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A Feminist Overhaul on Post-2000 Judicial Decisions towards Enforcing Women's Rights in Bangladesh

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Abstract: In midst of a crude reality of scarcity of appropriate women-friendly laws and over adversarial set up, the Higher Judiciary of Bangladesh often has come out with a number of directions and tried to fill the lacuna, if not the void. They came up frequently in the name of judicial activism, sometimes by its own motion or in response to general or public interest litigations. Such initiatives taken by the Supreme Court judges were massively hailed by women, civil society and pressure groups. Among a number of cases, few are really noteworthy and can be marked as historic development in endorsing women's rights in Bangladesh. In this paper, such noteworthy decisions will be analyzed under different heads to portray the approach of the highest courts followed by a critical evaluation of those judgments through the kaleidoscope of feminist theoretical framework. This article ultimately will argue that the Supreme Court judges resonated mostly liberal feminist ideas while imitating a general non-discrimination idea of CEDAW-driven global Human Rights regime. At the end, the article will recommend how leaning towards a bit radical feminist ideas can pave the way towards ensuring to a pro-gender legal protection regime by hitting the very root of patriarchy.

Keywords: Feminism, judicial activism, patriarchy, women's Rights.

1. Introduction

Although the Constitution of Bangladesh apparently tends to ensure equality between men and women in all spheres of public life, it has not ensured an effective equality regime since it is silent about the equality in personal life, where a number of personal laws are applicable. Such demarcation of public and private life has paved the way of allowing a number of gender-discriminatory personal laws leveling them as personal and leaving very limited scope of declaring them unconstitutional taking the aid of Article 27, since freedom of practicing religion is another fundamental right.¹ A plethora of gender-discriminatory laws, customs and traditions have set a circumstance over the years where women do not feel they are equal and equally empowered. In addition, frequent gender-based violence has been a demonstration of acute power-disparity between male and female and overt display of dominance over women. Even

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¹ Shahnaz Huda, *Combating Gender Injustice: Hindu Law in Bangladesh* (SAILS 2011)

if we consider the provision of 'public-life-equality'² as something better than having nothing, nowhere in the constitution is there a pledge of ensuring an environment that can contribute to breaking down the dominant patriarchal social structure. Although the fifteenth amendment included the provisions of equality in all sphere of national life, it is in the non-enforceable part of Bangladesh Constitution.³

However, some argue that, the reality is, Bangladesh, being a religiously sensitive terrain, has a dilemma of both ensuring equality in private life and defy the patriarchal social structure since these are not in tune with the conventional religious interpretations.⁴ However, the judiciary of Bangladesh has come up with few progressive ideas and tried to vindicate women's rights from a sandwiched position between the socio-religious construction and liberalist International Human Rights regime. Mainly, post 2000 judicial activism by the constitutional court has set a premise for women's rights activism by delivering a number of judgments which are generally regarded as gender-friendly. Although the judgments were immediate responses to erstwhile crises, we remark, these have contributed in shaping a contextual feminist jurisprudence for Bangladesh amidst a continuous socio-legal pressure regime and political reality⁵, especially with the presence of radical religious conservatives.⁶

In this article, we shall examine a number of celebrated judgments to check how far the court could ensure women's rights in the prism of feminist understanding of gender and society. In addition, this article will try to make an effort to categorize the judgments in light of differences of their genesis to name them with the prominent feminist ideas. The utility of doing so is evaluating the court's role and suggesting pathway about how the court can be a bit more pro-gender so that it not only can ensure the equality regime but also can contribute to reconstructing the idea of gender in the society on the face of patriarchal dominance taking the aid from feminist understandings. It is pertinent to mention that, few countries like Canada, United Kingdom, Australia, New Zealand and even India, different initiatives were taken not only to assess the judgments in feminist way, rather they even went beyond such qualitative and quantitative assessments to rewrite the judgments either partially or as a whole to make them compatible with feminist ideas.⁷ Such rewritten judgments are

² Art 28(2) reads, 'Women shall have equal rights with men in all spheres of the State and of public life'

³ 15th Amendment Act, 2011 replaced article 19(3) and included the words 'in all sphere of life'.

⁴ Center for the Study of Women in Society, Interview with Lamia Karim, Professor of Anthropology, University of Oregon (Oregon, 16 October 2009) <www.cswws.uoregon.edu> accessed 2 August 2017.

⁵ Arshi Saleem Hashmi, 'Religious Parties and Militant Groups in Bangladeshi Politics: A Case Study' in *Spotlight on Regional Issues* (Institute of Regional Studies December 2009) 20.

⁶ Jason Burke and Saad Hammadi, 'Bangladesh Simmers as Islamic Conservatives and Progressives Clash' *The Guardian* (London, 16 April 2013) <www.theguardian.com> accessed 2 August 2017.

⁷ Rosemary Hunter, 'Analysing Judgments from a Feminist Perspective' (2015) 15 (1) LIM 8.

generally sent to the judges for their kind consideration. For instance feminist activists have rewritten the judgments of *PGA v R*,⁸ *Cattanach v Melchior*,⁹ *Phillips v R*,¹⁰ *Sakshi v Union of India*¹¹ and many others under different feminist projects. Although the socio-cultural reality of most of the aforementioned countries are different than that of Bangladesh, best practices can always be followed for a better treatment regime.

2. Prominent Feminist Theories

Before evaluating the judicial decisions, it is expedient here to briefly discuss few prominent feminist theories prevalent in the contemporary and classical scholarships. Although the very notion of feminism is multicentered and undefinable¹² for its inherent differences, the core concept of feminism connotes the ultimate equality and non-discrimination between male and female. Many scholars thus think, feminist idea is a bandage on misogynist canons of western political and social philosophy.¹³ By saying so they tend to portray the urge of equality, non-discrimination and a halt of misogynist attitude. The prominent thoughts are, however, not in consensus how to ensure the core concepts of feminism in a given society.

Feminist theories not only focus on gender issues but also on sexual orientation, race, class etc. to assess how these categories intersect with the idea of gender equality.¹⁴ These theories not only have been influencing national laws but also gradually influencing the international legal regime.¹⁵ Although there remains quite a few school of thoughts, this article will only focus on these following ideas because of functional relevance.

2.1 Radical Feminism

This theory propounds that the root cause of all kind of suppression and discrimination against women is patriarchy.¹⁶ It is not the legal system or the political system that is behind such oppression rather the age-old 'patriarchal set up' has caused the historical

⁸ [2012] 245 CLR 355.

⁹ [2003] 215 CLR 1.

¹⁰ [2006] 225 CLR 303.

¹¹ [2004] AIR SC 3566; Madhumanti Mukherjee, 'Judging in the Presence of Women as Legal Persons: Feminist Alternative to the Indian Supreme Court Judgment in *Sakshi v Union of India*' (2011).

¹² Judith Grant, *Fundamental Feminism: Contesting the Core Concepts of Feminist Theory* (Routledge, Great Britain 1993)1.

¹³ *ibid.*

¹⁴ Hilarie Barnet, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Limited 1998) 197.

