

The Role of Courts in Combating Sexual Harassment in Bangladesh: Judicial Activism versus Feminism?

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The problem of sexual harassment is an uncomfortable headache for Bangladesh as it has been brewing in the society for a very long time. Until recently there were no sexual harassment laws or guidelines to deal with sexual harassment on women. The judicial activism of the court has resulted in the first proper guidelines being given to combat sexual harassment. But is it enough? This article argues that :i) the transplantation of foreign law in order to lay down the guidelines for sexual harassment is praise worthy but it should be done with caution as the context and the circumstances of the allegations should be taken into account ii) the judicial activism of the court is liberal in nature from the feminist legal theory perspective as the courts are trying to protect the livelihood of millions of women at the same time and do not want to pressure the employers and iii) the lack of implementation and enforcement of the guidelines might unravel the judicial activism of the court.

Introduction

The opening of the various service sectors for women in order to empower them has seen mixed results in Bangladesh as their male colleagues have not always been cordial and professional in their dealings with them. Although in certain sectors the employers took adequate steps to ensure a safe working culture for women, in most sectors of the economy including the garments sector², women still do not feel comfortable and secure because of the adverse working environment and sexual harassment from their male counterparts. The sexual harassment of women in the workplace not only impedes their work performance but also affects their mental health. This loss of honour and dignity also results in them losing their confidence which also has an adverse affect in their personal lives.

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² The garment sector provides more than half of Bangladesh's revenue and almost 85 percent working in this sector are women.

This paper aims to evaluate the concept of sexual harassment within the existing legal framework of Bangladesh. It would then critically analyze the approach taken by the courts in the cases relating to sexual harassment and the role played by them due to the legal vacuum in this area. In analyzing the approach taken by the courts, this paper would further analyze this judicial activism of the judiciary from the perspective of feminist legal theories.

The first part of the paper discusses the concept of sexual harassment from the landmark judgements given by the court. It is argued that the definition of sexual harassment is ambiguous and the circumstances and the context of the allegation of the victim may be taken into account before classifying a case as sexual harassment. The second part of the paper analyses the current legal framework in regard to sexual harassment cases and the problems and implications of some of the legislations enacted by the legislators in order to deal with sexual harassment on women.

The third part of the paper looks at the various feminist legal theories and applies it to analyse the judicial activism of the court. It is argued that if understood from the feminist perspective, the courts tend to be more liberal in nature when dealing with the sexual harassment cases. Finally the fourth part of the paper discusses the judicial activism of the court due to the lack of legislations in this area and how far the courts can achieve their quest for gender equality despite some obvious constraints in regard to their authority. While analysing the effect of the court guidelines on sexual harassment, the feminist perspective on this issue would also be taken into account.

The concept of sexual harassment

There has been a lot of writing in both academic journals and in newspaper columns about sexual harassment at workplaces for women in Bangladesh and also in other parts of the world. The issue in regard to the female garment workers being constantly harassed and stalked by their male colleagues is quite common in Bangladesh. There are also allegations of sexual harassment and intimidation in other service sectors as well. But just what is sexual harassment? If wrong, why is it wrong? What can you actually say at work which will not get you into trouble? Can you tell a dirty joke? Ask your subordinate out for a date? Comment on someone's clothes?

In most instances of sexual harassment cases the concept of ‘I know –it-when I –see-it-ness is involved.³ Most average people can distinguish between a tentative but unwanted, sexual overture or a clumsy compliment on one hand and a hostile and demeaning sexual remark on the other. As a result the sexual harassment cases are filled with vagueness and contradictions as there is a grey line which could be interpreted as sexual harassment or an innocent flirtatious behaviour.

