



JOURNAL OF CREATIVE WRITING

VOLUME 6 ISSUE 2

2022, PP 01-11

ISSN 2410-6259

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Scope and Application of Constitutional Tort in Bangladesh: An Analytical Study

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Abstract

The private law tort is applied in Bangladesh under the common law jurisdiction. It is possible to first bring a lawsuit for a private law tort in the relevant civil courts and tribunals. Contrarily, the simultaneous application of Article 44 and Article 102(1) of the Constitution applies to constitutional tort. A writ petition for compensation may be filed in the nation's constitutional court, holding the state accountable when the statutory authority is responsible for breaching the constitutional rights established in part III of the constitution. The essay compares and contrasts several features of tort law, including its effectiveness, problems of determination, and financial factors, drawing on case studies in Bangladesh. To investigate the purpose and application of tort law in Bangladesh, it closely examines scholarly literature and well-known cases. It also examines common misunderstandings about the application of torts, the defense of individual and societal rights, the formalization of tort cases in courts, the many forms of legal remedies for damage, and other issues. People who have damaged governments or public authorities cannot seek compensation because they are unaware of constitutional tort law. This article will concentrate on the need for a compensation remedy when a public official or employee violates

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a citizen's fundamental rights. Additionally, the constitutional tort should be considered while analyzing vicarious liability.

Keywords: Tort, Constitutional Tort, Vicarious Liability.

Introduction

A breach of a person's constitutional rights by the government or government agents is referred to as a 'constitutional tort'. Government officials may injure the victim in a number of different ways. Generally, there is room to file a lawsuit under tort existing on common law or statutory principles in Bangladesh when a person suffers bodily harm, emotional suffering, or a defamatory comment made by someone. But there is also a different kind of tort known as a constitutional tort (Wells, 1997). A person may file a lawsuit to collect damages for constitutional rights by following the correct legal procedures. There are several fundamental distinctions between common law and constitutional torts. The victim of a constitutional tort who has had their rights infringed may file a lawsuit against the government official or other public authorities. Although this precedent is not used in common law, Article 102 of the Bangladesh Constitution permits victims to claim damages for violating their constitutional rights (Judicial activism for constitutional torts, 2018).

History of Constitutional Tort

A tort is the area of law in which the courts may authorize a case for (often monetary) damages in response to a private or unlawful act or harm. Therefore, the goal is to restore the person to their pre-accident state. It is said that the concept of tort law is an advancement of the maxim '*ubi jus ibi remedium*' (Every right desire a remedy). The Latin word '*tortum*', which means 'crooked' or 'twisted', is where the word 'tort' originates. Originating from the French word for 'wrong', a wrongful act causes harm to another person, whether intentionally or accidentally. All negligence claims are included in tort law as deliberate wrongs that cause damage.

Moreover, along with the contract, property, and criminal law, tort law is one of the most significant areas of the law. It leads to more civil judicial proceedings than any other class (Khan, 2018). The English proverb 'King can do no wrong' inspired the concept of sovereign immunity, which was then brought to the United States and used to reject tort claims. However, over time and ultimately due to *Dorset Yacht Company v. The Home Office*, *the House of Lords* said the crown would be liable if, for example, the

youngsters who fled from the open borstal damaged a boat. Unfortunately, we must still adhere to the many and varied requirements of unjust civil law already built into our legal system. However, some aspects of civil wrongs law are being taken into account in court decisions, providing the legal framework for civil wrongs law in the People's Republic of Bangladesh to be fully applicable. In recent years, the court has adopted a stance in favor of adopting ordinary civil wrong law principles in situations involving carelessness and traffic accidents. Vicarious liability, other concepts drawn from unfair civil law, and other concepts are gradually being implemented into the system of the People's Republic of Bangladesh (Rafid, 2018).

Fundamental Differences between Common Law Tort and Constitutional Tort

There are several ways that government agents may hurt individuals. The victim may file a classic tort claim under state general law or statutory policy when an official causes bodily harm, causes mental anguish, makes a defamatory remark, or initiates a malicious lawsuit. However, there are additional solutions for general misuse. Due to the expansion of legal remedies for constitutional violations, there has been fear about cases being leaked for decades. Similar to regular law and order litigation, damages must accompany personal injury claims. Furthermore, since constitutional abuse cases do not raise violence, false imprisonment, defamation, malicious prosecution, or similar claims, they do not confront the issues mentioned above when the rights of independent speech are violated. The court must contend with a powerful force that is being drawn by the opposing order in the instance of constitutional torture (Wells, 1997).

