

## “Public law Compensation as a Remedy under Constitutional Tort Law in Bangladesh”

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**ABSTRACT:** Constitutional Tort Law is significant for protecting the rights of citizens, it allows citizens to take necessary action against the government or stakeholders if they violate their fundamental rights. Article 102 (1) of the Constitution of Bangladesh used the word “appropriate” by analyzing this word compensation as a remedy granted under the Constitution of Bangladesh. The distinct framework of the constitution regulates the connection between the state and its population. According to the research, several challenges still need to be addressed. These include people's lack of awareness of their legal rights and alternatives of action, as well as the vagueness surrounding the application of the constitutional tort theory. By shedding light on the legal framework that is essential in determining how citizens interact with their state's constitutional tort laws, this study aims to address this query. Furthermore, by guaranteeing compensation as a remedy, it will be an invaluable tool for scholars, policymakers, and lawyers seeking to understand how to better uphold the rule of law and the rights of the

people within Bangladesh's legal systems. There are primary and secondary data in this qualitative study. The author of this paper has concentrated on precedent-setting court rulings and formal print media. The study will end with specific discoveries where more research is needed, as well as some recommendations for the adoption of newly codified laws or regulations.

**Keywords:** *Compensation, Constitutional Tort Law, Tort, Constitution, Bangladesh.*

## INTRODUCTION

In countries like Bangladesh, where violations of guaranteed fundamental rights are frequent, a novel concept known as Constitutional Tort has emerged as a remedy. This concept allows individuals to seek compensation for the infringement of their rights. However, tort law in Bangladesh has not developed as extensively as anticipated. There is no codified tort law, making the concept of Constitutional Tort even more distant. Under Article 102(1) of the Constitution, individuals can invoke compensatory remedies for violations of their fundamental rights by government officials or statutory authorities. However, the assessment of the quantity and evaluation of compensation continues to be a disputed matter.

The gradual development of the idea of Constitutional Tort is a positive sign. However, in the absence of codified laws and policies, it cannot play a significant role in the country's jurisprudential landscape. This research paper examines the gap between rights and remedies in the context of Constitutional Tort. It analyzes the factors involved in assessing compensatory damages and the current scenario in Bangladesh regarding Constitutional Tort. The paper concludes with proposals for enacting new codified tort laws that provide clear guidelines for compensation.

The concept of constitutional tort is undergoing significant evolution in Bangladesh. There has been a discernible tendency in recent times to compensate persons who have had their fundamental rights violated. This revelation adds a new perspective to Bangladesh's legal past under the heading of constitutional tort. The notion of compensating victims is gaining traction, with an increasing number of similar cases being presented before the courts. However, the judiciary faces considerable challenges in assessing damages due to the absence of clear guidelines in the

compensation process. Article 102(1) of the Constitution of Bangladesh serves as the primary legal framework through which courts can award monetary compensation to victims whose rights have been infringed by statutory authorities. Despite this provision, the lack of codified laws and detailed policies complicates the process of determining appropriate compensation. This evolving jurisprudence highlights the need for comprehensive legal reforms to establish clear guidelines and ensure effective remedies for rights violations.

## **RESEARCH QUESTION**

1. What are the existing legal frameworks governing compensation as a remedy under constitutional tort law in Bangladesh?
2. How do the principles of constitutional tort law in Bangladesh guide the awarding of compensation for civil rights violations?

## **BACKGROUND OF CONSTITUTIONAL TORT LAW IN BANGLADESH**

In recent years, Bangladeshi courts have shown a tendency to adopt principles of ordinary tort law in cases involving negligence and traffic accidents. Concepts such as vicarious liability and other doctrines derived from tort law are gradually being integrated into the legal system of Bangladesh. In the context of Bangladesh, the incorporation of tort law principles into the legal system signifies a progressive approach to civil justice. The judiciary's adoption of doctrines such as vicarious liability demonstrates a commitment to ensuring that individuals have access to remedies for harm caused by others, including state officials. This approach aligns with the broader objective of upholding fundamental rights and providing effective legal recourse for violations.

Tort law ideas are used by the judiciary to hold state officials responsible for violating fundamental rights or going beyond their power in the context of constitutional tort litigation. Legal theories include strict responsibility, negligence, *res ipsa loquitur*, and vicarious liability are frequently used in this kind of action.

A number of human rights texts acknowledge some rights that roughly correspond to human cognitive ability. These rights are seen to be inalienable and necessary to

attain a fulfilling quality of life. Dr. Muhammad Ekramul Haque defines 'Fundamental Rights' as those that guarantee better protection, transcending both constitutionally sanctioned rights and other rights. TK Tope highlights that the purpose of basic rights is to guarantee that some rights are impervious to political shifts and to increase public confidence in the country.

Taqbir Huda points out that in the case of Bangladesh, awards made under Article 102(1) against the government or its representatives for transgressions of basic rights protected by the constitution are considered public law compensation. Since Article 102(1) does not define the kind of redress, petitioners and the High Court Division (HCD) are free to choose any appropriate remedy, including civil remedies, to enforce fundamental rights. The enforcement of fundamental rights is mandatory, as stated by eminent constitutional scholar in Bangladesh Mahmudul Islam, even though the HCD has considerable jurisdiction to decide what is an "appropriate" remedy under Article 102(1). Therefore, the inherent nature of the right to seek redress for abuses of basic rights imposes a duty on the court to devise innovative and efficient legal remedies for such violations.

The third part of the Constitution of Bangladesh addresses fundamental rights, comprising 18 different groups that include both ideological and rational perspectives. For instance, Article 39 asserts that freedom of thought and belief comes with the responsibility of recognizing limitations. While the compatibility of the right to a substantial majority and the general interest of society is evident, the freedom to exercise essential rights under Article 44 does not meet the same standards.

Article 102(1) of the Bangladeshi Constitution establishes the power to transfer matters to the High Court Division and protects the rights mentioned in this section. Article 44 provides even more support for this. The People's Republic of Bangladesh's Constitution, as stated in Articles 44(1) and 102(1), provides the impacted party with the right to petition the Supreme Court for a writ in the event that any of the rights enshrined in part III of the Constitution are violated. This was the case in the case of Kazi Mukhlesur Rahman v Bangladesh. These constitutional

torts are protected by these provisions, and by applying them, one can pursue remedies under tort law.

