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# Constitutional Torts in Bangladesh: In Search of the Application of Due Process in Awarding Compensation

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## ABSTRACT

*This paper systematically analyses the chronological framework of the progressive practice of Constitutional torts and the recent trends of the judiciary in awarding damages to the victims of Constitutional torts omitting the due process of law in Bangladesh. The paper also demonstrates how the existing provisions of the Constitution of Bangladesh can provide helpful guidance for developing and initiating newer tools to enable the Constitutional tort claimants to avail their proper and just remedies. In this paper, the principle of 'Due Process of Law' has been applied as a test to analyse the rationale of the judgments from different tort cases and to show how the lacuna of the proper application of the principle of due process of law is preventing the tort victims from getting what they legally deserve. Moreover, a proposal has been placed to apply compatible compensation theories in different tort cases. This paper not only sets a special focus on different substantial challenges due to which thousands of tort claims end in smoke every year but also provides effective recommendations for resolving those challenges. In addition, two effective mechanisms have been proposed to be implemented for determining the appropriate amount of compensation for the victims so that the Judiciary can perform its responsibilities more professionally and efficiently. With a view to carrying out this research, qualitative research methodology has been followed as well as notable case laws have been discussed for demonstrating whether the judiciary followed the due process of law for awarding compensation under the Constitutional tort law in Bangladesh.*

**Keywords:** *Constitutional Torts, Due Process, Compensation, Rule of Law, Hand Formula, Multiplier Theory, Human Rights.*

## I. INTRODUCTION

Bangladesh does not have a separate branch of tort law; it is to the best extent subsumed into the statutory principles. Demands for the provisions of tort law to be incorporated into the legal system of Bangladesh are outstretched, which have yet to be met, unfortunately. In Bangladesh, the law of tort is taught to undergraduate students; however, in court, it is not practised at all.

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One can file a money suit for compensation or damages in a civil court under the Code of Civil Procedure, 1908<sup>2</sup>. A victim's financial situation, together with long time management of a suit from the lower court to the Appellate Division, does not encourage him to file a money suit by paying the hefty court fee and case management cost. On average, a civil suit takes at least 4 to 5 years to resolve completely in Bangladesh.<sup>3</sup>

At this outset, human rights lawyers of Bangladesh have recently imported a mechanism<sup>4</sup>, i.e., filing writ petition for compensation on the ground of Constitutional tort to compensate the victims of tort. In Constitutional tort, it is implicated that a government official has violated the fundamental rights of a person guaranteed in the Constitution of Bangladesh (or any country) through his actions or inactions done in the course of his/her employment and thus due to the application of the principle of vicarious liability<sup>5</sup>, the State becomes liable to pay compensation to the victim.<sup>6</sup>

The research question of this article is whether the courts have delivered the judgments applying a uniform standard or compatible compensation theory while awarding compensation. To answer this question, the principle of 'due process of law' has been applied in this article to analyse the rationale of the judgements from different Constitutional tort cases in Bangladesh. The article has further tested whether the lacuna of the application of the principle of due process of law is preventing the tort victims from getting the proper remedy they legally deserve. In the end, newer compensation theories e.g., 'multiplier theory' and 'hand rule formula' have been discussed which might help the victims of Constitutional torts to get just and appropriate remedies.

After the introduction in section 1, the concepts of Constitutional tort and due process of law have been explained in section 2 of this paper. Under section 3, an attempt has been made to demonstrate the current status of Constitutional litigations as well as the absence of due process

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<sup>2</sup> Code of Civil Procedure 1908, sec.9.

<sup>3</sup> Rahman, M. S., "A Study on Delay of Civil Suits of Bangladesh", 5(2) (2019) *International Journal of Advance Research and Innovative Ideas in Education (IJARIIE)*, pp. 416-435, available at: [http://ijariie.com/AdminUploadPdf/A\\_STUDY\\_ON\\_DELAY\\_OF\\_CIVIL\\_\\_SUITS\\_OF\\_BANGLADESH\\_ijariie\\_9581.pdf](http://ijariie.com/AdminUploadPdf/A_STUDY_ON_DELAY_OF_CIVIL__SUITS_OF_BANGLADESH_ijariie_9581.pdf) (Last visited on January 2, 2022).

<sup>4</sup> It was first cited in *Monroe vs. Pepe*, 365 U.S. 167 (1961).

<sup>5</sup> 'Vicar' means who performs the functions of another, a substitute.' Accordingly, vicarious liability means liability for wrongs committed by another person. Normally, a person is held liable only for wrongs committed by him but sometimes he may be held liable for wrongs committed by another person: Common illustration of such liability is the liability of a master for acts of his servants, done in the course of employment, Liability of partners for torts committed by a fellow partner, liability of the principal for acts of his agent done within the scope of authority and liability of an employer for acts of an independent contractor employed by him.

