

PREVENTING SEXUAL HARASSMENT IN BANGLADESH: A SOCIO-LEGAL PERSPECTIVE

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Abstract

Despite positive changes and developments in many areas, sexual harassment in the country continues as a rampant negative issue which poses a great threat not only to the security of our women but also to the progress of the society as a whole and this problem is overshadowing our great achievements. However, it is notable that there are a lot of national legislations and case laws condemning conduct amounting to sexual harassment but that laws are not working well in preventing sexual harassment for a number of reasons especially for not proper implementation of these legal instruments, and reluctance of the members of the law enforcing agency. Moreover, our society is also struggling to prevent this problem. But the society cannot attain the desired success in preventing sexual harassment due to many reasons especially because of improper socialization process, degradation of moral values, credibility of the victims and the harassers, tendency of victim-blaming and lack of social policy and its proper implementation. This article argues that only the relevant legal provisions and their enforcement cannot prevent the social disease like sexual harassment rather all the concerned and conscious members of our society must have to participate in taking proper initiatives and playing courageous roles against sexual harassers.

Introduction

Every conscious citizen of a country wants to live in a society where every male and female member of the society can lead their lives in a secured and peaceful way. It implies a society which is free from any type of violence and harassment. It is more expected in case of women and they should be given more security against any type of violence, especially from sexual harassment and other sexual violence. But they are not so secured at any place of our country; even they suffer from sexual harassment at their own residence, workplace and educational institutions, where their normal security is expected. They are subjected to this unexpected problem silently at different levels of their lives. Nowadays it has become almost impossible to protect them from the sufferings of the harassment. Therefore, the problem of sexual harassment has become an uncomfortable headache for our country as it has been brewing trouble in the society for a very long time.¹

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¹ Rahman, Moshir, 2018, The Role of Courts in Combating Sexual Harassment in Bangladesh: Judicial Activism versus Feminism? University of Asia Pacific Journal of Law and Policy, Vol. 3, Issue-1, p 56.

There is a growing concern everywhere of the world including national and international levels about preventing and combating sexual harassment since it has become a “complex and evolving practice”. The rise of sexual discrimination in cyberspace is only one of the most recent and most striking examples of the phenomenon’s increasing complexity.² A good number of international bodies, both national and international non-government organizations, human rights groups and courts often express their concern about increasing rate of sexual harassment.

In Bangladesh, women are still in a peripheral position in the society, which is governed by patriarchal attitudes. Gender discrimination leading to gender violence is deeply embedded in our social structure. Most Bangladeshi social institutions permit, and even to some extent, encourage the demonstration of unequal power relations between the sexes. In other words, harassment of women in Bangladesh is culturally accepted, tolerated and, in certain prescribed forms and given contexts, legitimized by the society. However, to save our women from sexual harassment and other sexual violence, the State has taken various types of initiatives including inclusion of legal provisions relating to sexual harassment and violence in different legislations and establishment of some special tribunals for trial of the relevant cases. Again, the social workers and women rights activists are trying apparently to protect our women against any type of violence and are thinking about to find out the ways of solution to the problems which our women are facing. But these initiatives are not working well in protecting our women and girls from this abominable offence. Consequently, the enacted relevant laws have failed to be proved effective. Moreover, the relevant courts and tribunals cannot ensure justice in favour of the victims in all cases for a number of reasons especially due to failure of the prosecution lawyers to prove the case beyond reasonable doubt, lack of awareness among the victims of sexual harassment and wide spread practice of corruption by most of the law enforcing agency members on whom duties of investigation are imposed.

This research article aims to make the concept of sexual harassment clear along with various forms of the offence under the existing legal framework of Bangladesh and international instruments relating to the issue. Then it will focus on the major causes and effects of sexual harassment. This research work will also outline relevant legal provisions as well as case laws which have been made with intent to prevent sexual harassment and then evaluate their effectiveness and compatibility with the existing socio-economic and cultural conditions of our women. It would then try to explore the legal and social barriers in

² Franks, Mary A, 2012, Sexual Harassment 2.0, 71 Maryland Law Review, Volume 71, Issue 3, p 655. Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss3/3>.

combating sexual harassment. Finally, it would try to find out some recommendations that may be taken into consideration by the government in making relevant laws, by the social workers working in preventing sexual harassment and the victims themselves to get the desired justice and remedy against the perpetrators of sexual harassment.

