evidence on primary data-based empirical research in Bangladesh on PPP and it has been observed that people related to these projects do not have clear and specific information and understanding about this issue. Therefore, attempts have not been made to collect primary data. But secondary data have been collected from books, articles, reports, newspapers, etc. As the nature of this study is an exploratory one, it emphasizes a descriptive analysis on the participation of PPP in Bangladesh and whether existing laws and policies can make barriers to the PPP projects.

3.0 PUBLIC PRIVATE PARTNERSHIP: A Clarification of Relevant Concepts

Scholars have been divided in their thinking about PPPs. The greatest divide seems to be between researchers who view PPPs as a tool of governance and those who think it is a “language game” (Teisman and Klijn, 2002). For many people, PPPs are connected with infrastructure projects and are institutional arrangements for cooperation expressed through the establishment of new organizational units. In the world of infrastructure projects, PPPs are also seen as financial models that enable the public sector to make use of private finance capital in a way that enhances the possibilities of both the elected government and the private company (Graeme and Garsten, 2007). International Monetary Fund (IMF) defined PPPs as an arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government (Fiscal Affairs Department, IMF, 2004). PPPs are a variant of privatization in which a service elements previously run solely by the public sector are offered through a partnership between the government and one or more private sector companies. New venture is expected to act like other private business and government continues to play a role in some way. Some scholars termed these formats as PPP or P3.

Full privatization and public procurement stand at the opposite ends of a continuum defined by the degree of service obligations imposed, and ultimate ownership of assets although closely related, there are dissimilarities between public procurement, PPPs and full privatization (Ong'olo, 2006). The criteria often used to select the private partner for PPPs are more difficult than just who offers the best price and who match to the technical terms and specifications. Under a simple tender, government carries the responsibility for indicating exactly what it needs and PPPs underline the actual delivery of project phase. When procuring large infrastructural projects, governments usually have two options for endorsing capital expenditures: user fees or tax revenues. By tradition, the tax-based approach has been favored in the Northern Europe, United States and Japan, and engages using earmarked fuel taxes, general tax revenues or other dedicated taxes to pay for projects. Southern European nations such as Portugal, Italy, Spain, and France – together with many developing nations – have favored to apply of user fees collected in the form of tolls to finance their infrastructure needs.

According to some scholars, PPPs presents as a middle case between privatization and public procurement. Their involvement in open relationship encouraged business to offer options rather than mere provision of a service and the private sector operator will often have to design the finest solution given the government’s specifications. Other things would comprise proposing technical expertise and provision of feasible financial planning for the project, and most significantly, the bearing of the associated operational risks.

More emphasis is given on ability to deliver the service or infrastructure. In the case of a simple tender, the government takes the responsibility for indicating exactly what is required. In the case of a PPP, the private partner might be required to design the best solution for the project, propose technical expertise and provide feasible financial planning and arrangements, and to carry the related operational risks.

On the contrary, privatizations of public products and services generally occur within a regulatory environment that can impose detailed service and investment obligations, such as price caps for poor consumers or rollout schedules to rural areas. According to Farlam (2005), PPPs and privatization exist on a continuum termed by the degree of service duties imposed, and ultimate ownership of assets.

WHY SPECIAL PPP LAW?

When Government craving to implement public private partnership program or arrangement, it is needed to consider early on the development whether there are any aspects of the existing law of the country that would limit the possibility of the project. A particular law can help to diminish the level of uncertainty and ambiguity surrounding PPP project arrangements and have increased investors confidence. To avoid conflict over many instruments that include private contract law, company law, tax law, labor law, competition law, consumer protection law, insolvency law, infrastructure sector laws, property law, foreign investment law, intellectual property law, environmental law, public procurement law or rules, acquisition or appropriation law and many other laws, Bangladesh have enacted special legal and regulatory instruments for PPP. Although in Bangladesh, PPP laws are more recent than the other countries' PPP law, this law has been in force since late 2015. It is a strong belief that PPPs are a significant tool for generating investments in infrastructure projects and creating efficiency in public services. Given the fact that PPP was actually initiated and now is being extensively applied in Bangladesh, Cabinet Committee on Economic Affairs (CCEA) and Line Minister (LM) approved 61 projects under Public Private Partnership Program.³