<sup>6</sup> For example, in *MD. Shahanewaz vs. Government of Bangladesh*, 18 (1998) BLD (HCD) 337, due to the negligence of a police officer a poor fisherman had to stay in jail for six months but the court held only twenty thousand Taka as compensation against the police officer due to violation of the fundamental right to life of an innocent person.

in providing compensation in tort litigations in Bangladesh. For this purpose, the Constitutional structure and extent of fundamental rights under section 3.1, the mechanism for recovering compensation under section 3.2, recent judicial trends in awarding compensation under section 3.3, and the absence of a standard for calculating damages and compensation, as well as other challenges, under section 3.4 have been discussed. Section 4 then suggests recommendations for paying compensation in Constitutional tort litigations in Bangladesh, ensuring ‘Due Process of Law,’ while section 5 provides concluding observations.

## II. ELUCIDATION OF THE APPLICABLE CONCEPTS

One of the core objectives of tort law is to fill the statutory gaps and ensure the residue of justice but it has frequently been seen that in almost all tort cases the judiciary ultimately failed to follow certain basic principles of the rule of law which is the prerequisite for maintaining the due process of law. Under due process, it is the legal requirement that the State must respect all the legal rights that are owed to a person and the judiciary is liable to ensure the right to fair and public trial without undue delay and a rational and proportionate approach to remedy or punishment.<sup>7</sup> However, the concepts of Constitutional tort and due process of law have been elucidated hereinafter.

### (A) Concept of Constitutional Tort

There is an old maxim that —Every man who is injured ought to have his recompense.<sup>8</sup> Therefore, when a person commits a tort, the law allows the victim to claim money as compensation or damages to compensate for the commission of a tort.<sup>9</sup> This principle has been moulded by the common law courts over time. However, the idea of Constitutional tort is comparatively a recent phenomenon. When a wrong takes place in terms of the violation of fundamental rights guaranteed by the Constitution, it is usually called a —Constitutional tort.<sup>10</sup> For example, in Jihad case<sup>11</sup>, the court found that the fundamental rights of the victim, as guaranteed under article 32 of the Constitution, were violated due to the negligence of the government officials. Since the government failed to perform its duty to take care and acted negligently, the victim’s family was awarded compensation accordingly.

Constitutional torts are distinct from common law torts because in case of violation of any

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<sup>7</sup> Stein, R. A., “What Exactly Is the Rule of Law?,” 57(1) (2019) *Houston Law Review*, pp. 185-201, available at: <https://houstonlawreview.org/article/10858-what-exactly-is-the-rule-of-law> (Last visited on March 21, 2022)

<sup>8</sup> *Ashby vs. White*, (1703) 92 ER 126.

<sup>9</sup> Elliott, C.; Quinn, F., *Tort Law*, 2003.

<sup>10</sup> This term was initially pinpointed by American Jurist Shapo and has been established in the case of *Monroe vs. Pepe*, 365 U.S. 167 (1961).

<sup>11</sup> *CCB Foundation vs. The Government of Bangladesh*, 5 (2017) CLR (HCD).

Constitutional right of an individual by any public servant or government official body in Bangladesh, unlike common law torts, a suit can be filed by invoking article 102 under Constitutional torts. Furthermore, the concept of Constitutional tort implicitly recognises that Constitutional rights and liberties are specific limitations on government and they must be enforced.<sup>12</sup> Tort liability of the government and its employees is a vast and vital area of the law. As the role of the government has expanded over time, so too has the opportunity for official misconduct.<sup>13</sup>

### **(B) Concept of Due Process of Law**

Due process of law is a Constitutional concept which protects the citizens from arbitrary actions of the State. In other words, due process is a course of legal proceedings which requires the State to follow fair procedures prior to depriving a person of life, liberty or property.<sup>14</sup> The idea of due process was first embodied in clause 39 of the Magna Carta<sup>15</sup> and the concept developed in both English and American legal system.<sup>16</sup> The concept of due process of law aims not only to check if there is a law to deprive the life and personal liberty of a person but also to see if the law enacted is fair, just and non-arbitrary.<sup>17</sup> This doctrine provides for more fair treatment of individual rights. It is the courts, not the legislature, which must make the final determination as to what constitutes due process.

The application of the rule of law is an integral part of ensuring the due process of law because the due process of law is the admixture of the rule of law and fair, just and non-arbitrary procedure of law. It is a legal requirement that all proceedings be followed and maintained fairly and in coherence.<sup>18</sup> In *Gopalan case*,<sup>19</sup> the court shed light on the matter— "due process of law" was held to be the safeguard for the protection of private rights against the exercise of governmental authority through settled maxims of permissible sanctions and laws.

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<sup>12</sup> Jeffries, J. C. Jr., "Compensation for Constitutional Torts: Reflections on the Significance of Fault", 88(1) (1989) *Michigan Law Review*, pp. 82-103, available at: <https://repository.law.umich.edu/mlr/vol88/iss1/4/> (Last visited on March 23, 2022)

<sup>13</sup> "Government Tort Liability", 111(7) (1998). *Harvard Law Review*, pp. 2009–2026.

<sup>14</sup> Glicksman, R. L.; Levy, R. E., *Administrative Law: Agency Action in Legal Context*, 2010.

<sup>15</sup> Magna Carta, which is also known as "Great Charter", is a royal charter of rights agreed to by King John of England at Runnymede, near Windsor, on 15 June 1215. As per clause 39 of the Magna Carta—No freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested: and we will not set forth against him, nor send against him, unless by the lawful judgement of his peers and by the law of the lands.