## **SIGNIFICANCE OF COMPENSATION AS A REMEDY**

Compensation as a remedy in constitutional tort law is crucial for several reasons. Firstly, it provides tangible redress for victims, aiming to restore them to the position they would have been in had their rights not been violated. This encompasses both economic losses, such as medical expenses and delayed wages, and non-economic losses, such as agony and suffering. Secondly, compensation serves as a deterrent, imposing financial liability on the state or its officials, which discourages future violations by making it costly to engage in or tolerate rights breaches. This deterrent effect is vital for preventing both systemic violations and individual misconduct. Thirdly, compensation mechanisms enhance accountability by promoting transparency and ensuring that state actors are held responsible for their actions, reinforcing the principle that they must act within constitutional boundaries. Additionally, compensation carries significant symbolic value, acknowledging the harm suffered by the victim and affirming the importance of constitutional rights. This public recognition reinforces the commitment to uphold these rights. Finally, the process of awarding compensation often involves judicial oversight, ensuring fairness and reinforcing the rule of law by subjecting state actions to legal scrutiny. This judicial involvement is crucial for maintaining the integrity of the legal system and providing victims with a recourse to justice. Overall, compensation not only addresses the immediate harm suffered by victims but also promotes systemic reforms, accountability, and the protection of constitutional rights.

## **LEGAL FRAMEWORK FOR COMPENSATION UNDER CONSTITUTIONAL TORT LAW**

### **CONSTITUTIONAL PROVISIONS:**

In Bangladesh, the legal framework for constitutional tort law is essential for individuals seeking redress for violations of their fundamental rights by the state or its authorities. The Bangladeshi Constitution's Articles 44 and 102 serve as the main foundation for this structure. Article 44 establishes the right to enforce fundamental

rights as a fundamental right itself, thereby enabling individuals to seek judicial intervention from the High Court Division. This clause emphasizes how important judicial supervision is to defending fundamental rights. The High Court Division is empowered under Article 102 to issue directions and decisions, including ones pertaining to compensation, in order to uphold fundamental rights. In particular, the court may grant writs under Article 102(1), including certiorari, prohibition, mandamus, habeas corpus, and quo warranto. These writs are essential for redressing complaints alleging that a statute authority has infringed a person's constitutional rights. The provision for compensation through these writs ensures that victims of constitutional torts receive appropriate remedies, including monetary compensation.

In practical terms, individuals who believe their constitutional rights have been infringed can file a writ petition in the High Court Division. The court then assesses the case and, if it determines that a statutory authority has violated the individual's constitutional rights, it can order compensation. This process not only provides redress to the victim but also acts as a deterrent against future violations by state authorities.

The judiciary in Bangladesh has increasingly recognized the importance of awarding compensation in constitutional tort cases. Landmark judgments have established precedents for awarding compensation, demonstrating the judiciary's commitment to upholding the rule of law and ensuring justice for victims. However, challenges persist, such as ensuring due process and determining fair compensation amounts. The judiciary often faces difficulties in balancing the need for adequate compensation with principles of fairness and justice.

Recent scholarly discussions suggest that the judiciary should adopt more consistent and transparent methods for calculating compensation to enhance the effectiveness of constitutional tort remedies. This includes developing clear guidelines and criteria for assessing damages, which would help ensure that compensation awards are fair and proportionate to the harm suffered by the victim.

Overall, the constitutional provisions for compensation under tort law in Bangladesh reflect a strong commitment to protecting fundamental rights and ensuring that

victims receive just remedies for their grievances. By empowering the judiciary to award compensation, these provisions play a crucial role in upholding the rule of law and promoting accountability among state authorities. This legal framework not only provides redress to victims but also reinforces the importance of constitutional rights in the governance of Bangladesh.

### **STATUTES GOVERNING COMPENSATION:**

In Bangladesh, there is no specific legislation that explicitly defines the vicarious liability of the state for torts committed by its servants. However, the concept of constitutional torts provides a mechanism for seeking compensation for violations of fundamental rights, as outlined in Article 102(1) of the Constitution of Bangladesh. This article serves as the primary forum for addressing grievances related to the infringement of citizens' fundamental rights by state officials.

Part III of the Constitution of Bangladesh delineates eighteen safeguarded fundamental rights. When these rights are violated, the aggrieved party has the right to file a writ petition in the High Court Division against any person or authority to enforce their guaranteed rights. Article 102(1) specifically addresses judicial review in cases of fundamental rights violations, granting the High Court Division discretionary power to determine the appropriate remedy for enforcing these rights. The Constitution entrusts the High Court Division with the authority to measure and provide remedies for such violations, as the term "appropriate" in Article 102(1) is not explicitly defined.

Furthermore, the ability to enforce fundamental rights is established as a fundamental right in Article 44 of the Constitution. This provision underscores the constitutional mandate to limit the powers of state authorities and ensure the protection of individual rights. Therefore, when state officials violate fundamental rights, the remedy of public compensation is available under the constitutional framework.

Bangladesh is not covered by the doctrine of sovereign immunity, which generally shields the state from lawsuits. Article 146 of the Constitution explicitly grants citizens the right to sue the state. It affirms the right to sue the government by stating that the government of Bangladesh may sue or be sued under the name of

Bangladesh. This constitutional provision ensures that there is no legal barrier to holding the state accountable for the actions of its servants.

In summary, while there is no specific legislation defining the vicarious liability of the state for torts committed by its servants, the Constitution of Bangladesh provides a robust framework for addressing violations of fundamental rights through judicial review and compensation. Enforcing fundamental rights and making sure that state officials are held responsible for their acts are important tasks for the High Court Division.

### **KEY JUDICIAL INTERPRETATIONS- ARTICLE 102(1) OF THE CONSTITUTION:**

Article 102(1) of the Constitution of the People's Republic of Bangladesh empowers individuals who feel aggrieved to submit a writ petition against any person or authority, including those involved in the government of the Republic, to seek the protection of their fundamental rights as outlined in Part 3 of the constitution. This provision ensures that when basic rights are violated by public or private entities, the aggrieved party has a legal avenue to seek redress through the judiciary.

