
Decoding *Children's Charity Bangladesh (CCB) Foundation v Government of Bangladesh*: The First Ever Public Law Compensation Case in Bangladesh and the Way Forward

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Abstract

Recently, there has been an influx of both public and private tort law litigation in the courts of Bangladesh. In this connection, the case of *CCB Foundation v Government of Bangladesh*, popularly known as the Jihad case, stands out as the first-ever public law compensation case in the history of Bangladesh. Its judgment paved the way for imposing vicarious liability upon the state machinery through the interpretation of Article 102 of the Constitution of Bangladesh for violation of fundamental rights of the citizens by public officials. While a progressive verdict in itself, the High Court Division failed to provide sufficient reasoning behind the determination of the quantum of compensation awarded to Jihad's family. Thereafter, the Appellate Division's decision to deliver a non-speaking verdict while hearing the appeal missed out on several opportunities, such as failing to establish a strong precedent for public law tort claims. As such, this paper attempts to dissect and analyse the verdict, which for the first time fittingly established the concept of constitutional torts. It also discusses the impact of this case upon subsequent tort law litigation in our courts. The paper finally concludes by proposing the enactment of a specific statute for tort law, which will provide guidelines on awarding compensation to the victims and establish a specific forum for addressing these cases.

Keywords: Public Law Compensation, Writ Jurisdiction, Constitutional Tort, Judicial Activism.

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Introduction

In the recent years, the judiciary of Bangladesh has seen a rise in tort law litigations addressing violations of fundamental rights of the citizens of Bangladesh, either by public or private persons³. In this context, *CCB Foundation v Government of Bangladesh*⁴ stands out as the first ever public law compensation case in Bangladesh.

In this case, the High Court Division (hereafter referred to as the HCD), imposed vicarious liability upon the state due to the violation of the fundamental right to life of a citizen guaranteed in Article 32 of our Constitution⁵ by public officials, through a harmonious interpretation of Article 102 (1)⁶. In the full verdict released on 7 October 2017, the court held the Bangladesh Railway and the Fire Service and Civil Defense negligent of their public duties and liabilities, applying the tort law maxim of *res ipsa loquitur* (the thing speaks for itself).⁷ It then imposed a fine of taka 10 lac upon each of them, to be paid to the parents of Jihad for his wrongful death.⁸

Jihad's family received the full compensation from the respondents on 14 August 2018.⁹ The Appellate Division (hereafter referred to as the AD), later upheld the verdict of the HCD in a non-speaking judgment on 25 October 2018.¹⁰ A separate criminal proceeding was also instituted against two assistant engineers, three sub-assistant engineers and a contractor of Bangladesh Railway over Jihad's death. The Special Judge's Court-5 in Dhaka convicted the three sub-assistant engineers and the contractor to 10 years of imprisonment and fined them taka two lac each, under section 304 of the Penal Code¹¹ for culpable homicide not amounting to murder.¹²

³ Persons refer to both natural and legal persons.

⁴ (2017) 5 CLR 278 (HCD). Hereafter referred to as simply – 'the Jihad case'.

⁵ Article 32, The Constitution of Bangladesh reads: 'No person shall be deprived of life or personal liberty save in accordance with law'.

⁶ Article 102 (1), The Constitution of Bangladesh reads: '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'.

⁷ Jihad case (n 4) paras [54], [58].

⁸ Jihad case [108].

⁹ Staff Correspondent, 'Jihad's parents finally receive Tk 20 lakh compensation' *The Daily Star* (Dhaka, 15 August 2018) <www.thedailystar.net/news/city/jihad-family-receives-tk-20-lakh-compensation-from-government-1620571> accessed 13 August 2019.

¹⁰ (2018) 6 CLR 282 (AD).

¹¹ Section 304, The Penal Code, 1860 reads: 'Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause

Therefore, the HCD judgment, which provides detailed reasoning behind holding the Bangladesh Railway and the Fire Service and Civil Defense liable for the wrongful death of Jihad and the calculation of the compensation that was ultimately awarded to Jihad's family for the negligence of the respondents; the non-speaking AD verdict, which upholds the HCD's decision but fails to provide reasons for doing so and thus, misses out on establishing the scheme for compensation in constitutional tort litigations as a precedent; and the parallel criminal proceeding – all require detailed analysis.

As such, part A of the paper discusses the background of the case and part B analyses the HCD's judgment at length. Part C sheds light upon the AD's verdict and speaks of the missed opportunity by our apex court to establish compensation schemes in constitutional tort litigations via its precedence-setting mechanism under Article 111.¹³ Part D speaks of the aftermath of the case under two headings – the parallel criminal proceeding against the alleged perpetrators and the compensation paid to Jihad's family by the respondents. In the last part, i.e. part E, we propose some recommendations for the legislature and the judiciary, the adoption of which will codify tort law compensation cases in our legal system and ease the path for future litigants to claim and in appropriate cases, successfully receive compensation from negligent public and private persons swiftly.

A. HISTORY OF THE CASE

1. Material Facts

A four-year old boy named Jihad fell inside a 16 inches uncovered shaft that was left abandoned by the Bangladesh Railway and the WASA authorities while playing in the Shahjahanpur Railway Colony on the afternoon of 26 December 2014. During the rescue mission, the Bangladesh Railway and the WASA authorities sent down cameras through that shaft to locate the boy and evaluate his condition. However, the camera malfunctioned and they brought another camera for this task. This went on for about 10-12 hours without any result. It prompted the concerned authorities to abandon their efforts, declare that there was nobody inside the shaft and leave the scene. Shortly after the authorities left, a group of five young volunteers pulled up the dead body of Jihad from the shaft by using a hand-made device.

death, but without any intention to cause death or to cause such bodily injury as is likely to cause death'.

¹² Ashif Islam Shaon, 'Four sentenced to 10-years for Jihad's death' *Dhaka Tribune* (Dhaka, 27 February 2017) <www.dhakatribune.com/bangladesh/court/2017/02/26/4-get-10-years-jail-boy-jihads-death> accessed 13 August 2019.