Constitutional Mandate of Constitutional Tort

To enforce their fundamental rights, which Part III of the Constitution protects, an aggrieved party may file a writ petition against 'any person or authority under Article 102(1) of the People's Republic of Bangladesh. This includes anyone performing any function related to the affairs of the republic. For the violation of basic rights, an aggrieved person may bring a writ petition against both public and private entities. According to Article 102(1) of the Constitution of Bangladesh, it is up to the court's judgment to decide what kind of legal remedy to provide the victim suffering from violating a basic right. A recently developed judicial tool known as public

law compensation is offered as a constitutional remedy for upholding basic rights. The liberal interpretation of the word 'suitable' in Article 102(1) of the constitution is the foundation of public law compensation. The supreme court of Bangladesh has significant authority under Article 102(1) to compensate an aggrieved person financially for the infringement of fundamental rights. According to Article 44 of the Constitution, the right to enforce a citizen's basic rights is also fundamental. The supremacy of the constitution is stated in Article 7 of the Bangladeshi Constitution. Each clause in the constitution embodies and reflects the solemn declaration of the people's desire. Thus, it is required under the constitution to safeguard people's fundamental rights and restrict the state's power.

The Scope of Constitutional Tort in Domestic Law

In cases involving constitutional torts, courts use tort law concepts to hold state officials responsible for violations of basic rights or to place restrictions on their authority. In cases involving constitutional torts, courts often use the notions of vicarious responsibility, strict liability, negligence, and *res ipsa loquitur*. Under the case of *CCB Foundation v. Government of Bangladesh*, 279 5 CLR (HCD) [2017], a victim's right to compensation in public law was created for the first time in our country's legal system. The court used the *res ipsa loquitur* and negligence doctrines to award Taka 20 lacs in damages against the Bangladesh Railway Board, Bangladesh Fire Services, and Civil Defense for their egregious carelessness that resulted in the death of a 4-year-old kid. This case established a significant precedent that public authority entities may be held liable for the carelessness of their employees or servants under the legal theories of constitutional tort and vicarious responsibility. This scenario has two crucial components: i) The court noted that, in contrast to Article 300 of the Indian Constitution, the notion of sovereign immunity has no place in our system of government. Therefore, the courts can compensate the impacted family for violating the right to life protected by Article 32 of the Constitution. (ii) The court ruled that the recipient of monetary compensation under public law would not be prevented from pursuing private legal claims for reimbursement. The respondents' obligations under private laws will continue to exist. A victim of sexual harassment and bullying sued British American Tobacco Bangladesh Company Ltd. for damages after being fired from her job in the case of *Begum Shamsun Nahar v. British American Tobacco Bangladesh*

Company Limited, 66 DLR (AD) (2014) 80. The Appellate Division ruled BATB Company vicariously responsible for the tort perpetrated by its workers as well as for its inactivity when the victim complained about the employees who were harassing her for a long time after carefully reviewing the decisions of the High Court Division and Trial Court. The British American Tobacco Bangladesh Company Limited was ordered to pay Tk. 2,50,038,000 in monetary damages and interest at a rate of 15% by the Appellate Division. The right to life, protected by Article 32, includes the need to be free from sexual harassment. The phrase 'right to life' refers to the freedom to live in the best possible manner. John Marshall emphasized the necessity for remedies for rights abuses, the right of constitutional legislators to correct constitutional law infractions, and adequate remedies for victims of constitutional violations (Jeffries, 1999). Due to the vexation of the tort case in Bangladesh, the Supreme Court of Bangladesh has decided to record two cases of tort, which may be considered a landmark decision. The first case is *Bangladesh Beverage Industries Ltd. vs. Rosen Akhter*, 69 DLR 129, in which a group was asked to pay 1.7 crores to retaliate against the family members of a family of people on foot who were killed by their trafficker's reckless driving. The second is the payment of Tk. Twenty lacs to the heirs of the Jihad of High Court Division, which perished after being assassinated in the capital's open deep tunnel (Symposium on tort law judgments, 2017). Public interest attorneys and rights groups have demanded the protection of victims of human rights crimes, and Article 102 of the Bangladesh Constitution has been extensively discussed in constitutional compensation. The Jihad case should be considered a benchmark for increasing public health benefits in the judicial system, so the High Court Division embraces judicial activism, analyzes the first negligence, and analyzes the constitutional responsibility of government authorities for the first time. There is no stated plan for compensation for violating the key rights that Bangladesh's Constitution provides. There is no legal need for state abuse. However, Article 44 of the Constitution grants the High Court the ability to remove it in accordance with Article 102(1). This privilege to authorize principal rights is likewise a central right. The Constitution of the People's Republic of Bangladesh states in Article 102 that the High Court Division 'on the utilization of any individual abused may give such bearings or requests to any individual or specialist, including any individual playing out any capacity regarding the issues of the Republic, as might be proper for the

