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Constitutional Tort in Bangladesh: Evolution and Evaluation

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Abstract

Constitutional tort, though not a new concept in Bangladesh, has not evolved on a large scale after witnessing a great violation of any fundamental right guaranteed in the Constitution. Liberalizing the compensational jurisprudence in case of grave violation of fundamental rights is the modern view adopted by the Supreme Court of Bangladesh even though our Constitution does not preclude its guardian to take any weapon to protect the victim of such fundamental rights guaranteed there. Article 102(1) of the Constitution of Bangladesh ensures the enforceability of fundamental rights and it has the discretion to heal the victim in any manner whatsoever it thinks fit. India, the country next to us, progresses a long road ahead of us in acknowledging constitutional tort and in restoring the natural or proper condition as far as suitable despite their clear provision of 'sovereign immunity'. However, Bangladesh is currently following the same path and adopting quite a liberal, though not fully liberal, approach in granting proper relief, i.e., awarding compensation, to the victim in case of violation of fundamental rights by any authority. This article shows different case laws where the highest court of the country directed the public authority to pay-compensation for violating constitutional torts. This article recommends a convention or tradition of the Supreme Court to follow the precedent of awarding compensation in cases of constitutional tort. Since Article 102 guarantees relief of the person aggrieved against 'any person or authority', gradually the liability of the state authority is shifting to the persons who are under the control of the state and held vicariously liable for such constitutional tort which opens a new scope for making them accountable for violation of fundamental rights of the citizens.

Keywords: Constitutional, Public Law, Constitutional Tort, Civil Right, Comparative Analysis, Monetary Compensation.

Objective of the Study

The objective of researching constitutional torts in Bangladesh is to better understand how the concept of constitutional torts operates within the country's legal system and to explore its potential impact on protecting the constitutional rights of citizens.

Specifically, this research on constitutional torts in Bangladesh aims to:

Firstly, examine the legal framework and case law surrounding constitutional torts in Bangladesh, including the scope of constitutional rights protected and the remedies available for victims of constitutional violations;

Secondly, assess the effectiveness of constitutional torts in promoting government accountability and protecting the rights of citizens in Bangladesh and identify any challenges or limitations to the use of constitutional torts as a tool for redressing constitutional violations in Bangladesh;

Lastly, analyze the role of the judiciary in adjudicating constitutional tort claims, including the factors that courts consider when evaluating claims and the standards of proof required to establish liability and provide recommendations for improving the use of constitutional torts in Bangladesh, as well as reforms to the legal framework, judiciary, and other relevant institutions.

Overall, the objective of researching constitutional torts in Bangladesh is to contribute to the development of a legal system that is more responsive to the needs of its citizens and better able to protect their constitutional rights.

Research Methodology

This study is based basically on secondary source of information. It began by reviewing relevant legal literature on constitutional law and tort law in Bangladesh including constitutional provisions, relevant statutes, and case law related to constitutional torts.

Selected cases related to constitutional torts in Bangladesh were analyzed to understand how courts have applied legal principles in actual cases. This involves analyzing case briefs, court judgments, and legal commentary on the cases. A comparative analysis of constitutional torts in other jurisdictions was conducted to identify best practices and potential areas for improvement in the Bangladeshi context.

1. Introduction

The person who is aggrieved against the violation of his constitutional rights

mentioned in Part III of the Constitution by any public authority may file a writ petition in the Supreme Court and the Court may order the authority in the form of Mandamus, prohibition, quo-warranto, habeas corpus or certiorari if the authority is proved liable. But in none of the cases, the aggrieved person does get any monetary compensation for such violation which may render him unredressed. But the development of the principle of *ubi jus ubi remedium* urges that no person should go unredressed for violation of his right. Therefore the highest court of our country is gradually developing the concept constitutional tort and is willing to award compensation to the person aggrieved whose constitutional right has been violated. Tort is not the subject where legislation is made; rather it is the court which awards compensation for violating a civil right. Therefore, where any person violates the constitutional rights, and there is no law developed that determines a sum of amount to be awarded, it is the Supreme Court which should come forward awarding uncertain amount depending upon the facts and circumstances of the case. This new concept of awarding compensation is constitutional tort where the aggrieved person may get damages for the violation of his constitutional right.