Conceptualizing Sexual Harassment

The term 'sexual harassment' first came into use in the late 1970s in the United States. The origin of the term has been traced to a course on women and work taught by Lin Farley at Cornell University. In 1979, Catherine MacKinnon, a feminist legal scholar from the United States, made the first argument that sexual harassment is a form of sex discrimination prohibited by the constitution and civil rights laws of the United States.³ The typical case of harassment involves a more powerful, usually senior male supervisor, who uses his superior organizational position to demand and extract sexual favours from a less powerful, typically younger, female subordinate. Thus, it involves both abuse of his power and abuse of her sex.⁴ However, according to Brodsky, the term "sexual harassment" does include not only sexual advances but also all uses of sexuality as a way of disturbing those who felt "discomfort about discussing sex". Even to him it involves teasing men by other men about sexual potency or interest.⁵ He also viewed that this harassment could be directed not only top-down, from supervisor to subordinate, but also horizontally, from peer to peer, and even bottom-up, from subordinate to boss, because competition for privilege may occur in all of these cases.⁶

Though the term 'sexual harassment' has not been clearly defined in any Act of Parliament, in view of section 10 of *Women and Children Repression Prevention Act 2000 (The Nari O Shishu Nirjaton Domon Ain 2000)* touching the sexual organ or any other organ of a woman or of a child by any of his/ her organs or by any other objects or outrages her modesty will be deemed to be a sexual harassment. However, sexual harassment need not be limited to potential or actual conduct of a sexual nature, but it may include conduct based on a person's social identity as a woman or man. Some commentators would call this

³ Siddiqi, Dina M, 2003, *The Sexual Harassment of Industrial Workers: Strategies for Intervention in the Workplace and beyond*, published by Centre for Policy Dialogue, House No 40/C, Road No 11, Dhanmondi R/A, GPO Box 2129, Dhaka-1209, p 14. Available at: https://cpd.org.bd/pub_attach/unfpa26.pdf (Last accessed on 26. 01. 2019). For more information about the origin of the term "sexual harassment"; see Schultz, Vicki, 1998, *Re-conceptualizing Sexual Harassment*, *The Yale Law Journal*, Vol. 107, pp 1696-1700.

⁴ Schultz, Vicki, note 3, p 1692.

⁵ Brodsky, Carroll M, 1976, *The Harassed Worker*. Oxford, England: DC Heath & Co. p 28. Cited in Schultz, Vicki, note 3, p 1770.

⁶ Brodsky, Carroll M, note 5, p 1770.

gender role harassment -- acts precipitated by a person's perceived transgression of socially sanctioned gender roles and spaces.⁷ Recently, the High Court Division of the Supreme Court of Bangladesh has tried to define the term 'sexual harassment' in the following manner: Sexual Harassment includes a) unwelcome sexually determined behaviour b) attempts to establish sexual relation by use of administrative power or position c) sexually coloured verbal representation and expecting sexual favours d) sexually coloured remark or showing pornography e) Indecent gesture including teasing through abusive language, stalking and jokes f) insult through letters, telephone, mobile phones etc. g) taking still or video photographs j) preventing participation in sports, cultural organisation and academic activities.⁸ Furthermore, the High Court Division in the case of *Bangladesh Women Lawyers Association v Government of Bangladesh*, 31 BLD (HCD), 2011 extended the definition of sexual harassment as it included 'eve teasing and stalking' into its definition of sexual harassment.⁹

The *European Commission adopted a Recommendation on the Dignity of Women and Men at Work* in 1991 and attempted to define the term sexual harassment in the following words:

Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex, affecting the dignity of men and women at work. This includes unwelcome physical, verbal or non-verbal conduct. This conduct constitutes sexual harassment under three conditions: the behaviour must be (a) unwanted, improper or offensive (b) refusal or acceptance of behavior influences decisions concerning a job and (c) the behaviour in question creates a working climate that is intimidating, hostile or humiliating for the person.¹⁰

Thus, sexual harassment may be defined as unwanted, unwelcome and inappropriate conduct or behaviour of a sexual nature perceived as harassment by the receiver. Any unwanted and unwelcome sexual advances, requests for sexual favours and any inappropriate sexual conduct may also be regarded as

⁷ Siddiqi, Dina M, note 3, p 14.

⁸ *MS Salma Ali v Bangladesh*, 29 BLD (HCD) 2009, 415.

⁹ *Bangladesh Women Lawyers Association v Government of Bangladesh*, 31 BLD (HCD), 2011, p 327. However, the court in its judgement stated that "teasing is usually harmless if it is done between friends in a friendly environment and if the same is welcomed by the female recipient (at p.327)". It further stated that "while teasing may be enjoyable and pleasant to an American or British female of the same age because of cultural difference (at p.328)". This description of teasing may be in direct contradiction with the judgment of the Supreme Court in the case of *MS Salma Ali v Bangladesh* case, where it was specifically stated that sexual harassment includes "..... Jokes having sexual implication" (p 328). See also Rahman, Moshir, supra note 1, pp 66-67.

