IMPLEMENTING WOMEN'S EQUAL RIGHT TO EMPLOYMENT IN BANGLADESH: A COMPARATIVE JUDICIAL APPROACH WITH SPECIAL REFERENCE TO INDIA, CANADA AND AUSTRALIA

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ABSTRACT

Women's equal right to employment is a constitutionally entrenched fundamental right and is repeatedly affirmed in several pieces of labour legislation in Bangladesh. However, any legal initiative to advance women sounds hollow as long as it fails to redress the deeply embedded specific phenomena of a traditional culture such as that of Bangladesh, that has eventually made the exercise of 'equality' quite difficult and, on some occasions, impracticable for them. The situation is further exacerbated by the absence of any progressive judicial approach to combat women's unique concerns in employment. Experiences, however, in foreign jurisdictions demonstrate a global judicial consensus on equality that has led to a substantial transformation from the traditional standard of 'equality' and forced activist legal reforms to accommodate those concerns in employment.[1] This article investigates the judicial approach to women's employment in the public life in Bangladesh as compared to that of a number of countries, including India, and recommends the reconceptualisation of the ways in which the judiciary should handle discrimination issues in the workplace to meet women's contemporary values and concerns.

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[1] Refers to substantial equality, 'meaning equality of opportunity and of result', encompasses a broad "remedial component" to mitigate the effects of women's past incapacities by obligating the government to develop strategies appropriate to their particular experiences. See for details C. L'Heureux-Dube, 'Feminist Justice, at Home and Abroad: It Takes a Vision: The Constitutionalization of Equality in Canada' (2002) 14 *Yale Journal and Law Feminism* 363, 368.

I INTRODUCTION

Women's equal right to employment is a constitutionally entrenched fundamental right and is repeatedly affirmed in a series of laws in Bangladesh. In addition, a quota system has been endorsed in existing legislation to compensate for women's underprivileged status in the public service. This has helped women in Bangladesh gain increased access to positions in employment more than ever before. Despite this, the percentage of women in high-ranking positions in the public sector is still below 9%, and the existing provisions of 'equality of employment' fail to respond to this practical situation. The de jure (legal, 'formal' as I call it) equality as enshrined in the *Constitution of Bangladesh,* while it aims to ensure equality for the equals in the public service, overlooks women's traditional disadvantages in socio-economic opportunities that virtually incapacitate them in regard to competing on an equal footing with men to attain jobs. As the Supreme Court of India maintained, '[equality] of opportunity for unequals can only mean aggravation of inequality'.[2] Neither does this formal approach[3] to 'equality' recognise the need for redressing those disadvantages to produce women's factual equality.

Precedents across many nations illustrate how legislative and judicial efforts have made a significant departure from the traditional concept of 'equality' and developed a substantive approach[4] to accommodate women's particular experiences in the workplace.[5] A substantive approach seeks to improve women's position in employment by removing their socio-economic disabilities, by restructuring workplaces and by obligating employers to eliminate all forms of discrimination in employment.[6] It also requires the court to move forward the law (from its

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[2] *Kerala v Thomas* (1976) 1 SCR 906, 933.

[3] It presupposes an equal ability of men and women and claims for their identical treatment in enjoying all rights. This approach, however, does not recognise the same rights for all individuals but only for equals, 'similarly situated individuals', eg, same ranking employees in a particular job that is very unlikely to promote the already disadvantaged groups in society. See M. J. Frug, 'A Symposium on Feminist Critical Legal Studies and Postmodernism: Part One: A Diversity of Influence' (1992) 26 *New England Law Review* 665, 667; R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996 SAGE Publications: London) 177.

[4] L'Heureux-Dube, above n 1, 368.

[5] See, eg, Canadian Charter of Rights and Freedoms 1982, s 15; Constitution of the Republic of South Africa 1996, s 44.

[6] J. Hucker, 'Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality' (1997) 19 *Human Rights Quarterly* 547, 560; *Alberta Human Rights Commission v Central Alberta Dairy Pool* (Canada) [1990] SCR 489, 495; S. A. Law, 'Rethinking Sex and the Constitution' (1984) 132 *University of Pennsylvania Law*

cognitive meaning) as far as possible to provide favourable remedies to the disadvantaged groups.[7] I argued elsewhere[8]how formal equality proved ineffective in dealing with women's practical needs and perspectives and how law's continued tolerance of some traditional perceptions about women's roles reinforces their subordination in employment in Bangladesh. This article, therefore, predominantly focuses on the judicial approach to women's employment rights in the public life, arguing that despite a few attempts at progressive transformation in recent years,[9] Bangladesh's judiciary still adheres to the literal approach to interpreting laws and has failed to deliver any dynamic precedent in the last 40years to address women's contemporary concerns in the workplace. The paper claims that the judiciary owes an affirmative obligation to pursue a dynamic-cum-broad approach to eradicate stereotypical prejudices against women through an analysis of a leading judgement on women's equal opportunity in employment in Bangladesh as compared to that in a number of foreign jurisdictions, especially of India, given its similar constitutional and legal context and socio-cultural commonalities. Although it is not the purpose of this article to portray a comprehensive picture of those foreign experiences, such references may provide a strong basis for changes in Bangladesh.

This research has drawn on my personal investigations that I carried out among NGOs and in different courts in the capital and a regional city of Bangladesh where I collected cases on women's employment and relevant materials from both primary and secondary legal resources. The following discussion begins by briefly outlining the socio-cultural and legal context of

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Review 955, 955; A. York, 'The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1), (1996) 54 *University of Toronto Faculty of Law Review* 327, 328; L'Heureux-Dube, above n 1, 368.

[7] A. Begum, 'Judicial Activism v Judicial Restraint: Bangladesh's Experience with Women's Rights with Reference to the Indian Supreme Court' (2005) 14 *Journal of Judicial Administration* (Australia) 220, 220-221.

[8] See, generally, A. Begum, 'Equality of Employment in Bangladesh: A Search for the Substantive Approach to Meet the Exceptional Experience of Women in the Contemporary Workplace' (2005) 47 *Journal of the Indian Law Institute* 326, 326–50; A. Begum, 'Politics in Bangladesh: Need for a Reconceptualisation of the Politico-Legal Approach to Mitigate Women's Disadvantaged Positions in the Parliament' (2009) 44 *Journal of Asian and African Studies* (UK) 171, 171-198; A. Begum, 'Women's Participation in Union Parishad: A Quest for a Compassionate Legal Approach in Bangladesh from an International Perspective' (accepted for publication in *South Asia: Journal of South Asian Studies (Australia)*).