2. What is a Constitutional Tort?

In legal terms, a tort is a civil wrong or injury that one person causes to another, for which the injured party can seek compensation or damages. A tort is commonly understood as a tort under private law where a person is liable for a civil wrong. In private law tort, the aggrieved person files a civil suit in a civil court having jurisdiction of the same. In order to succeed in a tort claim, the injured party (the plaintiff) must show that the defendant had a duty of care to the plaintiff, that the defendant breached that duty, and that the breach caused the plaintiff's injury or harm. The amount of damages that the plaintiff can recover depends on the nature and severity of the harm suffered. As we know, there is no specific legislation governing tort law, the common law principles of tort are generally recognized and applied by the courts.

A constitutional tort is, however, quite different from the traditional tort and it means violating constitutional rights by the public authority or the state. The difference between these two types of tort—common law or public law tort and constitutional tort—lies basically in the person against whom the tort is claimed. When any civil wrong is done by any private or public person, the nature of such claim would fall under private law, and if any violation is committed by any public or statutory authority or body which is protected in the constitution, then constitutional tort takes place. Therefore, to become a constitutional tort, the claim must be made against any public authority, and the right for which the tort is claimed must be safeguarded in the constitution itself, and if the remedy is awarded

as a form of compensation, then such claim is called a constitutional tort.

Hence, the elements of the constitutional tort are three-

- i. The right must be guaranteed in the Constitution: The Constitution must protect the right claimed by the aggrieved person. It guarantees that if such a right is violated, then the constitutional court shall make the wrongdoer liable for such violation.
- ii. Any public or statutory authority is the wrongdoer: The violator of any right guaranteed in the Constitution must be a person or body who performs any function in connection with the affairs of the Republic. Therefore, this is public law.
- iii. Compensation is awarded for such violation: Compensation is awarded in case of proved violation of such wrongdoing done by such public authority.

These three requirements need to be fulfilled to claim a constitutional tort against a public authority. Here, the only main distinguishing factor between a common-law tort or private law tort and a constitutional tort is not just private law and public law rather the right claimed against the state must be sheltered by the Constitution itself in case of constitutional tort and compensation is awarded to the victim of the violation of such right.

3. Compensational Remedy of Constitutional Tort

Compensation is awarded in both public and private law torts, but in case of constitutional torts, the remedies are provided and protected in the constitution. Though our Constitution, in Article 102(1), does not mention any such remedy, that is, compensational remedy, it remains a floor of discretion on the part of the High Court Division to furnish any remedy of any kind as it thinks proper. Accordingly, it shall not be exaggerated to say that the 'Writ Court' is free to uphold any jurisprudence to apply balm to the sufferer of the infringement of the constitutional right. The Indian court in a famous case expressed the view that the court should be ready to adhere to any new principle to uphold the fundamental rights of the citizen.¹ Awarding compensation is such an ointment that might succor to heal the wound of the victim of constitutional tort.²

In *CCB Foundation v Government of Bangladesh*³, Mahbub J referred to the case *DK Basu v. State Of West Bengal*⁴ and stated:

Monetary compensation for redressal by the court is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.⁵

However, an aggrieved person is not debarred from claiming compensation for tortious liability under private law of the country in addition to public law under the constitution. In *Nilabati Behera V. State of Orissa*⁶, the Indian Supreme Court acknowledged that the claim under public law for violation of a constitutional right is distinctive and additional to the remedy under private law damages for tort. But getting compensation from the wrongdoer under public law tort becomes the only option for the sufferer when the tort claimed under private law is more hazardous and burdensome for him. He will suffer more if such damages are claimed under private law.

In the *CCB Foundation case*⁷, the court mentioned *Bangladesh Beverage Industries Ltd. Vs. Rowshan Akter and others*⁸ case and expressed that the only recorded instance of such a case where the High Court Division in an appeal in the year 2010 has awarded Tk. 02,00,00,000/= (Taka two crore) as compensation to the dependents of a journalist killed in a road accident in 1989, 24 years after the case was originally filed and still remains pending for hearing before the Appellate Division of the Supreme Court of Bangladesh, and the payment of compensation is still unrealized.

Therefore, it became the crying need for developing the compensational jurisprudence under public law in the country because the sufferer would suffer more if the door of the compensational remedy under the realm of constitutional tort is closed for the victim.

4. Problems on Claiming Compensation under Private Law of Tort

From the above discussion, it is clear that when a constitutional right is infringed by any public authority, it is open for the victim of such infringement to claim remedy both under private and public law of tort. However, the sufferer is more akin to claiming compensation under public law. There are several reasons behind this.