In Bangladesh till recently, there weren’t any set guidelines on sexual harassment.⁴ As a result on a public interest litigation filed in 2009⁵, the High Court Division of the Supreme Court of Bangladesh in its Writ jurisdiction called on the Government to explain their failure to act in respect of sexual harassment and why no legislation has been formulated to deal with this issue. The court gave its judgement in 2009 and gave guidelines in respect to sexual harassment. The court defined sexual harassment in the following manner: Sexual Harassment includes : a) “unwelcome sexually determined behaviour b) attempts to establish sexual relation by use of administrative power or position c)sexually coloured verbal representation and expecting sexual favours d)sexually coloured remark or showing pornography e) Indecent gesture including teasing through abusive language, stalking and jokes f)insult through letters, telephone, mobile phones etc g) taking still or video photographs j) preventing participation in sports, cultural organisation and academic activities”.⁶

The definition of sexual harassment provided by the court is quite ambiguous as the definition was taken from the Convention on the Elimination of Discrimination against women (CEDAW). The definition provided by the court falls into the ‘I-know-it-when-I see it ness’ category, as the courts would have to judge the context and the circumstances of the sexual harassment on women in the workplace to judge whether there has been a case of sexual harassment. In Bangladesh although sexual harassment on women in the workplace is

³ This term was coined in the case of *Jacobellis v Ohio*, 378 U.S. 184, 197, while claiming about obscenity, ‘I know it when I see it’.

⁴ The two landmark cases which set guidelines for sexual harassment are : *Ms Salma Ali v Bangladesh & others*, 29 BLD (HCD), 2009, 415 and *Bangladesh Women Lawyers Association v Government of Bangladesh & others*, 31 BLD (HCD),2011, 324.

⁵ *Ibid*.

⁶ See *Ms Salma Ali v Bangladesh & others*, 29 BLD (HCD), 2009, 415. The court defined sexual harassment along the following lines. The exact wording and certain provisions defining sexual harassment were however omitted for the purpose of this paper as they were repetitive.

high, it is important not to have such broad generalisations of what constitutes sexual harassment as the context and the circumstances of the allegations made against the perpetrators could change from case to case. As a result although the court guidelines provide a valuable tool in defining what could be construed as sexual harassment, direct transplantation of the definition from an international convention has caused certain ambiguities.

The existing legal framework dealing with sexual harassment

There are a number of provisions in the Constitution of Bangladesh that deals with sexual harassment. Article 10 of the Constitution has mandated the participation of women in all spheres of national life, Article 28 prohibits discrimination on the ground of sex while Article 29 guarantees equal opportunity of women in the public sector.⁷ Moreover Article 36 guarantees right of free movement to every citizen. Apart from Article 10 of the Constitution, the other articles are considered as fundamental rights of every citizen and the State as a result is obligated to ensure those rights. Further if the State fails to provide those fundamental rights to its citizens, Article 44 of the Constitution grants a person aggrieved to move a petition before the High Court Division of the Supreme Court of Bangladesh under Article 102 of the Constitution to enforce their fundamental rights.

Although Article 28 of the Constitution ensures that there should not be any discrimination on the grounds of religion, sex, race, caste or place of birth, there is no specific provision which deals with sexual harassment on women. Article 28 (4) comes closest as it states that “ Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens”.⁸ This allows the legislators to enact special laws to protect the rights of women as and when required to protect them.

The government has also promulgated new laws over time to protect the interest of women. Some of these legislations are The Dowry Prohibition Act 1980, The Cruelty to Women (Deterrent Punishment) Ordinance 1983, The Women and Child Repression (Special Provision) Act 1995, The Prevention of Women and Child Repression Act 2000 and The Acid Control Act 2002. The government enacted these laws in order to protect women from

⁷ See the Constitution of the Peoples Republic of Bangladesh

⁸ Article 28.4 of the Constitution of the Peoples Republic of Bangladesh.

certain crimes and most of these laws have not been drafted taking sexual harassment on women into account. Most of these laws are knee-jerk reactions by the government to protect women subjected to particular crimes at a particular time. Such ad-hoc legislations resulted in these laws being repealed several times due to imperfect definitions of crimes.⁹

The Penal Code of 1860 also has no specific provisions dealing with sexual harassment. The two provisions which deal with sexual harassment are Section 354 which deals with actions involving assault and Section 509 which deals with words, act or gestures insulting the modesty of women. Both these Penal Code provisions are not effective in dealing with sexual harassment cases as it stereotypes women based on the concept of modesty. Section 509 assumes the fact that all women are modest and the law will only protect women when they will be considered modest. This type of stereotype might prejudice sexual harassment cases as this will create a criteria in regard to what constitutes modest and immodest, which is prejudicial to the victim of sexual harassment.¹⁰ Further the Labour Act of 2006 also refers to modesty and honour of women. Section 332 of the Act, specifically refers to being respectful towards the modesty of women.¹¹ This is also another instance where the court would be bound to consider the modesty of the women in a sexual harassment case, since it is stated in the legislation to protect the labour rights of the workers.