[9] The Supreme Court (High Court Division) of Bangladesh has marked an important advancement for individual rights by addressing sexual harassment in the workplace and environmental issues through public interest litigation. See, for example, *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others*, Writ Petition No. 5916 of 2008;*M Farooque v Bangladesh* (1996) 48 DLR438; *M Farooque v Bangladesh* (1997) BLD 1, 33 where the Supreme Court has expounded the right to life as enshrined in Articles 31 and 33 of the *Constitution* to encompass the right to live, inter alia, free from pollution of air and water. See also, *Nazma Ferdous v National Laboratories Ltd* (1999) PW (*Payment of Wages Act 1936*) Case No 102/99.

Bangladesh to provide a background to the problem. Section III focuses on the judicial approach to dealing with a number of cases on women's employment in Bangladesh. Section IV examines ways the judiciary of other jurisdictions has endeavoured to interpret laws and provide remedies in favour of women, while section V presents a conclusion.

II SOCIO-CULTURAL AND LEGAL CONTEXT IN BANGLADESH

Bangladesh is a parliamentary democracy of 150 million citizens of whom 50% are women.[10] Traditionally, the country has been run along the lines of a patriarchal,[11] patrilineal and patrilocal[12] social system which, as elsewhere in the world, has promoted an unequal power relation between men and women, a rigid division of labour, and separate roles for the women. Society's excessive allegiance to those values, combined with poverty, ignorance and the lack of education have engendered women's subordination over the decades.[13]

Despite these social institutions and values, however, some important initiatives have been undertaken since independence in 1971 to improve the status of women. These include: a series of constitutional provisions guaranteeing equal opportunity in the public life; the right to freedom from discrimination and equal protection of law;[14] and special privileges under an affirmative action plan to enhance their participation in the public life.[15] A number of special

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[10] 'Bangladesh' <http://www.infoplease.com>; US Department of State, *Country Reports 2007*<http://www.state.gov>.

[11] Patriarchy is a concept, a socially established process through which men in general gain control over women – see A. E. Taslitz, 'Patriarchal Stories 1: Cultural Rape Narratives in the Court Room' (1996) S*outhern California Review of Law and Women's Studies* 5, 393–5.

[12] These consider the son the potential supporter of the parents in old age and their successor and a symbol of the family prestige and heredity: see Begum (2009), above n 8, 175–6.

[13] A. Begum, 'Rape: A Deprivation of Women's Rights in Bangladesh' (2004) *Asia- Pacific Journal on Human Rights and the Law* (Netherlands) 5, 29–40.

[14] See, for details, *Constitution of the People's Republic of Bangladesh 1972*, Articles 27–8, Articles 9–10, Articles 28(2)–(4).

[15] These are framed as enforceable fundamental rights under Chapter III of the *Constitution*. Article 29(3), for example, provides that '[nothing] in this article shall prevent the State from:
(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;
(b) giving effect to any law which makes provision for reserving appointments … for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.'
Consequently, these provisions have been used to, inter alia, waiving tuition fees for female students up to the 12th grade, providing reserved seats in the parliament and local Council and introducing non-formal institutions

laws such the *Dowry Prohibition Act1980*, the *Cruelty to Women (Deterrent Punishment) Ordinance 1983* and the *Women and Children Repression (Special Provisions) Act 2000* have also been enacted to address with cases of repression and violence against women.

Despite these laws, the overall record of women's rights in Bangladesh is very disappointing and often reflects disrespect for the rule of law. Patriarchal tradition remains a powerful force; discrimination based on gender is deeply rooted and a striking inequality in accessing employment opportunities is the leading factor depriving women of enjoyment of their de jure equality.[16]

Given the situation, judicial progressive intervention is not only desirable but also must be seen as inevitable in order to dismantle discrimination against underprivileged women. The following section examines the role of the judiciary in dealing with employment rights of women in Bangladesh as compared to other jurisdictions.

III JUDICIAL ENFORCEMENT OF WOMEN'S EMPLOYMENT RIGHTS IN BANGLADESH

The High Court Division (HCD) of the Supreme Court (SC), under its writ jurisdiction, is empowered to enforce equal rights to employment in the public life guaranteed by the Constitution.[17] The HCD also grants remedies to different employment grievances by allowing public interest litigation.[18] The Civil Courts are primarily responsible for dealing with industrial disputes and employment rights in the public life. The Labour Court (LC)[19] also has limited

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exclusively for women. See Bangladesh Statement (54th session of the Commission on the Status of Women, New York, 5 March 2010) <http://www.un.org/womenwatch/daw/>.

[16] See generally Begum, above n 13, 1–48; Begum 2005, above n 7, 227.

[17] Article 102(1), of the *Constitution*, for example, provides that '[the] High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution.' The fundamental rights provisions include equal employment opportunity and special affirmative measures to improve women status. See above n 14; above n 15.

[18] Above n 9.

[19] The Labour Court (a tribunal in practice) is empowered to adjudicate and determine an industrial dispute of the private organisation under *Bangladesh Labour Act 2006* (the 2006 Act). The 2006 Act provides that 'Labour court shall for the purpose of adjudicating and determining any matter or issue or dispute under this Act be deemed to be a civil court and shall have the same powers as are vested in such court under the code of civil procedure.' While in

jurisdiction over public service.[20] This section, however, only highlights a number of decisions of the Labour Court (LC) and the SC for the two fundamental reasons: there has been a dearth of reported cases on women's employment in Bangladesh; and the decisions of the civil courts are not reported.

Access to the decisions of the LC has been a problem in undertaking an in-depth study of the issue. After conducting a three-month personal investigation to collect the decisions of the LC in Rajshahi (a Division of Bangladesh), only two cases involving women employed in the public sphere were found. A slightly improved situation prevails in Dhaka, the capital city of Bangladesh, where a number of NGOs began to lodge public interest litigation in favour of women workers of the public and private sphere. For example, the Bangladesh Legal Aid and Services Trust (BLAST), a leading NGO in Bangladesh, filed a total of 71 cases with regard to women's illegal dismissal, payment of wages and maternity benefits,[21] yet only two decided cases of a similar nature on women employees in the public sphere were collected from the LC of Dhaka.

The *Rouhson Case* in Rajshahi LC involved challenges to the illegal and discriminatory official order of the Bangladesh Sericulture Research and Training Institute that forced her to resign

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dealing with offences, it can exercise the same power as of the court of a Magistrate of the First Class … and of the Court of Session (highest criminal court in the District) for the purpose of imposing penalty. An appeal against the decision of the Labour Court lies directly with the Labour Appellate Tribunal. See *Bangladesh Labour Act 2006*, ss 215-218.