¹³ Article 111, The Constitution of Bangladesh reads: 'The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it'.

2. Background of the Writ Petition Filed by the Children's Charity Bangladesh (CCB) Foundation

The incident was publicized by the electronic and print media, including renowned dailies like the Daily Prothom Alo and the Daily Star, which shocked the whole nation.¹⁴ Being aggrieved at this wrongful demise of Jihad and the sheer negligence of the concerned authorities, the petitioner, Mr. Md. Abdul Halim, a lawyer practicing in the Supreme Court of Bangladesh, filed the Writ Petition No. 12388 of 2014, in the form of a public interest litigation (PIL), under Article 102.¹⁵

The PIL was filed asking the court to direct the respondents to show cause as to why their inaction and/or negligence and/or failure to rescue Jihad, leading to his wrongful death should not be declared illegal and a violation of his fundamental rights under the Articles 31, 32 and 36 of the Constitution and why the respective ministries should not take steps against the respondents for failing to properly discharge their duties. In this regard, the petitioner sought a compensation worth taka 30 lac from the respondents to be paid to Jihad's family for violation of his fundamental rights under the Articles 31 and 32.¹⁶

Bangladesh Legal Aid Services and Trust (BLAST), a renowned legal aid organization having an excellent record of undertaking PILs especially on child rights issues, was added as an intervenor on April 2015 to assist the court.¹⁷ There were seven respondents enlisted in this PIL, of which the notable ones are – the Fire Service and Civil Defense (respondent nos. 3 and 5),¹⁸ the Bangladesh Railway Service (respondent no. 4)¹⁹ and Dhaka WASA (respondent no. 6).²⁰

B. VERDICT OF THE HIGH COURT DIVISION

The hearing of the case took place in November 2015 and February 2016, while the verdict was pronounced in February 2016. The full verdict was released on October 2017. While the PIL was heard by the bench of Farah Mahbub, J and Kazi Md. Ejazul Haque Akondo, J, the former authored the judgment.

¹⁴ Jihad case [1].

¹⁵ *ibid* [2].

¹⁶ *ibid* [1].

¹⁷ *ibid* [6].

¹⁸ *ibid* [108].

¹⁹ *ibid*

²⁰ *ibid* [97].

Mahbub J starts the verdict by mentioning the incidents leading to the death of Jihad, the facts relating to the filing of the writ petition in the form of a PIL, introducing the petitioner and the respondents in this case, and stating why the intervenor was added and the submissions of both the parties to the suit. She then points out the cardinal issues to be resolved to dispose of the petition. The issues²¹ were –

1. The locus standi of the petitioner;
2. Whether the death caused could be attributed to the alleged negligence of the respondents;
3. Whether a compensation claim could be sustained for breach of a statutory/constitutional duty against public bodies;
4. Whether compensation claims could be made under Article 102 of the Constitution against public bodies; and
5. The compensation to be awarded to the victim's family.

An effort will now be made to dissect and analyse each of the issues above, which were discussed at length in the judgment, with references to various domestic and foreign cases. The analysis will also highlight the submissions of both the parties on each of the issues and judge the merits of the arguments, wherever required. Any lacunae in the submissions or the reasoning of the judgment will also be pointed out in this regard.

1. The locus standi of the petitioner

Mahbub J rightfully commences her reasoning by tackling the core issue in question – the maintainability of the writ petition. She cites *Kartic Das Gupta v Election Commission of Bangladesh and others*²² where the AD observed that the primary duty of a writ bench is to determine the maintainability of the petition before going into the merit of the case.

The submission of the respondents that the PIL was not maintainable was based on the AD's verdict in *National Board of Revenue v Abu Sayeed Khan*,²³ which has set 14 criteria for the entertainment of PILs by the HCD. It is submitted that since this is the most recent pronouncement by the AD on the issue of maintainability of PILs, every single PIL instituted in the HCD has to meet any one of the criteria set out in that case. Otherwise, such PILs should be dismissed for being unmaintainable.

²¹ *ibid* [38].

²² [2011] 8 ADC 578.

²³ (2013) 18 BLC 116 (AD).

However, Mahbub J points out that criteria nos. 4, 7, 9 and 13 are relevant for the disposal of the present case. Criteria no. 4 elaborates the terms ‘person aggrieved’ in Article 102 as also someone ‘whose heart bleeds for the less fortunate fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority’. Criteria no. 7 speaks of a publicly spirited individual/organization, who/that espouses the writ jurisdiction on behalf of the disadvantaged and helpless persons. Criteria no. 9 cautions the court to observe that such PILs should be instituted for the benefit of the poor or such persons suffering from common injuries, who have been unable to reach the court. Lastly, criteria no. 13 speaks of entertaining petitions that are filed to protect basic human rights of the disadvantaged citizens who are unable to reach the Court for illiteracy or monetary helplessness.²⁴

It becomes very much clear to Mahbub J that the petitioner fulfils all the criteria set out above. She cites clause 13 of the object clause of the Memorandum of Association of CCB Foundation, which is ‘to organise legal assistance, support groups for victims of social, political and human rights crimes’. Furthermore, she also refers to the annexure submitted by the petitioner that proves the track record of the organization initiating different projects and conducting programs for child education and promotion of child rights.²⁵

However, Mahbub J does not stop there. She cites *Kazi Mukhlesur Rahman v Bangladesh and another*,²⁶ *Bangladesh Sangbadpatra Parishad (BSP) represented by its Secretary General Anwarul Islam v The Government of the People’s Republic of Bangladesh represented by its Secretary, Ministry of Information and 4 others*,²⁷ and *Dr. Mohiuddin Farooque v Bangladesh*,²⁸ where our AD has extensively analysed the issue of *locus standi* of petitioners and the instances where the HCD should grant them standing. This proves that the bench was extremely mindful even when exercising judicial activism, although after *Abu Sayeed*,²⁹ fulfilment of any one of those 14 criteria should suffice for petitioners to be granted standing by the court.