<sup>16</sup> Taylor, H., "Due Process of Law", 24(5) (1915) *The Yale Law Journal*, pp. 353–369.

<sup>17</sup> George, A. A., "Procedure Established by Law vs Due Process of Law" (November 2020), available at: <https://www.clearias.com/procedure-established-by-law-vs-due-process-of-law/> (Last visited on March 21, 2022).

<sup>18</sup> Wasee, A. A., "Due Process: A celebrated yet forgotten concept in Bangladesh", *Business Standard*, January 30, 2021, available at: <https://www.tbsnews.net/thoughts/due-process-celebrated-yet-forgotten-concept-bangladesh-193996> (Last visited on October 21, 2022).

<sup>19</sup> *A.K. Gopalan vs. The State of Madras, Union of India*, 27 (1950) AIR 88.

The concept of due process is implicitly mentioned in the Constitution of Bangladesh. If article(s) 27, 31, 32 and 35(5) are read together, it can be concluded that the State must follow due process before punishing a person or stripping him off from his rights. In article 31, it is stated that no action detrimental to the life, liberty or body of any person shall be taken except in accordance with the law. Article 32 provides that a person shall not be deprived of his life save in accordance with the law. These concepts are analogous to the concept of the due process of law.<sup>20</sup>

Therefore, in the case of tort litigations, the application of due process will be ensured only when the courts follow compatible compensation theories so that a proportionate and justified compensation can be provided to the victims without unnecessary delay and, of course, in a non-arbitrary and unbiased manner.

### **III. EXISTING STATUS OF CONSTITUTIONAL TORT LITIGATIONS IN BANGLADESH: A REFLECTION OF ABSENCE OF ‘DUE PROCESS OF LAW’**

Although in Bangladesh, the concept of the law of torts is not a new one, previously the courts were not that much enthusiastic about awarding compensations for Constitutional tort claims. Over time, the courts started realising the necessity of awarding compensation to the victims of tortuous activities and recently the courts have started moving towards the adaptation, development and application of compensatory jurisprudence in Bangladesh.

#### **(A) Constitutional Structure and Extent of Fundamental Rights in Bangladesh**

Generally, human rights guaranteed in the Constitution are called fundamental rights. The guarantee is a promise by the state not to encroach human liberty and freedom; it is a kind of sacred pact by the state with its people to ensure higher order and value as well as the existence of the human being. In the view of Tope, the purpose of fundamental rights is not only to ensure that the citizen's rights remain unchanged against political changes but also to make them feel that they hold an advanced level of national existence.<sup>21</sup>

In this way, the fundamental rights of the Constitution do not merely provide a citizen a guarantee and ultimate dignity against the violation of his right to life and personal liberty<sup>22</sup> but also ensure equal treatment for the equals,<sup>23</sup> protection of law,<sup>24</sup> freedom of movement,<sup>25</sup>

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<sup>20</sup> *BLAST vs. State*, 67 (2015) DLR (AD) 185.

<sup>21</sup> Tope, TK., *Constitutional Law of India* (1st ed.), 1988.

<sup>22</sup> Constitution of the People's Republic of Bangladesh, art. 32.

<sup>23</sup> *ibid* art. 27.

<sup>24</sup> *ibid* art. 31.

<sup>25</sup> *ibid* art. 36 at p. 7

freedom of assembly,<sup>26</sup> freedom of association,<sup>27</sup> freedom of religion<sup>28</sup> and so on.

The Constitution of Bangladesh has enshrined several fundamental rights in part III intending to safeguard its citizens. Moreover, it also incorporated the doctrine of Judicial Review<sup>29</sup> by which the Supreme Court of Bangladesh reserves the power to declare any existing law void if it becomes inconsistent with the fundamental rights. Therefore, in order to enforce the rights, an aggrieved person may sue the government and the agencies performing public duties.

However, in this part, eight rights are absolute e.g., right to safeguards as to arrest and detention under article 33 or right to enforcement of fundamental rights under article 44 and a total of six rights are enforceable subject to reasonable restrictions e.g., right to freedom of thought and conscience, and of speech under article 39 or right to freedom of religion under article 40. Finally, right to have a remedy against the violation of the fundamental rights is also a fundamental right under article 44(1) and a victim can avail the remedy by filing a writ petition under clause 1 of article 102 of the Constitution of Bangladesh.

### **(B) Mechanism for Recovering Compensation in Constitutional Tort Claims**

John Marshall, one of the most influential and famous Chief Justices of USA, firmly contended that for every violation of a right, there must be a remedy. Everyone agrees that there is a right-remedy gap in Constitutional law and that the victims of Constitutional violations should have effective redress.<sup>30</sup> Constitutional tort claims can be instituted through writ petition under the joint effect of article(s) 44 and 102(1) of the Constitution of Bangladesh whereas after dissection of clause 1 of article 102, it is clear that the High Court Division has been empowered to grant appropriate remedy to the victims even against any public official or authority. Moreover, reading article 102(1) with article 44 of the Constitution makes it confirmed that the High Court Division has the absolute power to give appropriate directions or orders for the enforcement of any of the fundamental rights of the Constitution. Therefore, it can be stated that those orders or directions may be granted in the form of or in addition to compensation as well.