¹⁵ Loveday Hudson and Troy Lovers, 'Feminist Judgments in International Law' (*Volkerrechtsblog*, 24 April 2017) <www.voelkerrechtsblog.org/feminist-...-in-international-law/> accessed 2 August 2017

¹⁶ Leila E. Villaverde, *Feminist Theories and Education* (Peter Lang 2008) 6.

systematic oppression against the women. On the face of this problem the proponents of this theory demand abolition of patriarchy and traditional gender-roles. Radical feminists see different social problems from a different viewpoint. For instance, these theorists say social problem like prostitution is not a choice of women rather they are compelled to do it for different socio-economic realities.¹⁷ Although consent is present in the case of prostitution, it is generally taken by systematic oppression where women are left with no other choices.¹⁸ Thus, they see no wrong with such acts like prostitution where the women only obey the demands of male and surrender to their patriarchal dominance.¹⁹ Other form of subjugations are, according to them, originate from this patriarchal domination. Consequently, this school of thought demands abolition of patriarchy and it believes no positive or negative measure, equal treatment will ensure ultimate equality if the patriarchal society is not uprooted.

2.2 Liberal Feminism

Unlike radical feminism, this school of feminism considers gender equality as the core concept.²⁰ This movement emphasizes on the state's (legislator's) intervention in protecting political rights of women to ensure gender equality. Although the primary goal of liberal feminists is to have the equality in public sectors like equal access to education, wages, working conditions, it also emphasizes on the private sphere equality since it believes private level inequality can impede the public sphere equality movement.²¹ Since the primary reliance is on the state, this school expects the laws of a state to be equal and non-discriminatory in terms of gender and the propagators believe that with women-friendly legal environment, women will be able to flourish more than any other way out. In modern state, rule of law is regarded to be one of the pressing ideals what all the countries want to achieve. If women's right and their equality can be infused with this trend, it is expected that more tangible dividends, in general, will be accrued therefrom.

It is pertinent to mention that the ongoing International Human Rights movement is much in tune with the liberal feminist idea since the core documents try to ensure

¹⁷ Jody Freeman, 'The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent' 1990 5 (1) Berkeley Women's LJ 75.

¹⁸ Katie Beran, 'Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform' 2012 30 (1) Law & Inequality: A Journal of Theory and Practice 34.

¹⁹ Cecilia Hofmann, 'SEX: From Human Intimacy to "Sexual Labor" or Is prostitution a Human Right?' (Coalition Against Trafficking in Women-Asia Pacific, August 1997) <www.catwap.wordpress.com/resources/speeches...to-sexual-labor-or-is-prostitution-a-human-right/> accessed 4 August 2017.

²⁰ Rosemarie Tong, *Feminist Thought* (West View Press, 2010) xi.

²¹ Jone Johnson Lewis, 'Liberal Feminism: How does it differ from other feminisms?' (*Thought.Co*, 31 October 2017) <www.thoughtco.com/liberal-feminism-3529177> accessed 3 August 2017.

equality in every sphere. The leading international document on women's rights, CEDAW 1979 is an instance of liberal feminist thought.²² However, Liberal Feminism is often criticized by many scholars as they think that equal laws cannot ensure equality between male and female since they are not alike for a number of reasons.²³

2.3 Cultural Feminism

This feminist idea maintains that there remains a basic biological difference as to the personalities of men and women where men are harsher, aggressive, competitive, and dominating than women, they are different in reproductive capacity.²⁴ The proponents of this theory, however, welcomes these sort of differences and their endeavor is to get rid of the existing problem of sexism by recognizing the fact that, women have their own way and this particular way is better than that of male counterpart. This 'woman's way' includes their special qualities and different experiences i.e. caring, cooperation, and egalitarianism. They believe these qualities can improve the existing global crises including halting ongoing wars and aggression.²⁵

This school advocates for valuing the household works of women monetarily and condemns the overvaluation of male-characteristics. Moreover, Cultural feminists advocate for female sexuality to be based on equality of power and not based on controlling role of male.²⁶ It can be inferred that, the pressing difference between this theory and other theories is that it does not lean to the very differences and similarities between men and women nor does it exclude men to only advocate women's interest unlike other branches of feminism.

2.4 Governance Feminism

Janet Halley coined out the term in a bit critic way in contrast to other feminist ideas in her book 'Split Decisions' and tried to portray the reality of 'quite noticeable installation' of feminist ideas in different institutional forums and legal regime.²⁷ The proponent termed it as Governance Feminism since according to her, few feminist

²² Jo Lynn Southard, 'Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination against Women' (1996) 8 (1) Winter Pace ILR 5 <www.digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1283&context=pilr> accessed 3 August 2017.

²³ Lorraine Code (ed), *Encyclopedia of Feminist Theories* (Routledge 2000) 304.

²⁴ Neeru Tandon, *Feminism: a paradigm shift* (Atlantic Publishers 2008) 52.

²⁵ Jone Johnson Lewis, 'Cultural Feminism: What is the essence of being woman?' (*Thought Co*, 31 July 2017) <www.thoughtco.com/cultural-feminism-definition-3528996> accessed 3 August 2017.

²⁶ Verta Taylor and Leila J. Rupp, 'Women's Culture and Lesbian Feminist Activism: A Reconsideration of Cultural Feminism' (1993) 1 Autumn Signs: Journal of Women in Culture and Society 32

²⁷ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2006) 10.

activists over-act in injecting feminist ideas in governance level which at times backfires because of conflicting interests of too many diverging views among feminists. Such governance feminism is seen not only at domestic level but also in the laws and policies of international organizations.²⁸ This school, however, wants a break (not a total exodus) from feminism for a qualitative change. Janet Halley sums it up:

[W]e (or at least some of us) have to be willing to Take a Break from Feminism. Not kill it, supersede it, abandon it; immure, immolate, or bury it—merely spend some time outside it exploring theories of sexuality, inhabiting realities, and imagining political goals that do not fall within its terms.²⁹

There are few other prominent feminist ideas in legal and political scholarship. Among them Postmodern theory, Difference theory, Marxist theory are notable to mention. Since neither directly nor indirectly these theories were dealt in the judgments (we are scrutinizing in this paper which are celebrated in general) delivered by our apex courts, we have limited our discussions only to above-mentioned theories.

3.1 Feminism in Bangladesh and the Influence of it in Judicial Decisions

The history of feminist movement in Bangladesh has not a systematic and organized one rather it started from individual level and is still running through limited number of organizations and individuals. Since the literacy rate in Bangladesh has always been poor, with women literacy rate being poorer, the idea has got least possibility to be welcomed here. Although in late nineteenth and early twentieth century, the idea of feminism started growing in this area, thanks to the activities and writing of Begum Rokeya Sakhawat Hossain and Nawab Faizunnesa Chaudhurani,³⁰ it did not develop with necessary intensity unlike many other parts of the world. Through various literary movements authors like Humayun Azad, Taslima Nasreen, Sufia Kamal, Salma Sobhan and few others tried to question the patriarchal oppressions of women.³¹ In addition to personal level activism, the ongoing wave of pro-women movement is led by a number of non-governmental organizations, *inter alia*, Naripokkho, Ain O Shalish Kendra (ASK), Bangladesh Legal Aid and Services Trust (BLAST), Bangladesh National Lawyers' Association, Kormojibi Nari, Manusher Jonno Foundation, SparC and others. These organizations have been advocating women's right not only by creating awareness, rather by invoking, litigating women's right in the court of law. The

²⁸ Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 Columbia Journal of Gender and Law 98.