Mahbub J reasons that the issues raised by CCB Foundation involve grave public injury and violation of the fundamental right to life of Jihad, a citizen of Bangladesh, and a member of a poor family. She mentions that as such, the petitioner has sought protection of the court, which is the guardian and

²⁴ ibid

²⁵ Jihad case [45].

²⁶ (1974) 26 DLR 44 (SC).

²⁷ (1991) 43 DLR 126 (AD).

²⁸ (1997) 49 DLR 1 (AD).

²⁹ (2013) 18 BLC 116 (AD).

custodian of the Constitution, under Article 102. Thereafter, she grants *locus standi* to the petitioner.³⁰

2. Whether the death caused could be attributed to the alleged negligence of the respondents

The petitioner submitted that the respondent no. 4, the Bangladesh Railway owed a duty to the public to keep uncovered tube well pipes covered, or surrounded with fences, or publicly display warning signs of the dangers such open areas posed to the citizens so that no one fell into such spaces. But that did not happen in this particular case as the mouth of the shaft remained open due to which Jihad fell inside, claimed the petitioner.³¹ The respondent no. 4 in their affidavits however responded that it was the duty of the contractor M/S S.R. House and the concerned engineers to look after and maintain the said tube well and it was due to their apathy, laxity and negligence that the mouth of the shaft remained uncovered, leading to Jihad falling inside.³² The submission of the petitioner in this regard was that the respondent through this submission, bypassed its own liability and negligence. Moreover, he claimed that respondent no. 4 could still be held vicariously liable for the negligence of its contractor that led to the tragic demise of Jihad.³³

Additionally, the petitioner claimed that the respondent nos. 3 and 5 were negligent in carrying out their duties towards the public. They sent down an unworkable camera to locate the boy and when it failed to locate him, deployed another camera. According to his submission, this process consumed 10-12 hours with no positive result and thus, proves the carelessness of the respondents in dealing with this crisis.³⁴ He further claimed that while the respondent no. 5 in the affidavit terms this situation as a unique and rare one, such occurrences are not rare as they can occur quite frequently. Thus, he inferred that the respondents were unfamiliar and inexperienced in dealing with such an incident.³⁵

The petitioner also highlighted that being unable to locate the boy, the respondent nos. 3 and 5 called off the rescue mission and publicly declared that there was no trace of human body inside the shaft. Shortly afterwards, a group of five young people rescued Jihad's dead body. Hence, he rebuts the claim of the respondent no. 5 that the dead body was discovered through a concerted effort of all the stakeholders.³⁶ The petitioner submitted that

³⁰ Jihad case [46].

³¹ *ibid* [47].

³² *ibid* [65].

³³ *ibid* [25].

³⁴ *ibid* [22].

³⁵ *ibid* [21].

³⁶ *ibid* [24].

according to the maxim – *res ipsa loquitur* and the strict liability principles under tort law, the respondents were indeed liable for the wrongful death.³⁷

The respondents made multiple assertions against this claim of the petitioner. Firstly, respondent nos. 3 and 5 submitted that under section 25 of the Fire Prevention and Extinction Act 2003, if any harm or damage is caused due to any act done in good faith by any officer or any employee of the Fire Service, he will not be liable to any civil suit or criminal case or any other legal proceeding. Secondly, the respondents actively took part in the rescue mission with due care and attention, despite the lack of training, manpower and limited resources. As such, these shortcomings cannot render them negligent in their duties.³⁸ Lastly, they asserted that their failure to rescue the victim's dead body does not prove their negligent conduct since they tried with utmost sincerity. Rather, the body was ultimately discovered through the integrated efforts of all the stakeholders, they claimed.³⁹

Mahbub J eloquently adjudges this issue. She commences by stating the definition of negligence as 'the breach of a duty caused by the omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do'.⁴⁰ She states that persons professing special skill or undertaking a higher degree of duty should exercise more care than ordinary prudent persons.⁴¹ Afterwards, she states the elements of proving an action for negligence⁴² and lays down the general rule that merely establishing the facts of the negligence of one party and the injury of the other party will not suffice. Rather, it should be proved that one was the consequence of the other.⁴³ Nevertheless, she acknowledges that in actions for negligence, the aggrieved persons may find it tough to prove that the negligent conduct contributed towards the accident, owing to the fact being solely outside the knowledge of the aggrieved party and within the ambit of knowledge of the other party. Here, she refers to the maxim *res ipsa loquitur* and states that in such cases the accident itself constitutes reasonable evidence of negligence, where the cause of accident was under the control of the other person.⁴⁴ Thereafter, she outlines that to apply this maxim, it would be crucial to prove that:

- a) the thing causing damage must be under the control of one party or its subordinates;

³⁷ *ibid* [28].

³⁸ *ibid* [32].

³⁹ *ibid* [13].

⁴⁰ *ibid* [49].

⁴¹ *ibid* [51].

⁴² *ibid* [52].

⁴³ *ibid* [53].

⁴⁴ *ibid* [54].

