

Public Law Compensation: An Emerging Concept in Constitutional Law of Bangladesh

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Abstract

Fundamental rights violations are seldom compensated in Bangladesh. Administrative authority can cause financial or physical harm, including moral harm. "Ubi jus ibi remedium"—"the law gives a cure for every injustice"—inspired tort law. But Bangladesh lacks tort law, making public law compensation a bit tougher. Bangladesh's concept of public law compensation is still developing. Article 44 of the Constitution enables petitioning the High Court Division to assert Part III rights under Article 102(1). These two articles provide a remedy to the victims of fundamental rights violations. *Bilkis Akhter and the C.C.B. Foundation* cases were successful fundamental rights violation compensation suits. The H.C.D. compensates more public law offenses than earlier. This liberalization's lifespan is undetermined due to the *Nurul Amin Appellate Division's* strict conditions. It's excellent that experts are catching on, but courts should follow liberal formulas.

1. Introduction

Compensation for public law offenses is still not commonly acknowledged in Bangladesh. This compensatory jurisprudence has recently gained favor in the country's legal sector after being underutilized for an extended period. The public is aware of suing under private law for compensation. However, Public Law Compensation jurisprudence is gaining significant recognition in the legal community daily. In rare instances, victims of this practice have gotten compensation from the authorities. The paper aims to discuss the concepts and notions that support this kind of legislation.

2. What is Public Law Compensation

Compensation compensates for losses, restorative damages reverse resource shifts, disgorgement damages demand the surrender of earnings, and punitive penalties penalize the perpetrator. These four remedial tasks are equally applicable to public and private law infractions. If a breach of public law results in a loss, compensation appears to be a suitable legal remedy; if a breach of public law results in a gain, disgorgement appears to be an appropriate legal response; and so forth. It has been claimed that high damages should be offered for violations of specific public law

regulations simply to underscore the rule's significance.¹ In Bangladesh, public law compensation refers to awards made pursuant to art. 102(1) against the State or its officials for violating these constitutionally granted fundamental rights.²

3. Acknowledgment of Public Law Compensation in Bangladesh

The fact that the court had to substantiate its position with foreign jurisprudence, including a Privy Council ruling, demonstrates that public law compensation was a fresh legal matter before the Bangladeshi courts³, including a lot of cases of the Supreme Court of India,⁴ submitted in accordance with the Indian Constitution's relevant provision,⁵ which is nearly comparable to Article 102 of the Constitution and Pakistani Supreme Court rulings.⁶ It was stated in the *Bilkis Akhter*⁷ case that 'the court is not helpless, and it should be prepared to forge new tools and devise new remedies and, if necessary, to develop new principles of liability to vindicate those previous fundamental rights.' Additionally, it highlighted that the Indian Supreme Court did not 'rest simply by issuing a proclamation or instruction, but rather offered relief when the circumstances necessitated 'exemplary costs and even damages for violation of fundamental rights relating to life and personal liberty.'⁸

4. Mechanism of Awarding Compensation

Compensation for victims is a well-established legal standard enforced by ordinary civil courts. Tort law entitles victims to compensation for the injury the accident caused to their person or property. A civil court's order awarding damages to victims may take decades to achieve, causing victims significant financial hardship. When considered in the context of the human rights approach, the development of compensatory jurisprudence demonstrates that the judiciary has taken on the responsibility of protecting all people's right to life and personal liberty, regardless of whether there is an express constitutional provision or judicial precedent to do so.

The Supreme Court of India has found a constitutional solution to the legal entitlement to monetary compensation for numerous human rights violations. This is the first time the highest court of India

¹ Peter Cane, 'Damages in Public Law', (1999) 9 (3) *Otago Law Review* 517 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwju8IGz7Jf0AhX27HMBHb7BC8AQFnoECAIQAAQ&url=http%3A%2F%2Fwww.austlii.edu.au%2Fau%2Fjournals%2FOtaLawRw%2F1999%2F4.pdf&usq=AOvVaw0_e3-wQ2SYfU_B-NypAPyw> accessed 4 September 2022.

² Taqbir Huda, "Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh" (2020) 21 (2) *Australian Journal of Asian Law* 44, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3876797> accessed 12 September 2022.

³ *Maharaj v Attorney General for Trinidad and Tobago* (1978) 2 AER 670.

⁴ *Rural Litigation and Entitlement Kendra v The State of U.P.* (1991) AIR (SC) 2216; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR (SC) 2426.

⁵ The Constitution of India, art. 32.