4.0 EXISTING LEGAL FRAMEWORK OF PPP IN BANGLADESH:

An Analysis of the Provisions

To attain the Vision 2021 goal of Bangladesh becoming a middle income country by 2021, Bangladesh needs to ensure a more rapid, inclusive growth path. To reflect the hopes of the people the target of the government is to raise the Gross Domestic Product (GDP) growth rate to 8 percent by 2016 and then 10 percent by 2021. To attain this GDP growth rate, the share of investment to GDP should be lifted to 35-40%.⁴ Currently the average investment GDP ratio is 26%, which is lower than the national savings ratio (Bangladesh Bureau of Statistics, 2013-14). One estimate suggests that to sustain GDP growth rate of 8 percent in 2016 and beyond requires additional USD 58 billion or BDT 4.8 trillion for 2010-2016. To diminish the investment deficit, contribution of the private sector through public private partnership is an important route. To create an enabling environment for attracting private investments on a continued basis, Government of Bangladesh (GoB) has taken a series of measures. Earlier, GoB had issued the Bangladesh Private Sector Infrastructure Guidelines (PSIG) for implementing the PPP Projects. There was some success in attracting private investment through PPP in the telecom, gas, and power sectors. These and other sectors need more investment and other sectors such as railway, roads, ports, waste management, water supply, education, e-service delivery, tourism etc need more investment. To develop the infrastructure sectors, PPP is being widely considered as a unique window for countries like Bangladesh. But Bangladesh has very limited experiences in PPP, and a need for information and clarification on the subject is high. In regard to a gradual increase of the use of PPPs in a wide variety of types of public infrastructure, it is appropriate to consider development of a model PPP law.

³ PPP Project Lists (2018), Public Private Partnership Authority, Government of the People's Republic of Bangladesh.

⁴ Finance division, *Invigorating Investment Initiative through Public Private Partnership (Position Paper, Ministry of Finance, GoB, 2009)*.

A. NATIONAL LEGISLATIONS

Literature review indicates that there is no clear international “best practice” regarding PPP legislation but some countries have successful PPP programs, PPP units, and procedures.⁵ In countries, such as the UK, Australia, South Africa, and Mexico, the executive branch of government runs and regulates the PPP program. In many other countries the PPP program has been supported by a dedicated PPP law. Examples include Greece, Germany, France, the Philippines, Indonesia, Thailand, and Brazil (PPIAF, 2012). Introducing a PPP law is therefore an option, not a requirement, for developing a PPP program. Depending on PPP program on legislation sometimes carries several disadvantages. The first is the time factor. It takes time and effort to introduce a PPP law. Taking too much time efforts obviously delay implementation of PPP program so it may also lead to undertaking interim measures to be put in place to enable good quality PPP projects. The second disadvantage is the inflexibility in changing law. A law is difficult to change once passed. This inflexibility contributes to some of the critical disadvantages. However, the Government of Bangladesh seems very much sincere and serious for PPP. The Government has already approved Policy and Strategy for Public-Private Partnership, 2010, Guidelines & Scheme for Public-Private Partnership Technical Assistance Financing (PPPTAF) 2012, and Guidelines for Viability Gap Financing (VGF) for PPP Projects. Also law on PPP is ready for presentation to the parliament. The law has integrated various legal and economic aspects of PPP along with a provision of giving compensation to the private partners, if any loss is incurred due to changes in laws and policies of the government. PPP unit has been set up under the Ministry of Finance. Bangladesh Infrastructure Finance Fund Limited (BIFFL) has been formed as a special purpose vehicle to finance infrastructure projects in the country.⁶ BIFFL will serve as the medium for mobilizing resources from the domestic private and foreign sources to finance infrastructure projects. These steps certainly reflect the positive attitude of the Government in this regard. Although the Policy, Guidelines, and Law do not treat PPP as a legal institute, but it directly regulates it since the Policy, Guidelines and Law on PPP calls for the application of the provisions of the Law on public procurement.⁷ Thus these provisions indirectly form the constituent part of the Law on PPP.