- b) the accident occurred, would not occur in the ordinary course of things, unless the controlling party was negligent; and
- c) there must be no evidence of the actual cause of the accident.⁴⁵

She also refers the leading English case *Scott v London & St. Katherine Docks Co.*⁴⁶ to substantiate the concept of *res ipsa loquitor*, before delving into the facts.⁴⁷

Firstly, she tackles the allegation of negligence of respondent nos. 3 and 5. Mahbub J endorses the rebuttal of the petitioner that falling inside pipes, wells and holes and getting entrapped into fences are not unique or rare, as claimed by the respondents. Moreover, she also rebuts the claim of the respondents that they did not have the expertise in this matter by saying that such a statement cannot absolve them of their statutory public duty and liability. She laments the fact that while five youths rescued the body via an ordinary device, such a mechanism was surprisingly unknown to the respective authorities.⁴⁸ Mahbub J also rejects the claim that the Civil Defense Authority did not have a high-tech, powerful camera for such rescue missions by stating that such an equipment is an important item and is commonly employed in any rescue operation.⁴⁹ She expresses her astonishment that the authority had not yet purchased such an equipment despite already spending taka 60 crore to purchase life-saving instruments in 2013-14.⁵⁰ She attributes Jihad's death to the delay the entire show down the respondent nos. 3 and 5 caused by unsuccessfully deploying two cameras to locate Jihad's body, without taking any productive measures. Lastly, she rejects the claim of the said respondents that Jihad's body was discovered due to the integrated efforts of all stakeholders by referring to the records that the rescuers had abandoned the mission claiming that there was no trace of human body inside the hole and the body was rather discovered by five youths later. This, she remarks, was 'an unfortunate reflection of negligence on the part of the respondents concern demonstrating their ineligibility to handle rescue operation in any deep pipe/shaft'.⁵¹

Secondly, on the issue of the negligence by respondent no. 4, Mahbub J states that it had not denied the negligence of its contractors. Rather, she states that it admitted the liability of its contractors and even submitted that the contractors and the defaulting engineer be held liable for Jihad's tragic demise. Mahbub J

⁴⁵ *ibid* [55].

⁴⁶ [1865] 3 H & C 596.

⁴⁷ Jihad case [56].

⁴⁸ *ibid* [58].

⁴⁹ *ibid* [59].

⁵⁰ *ibid* [60].

⁵¹ *ibid* [64].

then goes on to state that this statement cannot absolve respondent no. 4 from its liability due to the negligence of its contractor.⁵² She reminds the fact that the incident of Jihad falling inside the open shaft is a *prima facie* evidence of negligence by respondent no. 4 since the respondents failed to prove that this occurred even after they took reasonable care or for any other independent causes.⁵³ She thus found the respondent no. 4 through its contractors, negligent of its public duties, owing to which Jihad died.⁵⁴

It is submitted that this was the central issue of the entire suit. Only when negligence could be successfully attributed to the respondents, could the petitioner then proceed towards claiming for compensation from them. Mahbub J accepts the submission of the petitioner that the negligence in the said case should be judged in the light of the maxim *res ipsa loquitur* and even refers a leading judgment from English jurisdiction. She attributes vicarious liability upon respondent no. 4, although it is not expressly mentioned in her reasoning. Prior to that, she establishes the strict liability of the respondent nos. 3 and 5 and concludes why they too were negligent.

3. Whether a compensation claim could be sustained for breach of a statutory/constitutional duty against public bodies

Mahbub J points out that the negligence of the respondents was a glaring instance of the gross invasion of the fundamental right to life of Jihad.⁵⁵ She further points out that cases of wrongful deaths can be filed by the bereaved family members under section 1 of the Fatal Accidents Act 1955. She then adds that while disposing of such cases, the court may award such compensation as it deemed proportionate to the loss resulting to the bereaved party from such death and may also award for any pecuniary loss suffered by the family members of the deceased after his/her death.⁵⁶

She makes a pertinent observation on compensation being granted against public bodies by referring to Article 146 of the Constitution⁵⁷ that it neither distinguishes between sovereign and non-sovereign acts, nor outlines the extent of the government's liability. Hence, she opines that the power to grant compensation against public bodies due to their breach of a statutory or constitutional duty caused via any action or inaction on their part, which results in someone's death is not barred by the Constitution.⁵⁸

⁵² *ibid* [67].

⁵³ *ibid* [69].

⁵⁴ *ibid* [70].

⁵⁵ *ibid* [71].

⁵⁶ *ibid* [73].

⁵⁷ Article 146, The Constitution of Bangladesh reads: 'The Government of Bangladesh may sue or be sued by the name of Bangladesh'.

⁵⁸ Jihad case [80].

Later, Mahbub J makes another observation on the defense of sovereign immunity granted to public officials, which is as follows:

In this regard, it is pertinent to observe that in the Constitution of India the State has the defence of sovereign immunity as provided under Article 300 of the Indian Constitution... In our Constitution there is no such provision like Article 300 of the Indian Constitution; as such, there can be no bar to award compensation to the bereaved family members of Jihad for the injustice being caused to them due to the sheer negligence of the respondents concern leading to violation of his fundamental right to life, guaranteed under Article 32 of the Constitution.⁵⁹

It is submitted that this is the first ever instance where our HCD has made an effort to justify holding public officials or bodies liable to pay compensation for any breach of statutory or constitutional obligations under the scheme of Article 146. In doing so, Mahbub J has elaborated on the relevant constitutional provision and also distinguished it from that of our neighbouring jurisdiction. Any defense of sovereign immunity should therefore not lie to public bodies or individuals in similar cases in future.

4. Whether compensation claims could be made under Article 102 of the Constitution against public bodies

Mahbub J goes on to discuss all the relevant Bangladeshi and Indian cases on public law compensation or constitutional torts while dealing with this issue. The petitioner, while claiming for compensation, relied upon the decisions of the Supreme Court of India in *Rudul Sah v State of Bihar*,⁶⁰ *Smt. Nilabati Behera v State of Orissa*,⁶¹ and *D.K Basu v State of West Bengal and others*.⁶² Mahbub J starts off by referring to *Bangladesh Beverage Industries Ltd. v Rowshan Akter and others*⁶³ as the only recorded instance of compensation being granted to the family of an individual due to death in road accident.⁶⁴ However, by the time this verdict was released, the verdict of the AD in *Bangladesh Beverage case*⁶⁵ and those of the HCD in *Catherine Masud v Md. Kashed Miah*,⁶⁶ as well as *ZI Khan Panna v Bangladesh*⁶⁷ were already pronounced. As such, with three other prominent verdicts of recent times on tort law compensation readily available, it was the duty of the court to make references to those too in course of this judgment. It is submitted that the

⁵⁹ *ibid* [96].