⁶ *Government of East Pakistan v Rowshan Bijaya Shaukut Ali Khan* (1966) 18 DLR (SC) 214; *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri* (1969) 21 DLR(SC) 1.

⁷ *Bilkis Akhter Hossain vs. Bangladesh*, (1997) 17 BLD (HCD) 344 / 2 MLR 1997 113.

⁸ *Ibid.*

has acted in this manner. *Rudul Sah v. State of Bihar*⁹ was the first case in which the Supreme Court of India established the principle that compensation could be awarded in instances where a person's fundamental rights have been violated and that the higher courts have the authority to do so "through the exercise of writ jurisdiction and evolved the principle of compensatory justice in the annals of human rights jurisprudence," the court stated.¹⁰

It is readily apparent that monetary compensation has been granted when an individual's legal rights have been breached. Despite the absence of a particular statute defining this type of claim, courts have applied this jurisdiction as they thought fit. When a person's fundamental right is violated, even if no writ petition is filed, the person's right to compensation kicks in, and he or she shall be compensated equitably. In *Sebastian v. Union of India*¹¹, the Supreme Court of India granted each detainee's wife Rs. 1 lakh in fees since the government neglected to provide evidence in their habeas corpus petitions, which their spouses submitted.¹²

5. Case Laws from Indian Jurisdiction

India is Bangladesh's neighboring country. Both countries have nearly identical legislation, although not entirely. Compensation under public law is a recognized procedure in this country. In *Rudul Sah's* case¹³, for the first time in its history, the Supreme Court was faced with the decision to award compensation for a breach of the right to life and personal liberty granted by Article-21.¹⁴ The State's position was that the petitioner should have sued for damages under ordinary civil law. The Supreme Court, however, rejected this position, stating that it would have amounted to depriving Article 21 of its "Significant Content," according to Hon'ble Mr. Justice Chandrachud, the then Chief Justice. He further determined that monetary compensation of Rs. 30,000 was essential without affecting the petitioner's entitlement to seek damages under ordinary law in Civil Courts.¹⁵ Apart from this case, there are other instances in which compensation has been awarded from the state or local authority for violating fundamental rights.

In *Sebastian M. Hongray v Union of India*¹⁶ case, it was seen that the wives of unnatural deaths were ordered to get one lac rupees from the Union of India. However, the expenditure was exemplary yet resembled compensation. Even in the *Bhim Singh v State of J & K*¹⁷ case, the Supreme Court compensated the M.L.A. petitioner for being unfairly barred from attending the Legislative Assembly session, which is a fundamental right according to the Constitution of India.

⁹ Rudul Sah v State of Bihar and others AIR (1983) SC 1086.

¹⁰ Ibid.

¹¹ Sebastian M. Hongray v Union of India (1984) 3 SCR 544.

¹² Manmeet Singh, "Compensatory Jurisprudence" (Legal Service India,2021), available at <<http://www.legalservicesindia.com/article/1888/Compensatory-Jurisprudence.html>> accessed 28 September 2021.

¹³ Rudul, n (9).

¹⁴ CoI, n (5) art.21.

¹⁵ Rudul, n (9).

¹⁶ Sebastian, n (11).

¹⁷ Bhim Shingh, M.L.A. v State of Jammu and Kashmir (1986) AIR (SC) 494.

Then in the *Saheli v Union of India*¹⁸ case, the mother of the child was awarded damages against the Delhi Administration and its police officials for causing the child's death. Thus, in each of these instances, the vicarious accountability of the State was raised.

In Nilabati's case, the Supreme Court needed to clarify the State's commitment to compensate citizens for fundamental rights violations. The Supreme Court stated,

*"It would, however, be appropriate to spell out the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between the liability and the liability in law for payment of compensation in action on tort."*¹⁹

Before awarding compensation in *Nilabati Behera's case*²⁰, the District Judge investigated and reported to the Supreme Court. After reviewing the District Judge's report, the Supreme Court, the Amicus Curiae, and the parties' counsel awarded the victim's dependents financial compensation. This remedy, however, would be available where it is the sole realistic avenue of redress remaining. An alternative approach would have rendered the court powerless and rendered the Constitutional guarantee meaningless if the court could not grant any relief against the State.²¹

Thus, day by day, based on the circumstances of various case laws, public law compensation is judicially acknowledged in the legal system, albeit it is still not provided for explicitly in any specific legislation. Thus, India is on par with Bangladesh in this regard, but it has a much larger body of case precedents and judges that are more receptive to this strategy than Bangladesh.

6. Case Laws from Bangladesh Jurisdiction

Public Law Compensation has developed from several Bangladeshi case laws. Despite its innovativeness, the judiciary sometimes provides compensation based on the facts.