[20] Section 1 of Bangladesh Labour Court 2006 states:
(3) [this] Act shall not apply to-
(a) Offices of or under the Government;
...
(d) ... except, for the purposes of chapters XII, (Workers Compensation for Injury by Accident) XIII (Trade Union and Industrial Relations) and XIV (Disputes, Labour Court, Labour Appellate Tribunal, Legal Proceedings, etc) workers employed by the-
(i) Railway Department
...
(iv) Public works Department
...
(k) Workers employed in an establishment mentioned in clauses (b), (c) (d), (e), (f), (g) ...'

[21] This information was collected by telephonic communication with Ms R. Sultana, the Legal Director of the BLAST: see A. Begum, *Protection of Women's Rights in Bangladesh: A Legal Study in an International and Comparative Perspective* (PhD thesis, University of Wollongong, 2005) 160.

from her former job and be re-employed in a lower post.[22] In the second case, Ms Maloti received similar treatment from the Electricity Development Board for whom she had been working as a cleaner.[23] In both cases, the LC of Rajshahi was concerned with the issue of whether such acts violated women's right to employment as guaranteed by the law and upon examination of the issue it granted a favourable remedy to the two women by reinstating them in their former positions.[24] These decisions certainly reflect the LC's sincere commitment to remedy unfair practices in the workplace and send a positive message to women's current movement for freedom from discrimination in employment.

Nevertheless, the LC failed to condemn such discriminatory actions of the two public establishments and to take into account their hostile attitudes towards those underprivileged women which essentially help sustain stereotypical prejudices in the workplace. Neither did the LC address broader issues such as the dynamics of discrimination and its adverse impact on women, nor did it redress their emotional injuries so that future discrimination against women could be eliminated from or at least be reduced in the workplace.

In particular, the decisions in two other LC cases at Dhaka — in which two women were illegally retrenched without notice and without any reason being given for their dismissal — display the court's restrictive approach to resolving employment claims. In both cases, the LC of Dhaka granted partial compensation in regards to their payment of wages but did not grant any order for restoring their employment.[25] By failing to reinstate those women in their positions, the LC not only unduly 'extinguished' their legitimate rights, but also undermined a range of domestic and international human rights laws designed to eliminate all forms of unjust treatment

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[22] See Mrs Rouhson Akhtar v Director, Bangladesh Sericulture Research and Training Institute, Rajshahi (1991) IRO No 74/91 Labour Court, Rajshahi (unreported).
[23] *Ms Maloti Khatun v Electricity Development Board* (1999) ELA No 12/99, Labour Court, Rajshahi (unreported).
[24] Ibid; *Mrs Rouhson Akhtar v Director, Bangladesh Sericulture Research and Training Institute, Rajshahi* p(1991) IRO No 74/91 Labour Court, Rajshahi (unreported).
[25] See *Nazma Ferdous v National Laboratories Ltd* (1999) Case No-102/99 PW (*Payment of Wages Act 1936*), 2nd Labour Court, Dhaka; *Ms Ruba v National Laboratories Ltd* (1999) PW Case No-101/99, 2nd Labour Court, Dhaka (unreported cases).

in employment.[26] Inevitably, the consequences of this reinforce discriminatory practices against women in workplace by encouraging employers' unreceptive attitudes and unlawful actions.

One of the few cases on employment rights of women before the Supreme Court (SC) of Bangladesh was *Parveen v Bangladesh Biman Corporation* (the Corporation).[27] The case concerned the constitutional legality of the *Biman Corporation Employees (Service) Regulation 1979* that reduced the age of retirement of women from the Corporation. The formal approach to equality excessively dominated the SC's decision in this case.[28] According to the facts of the case, Parveen joined the Corporation as a stewardess in 1981. In 1995, a new Regulation 11 was promulgated, the *Biman Corporation Employees (Service) Regulation 1979*, which reduced the age of retirement of the flight stewardess to 35 from 57 but for stewards the retirement age was fixed at 45 years. The Corporation contended that the business of the Biman (Airbus) is competitive and 'the stewardesses are appointed to obtain maximum service for the Biman which has to be obtained from young and smart stewardesses … with the growing of age of the stewardesses [women attendants] are not as efficient … as their smartness with growing in age is lost.'[29] The Corporation, however, did not provide any evidence in support of its claims that only women's inefficiency and 'lack of smartness' increased with age, nor that their 'non-youngness' and 'lack of smartness' (as compared to that of men) with the increased age have adversely affected its profitability and other gains such as reputation. The underlying concern of the Corporation, therefore, reflects that the job is *barred* to the 'non-young' women, that is, those generally assumed to have children and domestic responsibilities.

Arguably, in Bangladesh as elsewhere in the world, in terms of appointment to various public and private positions of employment, there has been a common attitude among employers that considers 'working mothers' as 'less cost effective' compared to men and other women

[26] J. Mertus, et al, *Local Action Global Change* (1999, UNIFEM and the Center for Women's Global Leadership) 42.
[27] *Parveen v Bangladesh Biman Corporation* (1996) 48 DLR, 132–36.
[28] Ibid, 133–36.
[29] Ibid, 134.

candidates because of fear of extra costs (such as maternity leave) associated with them.[30] Unfortunately, none of these issues were dealt with by the SC.

The SC's approach was limited to only two issues: (i) whether Regulation 11 that reduced the age limit from 57 to 35 years had been made without lawful authority; and (ii) whether it violated Article 28 of the Constitution, which is about the right to freedom from discrimination on the grounds of, inter alia, gender. Drawing upon these issues, the SC chose to adhere to the 'similarly situated test' by placing exclusive emphasis on 'fixing an equal age' for Parveen and her male colleagues of similar ranks in the Corporation for retirement. It held that the Regulation 11 'has made a sharp discrimination between the persons rendering the similar service in violation of Article 28 [and deprived the petitioner from remaining] in service until expiry of age of 57 years'.[31] Such an emphasis, while demonstrating the Court's credible approach to equality in employment, fails to resolve some obvious tenets that have damaging and exclusive consequences for women**.** First, whether 'losing smartness' with the age is unique to women? Are the physical attributes of male stewards above that assumption? Even if this were true, should it be morally and legally justified to exclude women (as a group, regardless of individual capacity) from employment at an earlier age on that basis, or whether there is any effective but less discriminatory way of ensuring Corporation's profitability and other gains?