In *CCB Foundation v Government of Bangladesh*⁹, where a liberal approach for awarding compensation was taken by the court, the learned advocate on behalf of the victim argued, which Farah Mahbub, J agreed, that filing a case in civil court is more hazardous and time-consuming which led the aggrieved person to file public interest litigation in the Writ court. The learned lawyer, who was the intervenor in this case, said-

...the timeline for settlement of such cases is 10-20 years. Moreover, when a case is filed in civil court the pecuniary jurisdiction depends on the value of the suit, which also involves dilatory court's procedure and delay in trial. As a result, several cases were not even pursued to the end.¹⁰

The petitioner might file a civil suit claiming compensation under the Fatal Accident Act, 1855 for not taking proper action of saving the child which was certainly a negligent act of the state authority, but he filed this writ petition for such tortious wrong in the High Court Division thinking about a speedy remedy for getting compensation.

The Indian court in *Mehta vs India case*¹¹ opined that the Court should award relief and allowing relief is not a discretionary power of the court rather it is the duty of the court to grant any relief to protect the constitutional right and even if any new principle is required to be introduced to grant such relief then the court may do so as well to ensure fundamental rights.

Therefore, it can be said that seeking compensation under public law of tort is more complicated and this is the reason why constitutional jurisprudence under private law of tort is not growing as much as under public law. In the *Bangladesh Beverage Industries Ltd. Case*¹² as mentioned above, the case which was mentioned in the *CCB Foundation case*¹³ in this regard, the High Court Division took almost 24 years to award compensation to the wife of the victim and this case is still pending in the Appellate Division for which getting compensation is still unrealized by the victim.

5. Concept of Sovereign Immunity and a Comparative Study with India and the U.S

In India, there is a provision popularly named sovereign immunity that is mentioned in Article 300 of their Constitution. It says that the Government may sue or be sued but the state may enact any law which may be immune from prosecuting against it. That means the well-known doctrine which says the state or the King can do no wrong applies in India where the state is acting in sovereign power.

Therefore, the Constitution of India makes a fine line between sovereign and non-sovereign powers to sue against her. Sovereign functions, simply speaking, are those which are performed by the state authority in the discharge of their duty and the state cannot be held liable for any wrong done in the performance of such duty. Examples of sovereign functions are maintenance of the armed forces of the country, and maintenance of peace in the territory, police functions comprising maintenance of law and order, legislative functions, administration of law and policies, grant of pardon, etc. On the other hand, non-sovereign functions of the state are those which the government employees do not perform in the original course of their business.

*State of Rajasthan v. Vidyawati*¹⁴ was the first case after the commencement of the Constitution of India that rejected the plea of sovereign immunity of the state and held the state liable for the tortious act of the driver like any other employer. In that case, the victim died for the negligent driving of a jeep after repairing that was

maintained by the state. The court took the view that the cars are supplied by the state and the state keeps drivers for its Civil Service. Therefore the state is liable for this tortious act.

Later, in *Kasturi Lal v. State of U.P.*¹⁵, the Apex Court took a different view and held that abuse of police power is a Sovereign act, therefore State is not liable. In this case, the victim Kasturi Lal was suspected of possessing stolen jewelry and taken to custody by a constable. Afterward, the police released him but the jewelry was not returned to him as the constable took the same and fled away to Pakistan. Kasturi filed this suit against the state and asked for compensation for his property. But the court held that the negligent act by the police was committed in course of his duty and therefore, the state can claim sovereign immunity.

The Indian court, later on, keeps flexible the notion of sovereign immunity of the state by holding more and more functions as non-sovereign acts. The principle of *Kasturi Lal case*¹⁶ was repeatedly neglected in a number of cases later. In the latest case of *State of A.P. v. Challa Ramakrishna Reddy*¹⁷ the Indian court expressed that in today's time, the difference between sovereign and non-sovereign powers is irrelevant. The Supreme Court ruled that sovereign immunity was no longer valid. The Supreme Court ruled:

The Maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof.¹⁸

Thus, the ratio of this case was that sovereign immunity, which is a statutory justification, cannot be applied in case of violation of fundamental rights, because statutory provisions cannot override constitutional provisions.¹⁹

Interestingly, besides the idea of sovereign immunity applicable in India, the court recognizes compensational jurisprudence in constitutional tort cases. In *Smt. Nilabati Behera v. State of Orissa 1993 (2) SCC 746*, one of the most recent Indian cases awarding compensation in constitutional tort, the state took the defense of this sovereign immunity but the court rejected the argument and said that this immunity is unknown where the constitutional right is violated by the state.