The legislation should be interpreted in practice as extensive or in favor of the conclusion of different forms of PPP with the intention of fostering economic development and improving the quality of public services. These laws can direct to an inaccurate application of PPP and to have any negative effects if the provisions are interpreted incorrectly. The subject matter of the Law and Policy on PPP is broadly defined. The Law and Policy regulates the methods and conditions for defining, proposing and approving the partnerships, defines the subjects which is allowed to propose and recognize the projects of PPP, the rights and the duties of the private and public sector partners, the structure and the content of the public contract, with or without the concession constituents, the legal protection in the process of awarding the public contract, the subject of concession, as well as all other concerns which are significant for the realization of a PPP (the Act on public-private partnership, 2015).

The policy sets forth the ways in which private investment could be leveraged in tackling the hazard of poor infrastructure stocks and improving delivery of services to the public in a manner that is sustainable.

⁵ UK instituted over 700 PFI projects between 1992 and 2008.

⁶ See Credit Policy of BIFFL, September, 2018.

⁷ Finance division, *Invigorating Investment Initiative through Public Private Partnership (Position Paper, Ministry of Finance, GoB, 2009)*.

Common law and civil law jurisdiction have different approaches to many issues relevant to PPPs. In many civil law countries, a separate administrative law governs PPP arrangements because the service in question is deemed to be a public service. Administrative law sets out fundamental principles which cannot be derogated from agreement of the parties (PPPIRC, 2009). No specific legislation is necessary to implement PPPs in some jurisdictions. For example, the United Kingdom (UK) provides one of the most remarkable examples of the widespread and successful implementation of PPPs with no inclusive PPP law. The UK introduced the Private Finance Initiative (PFI) in 1992, and standardized the pioneer model through the implementation of numerous PFI projects (Son, 2012).

B. STANDARDIZED CONTRACT

The standardized contracts make the implementation of PPP contract much effective and more transparent, which has not been discussed in the PPP Policy of Bangladesh. The UK implemented standardized contracts and supporting documents through a number of experiences of Private Finance Initiative (PFI) projects (Standardisation of PFI Contracts, 2007). They are designed to simplify and ensure equity in the PPP implementation process. It promotes a common understanding of the risks which are encountered in a standard PFI project, and also allows consistency of approach and pricing across a range of similar projects (Gaffey, 2010). The standardized contracts diminish the cost and time of negotiation by allowing all parties concerned to agree a variety of areas that can follow a standard approach. The standardized contracts are not required for PPP project, but a law may advise to form standardized contracts and to make publicly available by the government, along with guidance notes to aid PPP parties.

C. TERMINATION OF THE CONTRACT

PPP Act, 2015 Sections 48-1 (contract authority's right), 48-2 (concessionaire's right) and 49 (either party's right) in Chapter IV are related to termination of concession contract. Section 48-1(a) provides for a right of termination for the contracting authority "for compelling reasons of public interest". A general and unqualified right to terminate the concession contract for reasons of public interest may appear for a risk that is difficult to assess to the private sector without adequate guarantees. In practice, the compensation due for termination for reasons of public interest may cover items that are taken into account when assessing the compensation that is due for termination for serious breach by the contracting authority (PFIP, 2011). The guarantee of sufficient amount of compensation is significant point for the private party. At the same time, there may be possible reduction for compensation. The Act should take into account the relevant situations and the grounds for reduction of the amount.

Section 48-1 of the Act sets forth the concessionaire's rights of termination which, unlike the contracting authority's right, are admitted under the limited grounds such as previously indicated reasons in project proposal document and later reasons indicated in partnership contract. These reasons could be serious breach by the contract authority, the parties' failure to accomplish agreement on a revision of the contract, or the substantial increase of the contractor's costs or the substantial diminish of the value received for performance of the contract (Armitage, 2011). With respect to Section 52(1), there is a suggestion that if the procedure for resolving disputes under the contract ought to be capable of dealing with a failure to accomplish agreement, it might not be appropriate to allow the contractor a right of termination.

Act Section 49 provides the right to terminate the agreement by either party in the event that the performance of its responsibilities is delivered impossible by circumstances beyond either party's reasonable control. The language of this provision is ill-defined, and the relevant circumstances must be defined in the project/partnership agreement. The PFIP Guide advises that if the exempting obstacle persists for a certain period, or if the completing the project is rendered impossible due to amendment of laws, the agreement might be terminated by either party.