In particular, the SC obscured the necessity to determine and remedy more fundamental issues: whether the Corporation's inaccurate assumptions (since no evidence has been put forward by the Corporation) about women's ability to work originated from their biological 'specialness' or from the cultural arrangements in which they stand; and whether such an assumption is compatible with the objectives of 'equality' or the affirmative measure as guaranteed by the Constitution. Every effort to eliminate discrimination, however, should take into account hidden

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[30] See, eg, L. M. Finley, 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate' (1986) 86 *Columbia Law Review* 1118, 1120; J. Mertus, 'Human Rights of Women in Central and Eastern Europe' (1998) 6 *American University Journal of Gender, Social Policy and the Law* 369, 372; J. C. Williams, 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797, 797–811; C. J. Ogletree and R. de Silva-de Alwis, 'When Gender Differences Become a Trap: The Impact of China's Labor Law on Women' (2002) 14 *Yale Journal of Law and Feminism* 69, 69-96. See also 'Court Orders Air India To Reinstate Air Hostess', *Thaindian News* (online). 19 September 2010 <http://www.thaindian.com/newsportal/business/court-orders-air-india-to-reinstate-air-hostess_100430846.html>.

[31] *Parveen v Bangladesh Biman Corporation* (1996) 48 DLR, 136.

factors which are not readily apparent but have a powerful influence on maintaining this negative assumption with its devastating consequences for women. There has been general agreement among legal academics and feminist scholars that such an assumption has originated from culture rather than from nature. Freedman, for example, argued that 'particular human characteristics have no inherent social significance, and no social arrangements concerning sex differences are "natural" rather than culturally determined.'[32] And the validity of this classification needs to be judged through reasoned analysis instead of through the 'traditional, often inaccurate, assumptions about the proper roles of men and women'.[33]

If that assumption is the result of culture, the question then becomes one of whether and how the Court should respond to it. In Bangladesh, there has been a social acceptance of treating women as a group subordinate to men,[34] a strongly embedded phenomenon which is also evident from the Corporation's behaviour towards women but there is no indication in the judgment that the Court addressed or even recognised the issue**.** More fundamentally, the Court failed to evaluate the fact that Corporation's degrading belief that only *women's* ageing and their resulting 'lack of smartness' caused 'an early decline in their ability to work' demonstrated the influence of the existing dominant discriminatory assumptions about women's work. Neither did it feel an obligation to foster a culture which condemns all forms of discrimination and provides due respect for female employees essential for the enjoyment of all related rights.

Thus, by failing to examine the ways in which the negative ideas are deeply embedded in the Corporation's policies, the SC seemed to support the maintenance of such a social pattern that creates and perpetuates women's subordination in employment. Second, and more importantly, when the Corporation placed special emphasis on women's physical characteristics and assumingly their commensurate social roles as a justification for adopting such a discriminatory policy, the SC failed to properly deal with the issue. The cultural perception that the 'mother is the exclusive child carer' has a unique and damaging impact on women's access to and ability to

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[32] A. E. Freedman, 'Sex Equality, Sex Differences, and the Supreme Court' (1983) 92 *Yale Law Journal* 913, 945.
[33] Ibid, 950.
[34] For example, see generally Begum (2004), above n 13, 1–48; Begum, 'Dower Under Muslim Law: Principles and Practices in Bangladesh' (1996) 1 *Chittagong University Studies* at 114–24; A Begum, 'Rights of Women under Muslim Law: Principles and Practice in Bangladesh' (1999) 1 *Islamic University Studies*, 19–37.

remain in employment. This particular perception not only restricts women's employability by placing almost exclusive child care responsibility on them but also enhances 'men only prospects' in employment by relieving them of this responsibility.[35] The SC ignored the need to rectify this attitude and, by failing to do so, it also undermined women's dual and significant contributions to society, which deserve to be valued and accommodated in the workplace.[36] At one level, women are to bear the primary responsibility for child care and maintenance of the home (domestic chores), on account of which they are able to afford less time, compared to men, for their career development, a situation which ultimately affects their pay scales, promotions and the like. At another level, they suffer different forms of discrimination on account of those same responsibilities. The SC failed both to recognise these special phenomena attendant upon women and to uphold any strong stand by referring to international precedents (except for one case from India) in favour of women.

Nevertheless, the 'biological and societal uniqueness' of women in itself should no longer rationalise discriminatory practices against women, especially when they are burdened with such an important role as child rearing and caring for the family and at the same time are penalised for that. Rather, there are compelling academic arguments[37] that the traditional standard of social values needs to be reviewed to accommodate their specific experiences in employment. Here, the core issue is not with the responsibility of 'motherhood' in itself but rather how the culture works as a powerful means to disproportionately affect women and how it reduces a woman's employability by increasing employers' eagerness for males due to women carrying out that responsibility.

Thus, rather than analysing the broad spectrum of the socio-cultural particularities that shape and give significance to women's work, the SC adopted a very narrow approach and compensated the possibility of eliminating discriminatory elements in employment. The decision did not incorporate either the idea of combining family and work, now a quite old concept worldwide in the workplace regulation.

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[35] Mertus, above n 30, 372.
[36] How the Supreme Court of Canada recognised women's contribution to both worlds (public and private) and provided favourable remedies to a woman: see, eg, *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219.
[37] See Finley, above n 30; Mertus, above n 30; Williams, above n 30; Ogletree, above n 30.

Certainly, all of these omissions appear to demonstrate the Court's poor understanding of the contemporary approach to trial which promotes the way the judiciary should handle discriminatory cases against women, this is addressed shortly.

With globalisation and technological advances, the core pursuit of individual rights as well as national and international expectations has entrusted the judiciary with an affirmative obligation to deliver justice that accommodates the needs of different groups, and especially the target group (if any) for whom the particular law has been made.[38] The realisation of these objectives may require the court to develop a new approach through judicial activism even by going beyond formal provisions to suit the particular situation.[39] There are, however, strong arguments that such an action tends to insert an extra-legal element into their (judges) decisions and it 'may become a threat if it is not comprised of judges of the highest integrity'.[40] While such a contention needs to be valued by ensuring a cautious application of this activist approach, an analysis of the source of power of the Court and the role assigned to it by the Constitution suggests that the Court is entrusted with an obligation to balance the conflicting interests of different groups.[41]This obligation also warrants that the court should remain alive to the needs and challenges of contemporary society while it preserves fundamental values of the rule of law.[42]

The SC of Bangladesh marked an important advancement towards women protection from sexual harassment in 2009. In a leading judgment, the SC issued a set of guidelines to address sexual harassment in the workplace in which, inter alia, the authorities concerned were directed

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[38] In interpreting and applying laws, the judiciary should have two basic objectives: (i) to interpret the law in a way that reflects its object and to be cautious about the adverse impact of the law on a particular group; and (11) to deliver justice to accommodate the needs of different groups, and especially the target group for whom the particular law has been made. See, Begum, above n 7, 220; *Andrew v Law Society of British Columbia* [1989] 1 SCR 143 at 166-170.