However, the Constitution of Bangladesh does not recognize any kind of sovereign immunity and it is very clear in prosecuting against the state. Article 146 of our Constitution, which is identical with Article 300 of the Indian Constitution, is very certain in suing against the state without acknowledging any sovereign immunity. Therefore, no one needs to take any kind of permission before suing any

government officials. The Indian court is recently making this doctrine flexible. it is narrowing the scope of sovereign functions so that the victims would receive damages.²⁰ India, despite having its sovereign immunity provision, did not recognize this doctrine and provided the compensational remedy to the victim by their writ court in case of grave violation of constitutional rights, Bangladesh should and currently is recognizing compensational remedy in constitutional tort cases.

The evolution of constitutional tort law in the United States has been a gradual process that began in the mid-twentieth century. In 1961, the U.S. Supreme Court recognized the concept of a constitutional tort *in the case of Monroe v. Pape*²¹, where it held that a police officer could be held liable under federal law for violating an individual's constitutional rights. This decision paved the way for the development of a body of law that holds government officials accountable for violating individual rights under the U.S. Constitution.

Over the years, the Supreme Court has expanded the scope of constitutional tort law, recognizing new causes of action and clarifying the standards for proving liability. For example, in the case of *Bivens v. Six Unknown Named Agents*²², the Court held that individuals could sue federal officials for damages when those officials violated their Fourth Amendment rights against unreasonable searches and seizures. The development of constitutional tort law has been significant in protecting individual rights and holding government officials accountable for their actions. However, it has also been a source of controversy, with some arguing that it places too much liability on government officials and undermines the ability of public officials to perform their duties.

Despite these debates, the concept of constitutional tort remains an important part of U.S. law, and it continues to evolve as courts grapple with new challenges and issues in the context of individual rights and government accountability.

6. The Deterrent Effect of Compensational Remedy:

Now the question arises as to why compensational remedy is so important in constitutional violation by the state authority. The *Indian Court, in Rudul Shah vs State of Bihar case*²³, identified compensational remedy in constitutional tort case as both “mulcting” for violators and offering a “palliative” for victims. Though compensation does not restore the victim or the incident in its original nature it may help heal the wound of the violation. Our court in the *CCB Foundation case*²⁴ before mentioning the *Rudul Shah case*²⁵ said that snatching away one’s life cannot be equated with compensational relief at all. This is the only effective mode of redressing the violation according to the court. Therefore, it may be said that

though compensation is not able to deter the constitutional violation, it may be the most effective method of redressing the wrongdoing.

The Indian court in *Smt. Nilabati Behera (supra)* case again uttered that it is not the duty of the court to protect the interest only of the petitioner and the respondent but also of the public at large and for this reason, compensation was granted in that case so that the wrongdoer or the state authority shall think ten times in violating any constitutional right of any citizen.

7. Constitutional Tort and Vicarious Liability

Vicarious liability of the state, also known as the tortious liability of the Government, means to be held liable of the government in case of any wrong done by any government employees. Courts are now more liberal in awarding compensation in vicarious liability of the state officials. Therefore, the state becomes liable if any person sues against any public servant for constitutional tort. The High Court Division in the *CCB Foundation case*²⁶ held the state vicariously liable for the negligent act of Fire Service and Civil Defense, Bangladesh Railway and WASA, and also of the contractor assigned for supervising the place of accident. Therefore, the state may be held vicariously liable for any actions of any private person as well in case of a constitutional violation. By recognizing vicarious liability, the court opened a wide range of suing constitutional tort against the state. To answer the query that who a public authority is, it is not confined to only the state officials who commit the wrong but shall also mean a private person who is controlled or supervised by the state organization.

Besides recognizing vicarious liability the court acknowledged positive obligations of the state in the rubric of constitutional tort. That means, the state may not be held liable for fulfilling its negative obligation of protecting constitutional rights but the state is also precluded from violating any right guaranteed in the constitution. The positive obligation of the state means to perform an act to secure fundamental rights of the Constitution and the negative obligation is to abstain from harming in violation of the constitutional rights. The High Court Division in the *CCB Foundation case*²⁷ acknowledged the positive obligations of the state and held the state liable for not taking proper measures to secure Zihad's life. The state should actively participate in doing the right action to protect the life of the child. Therefore, constitutional tort may take place if the state does not perform any active duty to safeguard the constitutional right.