6.1. Children's Charity Bangladesh Foundation (C.C.B. Foundation) VS. Bangladesh and others (2017)

*C.C.B. Foundation v The Government of Bangladesh*²² can be considered a milestone case in tort law and constitutional torts. It is the case of Jihad, a four-year-old boy who fell into an open pit on December 2014. The Fire Service rescue squad failed to trace any life form in the pipe despite working for hours. But an amateur local group with a homemade detection device later dragged

¹⁸ *Saheli v Union of India* (1990) AIR 513 SC.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ V.K. Sircar, "Compensation for Violation of Fundamental Rights A New Remedy in Public Law Distinct from Relief of Damages in Tort", (1995) 2 J.T.R.I. JOURNAL, available at <<http://ijtr.nic.in/articles/art7.pdf>> accessed 27 September 2022.

²² *Children's Charity Bangladesh Foundation (CCB Foundation) v Bangladesh and others* (2017)5 CLR (HCD) 278.

the body of an already dead Jihad out of the shaft. Bangladesh Railway, Fire Service, and Civil Defense were judged to have been neglectful in their duty by the court.

Interestingly, the tort law standard for finding negligence was employed here. A duty of care and a breach of that obligation was established by applying the maxim *res ipsa loquitur* ("the thing speaks for itself") and strict responsibility. Because the government violated Jihad's fundamental rights, the court compensated his family for their loss. Justice Farah Mahbub wrote an organized and persuasive opinion that addressed the critical question of whether a public entity can be sued for breach of constitutional duty.²³

Following this incident, the foundation, the Children's Charity Bangladesh (C.C.B.), filed a Public Interest Litigation (P.I.L.) writ in the H.C.D. under art. 102(1), seeking directions from the concerned authorities (Bangladesh Railway, Bangladesh Fire Service and Civil Defense) and claiming compensation of Tk. 30 lacs for their gross negligence, payable to the boy's parents. On 7 October 2017, the High Court Division ordered the respondents to pay the parents Tk 20 lakh in compensation. The respondents sought leave to appeal to the Appellate Division, but the apex court denied their motion on 5 August 2018 and upheld the H.C.D. ruling.²⁴

Prior to providing compensation, certain factors, such as the time of death, future prospects, and life expectancy, must be determined and noted. While these and other critical factors are considered when calculating a figure, certain aspects of life, such as suffering, pain, and grief, are unquantifiable. Thus, the mechanism for establishing the lump sum award, in this case, remains uncertain. The annual expenditures of the Civil Defense Authority were also analyzed in order to determine the amount of the compensation. However, any established compensation criteria are still lacking, yet this case opens the door to suing a public agency for breach of constitutional obligation.

6.2. Z.I. Khan Panna Vs. Bangladesh and Ors.(2017)

In *ZI Khan Panna v Bangladesh*²⁵ case, the H.C.D. considered compensation under art 102(1) in the context of unlawful arrest and detention. To compensate victims of illegal and unlawful conduct committed during the period covered by the Joint Drive Indemnity Act 2003, the petitioners sought an order from the State to form a fund of 100 million B.D.T. (A\$ 1.65 million). The 2003 Act was enacted primarily to offer amnesty to all members of combined forces who participated in a highly publicized countrywide criminal search, known as 'Operation Clean Heart' between 16 October 2002 and 9 January 2003. The petitioners presented newspaper clippings

²³ Raihan Rahman Rafid, 'When negligence costs lives' Dhaka Tribune (Dhaka, 8 January 2018), available at <<https://www.dhakatribune.com/opinion/op-ed/2018/01/07/negligence-costs-lives>> accessed 2 September, 2022.

²⁴ Taqbir Huda, 'Judicial activism for constitutional torts' The Daily Star (Dhaka, 7 August 2018), available at <<https://www.thedailystar.net/news/law-our-rights/judicial-activism-constitutional-torts-1616731>> accessed 4 August 2022.

²⁵ *ZI Khan Panna v Bangladesh and others* (2017) 37 BLD 271 (HCD).

indicating that at least 43 people were killed while in the joint forces' custody during the 85-day operation.²⁶ Thus, they called for the establishment of the fund to pay victims of torture and, in the instance of custodial deaths, the dependents of the deceased, who are entitled to compensation under Article 102(1) of the Constitution.²⁷

The court decided to abstain from issuing any "wholesale order" for Operation victims' compensation since no affected individual had "personally exercised the H.C.D.'s writ authority for awarding compensation under Article 102."²⁸ Thus, the court authorized victims to use the H.C.D.'s writ jurisdiction to seek compensation for the State's "illegal and unconstitutional" actions.²⁹ It then nullifies the 2003 Act as unconstitutional. The court was reluctant to order the State to establish a 100 million B.D.T. (A\$ 1.65 million) fund for the victims.³⁰ This case expands the Supreme Court Division's discretionary compensatory jurisdiction.