⁶⁰ (1983) 3 SCR 508.

⁶¹ (1993) 2 SCC 746.

⁶² (1997) 1 SCC 416.

⁶³ (2010) 62 DLR 483.

⁶⁴ Jihad case [74].

⁶⁵ (2017) 69 DLR 196 (AD).

⁶⁶ (2015) 67 DLR 523.

⁶⁷ [2017] 37 BLD 271 (HCD).

cumulative effects of the abovementioned cases along with the Jihad case has actually given rise to similar public or private law compensation cases in our HCD (this will be discussed in the later part of this paper). Hence, had this verdict mentioned the three previous tort law compensation cases disposed of by our apex judiciary in the recent past, it would have strengthened the tort law jurisprudence by virtue of precedence-setting mechanism under Article 111.

Mahbub J then proceeds to explain how compensation claims can be made under Article 102. She cites renowned constitutional law scholar, the late Mr. Mahmudul Islam that the HCD has the power under Article 102(1) to pass necessary orders to enforce fundamental rights. Article 44(1) has clearly stated that the right to move to the HCD under Article 102(1) is a fundamental right. Therefore, drawing parallels from *Kochuni v Madras*,⁶⁸ it has been inferred that once the HCD finds any violation of a fundamental right, it has a constitutional obligation to grant relief. This power therefore, is not discretionary.⁶⁹

She then cites *Bangladesh v Ahmed Nazir*⁷⁰ that the Constitution has not stipulated the nature of relief to be granted under Article 102, rather that was left to the discretion of the court according to the facts and circumstances of each case. She also refers to *M.C. Mehta v Union of India*,⁷¹ to state that such relief can also be a remedial one.⁷²

Afterwards, she goes on to discuss the scope of remedy under public law for violation of fundamental rights by public officials by mentioning the Indian cases - *Rudul Sah*,⁷³ *Railway Board v Chandrima Das*,⁷⁴ *M.C. Mehta*⁷⁵ and *Nilabati Behera*.⁷⁶ She endorses the view of the court in *Rudul Sah*⁷⁷ that ordering monetary compensation would also act as a preventive measure against violation of fundamental rights and ensure due compliance of Article 21 of the Indian Constitution by public officials.⁷⁸ Moreover, she highlights the court's view in *Railway Board*⁷⁹ that on account of violation of fundamental rights by public functionaries, the remedy would still be available

⁶⁸ [1959] AIR 725 (SC).

⁶⁹ Jihad case [76].

⁷⁰ (1975) 27 DLR 41 (AD).

⁷¹ [1987] AIR 1086, 1091 (SC).

⁷² Jihad case [77].

⁷³ See above (n 60).

⁷⁴ (2000) 2 SCC 465.

⁷⁵ See above (n 71).

⁷⁶ See above (n 61).

⁷⁷ See above (n 60).

⁷⁸ Jihad case [79].

⁷⁹ See above (n 74).

under the public law, despite damages being readily available under private law.⁸⁰ She then quotes *M.C. Mehta*⁸¹ where the court has eloquently put forward that only in exceptional cases, such as when the infringement of fundamental right is so gross and patent and affects the rights of a large number of people, compensation may be granted under Article 32.⁸² It is submitted that in future cases, our courts too should keep this criterion in mind while devising compensation schemes under the Constitution. She also quotes *Smt. Nilabati Behera*⁸³ to reiterate the above view of granting compensation under Article 32 in appropriate cases despite such a remedy existing under private law.⁸⁴ Therefore, Mahbub J tried to draw a parallel of the scheme under Article 32 of the Indian Constitution with that of Article 102 of our Constitution, in order to establish the principle of constitutional tort in our jurisdiction.

She lastly refers to *D.K. Basu*⁸⁵ which soundly pronounces the prime reason for granting monetary compensation to the deceased's family in such cases. It reads: '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'.⁸⁶ Given that the life of the deceased can never be brought back, Mahbub J endorses the view that compensation could be the only means of solace for the bereaved family.

Afterwards, Mahbub J proceeds to cite the very few Bangladeshi cases where both divisions of our Supreme Court have discussed and/or granted compensation to the victims whose fundamental rights have been violated. She aptly points out that while it has been an established practice of awarding costs to victims in judicial proceedings, the practice of granting constitutional compensation to persons whose fundamental rights have been violated is still absent.⁸⁷ This pronouncement makes it clear that the Jihad case would go on to establish the practice. She firstly refers to *BLAST v Bangladesh*⁸⁸ where the court observed that due to colourable exercise of power by police under the Code of Criminal Procedure 1898, if any wrong was done to the citizens via illegal detention or death in custody, the court was competent to award compensation to the concerned persons. The court in that case drew parallels

⁸⁰ Jihad case [82].

⁸¹ See above (n 71).

⁸² Jihad case [83].

⁸³ See above (n 61).

⁸⁴ Jihad case [84].

⁸⁵ See above (n 62).

⁸⁶ Jihad case [86] (emphasis added).

⁸⁷ *ibid* [87].

⁸⁸ (2003) 55 DLR 363 (HCD).

to the Indian Supreme Court's power to grant compensatory relief.⁸⁹ Mahbub J then quotes *A.K. Fazlul Hoque v Bangladesh*⁹⁰ and *Md. Shahanewas v Government of Bangladesh*⁹¹ where token compensation was granted to the victims due to the sufferings caused by public officials. In the former case, the HCD awarded Tk. 25,000/- to the petitioner for non-payment of his gratuity and pensions while in the latter case, it awarded Tk. 20,000/- to the petitioner for his immense suffering and loss of livelihood for six months due to wrongful imprisonment.⁹²

Then, she refers to two other cases - *Habibullah Khan v Azaharuddin*⁹³ and *Bilkis Akhter Hossain v Bangladesh and others*⁹⁴ where despite the HCD granting compensatory relief to the petitioners due to wrongful actions of public officials (exercise of excessive power and *mala fide* action by a Minister in the former case and unlawful detention in the latter case), the AD set aside both the verdicts. During the hearing of the appeal in *Habibullah Khan*, the AD however observes: 'awarding of compensatory costs is no doubt a matter of discretion of the Court, but it must be exercised judiciously'.⁹⁵ Therefore, it does endorse the power of granting compensation under the scheme of Article 102, albeit striking down the award in this particular appeal.