In *Md Ruhul Quddus v Government*,²⁸ victim Rajib, a 22 year old student, lost his hand in collision of two buses competing with each other. Sajan Paribahan, which was competing with the BRTC, argued that they leased their bus to a businessmen

and at the time of such accident the bus was under the lease of such businessman. The driver was not in their control and therefore they are not liable for the loss of Rajib. The court rejected their argument and stated that Sajan Paribahan is vicariously liable for the accident though the driver was not directly employed by them.

8. ‘Other Efficacious Remedies’

It is a settled principle originated from England prerogative writ that where there is an alternative equally efficacious remedy available in the hand of the petitioner the Writ court is unwilling to entertain its writ jurisdiction. In *Shafiqur Rahman vs Certificate Officer*,²⁹ the Appellate Division noted that:

.... If the alternative remedy is adequate and equally efficacious, in that case, such an alternative remedy is a positive bar to the exercise of the writ jurisdiction...³⁰

In *Abdul Mukit Chowdhury vs. Chief Election Commissioner*³¹, it was stated that where a special forum is created by a statute for enforcement of a special right, the High Court Division should normally decline to exercise the constitutional power.³²

When this is the case, there remains the other side of the coin. There is an exception to this rule. The bar of efficacious remedy is not attracted when an infringement of fundamental right is alleged.³³ In *Mujibur Rahman vs. Bangladesh*,³⁴ the Appellate Division opined that “an aggrieved person may, out of desperation or just for taking a sportive chance in the writ jurisdiction, allege contravention of some fundamental right which may turn out to be frivolous or vexatious or not even remotely attracted in his case. This court³⁵ is to be a guard so that the great value of the right given under Article 102(1) is not frittered away or misused where a substitute for more appropriate remedy available for an unlawful action involving no infringement of any fundamental right.”³⁶

In another case,³⁷ it was stated that

where the vires of a statute... is challenged; where the alternative remedy is not efficacious or adequate; where the wrong... is so inextricably mixed up that the HCD may, for the prevention of public injury..., examine that complain.³⁸

It is not necessary that the aggrieved person must have a good reason to by-pass the alternative remedy.³⁹ Therefore, the alternative remedy will always not be a bar to file a writ petition basically when the statute or a provision of statute is itself challenged as unconstitutional.⁴⁰ The Court said that:

Thus apart from the question as to when a remedy is efficacious, the alternative remedy provided by a statute will be no bar to a writ petition if a statute or a provision

of a statute under which the impugned action has been taken is itself challenged as unconstitutional or if private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to art. 102(2).⁴¹

9. Growing Trends of Several Compensation Cases in BD

In the *Bilkis Hossain case*⁴², the court referred to the judgment of *Habibullah Khan v Azaharuddin*⁴³ and observed that:

The High Court Division awarded compensatory cost against Mr. Habibullah Khan, the then Minister-in-charge of Ministry of Information for exercising excessive power and malafide action. But the Appellate Division, on the ground, that while High Court Division made several adverse findings against Habibullah Khan in the judgment of the main writ petition, Habibullah Khan was not a party, set aside the judgment passed against him ... The judgment awarding compensation cost was set aside on the ground that Habibullah Khan was not a party in the main writ petition ... But in the said judgment it was held by the Appellate Division that the awarding of compensatory costs is no doubt a matter of discretion of the Court, but it must be exercised judiciously.⁴⁴

The individual against whom compensation is granted must be a party to the lawsuit to be held accountable. However, in reaching this conclusion, the Appellate Division also confirmed that the HCD does have the authority to award compensation.

In the *Bhim Singh, MLA v The State of Jammu and Kashmir case*⁴⁵ (also mentioned in the *Bilkis Akther case*) the court held:

In appropriate cases, we the court have the jurisdiction to compensate the victim by awarding suitable monetary compensation.⁴⁶

In the well-known case of *Bangladesh Legal Aid and Service Trust (BLAST) v. Bangladesh*⁴⁷, which involved sections 54 and 164 of the Code of Criminal Procedure, the HCD adopted a similar view. Police from the Detective Branch (DB) viciously tortured Shamim, a university student, till he died. Due to the uproar this caused, the accused police officers were found guilty and given life sentences. This incident resulted to the filing of the BLAST case.

In this case, the petitioner sought monetary compensation on behalf of the victim, and while addressing its competence to award compensation, the court held:

Now, a question is raised whether this court is competent to award compensation to a victim of torture or to the relation of a person whose death is caused in police custody or jail custody. We have considered the principle laid down in the case reported in

AIR 1977 (SC) 610. According to us, this Court, in the exercise of its power of judicial review when finds that fundamental rights of an individual has been infringed by the colorable exercise of power by the police under section 54 of the Code or section 167 of the Code, the Court is competent to award compensation for the wrong done to the person concerned.⁴⁸

In this case, the court determined that it is capable of awarding compensation when the government violates a person's fundamental rights. It also determined that it has the authority to award compensation to a relative of a person who died as a result of police action.