D. DISPUTE RESOLUTION

A framework should be considered for developing successful dispute resolution design. Especially in developing country contexts where there are other norms rather than laws that play a defining role, weak institutions, great poverty, or enforcement perceived not feasible. The alternatives for dispute resolution must strike a balance between the interests of the local citizens and the interests of the private and public parties (Greiman, 2011). Section 52(1) of Chapter V suggests to resolve dispute, if arise, as per partnership agreement. If the dispute is not resolved, Section 52(2) refers Arbitration Act I, 2001 to resolve the dispute. Section 53 provides the right to contract authority for giving instruction anytime to resolve the claim of the user of public services.

E. PPP OFFICE

Many successful PPP programs depend on central PPP units. These include Infrastructure and Projects Authority in UK,⁸ Partnerships Victoria in Australia, and the National Treasury PPP Unit in South Africa. These units fulfill some or all of a range of functions, which may include promoting the PPP program, supporting government departments in developing and implementing PPPs, or regulating the PPP development process by assessing and approving PPP project proposals (PPIAF, 2012). PPIAF recommends establishing PPP unit under Ministry of Finance, most common in other countries, and as stand-alone units. In Bangladesh, a PPP unit has been set up under Ministry of Finance (MoF) and Bangladesh Infrastructure Finance Fund Limited (BIFFL) has been formed as a special purpose vehicle to finance infrastructure projects in the country. But in the Act under Section 54 in Chapter VI, it has been mentioned that an Office for PPP shall be established as an autonomous unit having different manpower under Prime Minister's Office. There is no mention about the responsibilities and roles of PPP units that has already been formed under MoF although it has been mentioned in Policy and Strategy for PPP, 2010 under Section 11.6. Section 11.6 of PPP Policy described "the Finance Division is primarily responsible for examining PPP proposals from financing perspective and managing various financial participation of the government in PPP projects. A PPP Unit will be established in the Finance Division for this purpose" – whereas in the Act, this section is absent.

F. OVERSIGHT

Pure government agencies are necessary for overseeing PPP projects. For example, the National Audit Office (NAO), UK is the principal office responsible for overseeing the UK PFI program, while a Public Accounts Committee (PAC) helps in the oversight and responds to reports issued by the NAO (Carrillo, 2008). In Spain, the Ministry of Public Works is needed to consign public engineering to oversee performance of PPP projects both during construction and throughout operation (GAO, 2008).

⁸ On 1 January 2016, Infrastructure UK merged with the Major Projects Authority to form a new organization, the Infrastructure and Projects Authority.

The PFIP Guide acknowledges the necessity for measures including audit to increase transparency at the events for the selection of the concessionaire. Nevertheless, it does not consider the concrete oversight mechanisms not only in the procedure of party selection but also through the performance of the projects. In the law for PPP in Bangladesh, Sections 57 and 60 under Chapter VI authorizes PPP Office to oversee and maintain accounts and audit of the PPP projects.

G. SECURITY INTEREST

Security arrangements are critical for financing infrastructure projects. Section 39(1) of PPP Act 2015 states that the concessionaire has the right to make security interests over any of its assets, rights or interests, comprising those relating to the project. Conversely, in some jurisdictions, any security given to lenders that makes it possible for them to take over the project is only allowed under exceptional circumstances and conditions.⁹ The creation of such security, for example, is subject to agreement of the contracting authority; the security should be granted for particular purpose of assisting the financing or operating of the project; and no impact on the obligations of the concessionaire for the security interests.

Section 39(2) states that no security may be created over public property or other property, assets or rights required for the provision of a public service, where the making of such security is prohibited by any law of Bangladesh. The problem of this provision is that it just stipulates a general prohibition on the creation of security, but does not express the exceptional circumstances or particular conditions under which such security can be permitted. A blanket prohibition on security arrangement can limit the project company's capability to raise fund, and discourage the facilitation of the project. Thus, this provision requires clarification on the scope of prohibitions.

H. COMPLAINTS AND APPEAL PROCEDURES

Under Section 26 of Chapter II, PPP Act, 2015 presents method for establishing the appropriate appeal procedures. It includes right to complaints, appeal, and effects of appeal (sub-section 1), application for review before the procuring entity (sub-section 1), rights of participants in review if not satisfied on the results or not getting answer within 30 days from the contract authority. Appeal may be lodge to the related Ministries or higher administrator of the contracting authority, and Appeal Authority will settle the complaints or appeal in stipulated time by maintaining appeal proceedings (sub-section 3). Section 26 simply addresses a need for review and complaints system for an unsuccessful bidder rather than stipulates the crucial elements for establishment of an adequate review system. Neither the Policy & Strategy for PPP nor PPP Act 2015 addresses the elements for establishment of a review system that are discussed in the PFIP Guide.