Nevertheless, the term ‘appropriate’ is subject to proper interpretation which means the remedy is unfixed and subject to the satisfaction of the court. Therefore, it can be interpreted that it is the discretionary power of the court to provide compensation. Moreover, the inclusion of ‘may

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<sup>26</sup> *ibid* art. 37 at p. 7

<sup>27</sup> *ibid* art. 38 at p. 7

<sup>28</sup> *ibid* art. 41 at p. 7

<sup>29</sup> In the Constitution of Bangladesh this term has not been mentioned even for once. However, the art(s). 7(2), 26, 44(1) & 102 indirectly support the Judicial Review system.

<sup>30</sup> Jeffries, J. C. Jr., “The Right-Remedy Gap in Constitutional Law,” 109(1) (1999) *The Yale Law Journal*, pp. 87-114, available at: <https://core.ac.uk/download/pdf/215559195.pdf> (Last visited on October 21, 2022).

be' also raises another issue as to whether the court, using discretionary power, can refuse to grant any remedy.

The last part of sub-clause (i) of clause (a) of sub-article (2) of article 102 denotes the existence of writ jurisdiction of the High Court Division (HCD) by which the apex court may direct any person, corporation, lower court or government to do something, specified therein, which pertains to his or their office and is in the nature of a public duty.<sup>31</sup> Therefore, this provision technically empowers the superior courts to apply discretionary power to provide compensation or any other appropriate remedy to the sufferers. Article 104 also accelerates the superior courts to provide more appropriate remedies in the form of compensation. This article also gives license to the judiciary to envisage the best feasible remedy for the victims and the ends of justice can only be met if the remedy is awarded in the form of compensation only.

At this point of discussion, article 110 of the Constitution is also relevant whereas it declares the power of the High Court Division to withdraw a case and dispose thereof from any subordinate court to it upon two basic grounds, firstly, if the case is related to a substantial question of law as to the interpretation of the Constitution or, secondly, if it is on a point of general public importance. It can be another gateway for facilitating the practice of awarding compensation to the victims of Constitutional torts and that is how the higher judiciary can develop and popularise the compensatory jurisprudence in the legal arena of Bangladesh.

Therefore, after examining manifold provisions, it can be firmly stated that in no way the Constitution pulls the reins of law for awarding compensation to the victims rather, in some cases, it accelerates the mechanism for providing just and appropriate remedy to the victims. Despite all these mandatory Constitutional provisions, the courts frequently overlooked and utterly failed to ensure proper justice to the Constitutional tort victims; and this fact will be highlighted in the latter part of this article.

### **(C) Recent Judicial Trends in Awarding Compensation for Constitutional Tort Claims**

In recent times, both the bar and bench have been vehemently dealing with litigations and awarding compensation for Constitutional tort claims in Bangladesh. However, unliquidated damages<sup>32</sup> is awardable under article 102 of the Constitution only if it appears before the court that there is an infringement of certain fundamental rights which is incontrovertible. It is evident that in many cases, compensation is the most appropriate remedy due to poverty, disability or

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<sup>31</sup> Miah, S. R., *Law of Writs in Bangladesh*, 2007.

<sup>32</sup> Unliquidated damages can be defined as the sum of money that cannot be foreseen or assessed by a fixed formula. It is established by a judge in a court. Damages may be categorised as unliquidated when the amount of damages is unidentifiable or subject to an unforeseen event that makes the amount not calculable.



socio-economic disadvantaged position of the victim.<sup>33</sup>

In *Bilkis Akhter* case,<sup>34</sup> one of the earlier cases, where MM Hoque J. declared the detention of four political leaders illegal and extra-Constitutional and for the first time awarded one lac Taka to each of the four victims. The court opined that to detain a person without proper adherence to due course of law is a violation of the fundamental rights ensured by the Constitution of Bangladesh and also expressed that any citizen so aggrieved can, under Article 44 read with 102, come before the High Court Division to seek redress.

In this case, the court awarded compensation on five grounds. Firstly, for the loss of name, fame, dignity, prestige, social status, reputation and defamatory or disrespectful circulation of news through different national and international journals and news media. Secondly, the victim was detached from his family members and deprived of his usual avocation of life for several days. Thirdly, the detenu has been subjected to inhuman mental and physical torture and sufferings in jail for the last seventeen days. Fourthly, such detention is malicious and malafide and made for political victimisation and finally, the detenu was compelled to spend a considerable sum of money as litigation costs. The court finally reached the opinion that the ends of justice would be met if the court provides a reasonable but exemplary lump-sum monetary compensation to the victim and the court settled compensation of one lac Taka to be paid to the detenu considering the above reasons and sufferings for the detenu and his social status.

*Jihad* case<sup>35</sup> is a milestone case in the history of Constitutional tort law cases in Bangladesh where a four-year-old boy, Jihad, while playing with other children, died after falling into a 300ft uncovered shaft in Dhaka's Shahjahanpur Railway Colony on December 26, 2014. After hours of effort, the Fire Service rescue team ultimately failed to trace the boy in the pipe. Even they did not find the body of the boy. Thereafter, an untrained local group of people with a homemade detection system later recovered the body of the boy out of the shaft.