¹⁰ Bajema, Cristien and Greetje Timmerman, "Sexual Harassment in Northwest Europe" in *The European Journal of Women's Studies*. Vol. 6:4, 1999. pp 419-439, p. 423. Cited in Siddiqi, Dina M, note 3, p 14.

sexual harassment. Sometimes what one person perceives as sexual harassment may not be so considered by another person.¹¹ However, the defining characteristics of the term is that the behavior is offensive to and unwanted by the recipient and would be regarded as sexual harassment by any person of ordinary prudence.

Forms of Sexual Harassment

Sexual harassment may be committed in any of the following forms:¹²

a. Physical Conduct

1. Physical violence;
2. Physical contact, eg unwelcome touching, patting, stroking, grabbing, pinching and hugging; and
3. Blocking someone's path with the purpose of making a sexual advance.

b. Verbal Conduct

1. Comments on a woman's appearance, age, private life, etc.
2. Sexual comments, stories and jokes;
3. Sexual advances (explicit or implicit);
4. Repeated unwelcome social invitations;
5. Insults based on the sex of the worker and
6. Telling lies or spreading rumors about a person's personal or sex life.

c. Non-verbal Conduct

1. Display of sexually explicit or suggestive material;
2. Sexually suggestive gestures;
3. Staring, stalking, whistling, etc. and
4. Unwanted SMS/e-mail containing sexual comments.

¹¹ The High Court Division, in the case of *Bangladesh Women Lawyers Association v Government of Bangladesh*, 31 BLD (HCD), 2011, states that "What may be normal for a girl in Dhanmondi or Gulshan may be the reason for mental disturbance of a girl in a remote conservative village".

¹² For details see "What is Sexual Harassment"; available at: <https://www.unodc.org/res/ji/import/guide/whatish/whatish.pdf>; accessed on 30 January 2019.

Different Types of Sexual Harassment

There are two kinds of sexual harassment at workplace. The first is *quid pro quo* harassment and the second type refers to the creation of a hostile work environment.

1. *Quid Pro Quo* harassment: This type of sexual harassment is said to have been committed when a benefit of a job—such as a pay rise, a promotion, or even continued employment—is made conditional on the victim acceding to demands to engage in some form of sexual behavior.¹³ It occurs when (1) job benefit, including employment, promotion, salary increases, shift or work assignments, performance expectations and other conditions of employment are associated with the provision of sexual favours, usually to an employer, supervisor or agent of the employer who has the authority to make decisions about employment issues; or (2) the rejection of a sexual favour or request for sexual favour results in a tangible employment detriment, a loss of a job benefit of the kind described above.

2. *Hostile environment* sexual harassment: It exists where there are sexual advances, fondling or a sexually suggestive workplace atmosphere that the victim finds unwelcome.¹⁴ This type of sexual harassment involves unwanted and unwelcome conducts or behaviour, whether physical, verbal or non-verbal, making a work environment uncomfortable to an employee. In this type of harassment, the offender often creates conditions that are intimidating or humiliating for the victim.¹⁵ Thus, it occurs when unwelcome conduct of a sexual nature creates an intimidating, threatening or abusive working or learning environment or such conduct is so severe, persistent or pervasive that it affects a person's ability to participate in or benefit from any program or activity.¹⁶ This kind of harassment usually happens at the working place due to unequal power relations among the workers, other employees and the employers.¹⁷

¹³ Reilly, Marie T., 1994, A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss, *Vanderbilt Law Review*, Volume-47, p 452.

¹⁴ *Walker v Sullair Corp.*, 736 F. Supp. 94 (W.D.N.C. 1990), Cited in Schultz, Vicki, *supra* note 3, p 1717

¹⁵ BREAKING THE SILENCE, THE FWF VIOLENCE AND HARASSMENT PREVENTION PROGRAMME, p 6; available at: https://www.fairwear.org/wp-content/uploads/2018/04/2018_FWF_Breaking-the-silence.pdf.

¹⁶ *Ibid.* see also “What is Sexual Harassment?” Available at: <https://sapac.umich.edu/article/what-sexual-harassment>; accessed on 30 January 2019.

¹⁷ Sultana, Mily, 2018, Role of Women in Improving the Quality of Healthcare Sector in Bangladesh: Challenges and Opportunities, *Journal of Dhaka International University*, Volume 10, Issue -2, pp 116-117.