6.3. Bilkis Akhter Hossain Vs. Bangladesh and others (1997)

This is a landmark case involving public law compensation. The victim was a prominent politician and opposition party member detained under the Special Powers Act 1974. Her wife challenged the legality of this arrest and detention, claiming that it was conducted solely for political victimization to suppress his planned political activities, thereby violating his constitutionally guaranteed rights to liberty and freedom of speech. The H.C.D. was forced to address the issue of compensation after it was stated emphatically by the petitioner that the respondents should be imposed with exemplary monetary compensation and costs' for these rights violations so that detaining authorities would 'think ten times' before taking similar unlawful action in the future and abusing their 'discretionary power' in such an arbitrary manner.³¹ The court found 'force' in the petitioner's counsel's arguments and, after demonstrating the wrongful character of the imprisonment, determined that this was a 'suitable instance where justice requires an exemplary monetary recompense' from the respondents for the detainee.

Additionally, the court referenced examples from Indian precedent in which it was determined that under Article 102 of the Bangladesh Constitution, there is no specific provision for compensation. India faces a similar issue. However, despite this legal impediment, the Supreme Court of India determined that the defense of sovereign immunity would not apply in cases involving violations of basic rights.

²⁶ Ibid.

²⁷ Ibid. 2

²⁸ Ibid. 74

²⁹ Ibid.

³⁰ Ibid. 75

³¹ Bilkis, n (7).

As a result, it was determined that there was 'no impediment to compensating the aggrieved individual under writ jurisdiction.'³² Numerous constitutional rights of the detainee were infringed, including irreparable harm to his reputation and social status, alienation from family members, 'inhuman mental and physical suffering' endured while in jail, and the detainee's expenditure of a sizable sum of money on lawsuit costs.³³ The court determined that the detainees should get 'exemplary lump-sum monetary compensation' of 100,000 BDT (A\$ 1,650).³⁴

Thus, while the H.C.D. established that its power to award relief under writ jurisdiction was not limited to declarations or injunctions but also included other remedies not specifically mentioned in the Constitution, such as compensation, it failed to articulate the constitutional rationale for such power to award remedies, for example, by failing to acknowledge the deterrent effect it may have on public authorities, as the petitioner's lawyer argued.

6.4. *Government of Bangladesh and others v Nurul Amin and others (2015)*

The verdict in *Bilkis Akhter* came before the A.D. on appeal in 2012 in *Bangladesh v Nurul Amin*³⁵ case. The respondents contended that the compensation should be put down for two reasons: first, the H.C.D. cannot make an order for compensation or compensatory costs under art. 102(1) because 'no such provision has been made in art. 102 of the Constitution; and second, because the plaintiffs did not pray for compensation or compensatory costs in their writ petitions, and thus the court 'erred in granting the relief of monetary compensation without suasion.'³⁶ While the A.D. dismissed the first argument, it, unfortunately, accepted the second. As a result, fifteen years later, the *Nurul Amin case* set aside the compensation award in the *Bilkis Akhter case*. In response to the appellant's first point, the A.D. openly conceded that 'it is difficult to identify... any ruling' in 'our jurisdiction' that particularly addresses compensation for violations of fundamental rights.³⁷ As a result, it looked to foreign law and supported the H.C.D.'s authority to grant compensation under Article 102. However, the A.D. cautioned the H.C.D. about the unique character of compensation under art. 102(1), stressing that the court must act decisively but with care and self-control.³⁸

After reiterating the H.C.D.'s authority to award compensation pursuant to writ jurisdiction, the A.D. considered whether the compensation award was justified in this particular situation. It responded negatively and chose to withhold compensation for two primary reasons. It was considered by the A.D. that there was no evidence of physical or mental abuse other than 'vague and imprecise statements without accompanying documentation.'³⁹ According to the evidence

³² Ibid. 33

³³ Ibid. 46

³⁴ Ibid. 47

³⁵ *Government of Bangladesh and others v Nurul Amin and others (2015)* 67 DLR 352 (AD).

