

RIGHTS ADVOCACY

Victims’ right to public law compensation



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On 21 July, in a tragic aviation disaster, a training aircraft of the Bangladesh Air Force crashed into a two-storey academic building of Milestone School and College in Uttara, Dhaka, resulting in numerous casualties. A writ-petition has been filed with the High Court Division (HCD) of the Bangladesh Supreme Court seeking compensation for the deceased and injured. The court directed the government to form a committee to investigate into the incident and issued a rule asking why adequate compensation should not be provided to the victims.

Usually, when a fundamental right granted in the constitution is violated due to someone's negligence and the right-holder suffers due to the said violation, it raises a claim in constitutional tort. Consequently, the right-holder becomes entitled to receive compensation from the wrongdoer, which is popularly known as public law compensation.

In this piece, I argue that the incident of the training jet crash contains all the elements of a constitutional tort to establish the victims' right to public law compensation. According to Article 32 of the Constitution of Bangladesh, it is one of the constitutional duties of the state to uphold everyone's fundamental right

to life, save in accordance with law. This constitutional duty was breached in the jet crash incident, resulting in severe casualties.

Although the words 'constitutional tort' or 'public law compensation' are not directly mentioned in the Constitution of Bangladesh, a careful analysis of the constitutional provisions can reveal that these ideas already exist within the constitution. Article 44(l) of the Constitution of Bangladesh guaranteed the right to move the HCD in accordance with Article 102(l), for the enforcement of the fundamental rights. Article 102(l) states that the HCD, on the application of any person aggrieved, may give such directions or orders to any person or authority as may be appropriate for the enforcement of any of the fundamental rights enshrined in the Constitution. Here, the word 'appropriate' provides a wide jurisdiction to the HCD to make 'any order' to 'any person', either state or individual, to enforce the fundamental rights. Therefore, the HCD is empowered by the Constitution to grant appropriate remedy, including compensation, for the violation of any fundamental right.

Additionally, the granting of public law compensation as a remedy has been in the judgments of the Supreme Court of Bangladesh. Bilkis Akter Hossain v Bangladesh (1997) was the pioneer case in this context,

where the concept of public law compensation as a remedy was introduced by the HCD. However, the Appellate Division (AD) modified the lenient 'case-by-case' test to a stricter 'exceptional cases' test.

The successful application of public law compensation further came up in the landmark case of CCB Foundation v Government of Bangladesh and others (2016), which is commonly known as the 'Jihad Case.' In this case, the HCD ordered Bangladesh Railway, and Bangladesh Fire Service and Civil Defence to compensate BDT 10 lakh each to the parents of the four-year-old boy, who died after falling into a deep shaft adjacent to the Shahjahanpur Railway Colony playground. The shaft was 16-inch-wide and more than a hundred feet deep and was left uncovered and unattended by the respondents. The AD upheld the decision of the HCD, thereby giving effect to the application of constitutional tort and public law compensation in Bangladesh.

In 2019, the HCD issued an order in favour of Russel Sarker, a car driver who lost his left leg after being run over by a Green Line bus. The court directed the company to compensate Russel Sarker with BDT 50 lakh. This decision of the HCD was then upheld by the AD and consequently, widened the scope of the application of constitutional tort in Bangladesh by making a private party liable to public law compensation.

To establish tortious liability, it is usually necessary to prove the negligence of the responsible party. However, an exception to this rule is the principle of 'strict liability,' under which a party is held liable for a breach of duty irrespective of negligence. It is a worldwide recognised principle of tort law, which was established in the famous case of Rylands v Fletcher (1868). This legal concept is essential in cases where the activities pose inherent risks, regardless of the precautions taken. In this regard, even if we assume that there was no negligence on part of the responsible authorities in the jet crash incident, they still fall under the strict liability principle for the activities such as flying training aircrafts in the airspace of a densely populated urban area, setting up a public school so close to an international airport and directly in aircrafts' flight path, etc.

Where there is a right, there must be a remedy. It is a legal principle that comes from the Latin maxim ubi jus ibi remedium. Considering the maxim, it can be said that the existence of the right to life in Article 32 of the Constitution of Bangladesh itself opens the door to a remedy against its infringement.

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RIGHTS WATCH

Realising the voting rights of the Bangladeshi Expatriates

The right to vote is a cornerstone of any democracy. The fundamental nature of such a right places an obligation on a country to enable its citizens to vote and elect their representative. No matter where in the world a lawful citizen resides, they should retain their right to participate in the democratic process as long as they hold ties with their country. However, it is frustrating to see that over 15 million Bangladeshi citizens living abroad remain largely disenfranchised in our national elections, despite being an integral part of the country's economy and development narrative. This calls for urgent policy-legal reforms in order to guarantee voting rights of this sizable population in a meaningful manner.

Article 11 of the Constitution of Bangladesh enumerates that “the Republic shall be a democracy in which fundamental human rights and freedom and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representative in administration at all levels shall be ensured.” Article 27 ensures equality before the law, and Article 122 lays down voter eligibility based on citizenship, age, registration and by the court decisions, in some cases. Nowhere does the constitution say that residence within the country's territory is a precondition to exercise the voting right. Hence, the Constitution of Bangladesh requires no amendments to afford voting rights to its citizens living abroad. For a long time, several factors such as a combination of bureaucratic inertia, logistical reluctance, shortage of trained personnel, inadequate funding, technological constraints, and most significantly lack of staunch political contributed to the delay in actualising this constitutional right of the expatriates.