Although the Government has over the years passed various forms of legislations to curb violence on women, there has not been any specific law dealing with the sexual harassment of women at workplaces. Moreover severe punishments including death penalty in respect to certain crimes committed against women have also failed to stop violence against women.

Further despite the Constitution providing gender equality, the provisions do not go far enough in combating sexual harassment on women. Until recently the vast majority of women were engaged in the private sphere – i.e. domestic and household labour. Therefore the harassment and discrimination of women in the work place escaped the notice of the government. This explains the lack of legislation dealing with discrimination and

⁹ See Tania,S.J., “Special Criminal Legislation for Violence Against Women and Children”- A Critical Examination”, *Special Issue : Bangladesh Journal of Law*,2007 at p.199.

¹⁰ Ibid.

¹¹ The Labour Act of 2006. Can be accessed at : http://bdlaws.minlaw.gov.bd/chro_index_update.php

harassment.¹² Moreover since there is also a lack of knowledge among most Bangladeshis about their constitutional rights, women have been slow to avail the protection provided to them by the Constitution. This results in sexual harassment on women going unchecked at times.¹³

The feminist legal theories

It is difficult to define what feminism is as modern feminists believe that there should not be any single definition of feminism. However for the purpose of this paper, feminism will be defined as “a concept that commits to equality of sexes at the substantive level and at the methodological level it implies a commitment to gender as a focus of concern and to analytic approaches that reflect women’s concrete experiences”.¹⁴ Feminism in general focuses on gender equality between a male and female and rejects patriarchy and promotes liberation of women. Moreover feminist theories and practitioners are not only interested in gender issues, but also in race, class, sexual orientation, especially how these categories might cross-roads with gender.¹⁵ In fact many cross paths with issues of justice and peace.

Further feminist legal theory emerged at the last quarter of the 20th century during a time when feminists challenged the stigma in regard to women working. As a result, feminism is part of a critical tradition of jurisprudence that connects to legal realists and critical legal studies and is grounded in the civil rights movement.¹⁶ Hence it can also be said that feminist theory has its legal roots in the 19th century women’s movement as well.¹⁷

Many feminists also believe that law is not a neutral system and they argue that that the legal concepts of impartiality and objectivity are views of male dominated society. They also observe that “if sexes are unequal and perspective participates in situation, there is no ungendered reality or ungendered perspective”.¹⁸ During the 1960s and 1970s many feminist legal theories emerged that can be classified as liberal theory, cultural theory, dominance

¹² Above n.8.

¹³ Most women in Bangladesh do not report cases of sexual harassment unless and until it is serious in nature. See Mahtab, N., *Women in Bangladesh: From inequality to Empowerment* (Dhaka: AHDPH, 2007).

¹⁴ See Rhode, D.L., *The “No problem” Problem: Challenges and Cultural Change*, 100 Yale Law Journal, 1991 at p.1731.

¹⁵ See Barnet, H., *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing Limited, 1998).

¹⁶ See Smart,C., *Feminism and the Power of Law* (London: Routledge, 1989).

¹⁷ Ibid

¹⁸ See Mackinnon, K.A., ‘Method and Politics,’ in *Towards a Feminist Theory of State* (Cambridge: Harvard University Press, 1989) 114.

theory and postmodern theory. However for the purpose of this paper only liberal, cultural and dominance theory would be discussed.

Liberal Theory

The liberal feminists believe that the subordination of women is caused by social and legal barriers that result in women not being able to participate in politics and economics. They advocate that women are fundamentally similar to men and that they should be treated equally with men. Liberal feminists argue that law should be gender blind and that there should not be any restriction or special assistance on the grounds of gender.¹⁹ Liberal theory was extremely popular during the 1970s as it resulted in women getting access to employment, education and politics.