In the case of *ZI Khan Panna v Bangladesh*⁴⁹, the petitioner filed a writ petition asking for compensation for the loss suffered by the government in “Operation Clean Heart”. Though the court did not award compensation on the ground that this case was filed in the form of public interest litigation (PIL) and no writ petition was filed by the victim or any of the relatives of the victim in this particular case, but it acknowledged that the affected persons are entitled to seek monetary compensation from the government by invoking writ petition against them.⁵⁰ However, this judgment created a limited scope for seeking compensation in cases of constitutional tort by making a fine line in PIL cases and non-PIL cases. The court might feel that if PIL cases are accepted for granting compensation in constitutional tort cases then it would open a floodgate for the busybody in the name of PIL. But by closing the door of the PIL case in granting compensation, the court shut down the gate of the victims who are not able to knock on the door of the court at all.

In *CCB Foundation v Bangladesh*⁵¹, the court awarded compensation to the family of the victim Jihad who died due to the negligence of the Fire Service and WASA. The court found that this case involves grave public injury as well as an invasion of the fundamental right to life of the victim guaranteed under the Constitution. As such, it cannot be said that the petitioner Foundation has no locus standi in this case. Comparing the case of *ZI Khan Panna*⁵², the court in *CCB Foundation* was more liberal in accepting the PIL case in awarding compensation if any fundamental right is violated by the state.

In the famous *Masdar Hossain case*⁵³, in 2010, the High Court Division of the Supreme Court of Bangladesh recognized the right to access to justice as a fundamental right under the Constitution. The court held that government officials could be held liable for violating this right, and that individuals could sue for damages in cases of such violations.

These cases demonstrate the gradual development of constitutional tort law in Bangladesh, as courts have recognized new fundamental rights and expanded the scope of government liability for violations of these rights.

10. How the Constitution is Related to Compensational Remedy:

According to Article 44 of our Constitution, it is a citizen's fundamental right to seek enforcement of his/her fundamental rights from the HCD in accordance with Article 102(1) of the Constitution. Article 102(1) states: "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution."⁵⁴

But the Constitution does not specify the remedy that may be granted by the HCD in such cases⁵⁵. Rather, the choice of remedy is left to the court's discretion, to be determined considering the circumstances of each case.⁵⁶ So if the HCD deems it necessary, it can award monetary compensation where a violation of fundamental rights has taken place. In *Bilkis Akhter Hossain v Bangladesh*,⁵⁷ the petitioner asked compensation for violation of the fundamental right and argued that an example must be set out for such a grave violation so that the government thinks twice before committing such action further. In response, the HCD held:

Now a question may arise as to whether we, sitting in writ jurisdiction under Article 102 of the Constitution, can award any monetary compensation to the aggrieved person. Under Article 102 of the Constitution Special Original Jurisdiction has been conferred to us. It is an original, but not appellate or revisional jurisdiction conferred under Article 102 of the Constitution conferring discretionary as well as extraordinary power to meet every situation where no other alternative, adequate and efficacious remedy is available. Though there is no specific provision for awarding cost and compensation under Article 102 of the Constitution, yet it is a long-drawn tradition, custom or discretion of the High Court Division that in every writ case this Court always passes judgment either with cost or without cost. Since this Court exercises its Special Original Jurisdiction and since this Court has got extraordinary and inherent jurisdiction to pass any order as it deems fit and proper, we are of the view that this Court has the power to award simple cost of the case as well as monetary compensation considering the facts and circumstances of each case.⁵⁸

So where the court witnesses a violation of a fundamental right, it finds that it has a jurisdiction under Article 102 to grant an adequate and efficacious remedy. As the HCD has the discretion to pass any order as it deems fit for redressing the victim of the violation of constitutional right, it often passes judgments awarding costs. Since it has the power to grant costs when it considers necessary, the court shall also enjoy the power to grant monetary compensation where the circumstances of the case call for it. While deciding the *Bilkis Akhter Hossain case*⁵⁹, the court referred

to the case of *Ruhul Shah v State of Bihar*⁶⁰, where their Lordships held: “In the circumstances, the refusal of this Court to pass an order of compensation in favor of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21, which guarantees the right to life and liberty, will be denuded of its significant content if the powers of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct the violator by requiring the payment of monetary compensation. Administrative sclerosis leading to flagrant infringement of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner’s rights. It may have recourse against those officers⁶¹

The Indian Supreme Court ruled here that granting only the release of the detained accused or punishing the perpetrator is not enough to ensure the fundamental rights of the citizen. Rather additionally, the victim needs monetary compensation and it is the most effective tool to redress the wrong committed by the state.