The de facto disenfranchisement began with the Electoral Rolls Ordinance of 1982, particularly through Section 8, which described the term “resident” as a person who “ordinarily resides” in an electoral area or constituency. This narrowly tailored definition of residency effectively disenfranchised even those expatriates who physically returned to Bangladesh during elections to get registered and vote, as they were not considered to “ordinarily reside” in any constituency for that matter. This matter didn't go unquestioned, but was challenged



in the case of Ali Reza Khan v Bangladesh Election Commission (1997) 17 BLD 641. In that case, the High Court Division of the Supreme Court of Bangladesh held that if a person who is temporarily residing abroad, is a permanent resident of Bangladesh and has fulfilled all other conditions required by law to be a voter, is entitled to be registered as a voter in Bangladesh.

After that, a significant legislative reform was brought about in August 2009, when Parliament repealed the 1982 Ordinance altogether. In its place, the Voter List Ordinance of 2007 was enacted with a forward-looking provision: “Bangladeshis residing abroad would be deemed residents of the constituency where they had previously lived or where they still maintained ancestral property”. This legal reform marked a pivotal moment; it was the first concrete step toward recognising the voting rights of the expatriates within Bangladesh's electoral framework.

According to the International Institute for Democracy and Electoral Assistance (International IDEA), based in Stockholm, over 126 countries and territories worldwide have already extended some form of voting rights for their expatriate citizens. Bangladesh has no reason to lag behind in this global progress. At present, as Bangladesh goes through a political transition and as a new spirit of reform and inclusivity rises in the wake of the July–August mass uprising, a window of opportunity for meaningful institutional reforms has opened. Notably, the interim government has already expressed its commitment to ensuring voting rights of expatriate Bangladeshis.

As part of ongoing reformation process, the Electoral Reform Commission has recently proposed four possible methods for enabling overseas voting. One proposed method is In-Person Voting, which requires voters to be physically present at a designated polling location on election day- feasible at embassies or consulates. Another option is Postal Voting which allows voters to cast their ballots via post from their country of residence. The third alternative proposal is Proxy Voting, which allows a designated proxy in Bangladesh to vote on behalf of the expatriate voters, based on prior nomination and legal authorisation. Finally, the Commission is also exploring Electronic Voting that enables voting through digital means, such as Electronic Voting Machines (EVMs) or Internet-based systems (I-voting).

Implementing such a system will mark a tipping point for democracy in our country. It would not only strengthen democratic participation but also enhance the legitimacy of governance and reinforce inclusivity within the electoral system. By embracing this long-overdue reform, Bangladesh can take a pivotal step toward a more inclusive, participatory, and globally connected democracy- a vision truly reflective of its constitutional values and democratic ideals.

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LAW REVIEW

Fragmentary approach toward maritime tribunals

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After 47 years, the Territorial Water and Maritime Zones Act of 1974 had been updated with a lengthy amendment back in 2021. Following the enforcement of the Bay of Bengal cases and ratification of United Nations Convention on the Law of the Sea in 1982, the Territorial Waters and Maritime Zones (Amendment) Act of 2021 came into force. One of the aims of this Act was to carry out the duties described in Article 143(2) of the Constitution where it is stated that the Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and of the territorial waters and the continental shelf of Bangladesh. This updated legislation has introduced several new definitions, including Continental margin, Convention, dumping of waste, Martine Pollutions Installations, Internal Waters, Maritime Zones, Maritime Tribunal, Blue Economy, Waste, and Warship etc. and tried to bring domestic legislation into compliance with UNCLOS.

The introduction of a new adjudication system named Maritime Tribunal ushered in high hopes for strengthening ocean governance in the country. With an

aim to safeguard the marine ecosystem, conserve marine biodiversity and to ensure accountability for any crimes committed within maritime boundaries Section 27 of the Act envisaged establishment of one or more maritime tribunals across the country. Sadly, after 4 years of entering into force, any tribunal of this nature is yet to be established.

The law also prescribes that the Government may appoint any district Judge or additional district judge to adjudicate in the Maritime Tribunal, after consulting with the Supreme Court. However, this Act does not ordain establishment of a distinct or independent maritime tribunal rather the judges will perform the duties of the tribunal, in addition to their own duties.

Moreover, Section 30 of the TWMZ (Amendment) Act, 2021 has shown a restrictive approach in case of access to justice before maritime tribunal. This section bars the ordinary citizens to file a case to the tribunal directly. Rather the tribunal can take cognizance only when written complaint is submitted by the duly authorised person by the government.

Another limitation of this Act is that “the duly authorized person by the Government” is not specified. Furthermore, there is no

mention of knowledge, specialisation, or qualifications of judges of this tribunal. Due to these obstacles, the victims are unable to seek remedy through accessing environmental justice under TWMZ (Amendment) Act, 2021.

Admittedly, this amended Act has introduced many new offences; for instance, any individual/ legal entity or foreign company, who commits any of the specified acts in Bangladesh's Maritime Zones, such as discharging pollutants to sea without following the provisions or affecting the marine environment in coastal areas, shall be imprisoned for a maximum of three years or fined between 2 crore and 5 crore Taka or both. However, without the establishment of tribunals, the victims will not get justice, and this Act will remain unvalued and only in the statute books.

In conclusion, the TWMZ (Amendment) Act 2021 has taken a fragmentary approach to maritime justice. It needs thorough and critical scrutiny in case of ensuring access to justice before the maritime tribunal. The provisions of this Act must be amended, and additional provisions should be included for ordinary people so that the tribunals are more approachable and accessible. Apparently, the legal promise of establishment of maritime tribunals is facing a dead end. Even if the current provisions are enforced, there will be limited benefits to be shared by the justice seekers. It is high time that the promised tribunals be established and accessibility to environment justice is ensured. Only then will it function as the key to protect the marine ecosystem, preserve marine biodiversity, prevent criminals from committing any crimes and hold accountable the marine polluters.

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