Article 102(1) grants the judiciary the discretion to determine the appropriate legal recourse for individuals whose fundamental rights have been violated. One of the significant developments in this regard is the concept of public law compensation, which has emerged as a constitutional remedy for the protection and enforcement of fundamental rights. The basis for this compensation can be traced to the broad interpretation of the term 'appropriate' as used in Article 102(1). This interpretation has enabled the Supreme Court of Bangladesh to award monetary compensation to aggrieved parties in cases of fundamental rights violations.

Furthermore, Article 44 of the Constitution reinforces the enforcement of a citizen's basic rights by recognizing it as a fundamental right. This provision underscores the importance of protecting individual rights and provides a robust framework for addressing grievances related to constitutional torts.

The supremacy of the constitution is enshrined in Article 7, which declares that all provisions of the constitution represent the collective will and aspirations of the people. This article emphasizes the paramount importance of safeguarding fundamental rights and limiting the powers of governmental authorities. The constitutional mandate thus requires the protection of citizens' fundamental rights and ensures that governmental power is exercised within the bounds of the law.

In conclusion, the constitutional framework of Bangladesh provides a comprehensive mechanism for addressing violations of fundamental rights through the judiciary. Article 102(1) plays a pivotal role in this regard by empowering the courts to grant appropriate remedies, including public law compensation, thereby upholding the principles of justice and the rule of law.

## **PRINCIPLES OF CONSTITUTIONAL TORT LAW IN BANGLADESH**

### **HISTORICAL EVOLUTION:**

The term “tort” is derived from the Latin word “tortum,” meaning “crooked” or “twisted,” and from the French word for “wrong.” The English proverb “The King can do no wrong” inspired the concept of sovereign immunity, which was subsequently adopted in the United States to reject tort claims. However, this principle has evolved over time. In the landmark case of *Dorset Yacht Company v. The Home Office*, the House of Lords held that the Crown could be liable if, for instance, youths who escaped from an open borstal caused damage to a boat. Despite the entrenched and varied requirements of civil law, some aspects of tort law are being increasingly considered in court decisions, thereby providing a legal framework for the application of tort law in the People’s Republic of Bangladesh.

### **CASE STUDIES AND PRECEDENTS**

#### **KEY PRECEDENT-SETTING COURT RULINGS:**

The first case of public law compensation as a constitution law remedy,

*Bilkis Akhter Hossain vs Bangladesh and others* (1997)

The case marks a pivotal moment in the judicial history of Bangladesh, as it was the first instance where the High Court Division (HCD) invoked Article 102(1) of the Constitution to award monetary compensation. In this case, Bilkis Akhter Hossain, the wife of a politician, filed a petition under Article 102(1), alleging that her husband had been wrongfully arrested and detained. She contended that this detention violated his constitutional rights to freedom of movement and assembly, as well as his rights to life and liberty, as enshrined in Articles 36, 37, 31, and 32 of the Constitution of Bangladesh.

The petitioner argued for monetary compensation and costs due to the infringement of these guaranteed rights. The court emphasized the necessity of awarding exemplary compensation to deter the arbitrary use of state power and prevent future abuses. A critical question before the court was whether the HCD had the authority to grant monetary compensation to aggrieved parties under its writ jurisdiction as per Article 102.

The HCD addressed this issue by stating that although Article 102(1) does not explicitly mention compensation, the court, exercising its original special jurisdiction, possesses the discretionary and inherent power to pass any judgment it deems fit and proper. Consequently, the court affirmed its authority to award both simple costs and monetary compensation based on the facts and circumstances of each case. The court also referenced the Habibullah Khan case, where the Appellate Division (AD) had affirmed that the HCD is competent to award compensation in appropriate cases within its writ jurisdiction.

In this particular case, the court identified specific violations of the detainee's constitutionally guaranteed rights. The detention was deemed unlawful and carried out with malafide intent by the authorities. As a result, the court awarded the victim a sum of 100,000 BDT as exemplary lump-sum monetary compensation.

This judgment is significant in the evolution of constitutional tort law in Bangladesh, as it introduced the concept of public law compensation for the first time. However, the judgment did not establish clear and specific guidelines or mechanisms for awarding monetary compensation. Instead, it left a somewhat ambiguous precedent,

stating that compensation should be determined "considering the facts and circumstances of each case." Thus, the judgment did not provide a definitive framework for compensation under Article 102(1) of the Constitution.

Compensation was a constitutional transplant,

Rudul Shah Case, India (1983)

The Rudul Shah case, a Public Interest Litigation (PIL) filed under Article 32 of the Indian Constitution, sought both the release of Rudul Shah and compensation for the violation of his fundamental rights. Shah had been unlawfully detained for 14 years despite being acquitted of all charges. This case is a landmark in Indian legal history as it introduced the concept of state liability into its jurisprudence for the first time. The Supreme Court faced a significant dilemma regarding whether it could award compensation for the violation of fundamental rights, specifically the right to life under Article 21 of the Constitution.

The critical issue was whether the court, while exercising its jurisdiction under Article 32, could order the payment of monetary compensation. Upon examining the facts, the court found Shah's detention to be wholly unjustified, illegal, and an abuse of power. In addressing the pivotal question of compensation for the violation of fundamental rights, the court stated that the guarantee of the right to life and personal liberty under Article 21 would be rendered meaningless if the court's powers were limited to merely ordering the release of individuals who were illegally detained. Consequently, the court directed the state to pay Shah 30,000 rupees as compensation.

This case is significant because it marked the emergence of a new jurisprudential concept in Indian legal history, where the court held the state liable for infringing upon the fundamental rights of its citizens. The court asserted that the right to compensation serves as a remedy for the unlawful acts of state instrumentalities, which act under the guise of public interest and use state power as a shield.

The Rudul Shah case laid the foundation for the recognition and growth of constitutional tort law in Bangladeshi jurisprudence. Bangladeshi judges have

frequently relied on this judgment, as it was the first instance in India where compensatory relief was granted for the violation of fundamental rights. This case has thus played a crucial role in shaping the legal landscape regarding state liability and compensation for rights violations in both India and Bangladesh. The court agreed this transplant of the case in *Bilkis Akhter Hossain* case.