³⁶ Ibid. 17

³⁷ Ibid. 22

³⁸ Ibid. 37

³⁹ Ibid. 39

presented, the violation of fundamental rights did not satisfy the threshold for compensation because it was neither 'gross and patent and ex-facie apparent' nor 'unjust and overly harsh or oppressive.' Thus the H.C.D. 'erred in law in granting monetary compensation.⁴⁰ Secondly, the plaintiffs did not directly request compensation in their initial petition; it was presented during the hearing and during the counsel's remarks without a corresponding revision to the plaint.⁴¹ Since it is "clearly recognized that compensation or relief must be specifically requested for in the writ petition," the award, in this case, had to be reversed.⁴² Consequently, the A.D. modified the H.C.D.'s more lenient case-by-case approach in *Bilkis Akhter* by renaming it to the more strict 'exceptional cases' test.

Thus, *Nurul Amin* is a closed personification of the legal conservatism culture that hampered the successful implementation of public law compensation in Bangladesh during the conservative phase. Consequently, the claim for public law compensation faced an uphill battle in this case, and at the end of the day, the odds of receiving compensation must clear this hurdle. This case's precedent must be set aside to resolve this issue; otherwise, the victims and courts would face criticism when awarding compensation if the opposing party uses this case's judgment as a precedent.

7. Findings

After studying instances from the Indian and Bangladeshi cases, certain problems are evident in the implementation of Public Law Compensation in Bangladesh. These are-

1. Public Law Compensation is still a new and unknown topic among the mass people along with legal scholars.
2. Tort and Constitutional Law courses ignore the concept of constitutional tort along with Public Law Compensation while being taught in classes.
3. Lawyers hardly seek Public Law Compensation while filing any suit for violation of fundamental rights on behalf of any victim, and thus it remains ignored by the court.
4. The Courts of Bangladesh have awarded Public Law Compensation multiple times. But lawyers routinely overlook these cases. Thus, it deprived victims of claiming compensation. Even lawyers often refer cases from other jurisdictions that have only persuasive value. That is why the court can ignore this concept for having only persuasive value and not having any binding forces upon them.
5. Because the jurisprudence has not been established yet, there is no regular method for granting compensation.

⁴⁰ Ibid. 38

⁴¹ Ibid. 41

⁴² Ibid. 43

6. The case-to-case test of awarding compensation was set aside in the Nurul Amin case and created a new jurisprudence of exceptional case test while awarding compensation under Article 102 of the Constitution, which actually bars the H.C.D. from providing compensation in a liberal way.

8. Recommendations

There are some suggestions for introducing and implementing the Public Law Compensation system in the legal system of Bangladesh. These are:

1. Article 102 of the People's Republic of Bangladesh Constitution empowers the court to issue an order and expand the High Court Division's authority to award compensation in cases of violation of Fundamental Rights. This authority is to be widely spread among the people from the legal arena in order to ensure a broader acceptance of these rights of getting compensation.
2. Tort law must be taught critically and persuasively in the L.L.B. degree to ensure that law students learn that it has a wide range of applications in the Bangladesh Legal System and is also used extensively in the practice of law by substantiating and mentioning notable case laws from Bangladesh Jurisdiction.
3. Considering public law compensation is a relatively new and unfamiliar concept among the general public, it must be extensively discussed in law schools.
4. H.C.D.'s Public Law Compensation judgments impact lower court actions; thus, lawyers should consult with them to make sure to claim compensation from the very beginning, even in the lower judiciary.
5. Senior Advocates should readily acknowledge this issue and craft an appropriate case to persuade judges to grant this claim without hesitation.
6. It is necessary to broaden the scope of the jurisprudence governing the award of compensation.
7. The precedent established in the Nurul Amin case should be set aside as it has tightened the process of awarding compensation for violating fundamental rights.

9. Conclusion

Worldwide, courts recognize the importance of monetary compensation for violating fundamental rights by the State. In countries like Bangladesh, where private tort liability is still developing, compensation under public law is the only practical option. Article 102 of the Constitution allows persons to sue for damages after claiming violations of fundamental rights in the H.C.D. under Article 44. Obtaining public law compensation in Bangladesh has been a long process led by public interest lawyers and human rights organizations, notably BLAST and C.C.B. Foundation. We can connect successful compensation claims for fundamental rights violations to Bilkis Akhter and the C.C.B. Foundation case. Comparing the present liberal phase to previous phases reveals the H.C.D.'s willingness to pay public law compensation for a far wider variety of breaches. Not knowing how long this unexpected liberalization will endure. The restrictions that the A.D. gave in the Nurul Amin case are now difficult to predict. Although it's excellent that experts are catching on to this mechanism and we may hope that courts will follow the liberal example set by courts of other jurisdictions.