requirement of any of the fundamental rights provided by Part III of this Constitution'. The Government of Bangladesh may sue or be sued under the name of Bangladesh, according to Article 146 of the Bangladeshi Constitution. According to the Article mentioned above, the notion of sovereign immunity does not apply in Bangladesh, and the government is subject to legal action. The courts in India have benefited from the Constitution's Articles 32 and 226's open-textured wording. These provisions offer the courts the discretion to alter remedies and even create new ones to uphold rights (Sathe, 2002, p. 232). The constitution's language in Bangladesh is also open-ended. Thus, there is no restriction on our set strategy to create our compensation law. In the well-known case *BNWLA v. Bangladesh*, the court went a step further and said unequivocally that: 'The main rights are to be examined in light of the global norms and standards without regard to local law in areas where there is no discrepancy between them. When there is no conflict between them or a gap in domestic law, it is now accepted that civil law should be translated in accordance with global law and customs (*BNWLA vs. Bangladesh*, 2009).

Definition of Vicarious Liability

The scenario in which one person is held accountable for the actions of another is referred to as vicarious responsibility. It is possible to file a lawsuit against an employer for the behaviors or acts of his employee by using the vicarious liability theory. In addition, an employer may be held accountable for third-party actions such as those of clients and consumers. When carelessness is discovered between legal connections, vicarious responsibility will develop. The negligence is blamed for the legal relationship between a parent and kid, a spouse and wife, a car owner and a driver, an employer and an employee, etc.. However, the exception is that a person's self-regulatory negligence is not to be regarded as another. The primary agent will be responsible for the subagents' actions if any carelessness on their part results (Mayer, Don et.al., 2012).

Application of Vicarious Liability

If any wrongdoing, such as discrimination, harassment, or damage, affects a worker at a firm, office, or other institution, the employer will be held vicariously accountable. The concept of vicarious responsibility will be brought up whenever any harassment or discrimination is committed by any

employee, even at employer-sponsored events, seminars, workshops, or other training, conferences, or businesses (Australian Human Rights Commission, 2019). In the early morning hours of work, there was sexual harassment between two company workers, which rendered the firm accountable (*Leslie v Graham*, 2002). Employers may be vicariously liable if they fail to uphold the obligation mentioned above. On this subject, the Bangladesh Supreme Court issued an official decision. The court stated in *British American Tobacco Bangladesh (BATB) Company Limited v. Begum Shamsun Nahar* (2014) that 'If a person fails to ensure the prevention of sexual harassment and fails to be convicted and against any organization or organization against it, it can be claimed against and for blamed for damages to women.' In the event of scandalous conduct by women in the workplace, wage approaches have been made thanks to the *BATB Company Limited vs. Begum Shamsun Nahar* case. The Supreme Court made an exemplary decision with this one, giving women in Bangladesh legal protection against harassment. Accordingly, there should be victims of abuse as well as criminally wrong actions in the workplace. In Bangladesh, women make up the majority of the population. Sadly, Bangladesh has substantially lower levels of female employment than most other nations. According to the Constitution of the People's Republic of Bangladesh, the honor of 'Work' is regarded as a right. In addition, the state will guarantee that everyone has an equal chance to participate in national life. When defining 'all realms of national life,' it may be claimed that 'workplace' must be a part of every sphere. Women thus have the right to work and coexist in the workplace alongside males.