Third case for compensation in light of constitutional tort law,

*ZI Khan Panna vs Bangladesh*

In the context of the immunity granted to members of the joint forces involved in ‘Operation Clean Heart,’ a controversial anti-crime initiative, it was articulated that the court possesses the authority to award compensation for unlawful arrest and imprisonment under Article 102(1) of the Constitution. During this operation, which spanned 85 days, the joint forces were responsible for the deaths of at least 43 individuals. Petitioners contested the Joint Drive Immunity Act of 2003, seeking compensation for victims of torture and custodial deaths under Article 102(1). However, the court dismissed this argument, citing the absence of specific cases brought by victims of the operation regarding the unlawful actions of the forces involved.

The court further clarified that criminal liability is inherently personal, and thus, it is not obligated to compensate the victims of the operation. Nevertheless, the court acknowledged that victims are entitled to seek reparations through the High Court Division (HCD) for unlawful and unconstitutional actions committed by the state during the operation. This recognition underscores the court’s acceptance of the necessity for public law compensation, despite the absence of a specific legal framework for such compensation.

Although the court did not award compensation in this instance, it highlighted the urgent need for public law compensation, marking a shift towards a more liberal approach to compensation for victims of state actions. This development signifies a progressive interpretation of constitutional provisions, aiming to ensure justice and reparation for victims of state misconduct.

Final case on public law compensation as a constitutional remedy,

CCB Foundation and the Government of Bangladesh (2017)

Material Facts:

The lawsuit between the CCB Foundation and the Government of Bangladesh, often referred to as the Jihad case, holds a notable place in history, as it is the first case in Bangladesh relating public law compensation. The ruling of the case sets a standard for holding state officials accountable by interpreting Article 102 of the Bangladesh Constitution when public officials infringe on citizen's fundamental rights. Despite the High Court Division (HCD) didn't provide sufficient justification for the compensation given to victim's family. Moreover, the Appellate Division (AD) didn't provide a comprehensive verdict during the appeal hearing and they didn't take several chances to set a strong rule for legal claims about wrongs done by public authorities. The legal challenge raised questions about the legality of such negligence and its classification as a breach of Jihad's constitutional rights, specifically under Articles 31, 32, and 36. It further questioned why measures shouldn't be taken against the ministries responsible for their failure to perform their duties. Mr. Halim has claimed compensation of 30 lakh taka for the violation of Jihad's constitutional rights under Articles 31 and 32.

In April 2015, Bangladesh Legal Aid Services Trust (BLAST), renowned for its advocacy in public interest litigation particularly concerning children's rights, joined to assist the court in this matter. The PIL had named seven respondents, which include prominent entities like the Fire Service and Civil Defense – respondent no. 3 and 5, Bangladesh Railway Service – respondent no. 4, and Dhaka WASA – respondent no. 6.

Verdict of HCD:

The case was heard in November 2015 and February 2016; judgment was delivered in February 2016, and the decision was published in October 2017. This is a case that was decided by Justices Farah Mahbub and Kazi Md. Ejarul Haque Akondo, with Judge Mahbub writing for the Court. The judgment covers the events leading to

Jihad's death, case details, involved parties, reasons for including an additional party, and arguments from both sides, highlighting the main points to be decided:

- Whether the person who brought the case had the right to do so;
- Whether the defendants' alleged carelessness directly contributed to the victim's death;
- Whether compensation claims could be made against public bodies for failing to fulfill legal or constitutional duties;
- Whether Article 102 of the Constitution does give the right to seek compensation from public bodies; and
- Determination of compensation amount payable to the victim's family.

Whether the Person who Brought the Case had the Right to do so:

Judge Mahbub touched upon the main issue of whether the writ petition could be accepted. He referred to the case of *Kartic Das Gupta v. Election Commission of Bangladesh and others*, stressing that the first task of a writ bench is to determine if the petition can be considered valid.

The respondents argued that the Public Interest Litigation (PIL) was not valid, citing the case of *National Board of Revenue v. Abu Sayeed Khan*. This case laid out 14 criteria for the High Court Division (HCD) to accept PILs. They claimed that a PIL must fulfill at least one of these criteria to be considered valid.

Judge Mahbub meticulously examined several criteria to assess the maintainability of the PIL: Criteria 4: Expands the term "aggrieved person" to include those who empathize deeply with the less fortunate, encompassing individuals affected by wrongs committed by any person or authority, even if not directly affected. Criteria 7: Recognizes the role of public-spirited individuals or organizations that advocate for the rights of the disadvantaged, contributing to the public good. Criteria 9: Emphasizes that PILs should serve the interests of those suffering common injuries or economic disadvantage, providing a legal platform for those without direct access to remedies. Criteria 13: Highlights the importance of PILs in safeguarding

fundamental human rights, encouraging petitions that address the needs of disadvantaged citizens, especially those hindered by illiteracy or financial constraints. The petitioners, to the satisfaction of Judge Mahbub, fulfilled all these criteria by organizing legal aid and support for victims of social, political, and human rights offenses. The petitioner's successful initiatives in child education and rights further supported their standing. Further, Judge Mahbub relied on a plethora of cases in his judgment, including, among others, the following: Kazi Mukhlesur Rahman v Bangladesh and another , Bangladesh Sangbadpatra Parishad (BSP) v The Government of the People's Republic of Bangladesh , and Dr. Mohiuddin Farooque v Bangladesh, for an elaborate discussion of petitioner's locus standing and the circumstances under which the HCD should grant it. She explained that the satisfying of any one of the 14 criteria from the Abu Sayeed case is sufficient for granting standing. In this case CCB Foundation, Judge Mahbub decided that the matters contained serious public harm and mala fide violation of the fundamental right to life of Jihad, a disadvantaged citizen of Bangladesh. She acknowledged the plea for protection by petitioner under Article 102 and granted standing to them.

If the Death Could be Blamed on the Alleged Carelessness of the Defendants:

In the case of Jihad, petitioner's contention is that Bangladesh Railway, respondent no. 4, had a public duty to take measures for securing open tube well pipes to avoid accidents, and as a result of the alleged negligence by the contractor and the engineers, a boy named Jihad fell into an open shaft. The petitioner claimed that Bangladesh Railway was liable for its contractor's negligence and accused respondent nos. 3 and 5 of negligence for using an ineffective camera in the rescue attempt, which delayed the process by 10-12 hours with no success. Despite their failure, a group of young individuals eventually recovered Jihad's body, contradicting respondent no. 5's claim of a joint effort.