11. Compensational Remedy in Public and Private Law

The difference between these two torts is clarified in the *Bilkis Akther Hossain case*⁶², where the court referred to *Maharaj v Attorney General of Trinidad and Tobago*⁶³ case and stated that:

Their lordships would say something about the measure of monetary compensation recoverable ... where the contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view whether money compensation by way of redress ... can ever include an exemplary or punitive award. For these reasons the appeal must be

allowed and the case remitted to the High Court with a direction to assess the amount of monetary compensation to which the appellant is entitled. The respondent must pay the costs of this appeal and of the proceedings in both courts below.⁶⁴

Therefore, it is clear that granting damages is the remedy in the case of private law of tort but in the case of public law, there must be a violation of fundamental right. In private law tort the main intention behind granting damages is to award exemplary or punitive damages. But in case of public law of tort the motive is not to award exemplary damages but to allow damages for protecting the fundamental rights of the citizens only.

In *Attorney General of Trinidad and Tobago v Ramanoop*⁶⁵, after referring to the *Maharaj v Attorney General of Trinidad and Tobago case*⁶⁶, the Privy Council decided that:

Lord Diplock ... left open the question whether monetary compensation by way of redress can ever include an award of what in a case of tort would be called exemplary or punitive damages.⁶⁷

The Privy Council then went on to say:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation ... An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches ... Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award.⁶⁸

Therefore, by following this principle, we can say that the court grants exemplary compensation in the civil or private law of tort.⁶⁹ But in the case of constitutional tort, the motive behind awarding compensation is to reflect public outrage, to uphold the gravity of a constitutional right, and to prevent further breach of a constitutional right.⁷⁰ The judgment also discouraged the use of expressions such as "punitive" or "exemplary" damages in cases of public law, which somewhat further

distinguished compensation under public and private law.⁷¹ In *Merson v. Cartwright & Anor (Bahamas)*⁷² after quoting *Ramanoop*⁷³ Lord Scott of Foscote held:

The nature of the damages awarded may be compensatory but should always be vindictory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindictory award is not a punitive purpose. It is not to teach the executive not to misbehave.⁷⁴

It was later clarified in *Graham v Police Service Commission*⁷⁵ that:

Plainly the statement that ‘the nature of the damages ... should always be vindictory’ does not imply a rule that a distinct vindictory award should be made in every case of constitutional violation; as the balance of the passage shows, it merely serves to indicate the overall purpose of any award of damages in constitutional cases.⁷⁶

Article 32 of the Indian Constitution and Article 44 of the Constitution of the People’s Republic of Bangladesh are often found to have the same application. Under Article 32, cases seeking compensation for violation of the right to life under their Article 21 are often filed. In such a case, *Nilabati Behera v State of Orissa*,⁷⁷ Justice J.S. Verma opined,

The relief of monetary compensation, as exemplary damages, in proceedings Under Article 32 by the Supreme Court or Under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed Under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the Court moulds the relief by granting ‘compensation’ in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of ‘exemplary damages’ awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a Court of competent jurisdiction or/and prosecute the offender under the penal law.⁷⁸

According to this judgment, monetary compensation under public law is awarded for establishing the fundamental rights and to build a legal environment where the citizens feel themselves protected from violation of such rights. It also deters the wrongdoers and protects the interest of the victim.

*In Md Ruhul Quddus v Government*⁷⁹, the HCD made another distinction between the two torts. It says that in public law of tort the court grants a lump sum amount of compensation whereas in case of common law, the damages is measured strictly considering the loss of the victim.

12. Amount of Compensation

Lump sum amount: According to Article 102 it is wholly a matter of discretion of the High Court Division to pass any order for enforcement of fundamental rights guaranteed in Part III. Therefore the amount of awarding compensation is also a matter of discretion of the court. The court awarded compensation for constitutional tort on a lump sum basis in various cases without any strict assessment or calculation.⁸⁰

*In Md Ruhul Quddus v Government*⁸¹, the HCD answered the question that how much amount should be paid to the victim's family. In answering the issue, the court stated that there is no strict assessment to be followed in awarding compensation in constitutional tort case; rather a lump sum amount may be paid to the victim. In passing this order, the court took consideration of the fact that the victim was the only earning member of his family and he was responsible for his younger brother's upkeep.