In this case, compensation was claimed for the infringement of the right to life and negligence of the government officials. The court applied the maxim *res ipsa loquitur*<sup>36</sup> and strict liability<sup>37</sup>

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<sup>33</sup> Ahmed, N., *Public Interest Litigation: Constitutional Issues and Remedies* (1st ed.), 1999.

<sup>34</sup> *Bilkis Akhter Hossain vs. Bangladesh*, 2 (1997) BLC 257.

<sup>35</sup> *supra* note. 10, at p. 4

<sup>36</sup> *Res ipsa loquitur* is a Latin phrase that means "the thing speaks for itself." It is a doctrine or rule of evidence in tort law that permits an inference or presumption that a defendant was negligent in an accident injuring the plaintiff on the basis of circumstantial evidence if the accident was of a kind that does not ordinarily occur in the absence of negligence. This means that while plaintiffs typically have to prove that the defendant acted with a negligent state of mind, through *res ipsa loquitur*, if the plaintiff puts forth certain circumstantial facts, it becomes the defendant's burden to prove he or she was not negligent.

<sup>37</sup> Strict liability is a legal doctrine that holds a party responsible for their actions or products, without the plaintiff

and found the duty of care and a breach of that duty and finally declared that Bangladesh Railway and Fire Service and Civil Defence were completely negligent in their respective duties.<sup>38</sup> The court found that the fundamental rights of the victim, as guaranteed under article 32 of the Constitution, were violated and the government of Bangladesh bore the vicarious liability which resulted in the shocking death of the victim. The government awarded twenty lacs Taka as compensation to the parents of the victim.<sup>39</sup>

*Rajib Hossain* case,<sup>40</sup> another Constitutional tort case, arising out of a writ petition filed under art. 102 of the Constitution, where Rajib, a twenty-year-old student of Government Titumir College, had lost his right arm while getting down from a bus of Sajan Paribahan as it hit a BRTC double-decker at the Saarc Fountain roundabout on April 3, 2018. He died from his injuries after spending two weeks in a coma at Dhaka Medical College Hospital on April 17, 2018. The High Court ordered the Bangladesh Road Transport Corporation (BRTC) and Sajan Paribahan to pay fifty lacs Taka as compensation to the family of Rajib Hossain, who died after losing his hand in a road accident.<sup>41</sup>

#### **(D) Absence of the Standard of Calculating Damages and Compensation along with other Challenges**

The recent role of the Supreme Court of Bangladesh is laudable in attempting to forge new and effective remedial measures. Nevertheless, it is a fundamental necessity to find a standard which can help the courts to calculate the damages for awarding compensations to the victims. As Bangladesh does not have any separate branch of tort law, there is no settled standard which can be followed by the courts while calculating the damages.

In *Bilkis Akhter* case<sup>42</sup>, although the court awarded compensation to each victim but did not follow any compensation theory or principle for determining the amount of compensation. In fact, the amount so awarded was too meagre for the violation of fundamental rights e.g., right to freedom of movement, right to life and right to liberty. With a view to ensuring the rule of

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having to prove negligence or fault e.g., when someone partakes in ultrahazardous activities such as keeping wild animals, using explosives, or making defective products, then they may be held liable if someone else is injured. Even if the defendant took necessary precautions and followed safety requirements, strict liability crimes are unique in that they would still hold the defendant responsible. Due to the nature of the activity, the defendant should be able to foresee that a person could be harmed by it.

<sup>38</sup> supra note 10, p. 4

<sup>39</sup> "Jihad's parents finally receive Tk 20 lakh compensation", *Daily Star*, August 15, 2018, available at: <<https://www.thedailystar.net/news/city/jihad-family-receives-tk-20-lakh-compensation-from-government-1620571>> (Last visited on March 21, 2022).

<sup>40</sup> *Md. Ruhul Quddus and Ors. vs. Bangladesh Road Transport Corporation and Ors.*, 6 (2018) CLR (HCD) 665.

<sup>41</sup> Rahman, M., "BRTC, Sajan ordered to pay Tk 50 lakh to Rajib's family", *Dhaka Tribune*, June 20, 2019, available at: <<https://archive.dhakatribune.com/bangladesh/court/2019/06/20/hc-brtc-sajan-paribahan-responsible-for-rajab-s-death-must-pay-compensation>> (Last visited on October 21, 2022).

<sup>42</sup> supra note. 10, at p. 4

law as well as the due process of law, the government's discretion must be limited to ensure the law is applied in a non-arbitrary manner. Though in the view of the court, it provided exemplary compensation but in fact, the amount was too little and arbitrary to be exemplary for preventing the happening of the same wrongful acts by the police. In addition, the court failed to provide proportionate compensation to the victims compared to their sufferings which was completely unjust and a straight violation of the due process of law.