5.0 OTHER ISSUES RELEVANT TO THE LAW

The entire PPP framework in Bangladesh centers on the principles of achieving better value and affordable services. As expressed in the Private Sector Infrastructure Guidelines (PSIG), there are economic, social and environmental objectives for the adoption of PPP model as a strategy for infrastructure development. It is the belief of the government that a private sector led drive for infrastructure development through PPPs will open up the infrastructure and service delivery landscape in Bangladesh to efficiency, including access and overall development of the quality of public service delivery in a sustainable way (PSIG, 2008).

⁹ See Section 40(2) of PPP Act, 2015.

PPP could be an opportunity to develop quality and application of an education system or increase funding possibilities in order to allow the government to offer a better educational system. In India, recently there has been an increasing push by the Government towards engaging the private sector as partners for achieving the goal of universalization of elementary education. Different models of Public-Private Partnership (PPP) in education are being proposed by the Government (AP Foundation, 2014). Nevertheless like many other governments, Bangladesh is poorly organized for the job of collaborating with private sector. No such provisions are enacted in Policy and Guidelines of PPP to encourage this sector. To achieve education development goals, government needs information regarding various forms of partnerships, set guidelines, policies, and regulations on PPP and design PPP schemes to encourage private sectors.

Big volume investments are made as results of PPPs. So the favorable guidelines, policy, law, regulatory, institutional and contractual environment should be formed for ensuring effectiveness of PPP contract and project cycle in long-term. Bangladesh state policy on PPPs and law were analyzed by criteria related to requirements for legal and regulatory framework, which are essential for protecting lenders and investors. Main regulating questions in acts for protecting investments are important for lenders and investors. But requirements for legal and regulatory framework to protect investors and lenders are not regulated in PPP policy and law of Bangladesh in full. Discomfort and opportunities in PPP law and policy in Bangladesh are described according to criteria, which are essential for protecting investors and lenders.

6.0 CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSIONS

This paper is descriptive in nature in that it reviews and critiques the applicable policy and laws in Bangladesh regarding infrastructure procurement and the private sector engagement in maintenance, operations, and provision of public infrastructure assets and service delivery. It makes an analysis of the legal framework that underlies procurement of infrastructure and the engagement of private sector capital in infrastructure provision, maintenance and financing in Bangladesh. The legal framework inevitably consists of the related regulatory and industry specific legislation and the regulatory mechanism as a whole.

This paper shows that an effective risk transfer for a PPP project is not a simple application to produce value for money. It requires the right project and significant government expertise. The legal infrastructure which underpins the PPP framework in Bangladesh is insufficient and the insufficiency of the legal and regulatory environment is partially responsible for the lack of encouragement for engagement on the part of the private sector – mostly foreign investors in the nation's public infrastructure assets and service delivery – and the general failure of the PPP mechanism in attracting the necessary private investment into infrastructure sector.

While not refusing the function of ensuring proper design, monitoring and so on of PPPs, the environmental and social challenges faced by the developing countries today are mainly rooted in the spread of local histories and global capitalism of dissimilarity in terms of access to income, productive resources and political voice. In order to explain the effects of PPPs, it is essential, therefore, to understand the status quo as an outcome of the struggle between a range of actors over the distribution of social and environmental hazards connected with the extensive processes of economic development and industrialization. It should be noted that Bangladesh is not sufficiently experienced in applying the regulations related to public-private partnerships.

6.2 RECOMMENDATIONS

6.2.1 *Recommended Outline and Contents of PPP Policy Statements*

Based upon the gaps and constraints contained within the existing PPP policy and strategy, and the constraints this causes to the PPP laws, institutions, and transactions – it is recommended that the Government of Bangladesh approve the preparation of an updated and revised PPP Policy Statement. The following provides the recommended outline and contents of the PPP Policy Statement:

As PPPs in Bangladesh require that important new skills be sourced and developed in the public sector, PPP Policy should call for supporting systematic and on-going PPP training and capacity-building. Most "deal flow" of PPP comes from the sector ministries and local government bodies, which are "close to ground" where PPP arrangements can be conceptualized, identified, prioritized, and fed up into the national framework of PPP for investment decisions. In order to perform this critical role, PPP Knowledge Centers need to be formed, need to be established in sector ministries and local governments, and skills within those Centers must be developed through a long-term commitment to training and capacity building.