But the AD's decision overturning the HCD's verdict⁹⁶ in *Bilkis Akhter Hossain* is quite puzzling. Earlier, the HCD observed:

...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 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.⁹⁷

It then reasoned that the illegal detention of the detenu was a violation of his fundamental right and as such ordered the government to pay an exemplary compensation of Tk.1,00,000/-. The AD set aside this verdict on hyper

⁸⁹ Jihad case [88].

⁹⁰ (2005) 57 DLR 725 (HCD).

⁹¹ [1998] 18 BLD 337 (HCD).

⁹² Jihad case [89]-[90].

⁹³ (1983) 35 DLR 72 (AD).

⁹⁴ [1997] 17 BLD 395 (HCD).

⁹⁵ Jihad case [90].

⁹⁶ See *Bangladesh v Nurul Amin* (2015) 67 DLR 352 (AD).

⁹⁷ Jihad case [92].

technical⁹⁸ grounds of not praying for this relief specifically in the writ petition⁹⁹ and thus *succumbed to legal conservatism*.¹⁰⁰ Nevertheless, it made a significant observation that:

... the High Court Division in exercise of its jurisdiction under Article 102 of the Constitution,...can award monetary compensation or compensatory cost mostly in appropriate cases for violation of fundamental rights which must be gross and patent i.e. incontrovertible and ex-facie glaring or that violation should appear unjust, unduly harsh or oppressive on account of the victim's disability or personal circumstance.¹⁰¹

It then went on to caution the HCD to exercise this power only in such exceptional circumstances. Mahbub J opined that the above observation had paved the path for victims to claim compensation in appropriate cases for violation of fundamental rights against public officials.¹⁰² In the end, she concluded that the violation of the fundamental rights of Jihad were so gross and patent that this was an appropriate case where the court was empowered to grant compensation under Article 102.¹⁰³

Mahbub J indeed gave immense focus to this issue by citing almost all the relevant leading cases on public law compensation from both Indian and Bangladeshi jurisdiction. Therefore, her reasoning stands on a strong footing and paves the path for public law compensation under Article 102. Yet, it is submitted that while discussing all the leading cases, she missed out on *Mohammed Ali v Bangladesh*,¹⁰⁴ as well as the three recent court verdicts mentioned above. This case referred to a similar Pakistani decision and thus, ordered each of the two police officers to pay a compensation of Tk. 5,000/- for the loss, injury, harassment and humiliation caused to the petitioner due to searching his house at midnight without warrant for consecutive days. This case, it is submitted, is important for two reasons: firstly, it is an earlier instance of the HCD ordering public officers to pay compensation and secondly, the manner in which the HCD ordered the compensation to be paid, i.e. out of the pockets of the delinquent officers (this will be discussed in the later part of this paper).

⁹⁸ This term was used by P.N. Bhagwati CJ in *M.C. Mehta v Union of India* while rejecting the arguments of the respondent. For a detailed understanding, see [1987] AIR 1086 (SC).

⁹⁹ Jihad case [93].

¹⁰⁰ Taqbir Huda, 'The Weaponisation of Article 102: Constitutionalising Compensation for Violations of Fundamental Rights in Bangladesh' (1st Senior Advocate Ozair Farooq Memorial Law Conference, Dhaka, September 2018).

¹⁰¹ Jihad case [94].

¹⁰² *ibid*

¹⁰³ *ibid* [95].

¹⁰⁴ [2003] 23 BLD 389 (HCD).

5. Measuring the quantum of the compensation to be awarded

Mahbub J commences the reasoning of this issue by accepting the fact that there was no proper yardstick to measure compensation in such cases. Additionally, she concurred that this yardstick in constitutional tort claims also varied from general damage claims in courts.¹⁰⁵ In this instance, she reverted to *D.K. Basu*¹⁰⁶ that there was no straight jacket formula in calculating the compensation for damages in such cases.¹⁰⁷ She also reverts to *Rudul Sah*¹⁰⁸ and *Nilabati Behera*¹⁰⁹ to reiterate that granting of compensation in such cases was the only effective mode to give redress to the deceased's family,¹¹⁰ but in doing so, the court must exercise certain circumspection and self-restraint.¹¹¹ This proves that while pronouncing the first ever verdict on public law compensation in Bangladesh, Mahbub J was cautious in exercising judicial activism and did not want to lay down an amount that was excessive in relation to the public wrong.

Thereafter, she firstly cites *Sri Manmath Nath Kuri v Mvi. Md. Mokhlesur Rahman*,¹¹² where the court observed: 'Assessment of damages in such a case must, therefore, necessarily be to some extent of a rough and approximate nature based more or less on guess work, for, it may well be impossible to accurately determine the loss which has been sustained by the death of a husband, wife, parent or child'.¹¹³

Secondly, she cites *Bangladesh Beverage*¹¹⁴ where the HCD remarked: '..... affection, pain, suffering, mental agony, physical incapability and emotion are not calculable and if the court is satisfied that plaintiff is entitled to any compensation that can be only in lump sum and not on calculation.'¹¹⁵

Afterwards, she goes on to remark that in this case, compensation had to be awarded in lump sum and not on calculation by the court.¹¹⁶ She then proceeds to order the Bangladesh Railway and the Bangladesh Fire Service and Civil Defense to pay taka 10 lac each as compensation to Jihad's family,

¹⁰⁵ Jihad case [99].

¹⁰⁶ See above (n 62).