In *Rowshan Akhter* case,<sup>43</sup> though it is not a Constitutional tort case, Mozammel Hossain Montu, an established journalist, lost his life due to gross negligence of the driver of the company. The plaintiffs, Rowshan Akhter (wife of the deceased) and the two minors (sons of the deceased) claimed three crore fifty-two lac and ninety-seven thousand Taka as compensation on the grounds of loss of potential income and post-retirement as well if he were alive, loss caused to the children for being deprived of father's affection and care, loss caused to the widow for being deprived of husband's love and care, loss of children's opportunity to use their father's reputation and mental losses suffered by the family members for the premature death.

The court reduced the quantum of damages and ultimately awarded the plaintiff one crore seventy-one lac forty-seven thousand and eight Taka as compensation. The focal point is how the court decided the stated amount of money as compensation. In fact, in deciding the non-financial losses, the court tried to measure the continuous pain and suffering of the plaintiffs. On the other hand, the court directly struck out the claim of loss of use of reputation as it could not be ascertained. The court tried to ascertain the potential income the deceased could provide his family if he were alive. Again, a question might be raised as to whether there was any guarantee that the deceased could continue to earn the same during his lifetime or what if he would lose his capability to earn for his family. The court did not have answers to these questions but in the end, the court took a very liberal approach in deciding this case which is very much commendable but the lacuna of application of a standard compensation theory still exists in this case.

Another glaring example is *Tareque Masud* case<sup>44</sup>, where Tareque Masud, a Bangladeshi filmmaker along with his team members was killed in a road accident in 2011. The Court finally awarded four crore sixty-one lac seventy-five thousand four hundred and fifty-two Taka as compensation in favour of Ms Catherine Masud and two others on the following grounds: loss of dependency of the petitioners, loss of love and affection by the petitioners, funeral expenses

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<sup>43</sup> *Bangladesh Beverage Industries vs. Rowshan Akhter*, 62 (2010) DLR (HCD) 483.

<sup>44</sup> *CATHERINE MASUD VS. KASHED MIA AND OTHERS*, 67 (2015) DLR 527.

for the deceased, medical expenses for the treatment of the petitioners and damage to the property.

Although the claim was brought under the Motor Vehicles Ordinance, 1983 the Court applied the principles of tort law which was another breakthrough for the reference in other tort cases. In this case, the court attempted to determine the deceased's professional prospects and considered his income, retirement age, etc. to determine the earnings he could naturally make if he were alive. The court's attempt was admirable but the compensation could be more justified if the court had followed any theory for awarding the compensation.

It has also been observed that the court awarded exemplary compensation in this case because the dead persons were well-known figures in Bangladesh and the incident got massive media coverage and positive public attention. This practice of awarding compensation demonstrated a complete biasness of the courts which showed the ultimate failure of the courts to follow the rule of law and maintain the due process as well.

In *Jihad case*,<sup>45</sup> while deciding the compensation, the court considered the socio-economic position of the country and provided twenty lacs Taka to the parents of the victim<sup>46</sup> which was utterly unjustified and inappropriate because, considering the gravity of the act, where the government was vicariously liable, the amount of compensation was too meagre. Moreover, without following any specific rule or applying any compensation theory, the court depended upon the socio-economic position of the country but nowhere in the judgments the court clarified the term socio-economic position of the country. In addition, the court failed to show proper justification or rationale as to the amount of the compensation. Since the court awarded compensation to Jihad's family for their loss arbitrarily, the court ultimately failed to follow the due process of law again and to ensure the ends of justice as well.

Despite the drawbacks, this case is immensely significant as the court established a milestone precedent by holding the government authorities liable for gross negligence of their employees by way of Constitutional torts and strict liability. In line with that, the judiciary expressly declared the negligent acts of the government authorities as a 'Constitutional tort' which ultimately recognised another long-awaited Constitutional remedy for the first time in Bangladesh.

However, in all the above-mentioned cases, one issue was undeniably common that in no case did the courts follow any standard or principle for awarding a compatible and justified

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<sup>45</sup> supra note. 10, at p. 4

<sup>46</sup> supra note. 39, at p. 13

compensation. In fact, the courts awarded compensation arbitrarily which was a grave non-compliance with the legal requirements of the due process of law. As a result, it is no wonder that a good number of people got access to justice but in most cases, the courts failed to ensure the ends of justice. However, it remains to be seen how existing rules and judicial approaches could practically resolve the relevant issues on tort in Bangladesh.

After analysing the different tort cases, it is contended that the judiciary has failed to award compensation to the tort victims in various ways. Those failures can be divided into six categories e.g., a) failure to provide proportionate compensation; b) failure to provide justification or rationale for the amount so awarded; c) failure to provide compensation without unnecessary delay; d) failure to act without being biased; e) failure to follow compatible compensation theories and f) failure to award compensation in a non-arbitrary manner.

It may be noted that in recent days the government provides relief more often to the victims. The amount released from the Prime Minister's Relief or Welfare Fund is a mere relief and in no way will it bar the receivers from claiming compensation against the government through court action and a court has every authority to adjust any amount awarded to an aggrieved by the amount already received.<sup>47</sup> Referring to the incident of the Tazreen Fire<sup>48</sup>, Taslima Yasmin argued that there is a misconception that the amount given by way of relief to the victims exempts the government from all liability, including that of giving compensation for the fault of its officers.<sup>49</sup> The government's relief might be a benevolent activity but it can not substitute or take away the right of the victims to get compensation through the courts.