PPP policy statement should define the roles and responsibilities of PPP Unit. It should also ensure that key positions within the PPP Unit are filled with suitably qualified professionals. The Ministry of Finance may procure the services of qualified outside professionals and/or technical experts to fill such positions, utilizing monies appropriated from Budget, dedicated revenues, or external funding sources.

In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria that the Contracting Authority considers appropriate in the particular proceedings. These criteria can be included in policy statement so that private partners can easily understand whether they are eligible to bid a contract.

PPP agreement should be publicly available which can be indicated in policy statement. The agreement should be governed by the law of the Republic of Bangladesh and shall provide for such matters as the parties deem appropriate. When applicable, the Agreement shall expressly identify the terms and conditions of any and all payments, guarantees, subsidies or other financial supports to be provided by the Contracting Authority.

It is recommended that PPP Office and PPP Unit must be acted upon hereby making the documents public. All assessment reports prepared at this stage along with the methodology used for the assessments must be publicly disclosed. All PPP project-related clearances and approvals received must also be made public. If the approval/clearance processes involve consultation with the people again, then all efforts should be made to disseminate the documents in the local languages using the print and electronic media as well as the Internet.

PPP policy should put in place an enabling environment to attract PPPs in marginal areas (i.e. economically and geographically disadvantaged areas in different parts of Bangladesh). To achieve this objective, it needs to prepare a communication strategy for awareness creation and consensus building for acceptance of PPPs in economically disadvantaged regions and their outcomes by all stakeholders including government leaders, parliamentarians, public officials, investors and the general public. In this process, all stakeholders will also be educated on the benefits of PPPs and associated costs and risks.

6.2.2 Recommended Contents of the PPP Act

Based on the analysis in section 4 and 5 of this paper, several policy issues can be discerned for incorporating in the PPP Act. The recommended elements for inclusion include the following provisions:

If the infrastructure services are delivered to a government agency, which then makes them available to users for a fee, no regulatory basis is needed. However, if it has been decided that the PPP contractor will directly collect fees from users, a legal basis for the authorization to levy fees and the determination of their level must be established.

The Act may impose an obligation on a State Authority to register a project being considered for procurement by way of a public private partnership arrangement with the PPP Unit and to comply with the Act. There should be a central registry of all PPP projects in order to be able to compile and disclose all liabilities (including contingent liabilities) and to be able to assess aggregated risks associated with PPP arrangements.

The Act can oblige the relevant Minister to publish a statement of payments and receipts, including contingent payments and receipts, financing support, guarantees and other supports provided by or on behalf of the State in connection with public private partnership arrangements. The PPP Unit should be obliged by the Act to prepare a Code of Practice relating to the conduct of its management, staff and advisers and others involved with public private partnership arrangements. The PPP Unit should be permitted to enter into administrative arrangements with State Authorities or with regulatory or other public bodies to enable the PPP Unit to carry out its functions. The PPP Unit should have authority to issue procedures, guidelines or instructions with the approval of the Ministry and the PPP Committee (if established).

The Act should give power to the Auditor General to audit and report on a public private partnership arrangement and the process by which an arrangement has been procured as well as assessing whether the arrangement is realizing the objectives that led to the procurement decision.

As per PFIP guidelines, it is recommended to add a Provision “Other Disputes” to resolve disputes among concessionaire and its shareholder. They should be free to choose the appropriate mechanisms for settling disputes among themselves. The concessionaire should be free to agree on the appropriate mechanisms to resolve disputes between itself and its contractors, suppliers, lenders, and other business partners.

When government introduces a PPP law, it should give the clearest possible message of the government’s commitment and dedication to the PPP program, an important determinant of the likely success of PPPs. The PPP law should institute the principles of the PPP framework, should be as concise as possible, and address general principles only.

