

LAW VISION

Bangladesh needs to introduce a good samaritan law

The Bangladesh Constitution imposes a duty upon the State to ensure the right to life and medical care in Articles 32 and 15(a), respectively. Thus, the parliament, being an organ of the State, is obliged to protect these rights and the voluntary saviours of these rights—good samaritans—by legislature.

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The common scenario concerning road accidents is that there are usually three types of people other than victims and wrongdoers, namely, reluctant spectators, stealers, and voluntary rescuers. The reluctant spectators are liable for breaching the obligation 'to perform public duties [of rescuing victims] and to protect public property [which ought to include lives of people]' as enshrined in article 21(I) of the Constitution of Bangladesh. The stealers are clearly offenders of theft and thus liable under section 379 of the Penal Code 1860. The voluntary rescuers, who act as saviours for victims, perform their constitutional obligation under Article 21(I). They are known as 'samaritans' or 'charitable or helpful people.'

Since the samaritans perform public duties voluntarily, the statutory law should protect them from unwanted harassment by medical officials and police, and further unreasonable incrimination. They facilitate the emergency medical treatment which victims need the most within one hour—the golden hour. The global trend, developing gradually in this regard, is to enact a specific 'Good Samaritan law' that provides legal protection to the samaritans by immunising them from legal liability that

might arise from injury or death consequential in the rescue process. For example, Canada enacted the Good Samaritan Act in 2001, Ireland enacted the Civil Law (Miscellaneous Provisions) Act in 2011, and the UK enacted the Social Action, Responsibility and Heroism Act in 2015. Such an immunity clause is 'generally' found in Bangladesh in section 92 which exempts from liability 'act done in good faith for benefit of a person without consent'. However, the scope of this section is limited to criminal liability only.



The trend of enacting specific laws for the protection of samaritans is followed by India as it inserted section 134A de novo by an amendment in 2019 in the Motor Vehicle Act 1988. This section immunises 'good samaritan' from any sort of legal action that may likely arise due to 'any

injury to or death of the victim of an accident involving a motor vehicle' on condition that such good samaritan 'render[s] emergency medical or non-medical care or assistance.' Such immunity even extends to negligent acts or failure to perform certain acts in the rescue process. This legislative change was introduced in compliance with the Indian Supreme Court's direction to the government, in *Savile Foundation v Union of India* (2016), to formulate a legal framework for the protection of good samaritans.

The development in Bangladesh in this regard is the Emergency Medical Services for Road Accident Victims and Protection of Good Samaritans Guidelines 2018, prepared by the Department of Health Services, Ministry of Health and Family Welfare. The guidelines were subsequently approved in 2020 by the High Court Division in *Syed Saifuddin Kamal v Bangladesh* (2020). The Court held the guidelines as legally enforceable 'up

until necessary legislative enactments are brought forth.' The term 'legislative enactment' is an indication to primary

legislation and an implied direction towards legislature to enact laws in this regard.

The guidelines contain 16 rules including a preamble. One of the objectives of the guidelines is to provide protection to good samaritan of road accidents victims. As per rule 5.8, a good samaritan refers to an individual who willingly steps forward to assist injured persons, without expecting monetary payment or reward. The concept of 'Golden Hour' is recognised in rule 6.2. Furthermore, rule 13 provides immunity to good samaritan



from detention or harassment by hospital authority, and also prohibits requiring Good Samaritan to disclose his/her identity or to give evidence or to pay compensation for any bonafide loss during rescue process. Now, it is high time we converted the guidelines into statutory law as a manifestation of compliance with HCD direction.

To conclude, the Bangladesh Constitution imposes a duty upon the State to ensure the right to life and medical care in Articles 32 and 15(a), respectively. Thus, the parliament, being an organ of the State, is obliged to protect these rights and the voluntary saviours of these rights—good samaritans—by legislature.

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LAW REFORM

Preventing illegal human organ trafficking

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The Human Organ Transplantation Act 1999 has been enacted in Bangladesh to prevent commercial organ trade. Section 2A of the Act says that no hospital can transplant human organs without permission from the government. According to section 3, a healthy person with a sound mind



can donate his/her organs for transplantation to a close relative if there is no fear of it disrupting his/her everyday life. If the person has been declared 'brain-dead', any of his/her legal heirs can permit in writing the transplantation of the organs from the body of the person.

Section 9 of the Act strictly prohibits buying and selling human body organs or getting any benefit in exchange and giving any advertisement or other kind of promotion. Section 10 of the Act further penalises the giving of false information about being close relatives, or encouraging, inducing or intimidating someone to make such false representation. Such person shall be punishable with rigorous imprisonment not exceeding two years or with a fine not exceeding five lakh takas, or both. In addition, if he violates any other provision of this Act or assists in the violation, he shall be punishable with rigorous imprisonment not exceeding three years or with a fine not exceeding ten lakh takas, or both. The doctor, if convicted, will get his/her registration canceled by the Bangladesh Medical and Dental Council.