[39] *R v Turpin* [1989] 1 SCR 1296, 13330–34.

[40] Aung Htoo, 'Seeking Judicial Power: With a Special Focus on Burma's Judiciary' (Occasional Paper No. 20, University of Hong Kong, 2011) 18. For details also see Begum, above n 7, 221-229.

41 Anand AS, 'Justice ND Krishna Rao Memorial Lecture Protection of Human Rights – Judicial Obligation or Judicial Activism' (1997) 7 *Supreme Court Cases Journal* 11, [9].

42 A. Byrnes, et al (ed), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (1997, Commonwealth Secretariat: London) 26. In *Iyer v Justice AM Bhattacharjee* [1995] 5 SCC 457, the Court observed that 'the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario'. See also M. N. Rao, 'Judicial Activism' (1997) 8 *Supreme Court Cases Journal* 1, 6; *Unnikrishnan v State of A P* [1993] 1 SCC 645.

to form a five-member harassment complaint committee headed by a woman at every workplace and institution to investigate allegations of harassment of women and to take action against the accused persons.[43] This judgment apart, the SC neither developed any concept of a substantive approach to redress the dilemmas of the 'equality provision' of the Constitution nor imposed any compensatory obligation on the government[44] in the last 40 years to overcome women's meagre status and different forms of exploitation in workplace. The constitutional affirmative measure and the women's quota for the public service (10% of the first grade positions and 15% for other grades of employment) hint substantive equality but in practice its application is far too remote and has been a subject of intense controversy.[45] In addition, most of the discriminatory incidents have gone legally unchallenged for a number of reasons, including different socio-cultural setbacks as mentioned.

Nonetheless, these issues have not yet attracted judicial attention; there is no precedent in Bangladesh to suggest that the Court has issued any *suo moto* directives for the government or the employer to adopt measures in conformity with laws to eliminate discriminatory practices against women in employment. Yet, an application of this approach becomes imperative when the State acknowledges an obligation through its provision of special legislative or administrative initiatives to deal with women's rights.[46]

The following discussion shows how the equality jurisprudence has evolved and been reconstructed in judicial interpretation across nations to eliminate systematic discrimination and

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[43] See, for details, *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others*, Writ Petition No. 5916 of 2008.

[44] It has become a common practice in India to hold the government liable for compensating the victims of discrimination and other allegations. See for example, above n 2; *Saheli v Commissioner of Police, Delhi* (1990) AIR SC 513.

[45] For example, the quota remains unfilled and educated women fail to obtain jobs as per quota. M. K. Akter, 'Bangladesh Has Offered Higher Education For Women But Not For Jobs', *The Daily Star* (22 December 2002); Begum, above n 21, 143.

[46] A number of laws and provisions and government policies in Bangladesh are designed to promote women's participation in public life which include, *The Constitution*, above n 14, Articles 28-29, *Labour Court Act 2006*, s 50; *Local Government Act 2009*, which provides reserved seats for women members of the Union Parishad (administrative unit in the local government) Committee and its different sub-committees; several government notifications on the role of women members that offer one-third of positions of chairperson of different Standing and Project Implementation Committees to women members and entitle them to participate in development activities. See for example, Begum (2010), above n 8; 'Government Orders' <http://www.dwatch-bd.org>; 'Developments in the Law – Legal Responses to Domestic Violence: IV. New State and Federal Responses to Domestic Violence (1993) 106 *Harvard Law Review* 1528, 1557–8.

to enhance women's participation in employment. As part of that process, protective legislation[47] that effectively works to limit women's employability by 'giving way' to men's prospects for employment, has been struck down by the judiciary.[48] This new jurisprudence facilitates understanding about how the formal approach to 'equality' works to the disadvantage of women by limiting their job opportunities and how employers' stereotypical presumption about women's work should be resolved. These initiatives could be an important reference for addressing discrimination in employment against women in Bangladesh.

IV COMPARATIVE JUDICIAL DECISIONS REFLECTING SUBSTANTIVE APPROACH

Before advancing with this discussion, it is, however, important to acknowledge that despite progressive attempts by the judiciary discrimination against women in employment still persists worldwide. Nevertheless, it is evident that awareness of discrimination and for the need for legal sanctions to dismantle discrimination has been raised higher than ever before and judicial activism does have a significant contribution to achieve this end. This activist task has not only been limited to implementing the stated and inherent objectives of laws to eliminate discrimination in employment, but also extends to remedy the dynamics of discrimination. Pursuant thereto, the judiciary has provided very authoritative and expansive application of the substantive equality to the detection and remedy of discriminatory practices in the workplace.

Bangladesh and India share a similar socio-economic and cultural heritage, based largely on the British legal and judicial systems. Nevertheless, a noticeable gap exists between the general

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[47] Protective legislation refers to those laws which regulate the terms and conditions of labour for women. These laws aim to, inter alia, facilitate women's parental responsibilities and protect their motherhood capacity. See, for detail, Mertus, above n 26, 8; J. L. Southard, 'Protection of Women's Human Rights under the *Convention on the Elimination of All Forms of Discrimination Against Women*' (1996) 8 *Pace International Law Review* 1, 55–6; see also B. A. Babcock, et al, *Sex Discrimination and The Law – Causes and Remedies* (1975, Little, Brown and Company: Boston) 19.

[48] Protective legislation, aims to, inter alia, facilitate women's parental responsibilities and protect their motherhood capacities, restricts women's work at some specific sectors, eg, women are not allowed to work at mining factories and hilly areas. Several studies claimed that maternity benefits reduce women's employability by increasing employers' eagerness for males because of extra cost associated with the benefit. See, eg, Williams, above n 30, 797–811, 805–11; R. J. Franklin, 'Jefferson's Daughters: America's Ambiguity Towards Equal Pay for Women' (2001) 11 *Southern California Review of Law and Women's Studies* 233, 247; Finley, above n 30, 1120; Ogletree, above n 30, 69-96.

approaches of the Bangladeshi and Indian courts to interpreting and applying laws that grant remedies to underprivileged groups. The Supreme Court (SC) of India has been renowned for its authoritative guidelines and liberal approach to preserving and developing rights.[49]More than six decades have passed, since then the SC of India recognised an obligation to facilitate remedies for women in exceptional circumstances by recommending modification to the existing legal and trial systems,[50] and in a number of cases, it made a significant move away from the traditional formal approach to equality. In the 1950s, for example, a decision considered formal equality out-dated and ineffective in ensuring women's factual equality where the Court observed that equal guarantees, subject to the rational relation to the object of law, may invoke different standards for different classes of peoples.[51]