The petitioner's case was based on 'res-ipsa-loquitur' and the principle of absolute liability under tort to establish the liability of the respondents for the wrongful death of Jihad. The respondents, on their part, relied on section 25 of the Fire Prevention and Extinction Act 2003, which shields a member of the Fire Service or any employee from liability for any act done in good faith. They argued that their active

participation in the rescue mission, despite limited training, manpower, and resources, showed they made earnest efforts and that failure to rescue did not prove negligence.

Judge Mahbub defined negligence as a breach of duty arising from an omission or commission that a reasonable person would avoid. She emphasized that individuals with specialized skills should exercise greater care. Referring to *Scott v London & St. Katherine Docks Co*, she pointed out that the claimant must prove causation and use the *res-ipsa-loquitur* maxim. Judge Mahbub found respondent nos. 3 and 5 negligent, rejecting their defense of lacking expertise, and held respondent no. 4 accountable for negligence through its contractors, leading to Jihad's death.

The petitioner stressed that negligence was the central issue and compensation depended on proving it. Judge Mahbub concurred, using *res-ipsa-loquitur* to assess negligence, and cited an English legal precedent. In her ruling, she made it clear that respondent nos. 3 and 5 are strictly liable for their actions. She also indirectly held respondent no. 4 responsible under vicarious liability, highlighting their negligence in a comprehensive manner.

If a Claim for Compensation Could be Made Against Public Bodies for Not Fulfilling a Legal or Constitutional Duty:

Judge Mahbub J emphasized that the negligence of the respondents constituted a direct infringement upon Jihad's fundamental right to life. She clarified that when a person dies due to someone else's fault, their family members can initiate a lawsuit under the Fatal Accidents Act 1955. The idea behind this combination of system and user prompts is to help the assistant get better at making the text sound more like it was written by a human; while still making sure the information stays accurate and true to its original meaning. Additionally, the court may provide monetary compensation for any financial hardships experienced by the family members following the individual's demise. She observed that Article 146 of the Constitution, which talks about compensation from public bodies, doesn't differentiate between acts of sovereignty and non-sovereignty, nor does it define the government's liability. So, she believes that the Constitution doesn't prevent the court from

granting compensation against public bodies if their failure to fulfill a legal or constitutional duty, through action or inaction, results in someone's death. In her remarks, she addressed the concept of sovereign immunity granted to public officials. While the Indian Constitution includes Article 300, which provides the State with this defense, our Constitution lacks a similar provision. Consequently, there are no restrictions preventing compensation from being awarded to Jihad's family members for the injustice they suffered due to the respondents' sheer negligence. The oversight broke Jihad's basic right to live given by our Constitution in Article 32. She also made a conclusion that for the first time in our HCD, they are trying to find a reason to hold public officials or groups responsible for failing to fulfill their legal or constitutional duties under Article 146. In her explanation, she clarified the relevant constitutional provision and drew a distinction from India's legal framework. Consequently, public bodies or individuals should not be able to invoke the defense of sovereign immunity in similar cases moving forward.

When Public Bodies Can Face Compensation Claims Under Constitution's Article 102:

In the situation of Jihad, Judge Mahbub J utilized multiple legal precedents from Bangladesh and India when discussing constitutional torts and public law compensation. The person bringing the case, the petitioner, noted rulings from the Supreme Court of India. These included cases such as Rudul Sah v State of Bihar, Smt. Nilabati Behera v State of Orissa and D.K Basu v State of West Bengal and others. Judge Mahbub J spotlighted the Bangladesh Beverage Industries Ltd. V Rowshan Akter and others case. In this case, a family received compensation after a death occurred due to a vehicle crash. Notably, this remains the sole known instance of such compensation in our legal context. However, at the time of this decision, three other significant verdicts related to tort law compensation had already been established, Bangladesh Beverage case, Catherine Masud v Md. Kashed Miah and ZI Khan Panna v Bangladesh. Judge Mahbub J highlighted that the court should have referenced these three prior tort law compensation cases during the present judgment which should have been referenced to fortify tort law jurisprudence under

Article 111. Additionally, she explained how claims for compensation can be pursued under Article 102.

Judge Mahbub J talked about public law compensation and constitutional torts. She underlined the role of the High Court Division (HCD) in upholding basic rights, according to Article 102(1). She pointed out that Article 44(1) considers seeking help from the HCD as a basic right. This means that the court has to respond if these rights are broken. She used the *Bangladesh v Ahmed Nazir*, as an example. He said that the Constitution doesn't set out the kind of help you can get under Article 102. It's up to the court to decide based on the details of the case. She mentioned Indian cases like *M.C. Mehta v Union of India*, as examples. These cases show that giving people money can stop rights from getting broken. It also makes sure that Article 21 of the Indian Constitution is followed. Judge Mahbub thought that courts in Bangladesh should give compensation under Article 102. This should still apply even when private law talks about damages, She compared Article 32 of the Indian Constitution with Article 102 of the Bangladeshi Constitution. This was to explain constitutional torts. She suggested that Bangladeshi courts should consider granting compensation under Article 102 in suitable cases, even if private law remedies are available. Finally, she highlighted the effectiveness of monetary compensation as a remedy, referring to the *D.K. Basu* case. Through her analysis, Judge Mahbub J underscored the judiciary's vital role in enforcing fundamental rights by providing appropriate and effective remedies, including monetary compensation, within the constitutional framework.

In discussing Bangladeshi cases, Judge Mahbub examined *BLAST v Bangladesh*, which recognized the court's authority to award compensation for police power misuse. She pointed out, *A.K. Fazlul Hoque v Bangladesh* and *Md. Shahanewas v Government of Bangladesh*. In these instances, the court gave money for wrong actions by public officials. She also mentioned another pair of cases and *Habibullah Khan v Azaharuddin* and *Bilkis Akhter Hossain v Bangladesh* and others. In these, the awards of money by the HCD were reversed by the Appellate Division (AD). This was because they were not wise or not asked for. Nonetheless, the AD acknowledged the HCD's authority to award compensation for clear rights violations.