Token compensation: At the initial stages of granting compensation in constitutional tort cases, the HCD awarded compensation as a token for violation of constitutional rights. *In Mohammad Ali v Bangladesh*,⁸² where policemen raided into the house of a journalist and humiliated his name, the petitioner asked for compensation for such harassment. The HCD acknowledged that such loss and injury 'appears to be irreparable and cannot be adequately compensated for with money' and the respondents should still be 'burdened with token compensation which may give consolation to the petitioner and inmates of the house to some extent'.⁸³ The court ultimately awarded tk. 5000/- only as a token compensation for such illegal act of the police.

In another case,⁸⁴ a public service officer was awarded token compensation for non-payment of his pension by the government authority for almost ten years and for disobeying the ruling of the HCD directing such payment. Though the court accepted that the respondents were liable for such wrong and held them liable for compensation, it stated that such harm 'cannot be equated or fully compensated

with money’ and therefore fixed 2500 BDT as ‘token compensation’.⁸⁵

Therefore, these two cases awarded token compensation considering the fact that violation of fundamental right cannot be healed by granting any amount of compensation at all and it cannot redress the loss or injury of the victim. But the court in these cases failed to recognize the Indian case *Rudul Sah v Bihar*,⁸⁶ where the Indian Judge stated that the only way to prevent such violation of fundamental right ‘is to mulct its violators in the payment of monetary compensation’⁸⁷

Case by case basis: When the Bilkis Akter case came before the AD in the name of *Bangladesh v Nurul Amin*,⁸⁸ the court in several times poked the decision of the HCD and rejected the order of awarding compensation. The AD took a stringent view of ‘exceptional case’ according to which compensation may be awarded in a very exceptional case where a grave violation of fundamental right of a citizen is involved. For that reason, the court must be shocked in particular cases witnessing such wrongdoing and only then the HCD may grant compensation in such cases. The AD rejected the lenient view of HCD’s case-by-case test and introduced this exceptional case test which is more rigid in awarding compensation in constitutional tort cases.

13. Conclusion

Constitutional tort evolved in Bangladesh gradually and the recent view is to award monetary compensation to the victim or victim’s family for violation of fundamental rights committed by the state authority. This concept is gently sifting the vicarious liability to the private authority. Constitutional tort law is an evolving area of law in Bangladesh, and there have been several cases that have helped to shape the development of this area of law. In Bangladesh, a constitutional tort refers to a violation of a person's constitutional rights by a government official or entity that results in harm or injury. The concept of constitutional torts is relatively new in Bangladesh, having been introduced through a series of court decisions in the early 2000s. The Bangladesh Constitution guarantees several fundamental rights to its citizens, including the right to life, liberty, and the pursuit of happiness, freedom of speech and expression, and the right to equal protection under the law. When a government official or entity violates these rights, the victim may seek redress through a constitutional tort lawsuit. To file a constitutional tort lawsuit in Bangladesh, the victim must first establish that their constitutional rights have been violated. They must then prove that the government official or entity responsible for the violation acted in a way that was intentional, reckless, or grossly negligent. The victim must also show that they suffered actual harm or injury as a result of the violation. If the victim is successful in proving their case, they may be entitled to damages, including compensation for any physical or emotional harm they

suffered, as well as any economic losses they incurred. In some cases, the court may also order injunctive relief to prevent the government official or entity from continuing to violate the victim's constitutional rights. Overall, the availability of constitutional tort claims in Bangladesh represents an important development in protecting the fundamental rights of its citizens and holding government officials accountable for their actions. The Supreme Court awards compensation for violation of fundamental rights to protect the interest of the citizens and to ensure a good governance in the country. The more precedent of compensation for violating constitutional rights of the citizen evolves, the more check may be ensured for the uncontrolled infringement by the public authority. However, more judicial activism is needed for controlling the negligent and callous behaviour of the authority. Most importantly, the Constitution itself makes a floor on what types of remedy the Supreme Court may provide in case of constitutional violation. Therefore, the guardian of the Constitution is under an obligation to satisfy the aggrieved person whose right has been violated to protect the principle of *ubi jus ibi remedium*. The evolution of the concept of constitutional tort is definitely appreciable but it should be widely developed and evaluated.

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