A leading case on women's employment was *Nargeesh*, in which the Court declared a service regulation of Air India that made pregnancy a bar to the continuance in service as an airhostess unconstitutional.[52] The Court held that such a bar is tantamount to obstructing the ordinary course of human nature and was 'not only a callous and cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution.'[53] In *Labour Union*, a similar case in terms of the nature of claims, the Court noted that 'it is too late in the day now to stress the absolute freedom of an employer to impose any condition which he likes on labour.'[54] That time

[49] The Supreme Court, for example, has granted remedies to victims of sexual harassment in the absence of domestic law and forced the government to enact a law on sexual harassment; accepted and expounded public interest litigation to compensate the victim; holding the government liable for breach of public trust; invoked and enforced fundamental principles of state policies for long to grant socio-economic rights which are not enforceable under the *Constitution of India*. See *Vishaka v Rajastan* (1997) AIR SC 3011-3017. In *Saheli v Commissioner of Police, Delhi* (1990) AIR SC 513, 516, the Court held that it is well settled now that the State is responsible for the torturous acts of its employees and ordered the State to pay RS75,000 (US$1,647) to the mother of deceased victim Naresh within a period of four weeks from the date of judgment. See also *Rudul Sha v Bihar* (1983)AIR SC 1086, 1089. According to Rwezaura, 'India's public interest litigation has achieved an identity of its own in the jurisprudence of the subcontinent. This new jurisprudence provides a meaningful escape from the procedural strictures of the common law': see Byrnes, above n 42, 135; *Unnikrishnan v Andhra Pradesh* [1993]1 SCC 645; *Iyer v Justice AM Bhattacharjee* [1995] 5 SCC 457; Grandle maintains that 'the expansive meaning of fundamental rights in India [is] due to the comprehensive approach of the Indian Supreme Court': See Grandle BB, 'Choosing to Help or to Advance Their Agenda: A Comparative Look at How the Supreme Courts of India and the United States Approach Violence Against Women' (2003) 24 Women's Rights Law Reporter 83, 83. See also Begum, above n 7, 229-230.

[50] See for detail, Begum, above n 7, 234.

[51] *Budhan Choudhry v State of Bihar* (1955) AIR SC 191, cited in M. C. Nussbaum, 'International Human Rights Law in Practice: India: Implementing Sex Equality Through Law' (2001) 2 *Chicago Journal of International Law* 35, 47.

[52] See generally *Air India v Nargeesh Mirza* (1981) AIR SC 1829, 1829–1840.

[53] Ibid, 1831; *Mackinon Macenzie v Audrey D' Costa* (India) (1987) SC 1281, 1281–1289.

[54] *Bombay Labour Union v International Franchies Pvt* (1966) AIR SC 942, 944.

had clearly passed, and employers are subject to the law and the courts. In a recent judgment, the Bombay High Court directed Air India to reinstate (with complete back wages) an air hostess, who was dismissed twenty years ago.[55]

In *Indra Sawhney*, the Court compensated a woman by mandating the State to undertake a practical measure such as developing educational institutions to overcome the unequal position of the handicapped women in employment.[56] The Court's recognition of women's socio-economic disadvantages demonstrates its strong commitment to the achievement of their factual equality by removing traditional discriminatory barriers to employment. In another decision, the Court urged the government to resort to compensatory State action aiming to make people equal in real life, people who are 'unequal in their wealth, education or social environment'.[57] At a time when the women's movement for 'equality' is gaining momentum, perhaps the most compelling impetus is the acknowledgement by the higher judiciary of the need for the State to develop appropriate measures to achieve the result.

Consistent with the Indian approach, it has been an established judicial practice across nations to invoke different practical methods to remedy women's unique concerns in employment. The SC of Canada, for example, developed a different mode for measuring the impact of a neutral requirement of Canadian National Railway (CNA) on women. The Court, in *Canadian National Railway*, placed emphasis on the issue of whether undertaking a compulsory 'strength-test', a factually neutral precondition to attain a job in the CNA, had discriminatory effect on women because of their inherent physical characteristics. By unveiling an unequal and disparate link between CNA's 'legal equal' requirement and women's practical-biological characteristics, the Court declared that the employment policy to be discriminatory and mandated the CNA to

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[55] Air hostess Jatav had been working with the Air India since 1983. She had applied for paid leave from 1 June 1988 to 1 July 1988 which she extended up to October 1990, and she delivered two children during the period. 'She was dismissed from service in December 1992, on the grounds that she had remained absent without leave for over 10 days.' See for details, 'Court Orders Air India To Reinstate Air Hostess', above n 30.

[56] *Indra Sawhney v Union of India*, [36], [39], cited in R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996, SAGE Publications: London) 180.

[57] *Kerala v Thomas* (1976) 1 SCR 906, 514.

introduce a special employment program to enhance women's positions in blue-collar jobs until their representation reaches the target level.[58]

In attempts to restrict an inappropriate application of 'equality' in employment in the public and private life, the SC of Canada advanced the two-fold standard and bona fide occupational requirement (BFOR) under the Charter and a range of Human Rights Codes.[59] The two-fold standard requires the court, in applying legislation in the workplace, 'to decide at the outset into which of two categories the case falls: (i) 'direct discrimination', where the standard is discriminatory on its face; or (ii) 'adverse effect discrimination', where the facially neutral stand discriminates in effect' and accordingly grant remedies.[60] The BFOR places the burden of proof of discrimination in employment on the employer. The three-step test of BFOR requires an employer to prove his/her prima facie non-discriminatory practice by showing that: (i) the adopted measure is rationally connected with the purpose of the job; (ii) the particular measure was taken with honest and good faith and was necessary for the fulfilment of the legitimate purpose of the work; (iii) without such measure it was impossible to accommodate individual employees, and to avoid undue hardship to the employer.[61]

Even though organisations' liabilities and government's special/affirmative measures are qualified by certain strict restrictions,[62] and have been intensely debated and contested since their introduction, they have made a significant contribution to reducing discrimination and intolerant attitudes in the workplace.[63]

To enhance women's participation in employment, the Court also developed an employment equity program which is designed to work in three ways.[64] The first test/action imposes