7.0 DIRECTIONS FOR FUTURE RESEARCH

The current legislation covering PPPs has the potential to reduce and/or create risk in major projects. To produce value for money, an effective risk transfer for a PPP project is not an easy application. In the modern era, it has become necessary for the nations to adopt the Public Private Partnership model to sustain economic growth along with fulfilling social responsibilities. Further research is needed to enhance possibilities of PPP and attracting private sectors. An important area of future research concerns carefully designing and evaluating the effects of PPP legislation and policy on attracting private investment in public infrastructure and service delivery. There is also a need for scenario-based studies to

better understand the effects of existing policy and strategies reported in the present study. Attempts should be made to obtain information at different periods of time based on practical experience in PPP projects in the country.

REFERENCES:

Armitage, R. (2011). Report to 3rd Session of the team of Specialists on Public-Private Partnerships 18-19 April 2011 regarding Model PPP Laws, UNECE, Simmons & Simmons LLP, England.

Azim Premji Foundation (2014) at http://www.azimpremjifoundation.org/PPP_In_Education (retrieved on 12.8.2014)

Bangladesh Bureau of Statistics (2014). GDP of Bangladesh 2013-2014, Bangladesh.

Carrillo, P. M. et al. (2008). Participation Barriers, and Opportunities in PFI: The United Kingdom Experience, *Journal of Management in Engineering*, ASCE, UK.

Farlam, P. (2005), *Putting Partnerships Together*, Nepad Policy Focus Series, The South African Institute of International Affairs.

Gaffey, D. W. (2010). Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States, *Public Contract Law Journal*, Vol. 39, American Bar Association in Cooperation.

Graeme, A. H., Garsten, G. (2007). *Public-Private Partnerships: An International Performance Review*. Public Administration Review, New York: Routledge.

Green Paper on public-private partnerships and community law on public contracts and concessions, published in: [com /2004/0327/ final](http://com.l2004/0327/final), published: eur-lex.europa.eu/EU/ROPA/eur-Lex, Home on 30/04/2004.

Greiman, V. (2011). The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships, *Virginia Journal of International Law*, Vol. 53, Virginia, USA.

Grimsey, D. and Lewis, M.K. (2002). Evaluating the risks of public-private partnerships for infrastructure projects. *International Journal of Project Management*, 20(2): 107-118.

International Monetary Fund (2004). *Public Private Partnership*. Fiscal Affairs Department, Washington.

Office of the Comptroller and Auditor General (OCAG), 2014 at <http://www.cagbd.org> (retrieved on 17.08.2014).

Ong'olo, D. (2006). *Public Private Partnerships (PPP): Practice and Regulatory Policy in Kenya*. The Institute of Economic Affairs, Kenya.

PPIAF (2012). *2012 Annual Report*, Public-Private Infrastructure Advisory Facility, Washington, USA.

PPPIRC (2009). Legal Framework Assessment, PPP in Infrastructure Resource Center for Contracts, Laws and Regulation at:http://www.web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUS_TICE/EXTINFRANDLAW/0,,contentMDK:21734392~menuPK:64860402~pagePK:4710368~piPK:64860384~theSitePK:4817374~isCURL:Y,00.html (retrieved on 12.8.2014).

Private Sector Infrastructure Guidelines (2008). Infrastructure Investment Facilitation Company (IIFC) at

<http://iifc.net/publication/miscellaneous/Summary%20of%20Private%20Sector%20Infrastructure%20Guidelines.pdf> (retrieve on 03.08.2014)

Son, S. (2012). Legal Analysis on Public-Private Partnerships regarding Model PPP Rules. United Nations Commission on International Trade Law, Austria.

Standardisation of PFI Contracts (2007). HM Treasury, United Kingdom at <http://webarchive.nationalarchives.gov.uk/20130129110402/> http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm (retrieved on 23.7.2014)

Teisman, Geert, and Erik Hans K. (2002). Public –Private Partnerships in the European Union: Official Suspect, Embraced in Daily Practice. Public Administration Review, New York: Routledge.

UNCITRAL (2011). Legislative Guide on Privately Financed Infrastructure Projects, United Nations, New York, USA.

GAO (2008). Highway Public-Private Partnerships: More Rigorous Up-Front Analysis Could Better Secure Potential Benefits and Protect the Public Interest. U.S. Government Accountability Office, Washington, USA.

Yuan, J., Zeng, A.Y., Skibniewski, M.J. and Li, Q. (2009). Selection of performance objectives and key performance indicators in public–private partnership projects to achieve value for money, *Construction Management and Economics*, 27(3): 253–270.