Judge Mahbub believed this judicial trend allowed victims to seek compensation for rights violations by public officials and concluded that the severe violation of Jihad's rights warranted compensation under Article 102. Her analysis, drawing extensively from significant cases in both India and Bangladesh, strengthened her argument for public law compensation under Article 102. She, however, did not address *Mohammed Ali v Bangladesh*, where police officers were directed to pay Tk. 5,000 for wrongfully searched and harassed people by invading their homes. This case is a landmark for the first time that penalized officers have paid compensation directly to the victims under HCD.

The Extent of Remuneration to be Provided to the Victim's Family:

In the Jihad case, Judge Mahbub J addressed the complexities of determining compensation in constitutional tort claims. She emphasized that calculating damages in such cases lacks a clear standard and differs from regular damage claims. Referring to D.K. Basu's case, she highlighted the absence of a one-size-fits-all formula for assessing damages in these situations.

She also referred cases of Rudul Sah and Nilabati Behera emphasizing that awarding compensation is the most effective way to provide relief to the family of the deceased. However, she cautioned against excessive awards, demonstrating her careful approach in delivering Bangladesh's first-ever verdict on public law compensation. Next, she mentioned a case of Sri Manmath Nath Kuri v Mvi. Md. Mokhlesur Rahman, where the court observed the difficulty of determining damages which typically come from the fact that the damages cannot be seen or felt due to the loss of a loved one. She refers to a previous case, *Bangladesh Beverage*, it was recognized that emotions like affection, pain, suffering, and mental agony defy precise calculation. Therefore, if compensation is warranted, it should be a fixed amount rather than a calculated one.

Judge Mahbub J ordered both the Bangladesh Railway and the Bangladesh Fire Service and Civil Defense to pay 10 lac takas each to Jihad's family. This decision considered Bangladesh's socio-economic context and relevant compensation laws. However, the lack of explanation for awarding a total of 20 lac taka instead of the

requested 30-lac taka remains surprising. Given that this case involves a public law tort claim, the court missed an opportunity to transparently discuss how the compensation amount was determined.

Verdict of the Appellate Division:

The unexpected verdict was handed down by the AD judge on August 5, 2018, after he weighed both arguments and examined the original verdict and supplemental documents. The AD came to the conclusion that there were no factual and/or legal mistakes in the judgment when decoding their intervention. It is, however, the court's lack of a detailed explanation that led to the failure to use these opportunities. They could have addressed issues that the HCD overlooked. Under the Constitutional Order, the AD has all the authority needed to provide the relief that was sought. This can even include awarding damages for the violation of a constitutional right as Article 104 enshrines in it.

Since the Appellate Division did not find any errors, they could have seized the opportunity to institute a good reason for the compensation that Jihad's family received. They would have drawn from precedents possibly starting with the Bangladesh Beverage case, to instruct the HCD on what to consider when fixing the quantum of compensation. Such guidance may have been useful when making decisions on cases regarding assessment of specific damages and when to allot a lump sum for accident victims and how much compensation ought to be given.

It could also have further developed the interpretation that the HCD gave to Article 146 as to whether the liability of the government has to be absolute or if a ceiling has to be imposed. The HCD expressed that the compensation order would not hamper other liabilities of the respondents or their officials concerning the victim's death, but it did not clarify whether by other liabilities it meant possible criminal liabilities under the Penal Code, 1860, or even the possibility of Jihad's parents claiming compensation under other laws. The AD's judgment should have addressed and clarified these issues for better understanding in law and for future reference. It also considers the issues of making a claim for compensation under other legal wrongs, such as The Fatal Accidents Act 1955.

The issue of claiming compensation under other legal wrongs, such as The Fatal Accidents Act 1955, was discussed. Taqbir Huda cited Naim Ahmed, who confirmed that the right to claim compensation by filing a civil suit remains intact. As a criminal trial against the offending parties was already completed by the time the Appellate Division heard the appeal, this question of compensation assumes importance. While pronouncing judgment in the Catherine Masud case, Justice Naima Haider opined that it is high time the law of torts should be revisited with a view to its adoption in Bangladesh. That would make claims arising from medical or any other form of negligence properly manageable. Justice Haider strongly argued that it is by a full judgment elaborating on the concept of tort and working out its interpretation that the Supreme Court of Bangladesh can do justice. Otherwise, social injustice will continue with cases of negligence having gone unpunished.

However, the AD missed a golden opportunity. It did not set an authoritative precedent on constitutional tort under Article 111. Further, it should have explained how compensation will be recovered. From some other fund for victims, or from the pocket of erring public officials? The silent judgment thereby did not become a landmark decision on constitutional tort nor did it lay any foundation for its structure in our jurisprudence.

#### Distinct Legal Proceedings Related to Criminal Matters:

In Dhaka, the Special Judges Court-5 convicted some people of culpable homicide in Jihad's death. Bangladesh Railway's Senior Sub-Assistant Engineers Jahangir Alam, Assistant Engineers Md Nasir Uddin and Md Zafar Ahmed Shaki, and Contractor Md Shafiqul Islam are the convicted who were accused under section 304 of the Penal Code. However, Assistant Engineers Dipak Kumar Bhawmik and Saiful Islam were denied punishment. Each of the four convicts was fined 2 lakh taka and an additional two years in jail could be imposed if the fine is not paid. The court's decision focused on criminal liability, despite Bangladesh Railway's compensation claim against the contractors for negligence. Both parties are dissatisfied with the trial outcome and are likely to appeal. This case highlights the necessity of independent civil and criminal trials, asserting that victims retain the right to seek compensation through civil proceedings, even if perpetrators face criminal penalties.

Compensation Paid to Jihad's Family:

The HCD had ordered the compensation to pay for within 90 days from the receipt of the copy of the judgment. But it took almost one year to compensate the amount of Tk 10 lakh by both Bangladesh Railway and the Bangladesh Fire Service and Civil Defense, on the 13th of August, 2018. Earlier, the officials of these two organizations were summoned by the HCD for non-compliance. Once the compensation was paid, the HCD cleared the officials of contempt of court.

Source of Compensation:

The ambiguity is whether the compensation has been paid by the public bodies directly or is recoverable from the persons found to be at fault. If the latter, it raises questions about how to adjust the fines imposed during criminal proceedings following the compensation payment.