Although liberal theory has proven to be successful in ensuring access to women in education and in other sectors of the economy as it challenged the discriminatory laws and classifications, the theory was less effective in challenging laws that justified different treatment on the basis of real differences. This 'real difference' law is difficult to apply in the cases where there is no man as a comparison, such as in pregnancy cases or cases of domestic or sexual violence.²⁰ Another problem with the theory was its benchmark of "male standard". Critics of the theory argue that liberals did not challenge the concept of the discriminatory law and that they only sought gender neutrality. As a result the law reflects only male experiences and does not help women much, especially women coming from disadvantaged backgrounds. Further, equal treatment between men and women would not result in any real equality as in many cases men will be benefited.²¹

Cultural Feminist Theory

Cultural feminism on the otherhand focuses on the differences between men and women. They advocate that the main role of feminism is not to assimilate women into patriarchy and try to prove that men and women are equal but to change institutions with the view to understanding women's unique virtues of love, patience, empathy and concern.²² According

¹⁹ Above n.12.

²⁰ See Kay,H.H., "Equality and Difference : The Case of Pregnancy" in Smith. P., (ed) *Feminist Jurisprudence* (New York: Oxford University Press, 1993).

²¹ This is especially applicable for custody and divorce rules.

²² Above n.12.

to cultural feminists, men and women undergo different moral development.²³ Cultural feminists also argue that modern jurisprudence is 'masculine' because it is of the belief that men and women are materially separate and that they should be treated differently.²⁴ As a result according to them, a greater volume of feminist scholarship is required which is grounded in women's subjective experience.²⁵

However, cultural feminists have also come in for criticism as they are accused of stereotyping women from the 19th century known for their emotional, domestic and nurturing qualities. This is dangerous according to some as this would affirm the difference between men and women and accept male superiority over women.²⁶ Further, this bias might adversely affect women as this may cause discrimination in respect to labour laws that might preclude different types of women work on the ground that they might need protection and that this unequal treatment is needed on the basis of women's inherent difference with men even though it means putting them in a subordinate position.²⁷

Dominance Theory

Dominance feminism does not see the issue of gender equality as an issue of sameness but rather as an issue of domination of women by men. The main protagonist for this approach is Catherin Mackinnon who argues that both liberal and cultural feminists embrace maleness as a norm. She states that "concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure".²⁸

Moreover according to dominance feminism the equality issue is not a question of sameness but a question of distribution of power and gender not a question of difference but of male

²³ See Gilligan, C., *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982). Carol Gilligan explains in her book that men and women typically undergo a different moral development. She finds that male respondents typically responds to the moral problems with an "ethic of Justice" while female respondents typically respond with an ethic of care.

²⁴ See West, R., *Jurisprudence and Gender*, 55 *University of Chicago Law Review*, 1, 1988.

²⁵ Ibid.

²⁶ See Mackinnon,C.A., "Difference and Dominance: on sex discrimination' in *Feminism unmodified: Discourse on life and law* (Cambridge: Harvard University Press, 1988).

²⁷ See Williams., "Deconstructing Gender", in Hilaire Barnet (ed) *Sourcebook on Feminist Jurisprudence* (London: Cavendish Publishing Limited, 1997).

²⁸ Above n.23.

supremacy and female subordination.²⁹ Further both the liberal and cultural feminist could not confront the issue of sexual harassment, violence on women and children with their approach of feminism. This is because the subordination of women is central instrument of male dominance.³⁰

However the dominance theory has been criticized as one dimensional as it only concentrated on women as the victims. Although the connection between sexuality and gender inequality is accurate, the use of sexuality for male dominance is over exaggerated.³¹ Further many feminists have also tried to explore the connection of sexuality, gender and law in order to understand the prevailing social inequality on women.