²⁹ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (n 27).

³⁰ Firdous Azim and Parveen Hasan, 'Construction of Gender in the Late Nineteenth and early twentieth Century in Muslim Bengal: The Writings of Nawab Faizunnesa Chaudhurani and Rokeya Sakhawat Hossain' in Leela Fernandes (ed), *Routledge Handbook of Gender in South Asia* (Routledge 2014) 28.

³¹ For instance books like '*Nari*' by Humayun Azad, '*Ka*', '*Narir Kono Desh nai*' by Taslima Nasreen etc.

practical problem encountered by these NGOs is that they have been advocating women's right to education and public role from a secular stance, where many women leaders who work in the pietist movement³² try to limit women's role to that of a 'good' chaste mother befitting the conventionally accepted religious framework, which is culturally important than assuming public roles.³³ Many scholars think that polarity between secular feminism and religiously-driven women's right has caused quite a lot of trouble for the feminist movement in Bangladesh. "Such polarities of middle-classness animated women's roles in contemporary Bangladesh, and troubled the feminist movement in Bangladesh", Professor Karim says in her interview.³⁴

Although these organizations are not advocating any particular type of feminism, their way of advocacy at times reflect their understanding and vision towards the idea of gender justice, role of women in the society and feminist underpinnings even after encountering different hurdles.³⁵ Their visions have been reflected in the public interest litigations they filed in the Supreme Court repeatedly. In most of the cases, they were successful in extracting the best possible pragmatic outcomes in prevalence of not-too-friendly adversarial legal set-up. They deserve necessary credit for guiding the court to go in a bit inquisitorial and activist way for ensuring women's access to justice and at times to deliver a number of women-friendly judgments. Despite their relentless efforts, still our courts are lagging behind many other advanced nations in incorporating necessary feminist ideas in their decisions.

Since feminist idea is being regarded as an important factor in accessing democracy and human rights, it is expected that our courts will be able to develop more befitting policies to increase the human security of women, especially when they are being deprived in their daily life by orthodox rigid interpretation of religious texts. At this backdrop judges deserve appreciation for their activism in a conservative society to come up with progressive thoughts in ensuring gender equality. Still, it is a long walk to go for them.

3.2 Areas of Exercising Feminist Ideas and Activism by Supreme Court Judges

If we consider the Post 2000 Judgments, we can easily mark them in contrast to the earlier judgments. The wave of public interest litigation has contributed to such increase in judicial decisions. The acid violence coupled with intense dowry victimization, which though still prevalent have nonetheless been curbed to a

³² Pietistic movement refers to attempts to focus on individual holiness and a consistent religious life.

³³ Interview with Lamia Karim (n 4).

³⁴ *ibid.*

³⁵ Sohela Nazneen and Maheen Sultan, 'Struggling for Survival and Autonomy: Impact of NGO-ization on women's Organizations in Bangladesh' (2009) 52(2) *Development Journal* 193-199.

noticeable extent, caused more than enough suffering for women to compel them to protest in a group.³⁶ This crude reality has set the necessity of emerging different pro-women NGOs in Bangladesh and a positive response from civil society against different menaces.³⁷ With passage of time Bangladesh has witnessed the rise of sexual harassment, custodial rape, domestic violence and other oppressions towards women with extreme magnitude. However, we tend to categorize the judgments under different genre to analyze how far they could pave the way of echoing global thoughts and movements.

Areas of judicial decisions which protected women's rights are as follows: 1. Declaring Prostitution not illegal *per se*; 2. Filling the lacuna of law relating to Sexual Harassment; 3. Declaring Fatwa violence (mostly towards women) illegal and without authority; 4. Condemning Custodial Rape and ensuring Custodial Healthcare; 5. Protection of (mostly female) Domestic Workers; 6. Ensuring proportionate and meaningful representation of women; 7. Declaring Sexual Harassment as tort and making the authority vicariously liable for failure to prevent.

Scholars think the recent judicial decisions have portrayed a discernible trend of judicial activism and a shift from the traditionally perceived biases towards males.³⁸ And it is pertinent to mention that the propensity of using International Human Rights Instruments in interpreting national legal provisions is a positive development and definitely paved for a better protection regime of human rights in Bangladesh.³⁹ We now tend to focus on the area-specific evaluation of post-2000 judgments here through a feminist prism.

3.2.1 Declaring Prostitution not illegal *per se*

The High Court Division in *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and others v Government of Bangladesh and others*⁴⁰ declared prostitution not illegal *per se* if it is not associated with other crimes. Such associated crimes can be, but not limited to, forced prostitution, kidnapping or abducting for the purpose of prostitution. Taking it as an age-old profession as the human civilization the court

³⁶ Julhas Alam, 'BD Women Protest Acid Attacks' *The Dawn* (March 09 2006) <www.dawn.com/news/182176/bd-women-protest-acid-attacks> accessed 10 August 2017.

³⁷ Habiba Zamana, 'Violence against women in Bangladesh: Issues and responses' (1999) 22 *Women's Studies International Forum* 37 <www.sciencedirect.com/science/article/pii/S0277539598000934> accessed 3 August 2017.

³⁸ Abdullah Al Faruque, *Analysis of Decisions of the Higher Judiciary on Protection of Women's Rights in Bangladesh* (National Human Rights Commission, Bangladesh 2013) 58.

³⁹ UNDP, *Mapping of Knowledge on Projects on Justice Sector Facility Development and Human Rights in Bangladesh since 2000*, (UNDP, 2015) 41.

⁴⁰ [2001] 53 DLR 1.

opined that, although socially condemned in Bangladesh and different parts of the world, it is not illegal under the law of the land.

The court in this case held that, eviction of sex-workers from two brothels of Narayanganj and sending them to vagrant home after beating and abusing violated the right to life since it deprived them of their livelihood. The court further held it illegal to throw out the prostitutes who are adults and being adult they can independently choose their profession. In this case, the court even ruled out the defence of the police department when they claimed that they evicted them with a view to rehabilitation. The court considered it as wrong since it was done without consent of the majority prostitutes. The court condemned the Government's plan of action to release them with a lump sum amount along with a sewing machine since this program rather stigmatized and played with the dignity of women. In this case it was alleged by Government side that prostitution is an illegal, unconstitutional act and Government party claimed that such eviction was a part of ongoing program to tackle health hazards in that vicinity. But the court rejected this view.