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[58] *Action Travail des Femmes v Canadian National Railway* (CNR) [1987] 1 SCR 1114, 1124-26, 1143-46.
[59] See generally Hucker, above n 6, 547–70.
[60] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] SCCDJ LEXIS 67, 16; see also Hucker, above n 6, 553.
[61] Ibid.
[62] Employers' liabilities and government's affirmative measures are subject to, for example, bona fide occupational qualification (BFOQ) as mentioned and 'compelling needs and specific intended outcomes' respectively. BFOQ signifies that the employers may escape their liabilities in disparate impact cases if they prove that their employment practices that result in discrimination is 'job related' and 'consistent with business necessity'.
[63] See, for example, *Adarand Constructor v Pena* (1995) 515 U.S. 200.
[64] *Action Travail des Femmes v Canadian National Railway* (CNR) [1987] 1 SCR 1114.

mandatory employment equity on the employer to recruit women and minimise the possibility of future discrimination. The second test aims to change the negative attitudes of employers regarding women's ability to work and to consider that women are capable of performing modern jobs beyond their traditional roles. The third test suggests creating a 'critical mass' through recruiting more women. The last mode 'will eliminate the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women'.[65]

Similarly, the substantive approach has been a dominant model in numerous judicial decisions of the European Court of Justice (ECJ) for redressing women's disadvantaged experiences in employment.[66] The ECJ, for example, in *Badeck,* was concerned with issues of whether regional rules giving priority to female candidates in areas of public service where they are underrepresented derogate from the principle of equal treatment.[67] The respondent contended that there was no hard and fast rule to give priority to female candidates; rather the law put emphasis on the 'best-qualified and most suitable candidate … [which] does not prevent priority being given to a male candidate if he is the most suitable for the post to be filled.'[68] Rejecting that contention, the ECJ maintained:

> … it is an obligation on the authorities to adopt a women's advancement plan to correct a situation of underrepresentation in particular sectors and grades in a career group and which imposes a requirement to encourage the recruitment and promote the careers of female employees.[69]

More importantly, the ECJ, in *Kalanke,* developed three core concepts of affirmative action to combat women's insignificant positions in public life. The first model aims to provide career guidance and to improve vocational training. The second model seeks to combine and create a favourable balance between the family and professional life and a better distribution of those

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[65] Ibid, 1143–44.
[66] See, eg, *Enderby v Frenchay Health Authority and Another* [1993] IRLR 591; *Commission of the European Communities v Kingdom of Denmark* (EU) (1985) ECJ CELEX LEXIS 6633; *Commission of the European Communities v French Republic* (EU) (1988) ECJ CELEX LEXIS 6958. The ECJ, in *Enderby,* invoked this mode in considering the difference in pay between two jobs of equal value, one was performed mostly by women and another predominantly by men. The Court favoured women, observing that '… the pay negotiations had not been conducted with the deliberate intention of treating women less favourably, but … the employer's pay policy indirectly discriminated against women in that the outcome to pay negotiations had an adverse effect upon women and was not justifiable': *Enderby v Frenchay Health Authority and Another* [1993] IRLR 591, [5].
[67] *Badeck and Others* [2000] All ER (EC) 289, [1].
[68] Ibid, [37].
[69] Ibid, [38].

responsibilities. The third action takes on a compensatory nature by providing preferential treatment to the disadvantaged group.[70] An affirmative action was also well explained in *Marscall*, where a female teacher was given preference in being employed over a male teacher of equal qualification. The Court made an objective assessment of women's specific phenomenon and observed:

> [I]t appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt the careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.[71]

Australia may be another leading example in adopting this approach to equality in employment, receiving authoritative recognition and long being given expression in numerous judicial decisions. In *Australian Postal Commission* (APC), the Court of Appeal, for example, examined the adverse impact of APC's neutral policies on two women where they were denied permanent appointments due to their lack of medical fitness — a specified bodyweight measured by height and sex being specified in APC's policy.[72] The Court favoured them by observing that the requirements may fairly measure the skills of all candidates but operate to disqualify women because of their inherent physical characteristics.[73] In *Municipal Officers' Association of Australia & Anor*, the Equal Opportunity Commission maintained that '[formal] equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life'.[74]

Although some of the above judicial findings are largely the consequence of recently enacted legislation, the courts of many nations have developed new ideas and tests to combat

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[70] *Kalanke v Bremen* [1996] All ER (EC) 66, [9].
[71] *Marscall v Land Nordrhein-Westfalen* [1997] All ER (EC) 865, [29]-[30].
[72] *Dao v Australian Postal Commission* [1987] 162 CLR 317, 318.
[73] Ibid. See also *Australian Iron and Steel Pty Ltd v Banovic* [1989] 168 CLR 165, 166, 205–208.
[74] *Municipal Officers' Association of Australia & Anor* (1991) EOC (92-344) 78,399. See also, *Australian Journalists Association* (1988) EOC (92-224) 77,124. The Commission observed that the under-representation of women in the AJA itself suggests that something more than the mere equal opportunity is required to attain the equal result of participation in its affairs: *Australian Journalists Association* (1988) EOC (92-224), 77, 126.

discrimination in employment. For example, the United States Supreme Court, in a series of decisions, treated pregnancy as any other disability or condition that can result in a loss for the employer and granted women qualified rights to reinstatement following childbirth,[75] even though there are arguments on issues as to whether and how far pregnancy could be equated with disability since the ability of women to get pregnant is an ability additional to those of men, rather than a loss of ability.[76]

Most importantly, 'rude behaviour' in workplaces in numerous jurisdictions has become acknowledged as actionable and compensable discrimination,[77] and there are convincing arguments for treating it with similar legal weight to incidents of sexual harassment since such conduct is frequently directed at an individual based on the basis of gender.[78] Based on these developments, productive and sophisticated approaches have also been employed by the courts to evaluate gender-specific claims and offer proper remedies. Many United States courts, for example, used the 'reasonable woman' standard instead of 'reasonable person' in dealing with gender specific claims such as sexual harassment.[79]

In addition, it has become a common judicial culture worldwide to invoke international provisions to remedy women's exceptional experiences, including sexual harassment in the workplace.[80] For example, in a leading judgment in 1997, the SC of India, in the absence of domestic legislation, relied on the provisions of the *Convention on the Elimination of All Forms*

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[75] See, eg, *California Federal Savings et al v Guerra* 479 US 272 (1987); International Union, United Automobile et al v Johnson Controls, INC 499 US 187 (1991).

[76] C A Littleton, 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279, 1306. '… pregnancy is not an illness. It is a normal often planned, part of people's lives. Giving women maternity leave should not be linked to whether or not employers have good policies for sick employees. The workplace must acknowledge that women have children rather than suggest that they are to forego childbearing or just cope with the difficulties during non-working hours.' See, for detail, S. J. Kenney, 'Pregnancy Discrimination: Toward Substantive Equality' (1995) 10 *Wisconsin Women's Law Journal* 351, 362.