Jihad Case and Tort Law Verdicts:

The Jihad case is notable for being the first instance where the victim's family received the full compensation awarded by the court, contrasting sharply with the typical 10–20-year settlement period for other tort law cases. Cases such as the Bangladesh Beverage case and that of Catherine Masud are just some of the earlier cases that up to now have not been paid compensation. In the future, looking forward, petitioners may get expedited justice based on Article 102 of the Constitution. The conditions that prevail in compensation payments, involvement of public bodies, and quick resolution are summarized points raised by the panel that tort law cases necessitate. The Jihad case has set precedence for others by having compensation paid timely.

## **PUBLIC LAW COMPENSATION FOR UNLAWFUL ARREST AND DETENTION**

In *Banu v Bangladesh*,

The HCD in Bangladesh has issued a directive for the state to provide BDT 2 million as compensation for the illegal detention of an individual who was wrongly detained due to mistaken identity as a fugitive convict. The HCD contended that the ultimate

responsibility for compensation ought to lie with the highest-ranking official of the police force, rather than on the state or the relevant ministry. The court cited the definition of vicarious liability, which pertains to the legal responsibility that a person in a position of authority holds for the actions of a subordinate or associate, as determined by their relationship. The HCD justified the amount of compensation by calculating the detainee's anticipated loss of earnings to be BDT 2,080,000, multiplied by 260 weeks, and therefore granted a sum of BDT 2 million. The court specified that this recognition does not prevent the victim from pursuing suitable compensation in civil law. The judgement made by the HCD to grant compensation in accordance with Article 102(1) enables the responsibility of both public officials and private companies to be upheld.

## **CONSIDERATION OF ELEMENTS IN FIXING DAMAGE**

*Bilkis Akhter Hossain Vs. Bangladesh and others 1997*

This is the initial instance in which the HCD has utilized Article 102(1) of the Constitution to grant Monetary Compensation. In this case, a petition was submitted by Bilkis Akhter, the spouse of a politician, claiming that her husband was unlawfully apprehended and held in custody, as per section 102(1). In addition, he claimed that his imprisonment was a violation of his constitutional rights to freedom of movement and assembly, as well as his rights to life and liberty, as stated in articles 36, 37.31, and 32 of the Constitution of Bangladesh, respectively. The monetary compensation is awarded based on several factors, including the irreparable damage to the individual's reputation, the media portrayal of the individual as a terror leader, the separation from family members, the inhumane mental and physical torture experienced while in custody, and the significant cost of litigation. The court awarded 100,000 BDT on a 'lump-sum' basis here also.

*BLAST vs. Bangladesh and others 2003*

The Bilkis Akhter case, which involved whistleblowing and compensation for state power violations of citizens' fundamental rights, often sets a precedent for future cases. Since no specific provision exists,

The topic of compensation under Art.102 (1) was challenged again in this case before the HCD. The writ case was brought by a Legal Aid NGO on behalf of a student who died in police custody. Police regularly violate civilians' fundamental rights, according to BLAST. Police abuse their power of arrest and detention. The petitioner requested that the court issue orders to prevent abusive authority usage and defend protected rights. The petitioner stated that HCD can provide compensation under ART.102 (1) if the detention was unlawful and the detainee was subject to torture, cruel, inhuman, and degrading treatment. The HCD acknowledged the reasoning but modified the compensation award to depend on the facts and circumstances of each case. Due to the fact that custodial death was involved, the court denied compensation to the victim's relatives in this writ petition.

## **IMPLICATIONS FOR CIVIL RIGHTS**

Evaluation of the effectiveness of Constitutional Tort Law on Civil Rights protection in Bangladesh.

In Bangladesh, individuals have the right to seek remedy for infringements of their constitutional rights by filing civil lawsuits under constitutional tort law. It enables individuals to ensure that government actors are held responsible for their conduct, offering an extra level of safeguarding beyond conventional remedies.

The concept of constitutional tort law is quite recent in Bangladesh. It refers to the violation of a citizen's constitutionally protected fundamental rights by a municipal authority or government official. Constitutional tort litigation refers to a type of legal action in which the aggrieved party is eligible for legal redress in the form of monetary compensation if any of their fundamental rights are infringed upon.

The efficacy of constitutional tort law in safeguarding civil rights in Bangladesh has been a topic of contention. A significant obstacle is the limited knowledge among citizens regarding their inherent rights and the legal recourse accessible to them. An additional obstacle arises from the absence of precision in the implementation of the constitutional tort theory. The article contends that it is imperative to have a more precise implementation of the notion of constitutional tort to prevent any potential misuse or exploitation.

Notwithstanding these difficulties, there have been noteworthy achievements in the implementation of constitutional tort law in Bangladesh. In the case of Bangladesh Environmental Lawyers Association v. Government of Bangladesh, the High Court Division of the Supreme Court of Bangladesh ruled that the right to life encompasses the right to a clean and sustainable environment. The court has instructed the government to implement essential measures to safeguard the environment and avoid any form of environmental deterioration.

Dr. Mohiuddin Farooque v. Bangladesh is a significant legal case in which the Supreme Court of Bangladesh ruled that the right to life encompasses the right to health. The court mandated the government to implement requisite measures to guarantee that the residents of Bangladesh had access to fundamental healthcare amenities.

Constitutional tort law has played a crucial role in safeguarding the civil rights of individuals in Bangladesh. The judiciary has been instrumental in safeguarding constitutional rights, and the notion of constitutional tort has been employed to offer a legal recourse to individuals whose fundamental rights have been infringed upon by the government.

The application of constitutional tort law has demonstrated its efficacy in safeguarding civil rights in Bangladesh. The law has raised the level of safeguard by enabling individuals to seek redress for infringements of their rights, going beyond conventional remedies. Nevertheless, there are obstacles to overcome, such as the restricted availability of legal recourse. To enhance the efficacy of constitutional tort law, it is necessary to address these problems and consistently reinforce its application.

## **RECOMMENDATIONS AND CONCLUSION**

### **Findings**

No Specific Compensation Policy: The lawyers of the Supreme Court said that although there is a rule to file a case in the judicial court regarding the compensation in the accident, there is no specific law or provision on how much money should be

paid to the victim. But the High Court of the country, by virtue of its constitutional and judicial powers, ordered the actual victim to pay a certain amount of compensation or money. However, no committee, policy or law has yet been made in this regard.