The court, however, opined that such eviction affected right to life and livelihood against the will of the sex-workers. Although the police tried to pass the liability to the owner of the house, the court condemned the actions of the police personnel for evicting the sex-workers, who had the duty to rather protect. The court asked concerned government authorities to formulate their promised rehabilitation schemes making it compatible to human dignity and urged it to be containing with educational, moral, and socio economic facilities that can discourage prostitution in the long run. However, it has always been a challenge to implement and monitor the directions in reality.⁴¹

To see in it in feminist prism, in this judgment, the author judge applied a blend of both liberal and radical thoughts. The judge categorized different kind of prostitutions where he observed that there are three kinds of sex-workers. He put the floating street sex-workers who have a link with brothel at the lowest end where in the second category he placed middle class people who carry out sex-works to supplement their meagre income and the third class being upper-middle class 'call girls' who sort of not too much dictated by need rather engaged with this sort of activities for pleasure. The court opined that the impugned sex-workers are those ill-fated ones who are the victims of the circumstance.⁴² This compassionate construction is in tune with the spirit of radical feminists who think the circumstance of prostitution is rooted in different

⁴¹ Ridwanul Hoque, 'The Inclusivity Role of the Judiciary in Bangladesh' in Nijam Ahmed (ed.), *Inclusive Governance in South Asia, Parliament, Judiciary and Civil Service* (Palgrave Macmillan 2018) 107(Forthcoming).

⁴² *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and others* (n 40) [36]

social reality and predominant patriarchal social structure. However, the court echoed liberal feminist thought when it declared that women have equal right to carry out their profession without which the constitutional protection of life and liberty becomes meaningless.

3.2.2 Filling the Lacuna of Law Relating to Sexual Harassment

In two different judgments the High Court decision has formulated a definition of sexual harassment and proposed a guideline for the legislators for their future legislation endeavors. This filling the void is regarded as an instance of using judicial activism. Although the very idea of judicial lawmaking has been criticized by many scholars,⁴³ the reality dictated the judges to come up with a prompt solution when the circumstance got huge magnitude and went beyond control. The first decision is *BNWLA v Government of Bangladesh and others*.⁴⁴ In this case, where there was no specific definition and any befitting legislative provision of sexual harassment towards women and girl-children, the court came up by formulating a guideline, which was demand of time.⁴⁵ The judge took notice of a number of sexual harassment cases in different universities and other organizations where women faced miserable problems.

The court under the power conferred in article 111 of the Constitution of Bangladesh had formulated interim guidelines until the enactment of legislation in this regard.⁴⁶ The court even applied international conventions and norms to interpret fundamental rights in absence of relevant domestic laws. By self-realizing the question of authority to do such, the judges came up with a justification and held that, although judges cannot make law directly, they can fill the void of any law for ensuring minimum standard necessary to maintain the independence of judiciary. Being empowered to do so, the court formulated a guideline where the court suggested a complaint committee structure in all educational institutions and workplaces to receive complains and to inquire into the merit of the contentions. The court after formulating a definition of sexual harassment directed how to create awareness and form public opinion against this social menace. In addition, the court guided the institutions how to take preventive actions to lessen the number of harassments.

However, in this judgment, liberal feminist thought was championed at its best.

⁴³ Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 78

⁴⁴ 14 BLC 694; 29 BLD 415

⁴⁵ Muhammad Omar Faruque, 'Combating Sexual Harassment: A Contextual Analysis of Existing Legal Mechanism' (*Dhaka Law Review*, 30 April 2015) <www.dhakalawreview.org/blog/2015/04/combating-sexual-harassment-830> accessed 4 August 2017

⁴⁶ BNWLA (n 44) 19

The liberal feminist thought welcomes this sort of laws and directions with the force of law which can contribute to equality in education and employment. The improvement of working conditions and environment is a must to attain for a meaningful participation of women in all sphere of life as enshrined in article 10 of Bangladesh Constitution. Citing the Indian case *Vishaka v State of Rajasthan and others*⁴⁷ the case formulated the definition of sexual harassment where such harassment has been regarded as a 'sex discrimination'. Viewing the very term as a form of discrimination is another instance of liberal feminist approach.

Here a noteworthy thing is that the judges only addressed the harassments which are without consent and unwelcomed with an attempt to outrage the modesty. To make any credible and successful accusation of unwelcome gesture, women need to act in so called socially acceptable 'virtuous and chaste' manner.⁴⁸ Women who does not bother conservative gender-role and defy the notion of 'chastity' or 'being virtuous' are seemingly remain outside the protection regime. A further extension of this view was remarked in a subsequent case *Nazmul Islam alias Nazu v State*,⁴⁹ where the court construed the term 'consent' very widely to held that if there is any evidence of prior relationship or sexual relationship between the complainant and defendant, it would amount to good consent and the defendant cannot be held liable.⁵⁰ There remain serious practical problem with this construction of consent when we juxtapose it with marital rape cases. In determining marital rape, a previous consent cannot be taken as a subsequent one. But in this current judgment, the approach is way too wide and makes women more vulnerable when in some point of time the complainant/victim consented or allowed them out of erstwhile love and emotion.

*BNWLA v Bangladesh and others*⁵¹ can be regarded as the sequel of the earlier *BNWLA v Bangladesh*⁵² where detailed guideline and directives were provided in respect of sexual harassment of girls and women in educational institutions and workplaces. This judgment has widened the area of sexual harassment to a great extent and it was appeared to the court necessary to adduce supplemental directives following the previous trend.

The High Court Division (hereinafter mentioned as HCD) in this case considered the seriousness of the result of 'eve teasing' and mentioned various incidents which

⁴⁷ AIR 1997 SC 3011.

⁴⁸ Chowdhury Ishrak Ahmed Siddiky, 'The Role of Courts in Combatting Sexual Harassment in Bangladesh: Judicial Activism versus Feminism?' (2014) 25 (2) Dhaka University Law Journal 107.

⁴⁹ 63 DLR (2011) 460.

⁵⁰ Shaila Alam Asha, 'Combating Sexual Harassment and Violence against Women in Bangladesh' (2015) III Jahangirnagar University Journal of Law 136.

⁵¹ [2011] 31 BLD 324.

⁵² BNWLA (n 44) 19

revealed the nasty face of our patriarchal society. To hold any act as a mere teasing or sexual harassment the role of cultural differences was also addressed in this judgment.⁵³ The main focus of the court was on the result of such teasing or harassment and the ways to contain it.⁵⁴

The weakness of the existing legal system to battle sexual harassment was also discussed. While holding that the term 'eve teasing' is not to be used anymore, some guidelines in this instant case were also given which is supposed to act supplementary to those given in *BNWLA v Bangladesh*.⁵⁵ The most noteworthy part of this judgment is that 'stalking' was also included under clause (m) within the definition of Sexual Harassment given in the previous case which is regarded to be helpful to catch those menacing persons.

Following, contacting through various mediums, entering or loitering near the place of residence or business of a female and keeping a female under surveillance etc. were held as stalking. Similar to the earlier case, in view of Article 111 of the Constitution of Bangladesh, the HCD directed that the widened definition of Sexual Harassment and guidelines in both cases together will be binding on all concerned and are to be implemented everywhere. In order to save victims or witnesses from further attack, torture or humiliation the HCD directed the incumbent Government to formulate laws for ensuring protection to witnesses, victims and to persons who came forward to resist sexual harassment and to give evidentiary value to the audio or video recorded statements of the victims or witnesses of sexual harassment so that the perpetrators can be punished solely on the basis of these. The HCD also directed for supervision by Police and District Law and Order Committee to combat the issue.

To evaluate from a feminist perspective, in addition to liberalist approach of ensuring education and employment, the HCD explained the horrific incidents through the lenses of radical feminism and asked for legal reformulation to tilt the balance while disfavoring the patriarchal setup of the society.