The role of court in dealing with sexual harassment cases

The Constitution of Bangladesh together with other legislations dealing with violence and discrimination on women did not till 2009 have any specific guidelines dealing with sexual harassment cases. The High Court Division of the Supreme Court of Bangladesh in 2009("2009 Case") and in 2011("2011 Case") laid down the guidelines for the first time to deal with issues relating to sexual harassment of women.³² The court gave the guidelines in response to a public interest litigation filed before the court by Ms. Salma Ali, head of Bangladesh Women Lawyers Association. The court in its judgement stated that "These directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of Article 111 of the Constitution".³³ As a result the court has taken it on itself to interfere in its constitutional capacity in order to protect the interest of the general public.³⁴

The court in its 2009 case judgement also stated that the objectives and functions of the judiciary include the following: "a) To ensure that persons are able to live securely under the

²⁹ Above n.24.

³⁰ See Cain, P, A., *Feminist Jurisprudence: Grounding the Theories*, 4 *Berkley Women's Law Journal*, 1990.

³¹ Kapur,N., *Erotic Justice: post colonialism, subjects and rights* (London: Glasshouse press, 2005).

³² Above n.4.

³³ Ibid.

³⁴ This action of the court is termed as Judicial Activism. Judicial Activism or Judicial legislation occurs where there is casus omissus(gap in the statute the court can fill in). However if there is no law and hence there is no question of filling in the gap then the judiciary can also take steps in the interest of the Society. Lord Reid in his article " The Judge as Law-maker", *The Journal of Public Teachers of Law*,1972, stated that "when it was thought almost indecent to suggest that judges make law-they only declare it.....but we do not believe in fairy tales any more".

Rule of Law b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights and c) To administer the Law impartially among persons and between persons and the state".³⁵ The third objective of the court as stated in the judgment is the most significant aspect of the court interfering in order to promote equality between men and women. The court saw the need to step in as the State had failed to give any guidelines through its legislative powers to protect women from sexual harassment. This aspect of the courts judgment is more akin to the liberal feminist approach which promotes the idea that there should be gender equality in respect of protecting the rights between male and female. In this case it could be argued that the court tried to promote equality between the genders.

Moreover it could be argued by radical feminists that the court had failed to identify the problem. The problem of sexual harassment arises out of the subordinate status of women and the victimisation by men. Sexual harassment for radical feminism is but one manifestation of the victimisation of women by men. Granting women greater equality does not solve the problem of sexual harassment, as according to radical feminists this is the outcome of the way that society is structured.

The court also held that a conduct would amount to discrimination "if a woman has reasonable grounds to believe that objecting to the conduct would disadvantage her in terms of her recruitment or promotion or when it creates a hostile work environment".³⁶ The court also recognized that the duty of the employer or 'other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required".³⁷

The court also placed an obligation on employers in both public and private sectors to take "appropriate steps to prevent sexual harassment" and provide for appropriate penalties against the offender.³⁸ Employers in both the public and private sectors must provide

³⁵ Above n.4 at p.415.

³⁶ Above n.4 at p.418.

³⁷ Above n.4 at p.419.

³⁸ Above n.4 at p.425.

procedures for deterring workplace sexual harassment.³⁹ Upon the creation of such workplace rules, the employer must notify all workers of the anti-sexual harassment policy.⁴⁰ As a result the court imposed an affirmative duty on the employer to prevent sexual harassment in the workplace. The court also directed that a complaint mechanism be created in the employer's organisation to redress the complaint made by the victim and that such a committee should be headed by a woman.⁴¹

The measures directed by the court in order to protect women from sexual harassment might be read with scepticism if analysed from the radical feminist perspective. However CEDAW, which is the basis for the court's sexual harassment guidelines, is regarded as a radical feminist convention.⁴² Article 5(a) of CEDAW intends to "modify the social and cultural patterns of conduct of men and women.....". Hence it shows that the guideline is trying to promote consciousness in the society regarding sexual harassment. However it can be argued that since the guideline relies so much on radical feminism, it is flawed as all women do not want to be perceived as victims.

Further the examples of workplace harassments stated in the judgment all relate to men in superior positions trying to abuse their administrative position in order to receive sexual favours.⁴³ As a result from the radical feminist perspective, the court passed its judgment through its 'male standard' rather than taking into account the women's perspective. Further it could also be argued that the stance taken by the court is more akin to liberal theorists as it tried to promote gender equality and work safety for women which will increase the participation of women in the workforce.