[77] Canada, for example, provides remedies for psychological harassment in workplace. Psychological harassment includes, inter alia, '… hostile or unwanted conduct, verbal comments, actions or gestures, that [affect] an employee's dignity … and results in a harmful work environment for the employee.' See *An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions 2002*, Ch 80, s 81.18.

[78] M Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review*, 113–4.

[79] See, eg, *Ellison v Brady* (1991) 924 F 2d 872, even though *Ellison's* endorsement caused controversy and was rejected in many cases such as in *Harris v Forklift Systems* 510 U.S. 17; *Oncale v Sundowner* (1998) 523 US 75.

[80] See, eg, *Aldridge v Booth* (1988) (Australia) 80 ALR 1; *Southern v Dept of Education Employment & Training* (1993) (Australia) EOC (92-491) 79,534, 79534–36.

of Discrimination Against Women (CEDAW) in remedying sexual harassment in the workplace.[81] It provided a set of guidelines emphasising employers' duties to eliminate harassment, including the ruling regarding the creation of a workplace-based Complainants Committee to be headed by a woman. To avoid any undue influence of employers, the Court also recommended involving a third party, an NGO or other body that is familiar with the issue, on the Committee.[82]

Inevitably, the above judicial decisions in other jurisdictions reflect the impression that the efficiency of the judiciary is imperative to realise women's rights. The dearth of employment cases on women in Bangladesh, despite the violation of laws, therefore warrants strong judicial intervention to develop an anti-discrimination culture in employment. However, given a gulf of inconsistency between developed and developing countries in regard to socio-economic realities, one may doubt whether the standard of the former should be applied to the latter. Yet this argument may not be relevant to the liberal interpretation of laws which inherently aim to protect a vulnerable group in the community.[83] Moreover, this argument can logically be blurred by reference to numerous judicial decisions of their neighbouring country, India, where a largely similar situation prevails. The SC of India, in a range of decisions, directed the central government to take immediate steps to provide the benefits and advantages of law in favour of employees.[84] Most significantly, the SC, on many occasions, even granted socio-economic rights which are not enforceable under the *Constitution of India* by elaborating the *Directive of State Principles.*[85]

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[81] *Vishaka v Rajastan*(1997) AIR SC 3011-3017. See also *Longwe v International Hotel* [1993], decision of the High Court of Zambia, 4 *Law Reports of the Commonwealth* 221. In this case, the Zambian High Court, relying on CEDAW declared the policy of the International Hotel discriminatory against women. The hotel policy had been denying women's entry to the hotel unless males accompanied them, which was not applicable to men. See also *Ephrohim v Pastory* [1990], decision of the High Court of Tanzania, *Law Reports of the Commonwealth(Const)* 757.
[82] *Vishaka v Rajastan*(1997) AIR SC 3011-3017.
[83] *Andrew v Law Society of British Columbia* [1989] 1 SCR 143, 178.
[84] For example, in *Labourers Working on Salal Hydro Projec v State of Jammu and Kashmir,* the Court went on to conclude that, '[we] would therefore direct the Central Government to tight up its enforcement machinery and to ensure that thorough and careful inspections are carried out by fairly senior officers at short intervals with a view to investigating whether the labour laws are being properly observed, particularly in relation to workmen employed ...': *Labourers Working on Salal Hydro Projec v State of Jammu and Kashmir* [1983] Writ Petition (Criminal) No-1179.
[85] See, eg, *Unnikrishnan v State of A P* [1993] 1 SCC 645; *Iyer v Justice AM Bhattacharjee* [1995] 5 SCC 457 (observing that '... the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario ...').

Thus it seems realistic to suggest that in applying and interpreting laws and employment policies, the judiciary of Bangladesh should consider the stated and inherent objectives of laws as well as their impact on women and take into account contemporary approaches to trial. In pursuance of constitutional mandates for special measures for women, the Court should issue proper directives which must possess the qualities of inspiring and binding the government to assume positive responsibility for the underprivileged. And this responsibility should require the government to develop special educational and other relevant institutions exclusively for women, as in India,[86] to promote their legal capacity to gain, maintain employment and utilise opportunities that employment should offer (for example, advancement). For a similar objective, *suo moto* judicial guidelines for employers can also help eliminate, or at least reduce, discrimination and all unwelcome sexual advances against women in the workplace. While the SC's recent directive on sexual harassment is a significant development in the history of judiciary for protecting women from disgrace and humiliation at work, and is the beginning of an era, it is hoped that the courts will be more and more inclined to redress the dynamics of discrimination and grant compensation 'as a matter of right and as a necessary consequence of the mental injury' to women.

V CONCLUSION

Obviously, any effort, either legislative or administrative, to advance women sounds hollow as long as it ignores the need to recognise the unique phenomena in a traditional culture (as in Bangladesh) that attend women and which has eventually made the 'equality' quite difficult and even sometimes impracticable for them. The situation is further exacerbated by the absence of any progressive judicial approach searching for an accommodation of women's specific perspectives in the public sphere. Experiences, however, in foreign jurisdictions demonstrate a global judicial consensus on the recognition and accommodation of those perspectives in employment. As part of the process, the traditional standard of measuring 'equality' was

[86] In India, there are 18,000 exclusive colleges for women, '189 Women's ITIs [Indian Technical Institute] and 211 Women's Wings in general ITIs ...' and 45 women's Polytechnics. For detail, see *Education in India* (2012) Wikipedia <http://en.wikipedia.org/wiki/Education_in_India>; Initial Reports of State Parties, India, (CEDAW/C/IND/1, 10 March 1999) [173]-[174]. Bangladesh has also introduced some technical institutions exclusively for women but these are insignificant compared to the current need and the number of women.

modified in the 1950s and a new approach has been incorporated in the judicial culture worldwide to combat women's disadvantaged experiences in employment. Quite in contrast, Bangladesh's judiciary still adheres to the literal approach to interpreting laws and has failed to deliver any dynamic precedent in the last 40 years that could cope with women's contemporary needs and values in the workplace. Yet, the repeated prohibition of sex discrimination in numerous international treaties, national legislation and court practices implies that 'there is a strong [necessity] to end discrimination on the basis of gender.'[87] Recognising this necessity, this paper recommends the reconceptualisation of the way in which the judiciary in Bangladesh deals with women's employment claims. This reconceptualisation must reflect contemporary judicial practices of foreign jurisdictions and the substantive approach which upholds the concern for equality of result and suggests that the extensive accommodation of women's exceptional phenomena into the workplace is the only way to achieve equality.

[87] Mertus, above n 26, 42.