3.2.3 Declaring Fatwa Violence Illegal and Without Authority

In response to the alarming trend of violating women's rights by imposing extra-judicial socio-religious verdicts, popularly known as Fatwa, the High Court Division came up with a timely verdict declaring Fatwa-pronouncement without lawful authority is illegal and unconstitutional in *Bangladesh Legal Aid and Services Trust v Bangladesh*.⁵⁶ It was observed that, denying sexual advances, giving birth of a child where the father

⁵³ *ibid* 11.

⁵⁴ *ibid* 12.

⁵⁵ *ibid* 25.

⁵⁶ [2011] 63 DLR 1.

did not acknowledge that child, becoming victim of the rape, premarital relationship, even talking to a male was subjected to different cruel, inhumane torture like lashing, beating, cutting hairs, deportation and so on. The court observed that although these sort of punishments were being provided with claims of conforming to *Sharia* and other customary local laws,⁵⁷ these are not with lawful authority since the rules regarding criminal aspect of *Sharia* is not applicable under section 2 of *Shariat Application Act of 1937*. On the other hand, few issues which were the subject-matters of fatwas were already under the definition of crimes in different criminal laws. So, adjudicating them through fatwas is illegal. Other issues like talking to a man, premarital relations, having a child out of wedlock were not offences under Bangladesh laws whatsoever. Even, women could not be prosecuted as an abettor in the offence of adultery of a man under the current scheme of law.⁵⁸

Since the question of validity of issuance of Fatwa was pending then before the Appellate Division (hereinafter mentioned as AD),⁵⁹ the court accepted that, even if it is valid, it cannot be declared without competence since the concept of fatwa requires it to be declared by expert person.⁶⁰ The court was really concerned about the extra judicial punishment by implementing fatwa and the fact that many educated people are not aware of their rights and obligations under the Constitution and of the rule of law.⁶¹

However, for a quick way out, the court directed the incumbent Government to take necessary measures to overcome this situation. The court opined that, it is the duty of the Government to incorporate various type of articles and reading materials in the syllabus of School, College and University levels and particularly in Madrasas highlighting the notions of ‘Supremacy of the Constitution’, ‘Rule of law’ and discouraging the imposition of extra-judicial punishments in any form including those in the name of execution of Islamic Sharia/Fatwa.⁶²

In this famous judgment the court inclined to the liberal idea of ensuring equality through ensuring the protection of law from arbitrary and illegal punishments. By doing so, the court indirectly denounced the patriarchal social structure where the women are not seen as an equal entity rather as a product or as an inferior human being, even talking to men by whom is considered as a crime. Declaring invalid, the court also

⁵⁷ *ibid* 20.

⁵⁸ Penal Code 1860, s 497.

⁵⁹ *Mohammad Tayeeb and another v Bangladesh* [2015] 23 BLT (AD) 10.

⁶⁰ Muhammad Khalid Masud, Brinkley Messick and David S Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Harvard: Harvard University Press 1996).

⁶¹ *Bangladesh Legal Aid and Services Trust v Bangladesh* (n 56) 19.

⁶² *ibid* 20.

championed the radical feminist idea of hitting the very root of social structure.

However, in another case, *Mohammad Tayeeb and another v Bangladesh* (Fatwa Judgment), the apex court declared fatwa as nothing more than mere opinion, thus held it as advisory and not binding to anybody.⁶³ The court held that fatwa can never be used as a coercive instrument using force.⁶⁴ By underscoring the importance of treating women with dignity as a sign of civilization the court condemned such whimsical practices and ordered the fatwa to not be declared by whoever wants to do so.

The court discussed the issue in detail and visualized the very fact that, every now and then, people, especially women, are being tortured severely as a result of fatwa delivered by personalities who are honored by local people out of religious sentiments. In this appeal against the judgment of HCD in a *suo moto* rule, AD had the chance to deliver its opinion and the majority of the bench decided that a fatwa, if issued, may only be accepted voluntarily by the person upon whom it issued but coercion or undue influence in any form to pressure an individual to accept a fatwa is forbidden.⁶⁵

“Mufti” or any person who may declare fatwa is not any authority to give a legal decision and such person is bound by the laws of the land.⁶⁶ The court further held that, no person can pronounce a fatwa that violates or affects the rights, reputation or dignity of any person protected by the laws of the land. Moreover, no punishment, including physical or mental violence, may be imposed or inflicted on any person in pursuance of a fatwa. The court only allowed properly educated person to declare fatwa⁶⁷ and if any fatwa is issued violating the above-mentioned restrictions, it will amount to contempt of court and the offenders will be punished accordingly. No special class of people was held eligible to declare fatwa and a blanket ban on fatwa was removed by this decision.

However, the AD was reiterating that the opinion by any person who is outside the traditional legal regime is not liable to be executed and such opinion can be expressed under the guaranteed fundamental right of freedom of expression with reasonable restrictions. To reduce the execution of fatwa, the court underscored the importance of intervention of state. Such inclination of the AD subtly paves the way of liberal feminism in the judicial activism as the liberal feminism always asks for gender friendly legislation because through this the legal system will be able to provide buttress for equality and non-discrimination for women. It is a bit of a surprise that the patriarchal face of the society was out of discussion as patriarchy is probably the strongest reason

⁶³ [2015] 23 BLT (AD) 10.

⁶⁴ *ibid* 119.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

of women being suffered because of execution of fatwa in such manner. This indicates that the AD was not really into radical feminism.

3.3.4 Condemning Custodial Rape and Ensuring Custodial Healthcare

Custodial Rape has been a common phenomenon in Bangladesh. In response to this vicious problem, the courts time and again have provided with exemplary punishments.⁶⁸ The offence is also punishable in Bangladesh under Section 9(5) of the *Prevention of Oppression against Women and Children Act 2000*. Under the purview of this act, people who are duty-bound to protect and under whom the arrested remain detained can be punished with imprisonments and fines, though not of a long period.⁶⁹ To make law enforcing agencies more accountable, the Law commission has recommended to shift the burden of proof to the accused in case of custodial injury or death.⁷⁰ Even after such protection regime, it is very tough to halt these incidents.

In one case of this genre, *Advocate Ms. Salma Ali v Bangladesh & Others*,⁷¹ a female detenu was charged for murder and kept in police custody pending her trial. Although the murder took place more than 5 years before the judgment, the charge was framed in a substantial delay of about 2 years. However, in 2013, it came into public knowledge that the detenu is pregnant when a local newspaper published the news about it. Learned Advocate and the petitioner of the case submitted that, since she was in police custody for more than 5 years, it is very probable that the law enforcing agency detaining her is responsible for her pregnancy. Among other prayers, the petitioner prayed before the court to order the respective authority to place her before the court in person, to direct a humanely treatment of the detenu under the protection enunciated as the fundamental rights in the constitution and to detect to find the responsible person who impregnated her.

In its judgment, the court ordered the concerned authority to ensure proper care which the detenu required. However, since the case had been under trial in the Court of Session Judge, Shariatpur, the HCD left the issue of bail to the consideration of that court. However, the court did not ponder over the issue of real perpetrator behind this pregnancy.