The Vicarious Liability Validation Process

When a man is seen to be responsible for the damage done to others, responsibilities become apparent. This kind of terrible responsibility exists. The danger arises from the actual wrongdoing and the use of the evil person's connections. A basic rule requires vicarious obligations in all circumstances regarding the master-slave relationship. The remaining "acknowledged" parts are only linked in exceptional circumstances. Dal Pant identifies three potential categories of agents: (i) those who can establish legal relations with third parties on the principal's behalf; (ii) those who may exert influence over those relationships on the principal's behalf; and (iii) those who have the authority to act on the principal's behalf (Pont, 2001). Due to Bangladesh's rising road deaths and other factors, the beverage case is not

only significant and noteworthy in terms of tort law in that nation, but employers can also encourage their staff to act more responsibly at work because failure to do so can lead to severe consequences like torture and significant harm to vicarious liabilities.

Constitutional Tort Litigation Observations

Some rights are acknowledged in several human rights texts as a generalization of human cognition. Human rights are fundamental, ineffective by nature, and necessary for a decent standard of existence (Haque, 2006, p. 49-62). Professor Ekramul said that the right to have more excellent protection than those rights recognized by the constitution and other rights is the fundamental right during the legal definition of 'Fundamental Rights.' Barrister Abdul Halim used similar language while defining 'fundamental rights (Haque, 2006, p.55). TK Top mentioned fundamental rights and said: TK Top noted that the purpose of fundamental rights is to achieve another level of national certainty among the populace, in addition to ensuring that some rights are insufficient against political change (Tope, 1988). The Constitution of Bangladesh's third part discusses fundamental rights. This portion has 18 groupings, some of which have ideological and others with rational solutions. Article 39, for instance, states that the freedom of thought and belief is accountable for being aware of restrictions. The right to a substantial majority and the general interest of society match the criteria but not the freedom to exercise core rights under Article 44. There aren't many words filled. The right to transfer the High Court Division has been secured following the provisions of Article 102 (1) for the rights conferred by this portion, under a declaration in Article 44 of the Bangladeshi Constitution. (Articles 44(1) and 102(1) of the People's Republic of Bangladesh Constitution) The aggrieved party (*Kazi Mukhlesur Rahman vs. Bangladesh*) may apply to the Supreme Court to file a writ petition when the rights outlined in part III of the Bangladeshi Constitution are infringed upon in some way.

How Compensation is Given in Successful Tort Litigations and Constitutional Tort Cases

The constitutional tort has not yet been created in Bangladesh. However, it is steadily becoming more prominent every day. In essence, the judges used their judicial discretion to determine the compensation. Since Bangladesh's

independence, just six cases have been successfully settled in our nation. *Rowsan Akhter v. Bangladesh Beverage Industries Limited* (2010) case involves vicarious liability and negligence and includes the following grounds for compensation: (i) By taking into account the loss of income; (ii) Non-financial loss that has a significant impact on the family; and (iii) Loss of the plaintiffs' reputation. The third defense, loss of reputation, was rejected by the court in this instance. The first and second points have received the court's attention. The death of a person causes great family hardships. As a result, the court is deciding on the account. Recently, the Jihad case was decided by the Bangladesh Supreme Court. The ruling gives Bangladesh's judicial system a new dimension. The situation demonstrates that the government is subject to the law. If a person violates his constitutional rights, the government is responsible for covering any resulting damages.

Conclusion

In our nation, the constitutional tort has not been extensively established. In addition, many Bangladeshis are unaware of what constitutes a constitutional tort or how this will be compensated. Constitutional rights must be regarded as a person's basic rights. People are now dealing with various issues or incidents that injure them and violate their fundamental rights. The tendency of tort law, however, is being taken into account in court decisions, opening the door for tort law in Bangladesh to be completely applicable. Therefore, Bangladeshi citizens must be informed of their basic rights and the procedure for receiving compensation when those rights are violated. In light of the above reasoning, it may conclude that the superior courts have the complete constitutional authority to award monetary damages as a constitutional remedy for flagrant violations of individuals' precious fundamental rights. The constitutional remedy for public law compensation is young and hasn't fully developed in our domestic legal system yet.

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