¹⁰⁷ Jihad case [100].

¹⁰⁸ See above (n 60).

¹⁰⁹ See above (n 61).

¹¹⁰ Jihad case [101].

¹¹¹ *ibid* [102].

¹¹² (1970) 22 DLR 51 (SC).

¹¹³ *ibid* 58.

¹¹⁴ See above (n 63).

¹¹⁵ *ibid* [104].

¹¹⁶ *ibid* [105].

bearing in mind the socio-economic condition of Bangladesh and the relevant laws on granting compensation.¹¹⁷

The preceding remark and the subsequent decision are what seems surprising, to say the least. While it is definitely commendable that this case laid down the principle of constitutional tort for the first time in the history of our legal system, no reason was forwarded for granting only a lump sum of a total of taka 20 lac to be paid to the deceased's family. The court remains silent as to why the full amount of taka 30 lac claimed by the petitioner was not deemed appropriate.

Given that the *Bangladesh Beverage case*¹¹⁸ and the *Catherine Masud case*¹¹⁹ discussed at length the determination of the quantum of the compensations awarded, this judgment missed out on this vital opportunity. Moreover, the abovementioned cases were of private law tort claims. Therefore, since the Jihad case is one of a public law tort claim, the judge had a greater responsibility to elucidate the quantum of the compensation granted. Hence, this remains a missed opportunity for the court.

C. VERDICT OF THE APPELLATE DIVISION

More baffling was the judgment of the AD. After fully hearing both the parties on the issues and perusing the impugned judgment and the relevant materials on record, the AD dismissed the appeal on 5 August 2018.¹²⁰ It observed: 'Considering the facts and circumstances of the cases, we find no legal infirmity in the impugned judgment factually and legally calling for interference by this Court'.¹²¹

By delivering this non speaking judgment, the court missed out on a number of opportunities. It could have tackled the issues that were lacking in the HCD's verdict. Firstly, as Ridwanul Hoque proclaimed:

Article 104 of the Constitution ... empowers the Appellate Division of the Supreme Court to issue "necessary" directions, orders, decrees, or writs for doing complete justice in any cause or matter pending before it, may also be seen as a power-base for the Appellate Division to award compensation for constitutional breaches.¹²²

¹¹⁷ *ibid* [108].

¹¹⁸ See above (n 63) and (n 65).

¹¹⁹ See above (n 66).

¹²⁰ See above (n 10).

¹²¹ *ibid* [2].

¹²² Ridwanul Hoque, 'Public Law Compensation in Bangladesh: Looking Within and Beyond' (2009) 1(2) *Journal of Law and Development* 1, 16 (emphasis added).

Therefore, as the AD found no legal infirmity in the HCD's decision, it could have added sound reasoning to the compensation granted to Jihad's family. Secondly, it could have referred to the decisions in the *Bangladesh Beverage case*¹²³ and the *Catherine Masud case*¹²⁴ and provided guidelines for the HCD to abide by in future cases while determining the quantum of compensation. This would have immensely helped the HCD to determine when to calculate the compensation and when to award a lump sum to the victims, as well as the amount of such sums. Thirdly, it could have added to the finding of the HCD regarding Article 146 and substantiated as to whether the extent of the government's liability should remain wide or some limit should be imposed upon it. Fourthly, the HCD opined: 'This order of awarding compensation will not impede/affect other liabilities, if there be any, of the respondents concern or its officials resulting from the death of the said victim'.¹²⁵ It remains unclear as to what the court meant via this observation. Did the court refer to penal liabilities of the public officials under the Penal Code, 1860 or did it refer to the possibility of Jihad's parents claiming compensation under other statutory torts besides this verdict? The AD's judgment should have clarified this observation.

On the issue of claiming compensation under other statutory torts, viz. The Fatal Accidents Act 1955, Taqbir Huda¹²⁶ refers to Naim Ahmed, who answers in the affirmative that [T]he right to claim compensation through a civil suit 'remains unaffected'.¹²⁷ Additionally, a criminal trial against the perpetrators already concluded by the time the AD heard the appeal. As such, this issue had to be addressed.

Lastly, as pertinently observed by Naima Haider J in the *Catherine Masud case*:

In our opinion, the time has come for us to review the law of tort and consider whether law of tort should be incorporated in Bangladesh so that claims arising from negligence, be it medical or otherwise, are properly dealt with... we feel that a comprehensive judgment should come from Supreme Court of Bangladesh which extensively deals with the tortious concept and clarifies how tort law should be interpreted.. If this is not done, social injustice that we see would not be cured and cases of negligence would go unpunished.¹²⁸

¹²³ See above (n 63) and (n 65).

¹²⁴ See above (n 66).

¹²⁵ Jihad case [109].

¹²⁶ See Taqbir Huda, 'Judicial activism for constitutional torts' *The Daily Star* (Dhaka, 08 August 2018) <www.thedailystar.net/news/law-our-rights/judicial-activism-constitutional-torts-1616731> accessed 13 August 2019.

¹²⁷ See Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (BLAST 1999).

¹²⁸ Catherine Masud (n 66) paras [14] – [15].

Thus, the AD totally missed out on this opportunity and failed to set a strong precedent of constitutional tort by virtue of its powers under Article 111.¹²⁹ It should also have clarified how the compensation money would be recovered – whether from a separate fund created for payment of compensation to the victims¹³⁰ or from the pockets of the defaulting public officials.¹³¹ Hence, as propounded earlier, the non-speaking verdict missed the vital opportunity to become a leading case on constitutional tort and lay the foundation for building its framework in our legal system.