Other Types of Sexual Harassment

There are also two types of sexual harassment which include psychological harassment and internet harassment.¹⁸

a. Psychological Harassment

Psychological harassment indicates repetitive, hostile, unwanted and vexatious behaviour that manifests itself in the form of conduct, verbal comments, actions or gestures. They affect the person's dignity or psychological integrity, and result in a risky and unwelcome work environment.

b. Internet Harassment

Internet harassment is used to describe the use of the internet to harass, threaten, or maliciously embarrass any person or body of individuals. Many workers are required to do their work and perform their official responsibility using the computer and the Internet. While using this digital instrument, many of the female workers are being harassed through internet. This harassment is termed as internet harassment or cyber harassment or cyber-bullying. Now-a-day's internet harassment is being considered as a matter of concern at work place, at home and at school. This type of sexual harassment may be committed by any of the following ways-

1. Sending unsolicited and/or threatening e-mail;
2. Encouraging others to send the victim unsolicited and/or threatening e-mail or to overwhelm the victim with e-mail messages;
3. Sending viruses by e-mail (electronic sabotage);
4. Spreading rumours;
5. Making defamatory comments about the victim in public discussion areas;
6. Sending negative messages directly to the victim;
7. Impersonating the victim online by sending an inflammatory, controversial or enticing message which causes others to respond negatively to the victim;
8. Harassing the victim during a live chat;

¹⁸ Bala, Shashi, 2017, Training Module on Prevention of Sexual Harassment of Women at Workplace, VV Giri National Labour Institute, Sector-24, Noida, Uttar Pradesh, India, pp 15-16, Available at: <https://vvginli.gov.in/sites/default/files/>; accessed on 30 January 2019.

9. Leaving abusive messages on Web site guest books;
10. Sending the victim pornography or other graphic material that is knowingly offensive and
11. Creating a Web page or writing an entry on a blog that depicts the victim in negative ways.

One could object that the harm caused by cyber harassment is by default less serious than that caused by harassment at workplace or school because victims are not “captive” in the way they would be at work or in school.¹⁹ But the impact of cyber harassment may be more serious than other types of harassment and the effects of cyberspace harassment can manifest anywhere, to anyone, and at any time. Targeted sexual harassment of women in cyberspace may not only produce all of the effects that “real-life” harassment does, but also has the potential to be even more pernicious and long-lasting than “real-life” harassment.²⁰

Causes of Sexual Harassment

The causes of sexual harassment vary which may cover many factors. Some of the causes are interrelated, linked to the culture and values in society and to the roles, relative power and status of the men and women concerned. However, the most obvious cause for sexual harassment at the workplace is unequal power relations in society as a whole. Gender-based violence is informed by the distribution of social, economic and legal power in society. Women are more likely to be victims of harassment because they lack power, occupy insecure positions or are socialized into suffering in silence.²¹

a. Socialization

The way in which men and women are brought up and taught to realize themselves and others often influences their daily conducts and behaviors. Various viewpoints could create such a negative circumstances that allows

¹⁹ Franks, Mary A, 2012, Sexual Harassment 2.0, 71 *Maryland Law Review*, Volume 71, Issue 3, p 681; available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss3/3>.

²⁰ However, cyber sexual harassment is far more responsive to control than much real-life harassment. Some of the very features of cyberspace that magnify the harm of harassment—for instance, permanence—also make such harassment easier to regulate. Much cyber sexual harassment is in some way recorded, and much is also date and time-stamped; thus, the evidentiary problems that often plague real-life harassment claims are lessened. Secondly, there is a clearly identifiable agent of effective control over sites where harassing activity takes place. Website operators have effective control over their sites and those who enter them, at least in theory. They can control the behavior of users on their sites at least as effectively as employers and school administrators can control individuals in their respective environments. See- Franks, Mary A, note 2, pp 682- 683.

²¹ Bala, Shashi, note 18, p 17.

incidents of sexual harassment at different levels of our society. In a culture where it is practiced and to some extent encouraged to discriminate against people on the ground of sex, race, culture, religion, life style, political conviction or any other attributes, occurrence of sexual harassment is not unusual.

b. Degradation of Moral Values

Due to moral laxity and huge practice of extramarital affairs, some male members of our society equate monogamy with monotony and indulge in office flirtations, whether one-sided or mutual. The person who tries, and doesn't accept rejection or sees the unwilling colleague as a challenge, easily becomes a harasser, or may victimize the reluctant colleague. The prevalence of marital stress and divorce in our society means that some men and women come to work in a state of emotional distress that could make them vulnerable to sexual harassment.