The 2011 case further improved the definition of sexual harassment as it included 'eve teasing and stalking' into its definition of sexual harassment.⁴⁴ However the court in its judgement stated that "teasing is usually harmless if it is done between friends in a friendly environment and if the same is welcomed by the female recipient".⁴⁵ It further stated that

³⁹ Above n.4 at p.425.

⁴⁰ Above n.4 at p.426.

⁴¹ Above n.4 at p.427.

⁴² Above n.30.

⁴³ Above n.4 at p.326.

⁴⁴ Above n.3 at p.327.

⁴⁵ Above N.3 at p.327.

"while teasing may be enjoyable and pleasant to an American or British female of the same age because of cultural difference".⁴⁶ This description of teasing may be in direct contradiction with the 2009 case judgment, where it was specifically stated that sexual harassment includes "... jokes having sexual implication".⁴⁷ This further reiterates the point made earlier in this paper, that it is important to understand the context and the circumstances of the allegations made. The definition of sexual harassment provided by both the 2009 and 2011 cases contradict each other as although the 2009 case does not discuss the context and the circumstances which could be interpreted as sexual harassment, the 2011 case clearly does.

Moreover although in the 2011 case, the court describes various conducts that could be described as eve-teasing, it stops short of defining it. The reason being it falls in the "I – know-it-when-I-see it ness" category, as depending about the situation and the context it could be interpreted as whether the action of the person can be considered as sexual harassment or flirtatious behaviour. As a result such cases are filled with vagueness and contradictions which make it difficult for the court to intervene as one of the parties might be prejudiced.

The 2011 case also discriminates against women coming from different backgrounds while dealing with the issue of sexual harassment. It states that "What may be normal for a girl in Dhanmondi or Gulshan may be the reason for mental disturbance of a girl in a remote conservative village". In this case both Gulshan and Dhanmondi being affluent neighbourhoods in Dhaka, it was perceived by the court that women living there would be more liberal and open to teasing than a conservative girl in a village in Bangladesh. This type of stereotyping goes against the general principle of sexual harassment as it prejudices women living in different areas. However it can also be argued that the court is promoting equality between the genders by adopting a more contextual approach. To expect all women to behave like village women would be essentialising, which is a criticism of radical feminism.

Taking into account the dominance theory perspective, such generalisation by the court goes against gender equality as women are held at a particular male standard of what should be

⁴⁶ Above N.3 at p.328.

⁴⁷ Above N.3 at p.328.

conservative and liberal. The wording of the judgment further reiterates the radical feminist perspective that gender inequality among other things is dependent on men's control over women's sexuality and laws plays a significant role in maintaining the gender inequality through its regulation of women's sexuality.⁴⁸

Both the 2009 and 2011 cases are significant for Bangladesh because of its recognition of the problem of sexual harassment and the fact that it is an experience many women are almost routinely subjected to in the workplace. These two cases could be considered as transformative despite their being no legislation dealing with sexual harassment cases in the country.

Judicial Activism versus Feminism

The court in the 2009 and 2011 cases stated that the responsibility of the court under Article 102 of the Constitution, for the enforcement of the fundamental rights covered under chapter III of the Constitution in the absence of any form of legislation, allows the court to intervene.⁴⁹ Further it also stated that 'the fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including sexual harassment or abuse and that the independence of the judiciary is an integral part our constitutional scheme'.⁵⁰ This shows that the separation of the judiciary from the executive has emboldened the court to fill the legal vacuum left by the legislators. As a result this judicial activism is possible for the courts due to the constitutional powers given to it by the Constitution.

Further due to lack of access to justice by the majority of people in the country, the fundamental right of the people gets violated. To these weaker and poorer segments of the population, the rights conferred by the Constitution mean nothing as they do not feel adequately protected. As a result the court sees it as their duty to intervene in order to protect the basic human rights of the people. The High Court Division of the Supreme Court of Bangladesh gave these two proactive judgements because sexual harassment violated the fundamental rights enshrined in the Constitution. The court relied on both domestic and

⁴⁸ Above n.27.