Determination of the amount of compensation is, undoubtedly, a complex matter because the injury sustained may vary from case to case. Moreover, it requires the courts to anticipate the losses that might lie in future. Therefore, the courts need to develop a mechanism of multiple 'legal tests' which can be applied in calculating the quantum of compensation. Nevertheless, in this part of the discussion, two more challenges are found, one from the perspective of victims and the other from the judiciary.

Firstly, as it has already been discussed that the award of compensation solely depends upon the discretion of the court itself which means the victims can claim the compensation but the court may reject the claim directly and is not bound to show any rationale even. It may be argued that even if the court properly applies its victim-friendly discretionary power, there is a

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<sup>47</sup> Yasmin, T., "Burning Death Traps Made in Bangladesh: Who is to Blame?", 65(1) (2014) *Labor Law Journal*, pp. 51-61.

<sup>48</sup> "Tazreen fire victims get compensation", *Daily Star*, December 5, 2012, available at: <<https://www.thedailystar.net/news-detail-259955>> (Last visited on June 12, 2022).

<sup>49</sup> supra note. 10, at p. 4

challenge in the recovery of compensation or implementation thereof. In reality, there is no guarantee of getting even a single coin for the victims. Therefore, with a view to resolving this problem, it is recommended that the judiciary must apply its judicial mind to choose the best remedy and award exemplary damages when necessary. Though in some cases, the courts expressed that exemplary compensation has been given, it was not exemplary at all, e.g., the *Bilkis Akther* case.<sup>50</sup> Moreover, the discretionary power of the courts should not be unfettered but rather be limited to choosing the best possible amount to compensate the victims.

Secondly, the courts often face serious complexities in deciding a balanced theory following which the courts can quantify the damages and award the best remedy to the victims. However, all the above-mentioned challenges can be reasonably mitigated if the application of due process is ensured and compatible compensation theories are properly established and implemented in resolving the tort litigations in Bangladesh.

#### **IV. RECOMMENDATIONS FOR AWARDED COMPENSATION IN CONSTITUTIONAL TORT LITIGATIONS IN BANGLADESH, THEREBY ENSURING ‘DUE PROCESS OF LAW’**

Developed countries like the United States have already developed and adopted specific rules with an eye to measuring the quantum of damages.<sup>51</sup> Those rules are somewhat effective, such as the Hand Rule,<sup>52</sup> Interest Theory,<sup>53</sup> Multiplier Theory<sup>54</sup> etc. In addition, the United States follows a guideline to measure the quantum of damages in property cases.<sup>55</sup> Our apex court also confirmed some mental and psychological elements as tortious e.g., agony, suffering and loss of expectation of life. Therefore, if the court is satisfied and decides to provide compensation to the plaintiff on the ground of emotional suffering, compensation can only be awarded in lump sum as the emotional sufferings are not calculable.<sup>56</sup>

In light of the discussion made in section 3.4, it may be recommended that the judiciary should apply, in case of negligence, the Hand Rule or Hand formula<sup>57</sup> where the courts calculate the damages depending on the point of a reasonable person’s indifference between less risk and

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<sup>50</sup> *ibid* at p. 19

<sup>51</sup> *U.S. vs. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947).

<sup>52</sup> Roy, M., “Quantum of Damages in Tort Law” (August 2010), available at: <https://dx.doi.org/10.2139/ssrn.1666830> (Last visited on April 21, 2022).

<sup>53</sup> Bangia, R. K., *The Law of Torts* (21<sup>st</sup> ed.), 2008.

<sup>54</sup> *ibid*.

<sup>55</sup> Goguen, D., “The Damages and Compensation Formula in an Injury Case”, available at: <https://www.alllaw.com/articles/nolo/personal-injury/damages-compensation-formula.html> (Last visited on October 21, 2022).

<sup>56</sup> *Bangladesh Beverage Industries vs. Rowshan Akhter*, 69 (2017) DLR (AD) 196.

<sup>57</sup> Since Judge Learned Hand first penned the famous algebraic expression,  $B = P L$ , that came to bear his name.

more expenditure on precaution.<sup>58</sup> This hand formula is basically an algebraic formula ( $B = P L$ ) and instructs potential tort parties to base their levels of precaution on three variables: (1) the probability,  $P$ , that an accident will occur; (2) the magnitude,  $L$ , of resulting harm, if any accident occurs, and (3) the cost of precautions,  $B$ , that would reduce the expected harm.<sup>59</sup> If the multiplication of  $P$  and  $L$  exceeds  $B$ , the defendant should be liable. If  $B$  equals or exceeds  $P L$ , the defendant should not be held liable. The positive consequence of applying this formula might be that it provides incentives for an efficient precaution and also ideally satisfies the principle of restorative justice. For this reason, Landes and Posner justified this possibility by stating:

‘[T]his may be a feasible as well as theoretically correct method of estimating tort damages. The tort system shows, as yet, no signs of moving in this direction; it continues to be wedded to the pecuniary-loss measure, which bears no necessary relationship to the economically correct Measure.’<sup>60</sup>

Therefore, it is highly recommended that this rule should be applied in case of quantifying the damages of negligence.