In this judgment, the court tried to ensure immediate care of the victim rather than digging out the causes behind it. Although the case has been celebrated by women's rights activists for directing a guideline of safety, the case did not even touch the point

⁶⁸ Nitya Ramakrishnan, *In Custody: Law, Impunity and Prisoner Abuse in South Asia* (SAGE Publications 2013) xxviii.

⁶⁹ Nari-o-Shishu Nirjaton Domon Ain 2000, s 9(5).

⁷⁰ Bangladesh Law Commission, 'Proposal for insertion of s 114 A in the Evidence Act, 1872' (1998) 6.

⁷¹ Writ Petition No. 5313 of 2013.

of finding out the real perpetrators to immediately arrest them. Here, although the court was prone to ensure a favorable condition for the pregnant women but missed a great opportunity of formulating a direction how the cases of pregnancy should be dealt in the jails countrywide and they missed the chance to formulate a jurisprudence of 'absolute liability of law enforcing agency' in such cases.

The court's order to bring the detenu to the court and ensure necessary health care and protection is a liberal approach while the court should have condemned the male subjugation towards women even when they are detained under their lawful custody.

3.2.5 Protection of Domestic Workers

At present total number of domestic workers in Bangladesh is about 2 million and 83 per cent of them are female.⁷² Such huge amount of women is contributing to the development of our economy helping us in home and by allowing their employers more opportunity to work. But agony is they are subjected to considerable violence by their employers and enjoy least possible legal protection. After a long-time advocacy of Domestic Workers Rights Network (DWRN) and other organizations, the cabinet had approved the Domestic Help Protection and Welfare Policy in 2016.⁷³

Behind the incorporation of this policy regime was there a judgment in the case of *BNWLA v Bangladesh*.⁷⁴ Although this decision is not exclusively for women, the judgment has great significance in the journey of women's rights in Bangladesh in the reality that the major part (almost 82%⁷⁵) of total domestic workers are women. In this judgment, the court opined about the necessity of adding 'domestic workers' under the purview of the definition of 'worker' laid in the *Labour Act 2006*⁷⁶ since the contributions of these domestic workers have not been recognized. The crude reality is that they do not have any definite work period, right to safe working environment and any definite rule as to holidays, termination and non-payment of salary.

It has been remarked that many female workers cannot but engage in domestic service to avoid being persecuted by hostile family members, to avoid forced prostitution, begging and other kind of persecutions and victimizations.⁷⁷ The court

⁷² Nasiba Khan, 'Sad State of Domestic Workers in Bangladesh' *The Independent* (21 March 2016) <www.theindependentbd.com/printversion/details/37912> accessed 3 August 2017.

⁷³ Fayeka Zabeen Siddiqua, 'Maid in Bangladesh' *The Daily Star* (May 13 2016) <www.the-daily-star.net/star-weekend/spotlight/maid-bangladesh-1222807> accessed 3 August 2017.

⁷⁴ [2011] 31 BLD 265.

⁷⁵ Bangladesh Institute of Labour Studies, 'Domestic Workers' Rights Network Bangladesh (DWRN), Activities and Achievement Report (Period: December 2006- June 2011)' <www.bilsbd.org/wp-content/uploads/2016/03/DWRN-Annual-Report-2006-2011.pdf> accessed 24 August 2017.

⁷⁶ Labour Act 2006, s 1(4)(o).

⁷⁷ BNWLA (n 76) 19.

significantly shed light on importance of not allowing girl children in the domestic labour since they become targets of early marriage and, being illiterate mothers, beget illiterate children which again stokes the poverty cycle.⁷⁸ The court however directed compulsory primary education, vocational training, where appropriate, registration of workers with a stipulation as to working hours for the domestic workers.⁷⁹ Moreover, they have emphasized on maintaining domestic workers' registration following the trend of India and Indonesia and other countries.⁸⁰

In such a way the court echoed liberal feminist idea of ensuring an environment so that women can engage in working opportunities without discrimination. Although the court directed few much needed welfare measure for the domestic workers, it did not categorically suggested any provisions of female in particular. For instance, we are still lagging behind from the modern trend since we are not even thinking about the special measures of women labourers during their menstrual cycle. The court did not even ponder over the idea how male are dominating women with their control over private properties taking the advantage of capitalist economic structure and compelling them to work inhumanely.

3.2.6 Ensuring Proportionate and Meaningful Representation of Women

The constitution of Bangladesh has ensured a proportionate⁸¹ and meaningful participation and representation of women in every spheres of life.⁸² Amidst such constitutional provisions, women are still lagging behind their counterparts in different sectors. Although three leading political figures including the Prime Ministers and Opposition Leaders from 1991 till date are women, Bangladesh has still been facing numerous challenges of ensuring such participations, which is a mysterious conundrum.⁸³ In last two general elections only 6% and 5.4% women got elected directly⁸⁴ and 50 seats were reserved for indirect appointment as a member of parliament.⁸⁵ Not only in the parliament but in every sphere of life women are being less-represented. When it comes to cheap labour, the labour of women are being exploited over the years leaving little room of exercising leadership and engaging in

⁷⁸ *ibid* 33.

⁷⁹ *ibid* 41.

⁸⁰ *ibid* 26.

⁸¹ The Constitution of People's Republic of Bangladesh, art 65(3).

⁸² *ibid*, art 19 read with art 29.

⁸³ Hasna Jashimuddin Moudud, 'Women's Leadership in Asia' in Karen O'Connor (ed), *Gender and Women's Leadership: A Reference Handbook* (SAGE 2010) 385.

⁸⁴ USAID, *Women's Reserved Seats in Bangladesh: A Systematic Analysis of Meaningful Representation* (IFES June 2016) 6 <www.ifes.org/sites/default/files/2016_ifes_womens_reserved_seats_in_bangladesh_a_systemic_analysis_of_meaningful_representation.pdf> accessed 03 August 2017

⁸⁵ Constitution of People's Republic of Bangladesh, 1972, art 65(3).

decision-making process.

To ensure equal participation in decision making process the overall environment altogether should be amiable towards women.

In a couple of cases, the higher courts shed light on this very issue. In *Advocate Md. Salauddin Dolon v Bangladesh and others*⁸⁶ the court condemned an incident of uttering culturally derogatory remarks like 'Prostitute' towards a female teacher in an open meeting by Upazilla Education Officer (UEO) which was declared by the court as sexually colored and discriminatory. The victim was a four time 'Best Teacher of the District Award' winner. In that meeting the accused UEO directed all female teachers to wear headscarves in schools. After protest by fifty female teachers, who were present in the meeting, the UEO had put such remarks. Although the court regarded it as sexually colored and discriminatory, it did not take any steps against the Upazilla Education Officer as the victim herself accepted unqualified apology of the UEO.