**Specific Payment Method Dilemma:** The issue of compensation payment remains unresolved since it is not specified who will be responsible for compensating, whether it be governmental institutions or individuals themselves. Therefore, the payment process between the parties is currently causing a dilemma and uncertainty, which hinders the prompt receipt of a compensation amount.

Several judgements that provide petitioners compensation have not yet been put into effect. The decisions have either been put on hold while an appeal is heard (this is a common procedure since the court system backlogs cases and appeals take years to resolve) or the respondents—mostly the government—continue to postpone paying compensation. There are 33 HCD compensation verdicts that have not been implemented, according to a July 2022 news source.

**Delay in receiving compensation:** Many individuals are currently awaiting compensation as they await the outcome of a court case. The delay in receiving compensation is due to the absence of specific laws that directly address their situation. The mass population in Bangladesh, who are victims of rights violations, face the additional challenge of dealing with large numbers of pending cases and the absence of particular legal provisions under which they can file suits. Establishing Tort Law in our country is a significant problem. Bangladesh does not have any legislation specifically governing Tort law. There is no explicit legal rule that defines Tort or provides details on its various types, components, and the areas it encompasses.

**Inadequate progress of tort law:** The application of our legal principles adds intricacy when determining the amount of compensation awarded under tort law. It is imperative to formally establish the legal framework for integrating tort law within our jurisdiction. The absence of codified legislation poses distinct obstacles for people, particularly in defining the specific set of regulations that must be adhered to

when filing a tort claim. Consequently, victims have become disinterested in pursuing a tort claim.

The absence of judicial activism and the lack of defined procedures for assessing damages:

The institutionalization of constitutional tort lacks judicial action. An unwillingness to embrace the advancement of tort law is also evident. However, subordinate courts are prohibited from adjudicating Constitutional Tort Cases. Furthermore, following independence, no effort was made to codify tort law. The current environment provides the constitutional tort remedy through the imprecise, unexpected, and unclear language of Article 102(1) of the Constitution. There is no definitive legal authority to grant compensation.

The HCD seems to be the sole authority: HCD has determined compensation in certain situations. In our legal system, the lower courts do not make decisions on claims related to Constitutional Tort Cases. Subordinate courts do not engage in the process of adjudicating Constitutional Torts, as they lack the authority to make decisions regarding Constitutional Tort claims.

In certain instances, HCD Judges take a pro-victim approach:

Numerous writs seeking compensation in the public interest worth crores of Takas are filed in the High Court Division. The HCD grants high-level compensation, which is subsequently not upheld in AD. As a result, in order to ask for and get high damages in the High Court Division, an evaluation is necessary to ascertain the true reasonableness of the desired damages, strengthening the case.

## **RECOMMENDATIONS**

1. The most vital observation and the recommendation stated by Naima Haider J in Catherine Masud case ““In our opinion, the time has come for us to review the law of tort and consider whether law of tort should be incorporated in Bangladesh law so that claims arising from negligence, be it medical or otherwise, are properly dealt with. We feel that a comprehensive judgment should come from the Supreme Court of Bangladesh which extensively deals

with the tortious concept and clarifies how tort laws should be interpreted. If this is not done, social injustice that we see would not be cured and cases of negligence would go unpunished in the absence of a central piece of law”.

2. There was a question arise that, which remedy under tort law is covered by the constitutional torts?
3. In Bangladesh, common law and civil law jurisdictions apply to private law torts. The proper civil courts and tribunals may receive the initial filing of a private law tort lawsuit. However, constitutional torts are implemented in accordance with both Article 44 and Article 102(1) of the Constitution. When the statutory authority is liable for the violation of the constitutional rights guaranteed in part III of the Constitution, an application for writ claiming compensation can be filed in the country’s constitutional court holding the state responsible. Therefore, that is clearly stated that only the violation of the constitutional rights guaranteed in part III of the Constitution falls under the constitutional torts.
4. The state must promptly enact legislation regarding tort law that has a mechanism for compensating individuals who have been damaged by Public Authority. There needs to exist clear and comprehensive legal provisions that precisely define all Torts.
5. The non-governmental organizations and the civil society have a responsibility to proactively assist individuals who have been unjustly treated in their endeavors to engage with the appropriate judicial institutions and assert their legal entitlements.
6. There is no alternative but to establish a comprehensive Tort law in the legal system of Bangladesh. The purpose of this legislation is to consolidate the existing tort remedy into a uniform and comprehensive framework. It attempts to provide a single, concrete piece of legislation that the courts can use to address claims related to tort law.

7. A precise and specific method for quantifying compensation claims, incorporating a comprehensive framework for calculating damages to address the issue of uncertainty in obtaining compensation. In India Constitutional Tort Model was developed due to legal reformation, In Bangladesh that needs to be inherited.
8. Judicial Activism is the most crucial and essential component for the development of Constitutional tort or tort law as a whole. Given the current authority of the Supreme Court, it is crucial for the court to have a genuine intention to establish new laws and identify the appropriate platform to address this unique issue. In cases where an individual's protected fundamental rights are infringed upon by a statutory authority, they should be entitled to receive compensation.
9. The Supreme Courts should offer institutional-level guidelines to facilitate the activation of the lower judiciary in adjudicating Constitutional Tort cases. In order to handle the influx of cases, it is imperative to enhance the lower judiciary's jurisdiction and allocate sufficient resources.

## CONCLUSION

In conclusion, the perception and application of constitutional tort law in Bangladesh may be influenced by various factors, including disparities in constitutional provisions, legal history, legal systems, judicial activism, amendments and legislative changes, as well as differences in legal culture and practices. Legal practitioners and scholars should acquaint themselves with the complexities of constitutional tort law effectively address cases involving breaches of constitutional rights, as the use of tort laws has grown in recent years. Article 102 (1) of the Constitution of Bangladesh used the word “appropriate” by analyzing this word compensation as a remedy granted under the Constitution of Bangladesh. The distinct framework of the constitution regulates the connection between the state and its population. According to the research, several challenges still need to be addressed. These include people's lack of awareness of their legal rights and alternatives of action, as well as the vagueness surrounding the application of the constitutional tort theory.

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