Moreover, for determining the damages in case of death of a person, it may be recommended that the judiciary should apply the Multiplier Theory. In this theory, further potential losses are assessed by multiplying the potential losses that occur each year by a factor that indicates how many years the loss will continue. The favourable side of this theory is the factors like the age of the deceased person or the dependents might be taken into consideration by the courts for determining the multiplier to be used for awarding compensation to the victims. Therefore, the value of the multiplier is decided on a case-by-case basis. For those reasons, the Multiplier theory is more balanced than any other damages theory.

Furthermore, it can also be argued that in two identical cases, where the facts are the same but the judges are different, the victims might get different remedies which may certainly frustrate the ends of justice. The most favourable side of this theory is that if it can be applied uniformly, consistency and certainty can be ensured, and consequently, it will also be possible to prevent awarding different amounts in similar cases.

For maintaining due process, the judiciary also has the liability to resolve a dispute without

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<sup>58</sup> *United States v. Carroll Towing Co.*, (1947) 159 F.2d 169.

<sup>59</sup> Grossman, P. Z.; Cearley, R. W.; Cole, D. H., “Uncertainty, insurance and the Learned Hand formula”, 5(1) (2006) *Law, Probability and Risk*, pp. 1–18, available at: [https://doi.org/10.1093/lpr/mgl012\\_](https://doi.org/10.1093/lpr/mgl012_) (Last visited on October 21, 2022).

<sup>60</sup> Landes, W. M.; Posner, R. A., *The Economic Structure of Tort Law* (1st ed.), 1987.

excessive delay but in *Rajib Hossain* case<sup>61</sup>, a few years have passed but his family has neither gotten justice nor any compensation yet.<sup>62</sup> To reduce such difficulty, Dr. Naim Ahmed prudently opined that under Art. 102 of the Constitution the compensation may be awarded in two stages:

Firstly, with a view to providing immediate temporary relief till the case is completely disposed of the court may grant an amount of compensation soon after the rule is issued. Secondly, the court may, at the time of disposal, calculate the total amount of compensation and settle the same with the amount already paid. In any case, any amount awarded by the High Court Division may be described as interim compensation since the victim is free to file a regular suit for compensation and damages.<sup>63</sup>

Undeniably, tort law remains largely unfamiliar in Bangladesh and has no vital effect. One of the core reasons behind this unfamiliarity is the unawareness of the people regarding relevant provisions and procedures of tort litigations. Although litigations have been filed and some of them are disposed of, the legal regime on tort law has not achieved a satisfactory stature. With a view to popularising the concept and application of Constitutional Tort, both the bar and bench must come forward with a modern and more liberal mindset and take two-fold duties.

Firstly, the bar must spread the spirit of Constitutional tort claims to their clients and encourage them to make claims under this. Secondly, the bench must award the compensation following due process and based on the principles of equity, justice and good conscience. So, despite a ton of drawbacks, the light of hope is still shining brighter day by day because the judiciary is performing its part in dispensing justice following the concept of tort law but at the same time, policy-makers must participate by developing the tort law principles in Bangladesh. Therefore, as there are not yet many case laws, the legislators and judiciaries should start preparing a guideline including the Hand Formula and Multiplier theory so that in the near future, the benefits of wide-ranged principles of tort laws can be invoked.

## V. CONCLUSION

Though Bangladesh does not have any specific branch of tort law, the Constitution of Bangladesh is capable enough to provide proper remedies for Constitutional tort claims. The Constitution of Bangladesh tactically empowers the courts to open new doors to provide a wide

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<sup>61</sup> supra note. 40, at p. 14

<sup>62</sup> Islam, R., “2yrs of Rajib’s Death: Neither justice, nor compensation”, *Daily Star*, April 17, 2020, available at: <<https://www.thedailystar.net/city/news/2yrs-rajibs-death-neither-justice-nor-compensation-1893631>> (Last visited on October 21, 2022).

<sup>63</sup> supra note. 32, at p. 11



range of compensation to the sufferers of the Constitutional torts for which the courts must play a pro-active role in fulfilling the profound sense of the Constitution.

After examining some Constitutional Tort judgments handed down by the Supreme Court of Bangladesh, it transpires that in almost all the cases the court did not apply any uniform standard or compatible compensation theory in awarding compensation and for that reason; in almost all the cases the victims were awarded minimal amount compared to the gravity of the wrong done; some cases show the arbitrariness and biasness of the judges in awarding hefty compensation based on other rationales e.g., media coverage of the incident, involvement of public figures, well-known personalities or celebrities, current sensitive issues etc. All these findings highlight the fact of failure of 'Due Process of Law' in case of Constitutional Tort litigations in Bangladesh. In the end, newer compensation theories, i.e., multiplier theory and hand rule or hand rule formula, are discussed through which the victims of the Constitutional torts might get just and appropriate remedies.

As the Constitution of Bangladesh neither imposes any bar nor creates any impediment on the way to developing compensatory jurisprudence in Bangladesh, the fundamental rights under the Constitution will be much more secured if the courts provide appropriate remedies following due process in any case of infringement of the Constitutional rights of the people.

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