After going through articles 28(2) and (4), 29, 39 of the Constitution of Bangladesh the HCD affirmed the equality of opportunity in respect of employment, not to be discriminated in respect of employment on the ground of sex and equal rights for all in all spheres of state and public life and in its dicta court mentioned that, "Freedom of expression ranges from the articulation of words and images to action and lifestyle choices, including choices around one's manner of dress and behavior."⁸⁷

HCD has agreed with the fact that there have been attempts by private persons and extremist political organizations to impose a dress code upon women but no finger was pointed at patriarchy which is an indication of not focusing on radical feminist ideas. While walking through the path of liberal feminism, the HCD opined that the guidelines by the HCD in *BNWLA v Bangladesh*⁸⁸ would have the force of law and Ministry of Education was directed to follow these guidelines in all educational institutions both in private and in public sector. The hope for women friendly laws to be prepared by legislature which will ensure safety, equality and dignity still continues to resonate. It has already been mentioned that the judiciary has tried to fill the lacuna of the legal system while relying upon international Human Rights Law instruments and this case is a perfect reflection of liberal feminist thought. But the court did not shed light on the very motive behind uttering such culturally heinous remarks. It is the patriarchal mindset that stirred the Upazila Education Officer to put these comments. May be it is because the apology was made by him to the victim.

⁸⁶ [2011] 63 DLR 80.

⁸⁷ *ibid* 88.

⁸⁸ [2009] 29 BLD 415.

In another decision of *Farida Akhter and others v Bangladesh*,⁸⁹ the court opined that, in a society where women participation is way too insignificant in the public sphere of life, provision postulated in the Constitution for accelerating participation of women certainly works as an upside for the women. Bangladesh has aimed for such acceleration and provisions for reserved seat for women and through a gradual increasing, have now come to fifty seats.⁹⁰ These members of parliament are selected by the three hundred elected members of the parliament through single transferable vote based on proportionate representation.

The number of reserved seats were increased to forty five by the fourteenth amendment in 2004 where these members of these seats were to be elected by the three hundred elected members on the basis of proportionate representation by single transferable vote and Act No. 30 of 2004 being *Jatiya Sangsad (Sanrakhita Mahila Ashan) Nirbachan Ain, 2004* was passed which provided the modality, methodologies and procedures of election of members for such reserved seats. The constitutionality of such reservation and procedure of election through the aforementioned act were challenged in three writ petitions and the AD dealt with these issues in this single judgment.

It was contended that such reservation violates some fundamental rights and will not result in equal treatment in accordance with law under Article 27 of the Constitution for the women who have not joined any political party but want to be elected in the reserved seats. The AD did not focus on the issue of discrimination between women and admitted the disadvantageous position of women in our society and denied the contention that such reservation is violative of the principle of equality before law or protection of equal law.⁹¹ Affirming that different people need different treatment, such reservation was held to be valid according to the theme of Article 28(4) of the Constitution to put reserved seats for backward section of society. It was also asserted that reservation of seats was put there by the founding fathers in the constitution from the commencement of the constitution and basic structure of the Constitution was not violated.

It is easily noticeable that the AD continued not focusing on the issue of contesting the reserved seat by a woman who does not belong to a political party. The apex court while dealing with the constitutionality of Act No. 30 of 2004 was repeatedly appreciating the fact that by this impugned act all the political parties, *jote (alliance)* and independent members of the Parliament have been given chance to elect women members of the reserved seats proportionally and held the act to be within the tenets

⁸⁹ [200] 11 MLR (AD) 237.

⁹⁰ Constitution of People's Republic of Bangladesh, 1972, art 65(3).

⁹¹ *Farida Akhter and Others* (n 91) 26.

of Constitution. The court was focusing on the fact that previously only the majority party had the right to elect members of the reserved seats.⁹²

Pro-women stance of the founding fathers paved the way to an increasing number of directly elected Member of Parliament. This endeavor is tantamount to ensuring a progressive women-empowerment-regime that can set a trajectory of relenting patriarchal dominion by the name of affirmative action. Radical elements, thus, was embedded from the commencement of constitution through provision of reservation of seats for women and the court went with the flow by axing the evil root of the society with appropriate force in the present judgment. Thus it can be labelled as a curious mix of both liberal and radical feminist ideas where in the one hand the judge tried to wave the flag of women participation high in parliament and in other hand condemned the patriarchal construction of society which was apparently the sole motive behind such objection as to the constitutional amendment.

3.2.7 Declaring Sexual Harassment as Tort and Making the Authority Vicariously Liable for Failure to Prevent

The recent developments in the field of sexual harassment appear to consider it as a tort where in the past nowhere in the criminal legislations or in the non-criminal paradigm this menace was addressed. After considerable activism by the civil society and women's rights pressure groups the court eventually had come up with a timely and innovative decision in the case of *British American Tobacco v Shamsun Nahar*.⁹³ In this judgment, the apex court held that a person can be liable for tort as well and damages may be claimed against him for such wrongdoing. Even if an organization or establishment fails to ensure the prevention of sexual harassment and bullying to a woman can be held liable under tort.⁹⁴

The court also opined that victims of such offence can avail compensatory damages for the physical and mental abuse and suffering and the court took it seriously to declare such infliction of psychological pressure as a good case for criminalizing. Even it is not required the direct involvement of the supervisor or agent rather their abstinence or acquiescence will be sufficient to qualify as an offence. In this trendsetting judgment the AD has set a new height in protection of the women in workplaces, who have been contributing to the national economy of Bangladesh.

We see an inclination to liberal feminist idea in this judgment, where the court tried its best to ensure a women-friendly working environment with the protection of

⁹² *ibid* 69.

⁹³ [2014] 66 DLR (AD) 80.

⁹⁴ *ibid* 13.

law in absence of sufficient women-friendly laws those could provide them with necessary legal protection, sense of trust and equality of opportunity. Although the constitution of Bangladesh mandated such equality in its article 29, (which reads that there shall be equality of opportunity for citizens in terms of employment and in the service of this Republic and no one shall, on grounds only, *inter alia*, sex be discriminated) hardly any legislation took the burden of ensuring such working condition with necessary legal set-up. The liberal feminists argue that the laws should be in an orientation where the women will enjoy equality which can contribute to amelioration of their current state of discrimination. To leave it to the hand of lawmakers has a political implication and depends on a plethora of social and political realities. Thus, this decision of the apex court is undoubtedly a milestone in tune with liberal feminist idea.

4. Critical Evaluation of the Role of the Court in Championing Feminist Ideas

If we observe the general trend of the two divisions of Bangladesh Supreme Court in the light of above-discussed judgments, we observe an inclination towards liberal feminist idea of trying to ensure equality through legislations, judicial decisions in order to create an environment favorable to women. Despite a manifest attempt of ensuring 'equality', the court failed to address the difference of the sexes as well as could not portray the cultural difference which at times needed a different treatment. In most of the decisions, an apparent inclination to CEDAW and other Human Rights documents is quite visible. In absence of a general teleological approach to gender justice, different judges came up with their own interpretations of gender and gender justice. It is inevitable that judges would stick to their personal observations and prejudices but the way judges constructed gender and treated these issues seemed to be a bit orthodox and limited, at times, for a number of reasons. Although the judges responded to notable causes and came up with liberal feminist idea, even this approach is, however, outdated in the countries who have gone way more advanced in terms of women empowerment. But as a trend of most other developing countries, we are still passing the era of 'liberal feminism' in terms of women's right and protection.⁹⁵

However, in a very limited scale, the courts, mostly in its *obiters*, resonated the radical feminist idea and questioned the patriarchal structure of the society. Although they admitted the menaces to be out of patriarchal mindset of the society but hardly came up with befitting alternatives those can be viable options of uprooting patriarchal arrangements.