⁴⁹ Above n.4.

⁵⁰ Above n.4.

international law in order to give these judgements. It also recognized that sexual harassment impairs the goal of equality in employment.

The 2009 and the 2011 cases define sexual harassment and lays down the guidelines for employers and educational institutions to ensure that their institutions prevent future sexual harassment on women. Employers were also required to set up complaints committees to take up complaints of sexual harassment and investigate those complaints thoroughly.⁵¹ Although these guidelines have highlighted the problem of sexual harassment, much remains to be done to address gender stereotyping and harassment in the workplace and to ensure that women have some form of recourse to effective resolution of their complaints.⁵² The guidelines laid down by the High Court Division of the Supreme Court of Bangladesh are not being followed adequately in all spheres of employment and in fact some employers are even ignorant about such guidelines.⁵³

The judicial activism of the court in the 2009 and 2011 cases from the feminist perspective shows that the current Bangladesh sexual harassment cases only focus on the non-consensual cases of harassment.⁵⁴ As a result, although the court's decision has brought about change, it did not question male supremacy as it subjects the regulation of sexual harassment to questions of consent. The concern is that 'beneath the surface, a moralism may be being smuggled into sexual harassment litigation'⁵⁵ as the courts will identify unwelcome behaviour "with an attempt to outrage the modesty of a female employee".⁵⁶ The unwelcomeness aspect in the 2009 and 2011 cases forces women to act in a manner which is considered as virtuous and chaste which is socially acceptable in order to bring about a credible sexual harassment claim.⁵⁷ The courts as a result will protect only virtuous and chaste women as they will consider them as genuine victims.

In analysing both these cases from the feminist legal perspective, the action of the court in dealing with sexual harassment cases are liberal in nature as they try to promote equality

⁵¹ Above n.4.

⁵² Above n.4.

⁵³ See Siddiqi, D.M., "Do Bangladeshi factory workers need saving? Sisterhood in the post-sweatshop era", *Feminist Review*, 91, 2009.

⁵⁴ See Mackinnon, C.A., *Women's Lives, Men's Laws*, *Law and Society Review*, vol 40, issue3, 2006.

⁵⁵ *Ibid*

⁵⁶ Above n.49.

⁵⁷ Above n.49.

certain crimes and most of these laws have not been drafted taking sexual harassment on women into account. Most of these laws are knee-jerk reactions by the government to protect women subjected to particular crimes at a particular time. Such ad-hoc legislations resulted in these laws being repealed several times due to imperfect definitions of crimes.⁹

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⁹ See Tania,S.J., “Special Criminal Legislation for Violence Against Women and Children”- A Critical Examination”, *Special Issue : Bangladesh Journal of Law*,2007 at p.199.

¹⁰ Ibid.

¹¹ The Labour Act of 2006. Can be accessed at : http://bdlaws.minlaw.gov.bd/chro_index_update.php

Further in both the cases, the court has taken help from foreign legislations and conventions as there was no domestic law to follow. As a result this transplantation of foreign law in dealing with our sexual harassment cases can cause problems with regard to how we define the concept of sexual harassment. It is important to take into account the context and circumstances of the allegation because there is a grey area with regard to the definition of sexual harassment. Their Lordships in their judgement have frequently pointed out the difference between western and Bangladesh’s conservative society but they did not consider whether western definition of sexual harassment is applicable in our society.

Further the court have been liberal in their interpretation of sexual harassment as they preferred to be gender blind in order to protect women from sexual harassment. Further feminist legal theory is at an infant stage in Bangladesh and the court has been careful to draw a line between the liberal interpretations of sexual harassment in order to protect the livelihood of women in the country.⁶² It should be noted that although a lot more needs to be done in order to reduce sexual harassment of women in Bangladesh, greater action is required both from the public and the legislators to protect women from sexual harassment, as judicial activism alone cannot deal with this problem.

⁶² See Azim, F., “Feminist struggles in Bangladesh”, *Feminist Review*, 80, 2005.