D. AFTERMATH

1. Separate criminal proceedings

The Special Judges Court- 5 in Dhaka found Bangladesh Railway Senior Sub-Assistant Engineer Jahangir Alam, Assistant Engineers Md Nasir Uddin and Md Zafar Ahmed Shaki, and Contractor and Proprietor Md Shafiqul Islam of SR House guilty under section 304 of the Penal Code for culpable homicide over Jihad's death on 26 February 2017.¹³² Charges were framed against them alongside Assistant Engineers Dipak Kumar Bhawmik and Saiful Islam on October 2016. The court however, acquitted the latter individuals. It also fined each of the four convicts taka 2 lac and in default of payment, they would serve two more years in jail.¹³³ Given the claim of Bangladesh Railway in the HCD trial that the contractors were guilty of being negligent and thus, they had to be held liable, the criminal trial did focus on holding them solely guilty of the tragic demise of Jihad. As both the parties remained dissatisfied over the outcome of the trial, an appeal is most likely to be filed to the HCD.

The criminal trial endorses the view of Mahbub J that the compensation award would not impede/affect other liabilities of the respondents in question.¹³⁴ A separate criminal proceeding was successfully lodged and a verdict was delivered against the perpetrators. The court not only sentenced the perpetrators to imprisonment, but also fined them. Therefore, this case is another proof of the fact that civil and criminal courts should not shy away from holding trials independently, regardless of the outcome in the other forum. The victim has the right to compensation under civil proceedings despite the perpetrators already being punished by a competent criminal court.

¹²⁹ See above (n 13).

¹³⁰ A rule *nisi* was issued by the HCD in this regard in *ZI Khan Panna v Bangladesh*. See above (n 67).

¹³¹ See above (n 104).

¹³² Shaon (n 12).

¹³³ *ibid*

¹³⁴ Jihad case [109].

2. Compensation paid to Jihad's family

After almost one year of the HCD's verdict that the compensation would have to be paid within 90 days from the date of the receipt of the judgment's copy, the Bangladesh Railway and the Bangladesh Fire Service and Civil Defense each paid taka 10 lac to Jihad's family on 13 August 2018.¹³⁵ Earlier, the HCD had summoned Md Amzad Hossain, the Director General of Bangladesh Railway, Brigadier General Ali Ahmed Khan, the Director General of Bangladesh Fire Service and Civil Defense, and Major AKM Shakil Newaz, its Director (Operation and Maintenance), over non-payment of the compensation money.¹³⁶ Thereafter, the HCD exonerated them from the rule of contempt of court once the compensation was paid.¹³⁷

It remains unclear as to whether the public bodies themselves paid the compensation money or it was recovered or will be recovered from the defaulting individuals. If it is the latter, the question remains as to whether or not the fines imposed upon each of them in the criminal proceeding would be adjusted following the payment of the compensation. Nonetheless, amidst other prominent tort law verdicts, the Jihad case remains the first one ever where the full compensation amount awarded by the court was ultimately received by the victim's family.

As the intervenor BLAST argued to the HCD, the timeline for settlement of such tort law cases is 10-20 years.¹³⁸ It is evident from the fact that despite the *Bangladesh Beverage case*¹³⁹ and the *Catherine Masud case*¹⁴⁰ being filed and disposed of earlier than the Jihad case, the petitioners of both the cases are yet to receive the compensation. Therefore, petitioners in similar cases in near future would certainly be wary of the time taken to dispose of such cases under other statutory torts and likely file petitions under Article 102 of the Constitution for speedier means of justice.

E. RECOMMENDATIONS AND CONCLUSION

The Jihad case is a significant milestone in our legal system. Multiple constitutional tort law claims have been filed ever since by the petitioner himself as well as others, following its success. In almost all the cases, our

¹³⁵ Staff Correspondent (n 9).

¹³⁶ Staff Correspondent, 'HC summons Railway DG for not paying compensation to Jihad's family' *The Daily Star* (Dhaka, 03 July 2018) <www.thedailystar.net/city/high-court-summons-bangladesh-railway-director-general-for-not-paying-compensation-jihad-family-1599310> accessed 13 August 2019.

¹³⁷ See above (n 9).

¹³⁸ Jihad case [73].

¹³⁹ See above (n 63) and (n 65).

¹⁴⁰ See above (n 66).

HCD has granted a rule *nisi* asking the concerned public authorities as to why they should not be directed to pay compensation for the violation of the fundamental rights of the concerned citizens due to their wrongful actions. However, this practice itself is problematic in the long run.

In the absence of a clear piece of legislation or a detailed pronouncement on public and private law torts, something the AD woefully missed out in this instance, it becomes an arduous task for the HCD to adequately determine in which cases it should direct compensation to be paid and most importantly, to determine the quantum of the compensation to be paid. It is submitted that now since the HCD is frequently entertaining such claims under Article 102 and that the AD is upholding such claims as well, greater focus should be given to the jurisprudence of the calculation of the amount of the compensation. In the absence of a proper legislation or guideline in this regard, such amounts being determined by the courts run the risk of being exorbitant or too scant – the former would unjustly punish the wrongdoers, while the latter would be a bar to ensuring complete justice for the victims.

Therefore, reiterating Naima Haider J's plea in *the Catherine Masud case*,¹⁴¹ a dedicated piece of legislation is crucial to formally incorporating the law of tort in the legal system of Bangladesh. It is high time that the legislature promulgates a law in this regard which specifies at least three things-

- ❖ The specific instances where courts would entertain tort law claims: This would entail linking the existing provisions of tortious claims in various laws of Bangladesh together and codifying those to create one single piece of legislation.
- ❖ The specific means to measure compensation claims: This would act as a guideline to calculate the quantum of the compensation to be awarded, although the final quantum of the compensation would usually be determined based on the unique facts and circumstances of each case.
- ❖ A separate tort law forum to adjudicate such cases: Given the different pecuniary jurisdictions of our civil courts, the creation of a separate tort law forum would be quite helpful to effectively dispose of such cases.

The current trend of our judiciary in granting compensation awards in tort law cases undoubtedly endorses its activist trend. It is therefore submitted that the legislature should do its own part too and facilitate this activism by promulgating this much-needed law.

¹⁴¹ See above (n 128).

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