⁹⁵ Chowdhury Ishrak Ahmed Siddiky (n 48).

For instance, the court in *Aftabuddin v State*,⁹⁶ evaluated a very different aspect of the status of women unlike their conventional approaches. It was subtly pointed out how slavery or proprietorship of women made their way into the legal system of Bangladesh. The court vehemently criticized Section 199 of the *Code of Criminal Procedure 1898*.⁹⁷ This particular provision deals with the offences of adultery and enticing or taking away or detaining with criminal intent a married woman. Under this section no court can take cognizance for these offences without a complaint by the husband or on his (husband's) behalf. Such provision heavily claws the dignity of women and brings their status to the level of something close to property.⁹⁸ The court asserted that through this provision women are deprived of dignity and fundamental rights of being treated equally and getting equal protection of law. The court feared of sexual harassment even by the husband himself in a sense that as the wife cannot go to court for these offences, the husband might let wife become prey to these offences for attaining his personal benefit.

However, neither Cultural Feminist approach nor any other school of feminist thought got any place in the thoughts of our judges, whatsoever.

5. Recommendations

After going through a number of judgments and case studies, we recommend that the judges should take more initiatives, generate ideas and innovations for ensuring gender justice widely in Bangladesh. Since Bangladesh has a pledge to ameliorate women's conditions, which is also a Sustainable Development Goal⁹⁹ set by United Nations to be achieved immediately, judiciary should contribute from their perspective as much they can by infusing befitting feminist ideas in their decisions where applicable. In addition to mere ensuring equality, the judges should be a bit prone to digging out the problem to find out the real menaces and prejudices behind. In such a way, the court should apply radical feminism more frequent and often than clinging to mere liberal feminist thought.

It is a debated issue in global feminist diaspora that whether there should be any specific school of thought to be followed or not.¹⁰⁰ Irrespective of that argument, the judges should bear in mind the theories, the underpinnings and historical experiences

⁹⁶ [2009] 63 DLR 1, 235.

⁹⁷ Shaila Alam Asha (n 50) 128.

⁹⁸ Amala Dasarathi, 'Section 497 and 498 of the IPC on adultery laws are dusty Victorian remnants' *The Firstpost* (India, 1 July 2016).

⁹⁹ Goal No 5 encompasses achieving gender equality and empowering all women and girls. <www.undp.org/content/undp.../sustainable-development-goals.html> accessed 3 August 2017.

¹⁰⁰ Rosemary Hunter (n 7).

behind mounting these discourses to better diagnose specific problems to reach a suitable decision that can ensure gender-justice.

It is important to understand that, one might debate over which feminist school of thought is more friendly to Bangladesh's need but the general idea of abstinence or taking a break from feminist splitting ideas, as propagated by Governance Feminism, is not pertinent for Bangladesh's case since the feminist thought is in its incubator in Bangladesh. It will be useful to take precautions for avoiding the perils as contemplated by Halley¹⁰¹ against rapid installation of the ideas in every governance tools overnight which may backfire on the long history (yet nugatory) of women movement in Bangladesh and might destroy the so-far-achieved progresses.

Although, judge's role and activism can mobilize civil society actors and activists to strengthen the voices seeking reform¹⁰² but gender litigations need to be used with precision as overwhelming infusion of gender everywhere has the inherent risk of producing opposite results. The Supreme Court of Nepal has asserted that CEDAW can be used only in instances of discrimination against women and cannot be cited as an example in expanding other rights and guarantees under the Nepalese constitution.¹⁰³ This decision has placed a clog on pro-women activism in Nepal. We find this negative development to be a response to a rapid installation of feminist idea. There lies the necessity of judicial restraint at times. The restraint is not in sense of restraining from offering equal treatment, rather restraining from overtly leaning to much radical ideas overnight. In doing so, judges should design the judgments in a way that question the patriarchal set-up and tend to demolish it gradually and steadily, even with an unhurried speed.

There remains a role of pressure groups. Internationally we have seen a wave of feminist decoding and reconstructing the judgments by interested groups.¹⁰⁴ Even a relatively new approach of re-writing the judgment partly or wholly has paved the way of amelioration of women's vulnerability in many parts of the world. Feminist movement of Bangladesh needs to take the charge to do so for setting up the standard in this jurisdiction following the footprint of Canada, US, India and many other countries where they can work as pressure group to the judiciary.¹⁰⁵ Much research has been conducted worldwide regarding how far and to what extent feminist theories can

¹⁰¹ Janet Halley (n 27).

¹⁰² Sapna Pradhan Malla, 'Upholding Women's Right through Litigation' (Commemorating 30 years of CEDAW, New York, 1-12 March 2010) <www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Sapana%20Pradhan%20Malla%20paper.pdf> accessed 10 August 2017.

¹⁰³ *ibid.*

¹⁰⁴ Loveday Hudson and Troy Lovers (n 15).

¹⁰⁵ Madhumanti Mukherjee (n 11).

be incorporated into judicial reasoning. We should follow this trend of critically evaluating the judgments qualitatively and quantitatively, suggesting judges how they can infuse the thoughts for a better protection regime of women.

Overall, the judgments discussed above have contributed to a better women-friendly environment countrywide with a positive shift in women's education, participation and employment. It is expected that by active role of the Court, Civil Society and Pressure Groups, the situation might be improved to a greater extent. We think, repeated pedagogic pro-feminist judgments with necessary guidelines and directions can pave the way of ensuring a sensible society where the people will feel the urge of gender justice. Since ensuring gender-justice following Top-to-Bottom approach contains a huge risk of backfiring, we think it should work in a Bottom-Up manner where the people will understand the cause at first instance. After sensitizing them with it, they will be able to welcome and celebrate the progressive judgments in a passage of time.

6. Concluding Remarks

This article was an attempt to understand the attitude of the judges and to examine how far they are dictated by feminist ideas and theories. After the discussions made above, we find the judges of the Supreme Court were not dictated by any specific feminist underpinnings rather motivated by their own understanding of the gradually developing International Human Rights norms. Since the very fabric of International Human Rights law is composed with liberal feminist idea¹⁰⁶, Supreme Court judges could not but resonate with the liberal approach mostly. Although in a very limited scale, judges at times also tried to discuss the very points radical feminists often argues on. However, the judges did not question the patriarchal set-up for guiding us solutions rather the tone they used in their judgments was helpless surrender to patriarchy. Even if it is argued that, such liberal crawling ultimately will pave the way of entrenching radical objects, such assumption has tremendously been banged by radical theorists. Besides liberal activism, the court should come up with initiatives, ideas and innovations that can help uproot the elements of patriarchy within a passage of time. By doing so, hugely discussed cultural feminist ideas and different theories can be considered in appropriate cases. However, at the same time, the court should apply its judicial restraint when it can comprehend backfire in a given sensitive cultural reality for ensuring a steady development.

¹⁰⁶ Jo Lynn Southard (n 22).