Section 10A of the Act further enunciates that if any offence is committed by any hospital under this Act, the hospital's permission to transplant organs will be canceled, and a fine will be imposed. However, the author believes that despite existing laws, illegal organ trade is not being prevented or controlled. This is because firstly, there is a lack of implementation of the law in our country. Secondly, the Act has made it too narrow as to who can do voluntary donate organs for transplantation, creating obstacles for emergencies. India's Transplantation of Human Organs and Tissues Act 1994, and Transplantation of Human Organs and Tissues Rules 2014 state that other emotional donors can donate their organs apart from close relatives.

In 2017, a writ petition was filed in the High Court Division (HCD) challenging the provisions that limit such donations. Then, in 2019, the HCD directed the government to amend the law to address this problem. Indeed, the government should amend the law and increase the punishment and fine so that illegal organ trafficking can be prevented in society; otherwise, such crime will only increase day by day. On the other hand, those who are 'emotional donors', should be allowed to donate. These amendments are urgently needed to address a pressing need of the society.

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RIGHTS AND REMEDIES

Compensation as a remedy under constitutional tort law in Bangladesh

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Article 102(I) of the Constitution enables the High Court Division (HCD) to give directions or orders as may be 'appropriate' for the enforcement of any fundamental rights. Thus, the Article permits the petitioner and the HCD to choose any suitable remedy, including compensation, for the enforcement of fundamental rights, as it does not specify the sort of redress.

Mahmudul Islam, a prominent constitutional thinker of Bangladesh, explains that the HCD has significant authority to determine what constitutes an 'appropriate' remedy under Article 102(I), but the enforcement of the basic rights is not subject to discretion. Hence, the inherent nature of the right to seek redress for abuses of fundamental rights impose a similar duty on the court to create innovative and efficient legal remedies for such violations.

According to articles 44(I) and 102(I), in the case of a violation of the rights enshrined in Part III of the Constitution, the party affected by such infringement has the option to approach the Supreme Court and submit a writ petition, as demonstrated in the case of *Kazi Mukhlesur Rahman v Bangladesh*. The same constitutional

provisions apply when the petitioner claims remedies under tort.

In the case of *CCB Foundation v Government of Bangladesh*, the court applied the doctrine of negligence and *res ipsa loquitur* to award monetary compensation of taka 20 lacs against Bangladesh Railway Board and Bangladesh Fire Service and Civil Defence for gross negligence that resulted in the death of a 4-year-old child. This case established a significant precedent for public authorities to be held liable for the negligence of their employees or servants. The Court stated that, in contrast to the Indian Constitution, there is no provision for sovereign immunity, permitting courts to award monetary compensation to aggrieved families for violations of the right to life protected by Article 32 of the Constitution. The court further held that the award of monetary compensation under public law will not preclude the harmed party or victim from seeking compensation under private law, and respondents' liabilities under private law will remain.

Compensation was also acknowledged as a legal remedy under Article 102(I) in the case of *Bangladesh v Ahmed Nazir*. In this case, the Appellate Division (AD)



determined that the Court possesses the authority to exercise its discretion in granting the remedy, which is contingent upon examination of the facts and circumstances. The responsibility for determining suitable remedies under Article 102 lies with the HCD, whether they

are monetary or otherwise.

However, the question of monetary relief under Article 102(I) was first raised in the case of *Azharuddin Ahmed v Bangladesh*, where the petitioner was forced into early retirement in violation of the due procedure. The HCD found the act to be

illegal and awarded 10 thousand Taka as compensation. On the question of who is to pay the compensation to the victim, the Court held that the public body, whose officials acted unlawfully, were 'generally' liable according to the Rules of the HCD of East Pakistan (1960). But such rules being sufficiently vague, the answer was left to the Court's discretion. Subsequently, in the case of *Habibullah Khan v Shah Azharuddin Ahmed*, the AD affirmed the decision of the High Court while adding that such discretion 'must be applied judiciously' in accordance with the rule of law.

In Bangladesh, constitutional torts are implemented by both Article 44 and Article 102(I) of the Constitution. When the statutory authority is liable for the violation of the constitutional rights guaranteed in Part III of the Constitution, a writ claiming compensation can be filed at the High Court Division holding the state responsible. Therefore, it becomes abundantly clear that only the violation of the constitutional rights guaranteed in Part III of the Constitution attracts constitutional torts.

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