c. Credibility of the Victims and the Harasser

The credibility of the victim is often called into question and usually her word against that of the harasser/s is not taken into consideration. In most of the cases relating to sexual harassment, our society is more interested to show male solidarity which results in failure of justice. The situation becomes more aggravated when the harasser is a person of high-level or highly-skilled person and the victim is a person of lower level and more expendable.

d. Tendency of Victim-blaming

The common tendency of victim-blaming often causes the complainant to deviate from making any accusation against the accused. As in the case of sexual assault and rape, the dress, lifestyle and private life of the victim are more emphasized than the behavior and conduct of the perpetrator/s while considering the concerned complaint. Some women are very much inclined to excessive self-blaming and feel guilty and often believe that they unwisely did or said something to invite the unwanted and unwelcome behavior from the harasser/s. And if they are ashamed or afraid and don't discuss the problem with their prudent well-wishers, who may be parents, nearest relatives or friends, they often don't realize that it is a fairly common occurrence and so they are not guilty.

e. Lack of Company Policy and Implementation

Many companies and industries do not have clear policies and disciplinary procedures to deal with harassment – or if they have them, such policies and procedures are not compatible with the socio-economic and cultural

circumstances of our country and are not properly implemented.

Impact of Sexual Harassment

Sexual harassment has many adverse effects on the victims; especially it disturbs employees' performance since they are often affected emotionally, physically, financially and socially. MacKinnon asserts sexual harassment is harmful because it makes critical to working women's survival and independence and promotes such employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women.²² Sexual harassment is sex discrimination because it makes women subordinate to men. Though there are many negative impacts of sexual harassment, the following are more remarkable:

a) Emotional Impact

Sexual harassment may have a serious emotional impact on employees which includes self-blame and guilt. This is mostly common to almost all women who are victims of sexual harassment and consequently they tend to think that have suffered this unwanted experience due to their own fault.

b) Physical Impact

The sexually harassed victims suffer from headaches, stress-related ailments and stomach ailments. In addition, the results of physical effect affect well-being of the employees and lead to absenteeism in their routine works and consequently they suffer also financial loss.

c) Social Impact

The victims of sexual harassment often withdraw themselves, either physically or emotionally, from friends, own family members and colleagues because maintaining interaction with others seems difficult to them. As a result, they end up their social interactions and fear to go to workplace where the incident has occurred. Some of the victims also indulge in alcohol or drug use/abuse and ultimately become drug addicted and a burden upon their family and society.

²² CATHARINE A MACKINNON, 1979, SEXUAL HARASSMENT OF WORKING WOMEN, p 5 cited in Scott, Julianne, 1999, PRAGMATISM, FEMINIST THEORY, AND THE RECONCEPTUALIZATION OF SEXUAL HARASSMENT, UCLA WOMEN'S LAW JOURNAL, Vol. 10:203, p 211.

d) Financial Impact

Since the women who have suffered sexual harassment experience emotional stress, depression, fatigue, anxiety, an inability to concentrate, humiliation, and anger among other things, their overall condition affects their work performance in workplace which ultimately affects their family and the national interest of the State. Because tension, hostility, emotional stress, depression, fatigue, anxiety and fear of the victim in the workplace hinder teamwork and collaboration, leading not only to decreased productivity but also to increased absenteeism, loss of interest in work and in severe cases to the resignation of valuable employees. Thus sexual harassment constitutes a major concern for individual women and their families, for society, and for the national economy.²³

Attempt to Prevent Sexual Harassment

Over the last two decades, sexual harassment has received much attention as both a social and a legal problem. Rights groups across the globe have mobilized around the issue, pressuring individual governments as well as international institutions to take action. In 1979 the *United Nations Convention for the Elimination of All forms of Violence against Women* included sexual harassment in its definition of violence. In 1986, the Women's Bureau of the International Confederation of Free Trade Unions published a Trade Union Guideline on Sexual Harassment. In 1992, the International Confederation of Trade Unions adopted a resolution recognizing sexual harassment as a legitimate trade union issue.²⁴

Social and Legal Struggle against Sexual harassment

The most effective weapon against sexual harassment is prevention. Harassment does not disappear on its own accord. In fact, it is more likely that if the problem is not properly addressed, the harassment will worsen and become more difficult to solve the problem. Indeed, denial and a lack of awareness are major obstacles in the battle against harassment. Many of the behaviors that constitute harassment are naturalized in social practices and taken for granted by the perpetrators.²⁵

In addition to legal measures, governments, employers' and workers' organizations, and other bodies need to take appropriate measures and use a range of techniques to prevent sexual harassment and help the victims. The government should issue guidance on how to design anti-sexual harassment measures and to offer counseling to workers who have been targeted. At the workplace level, all the employers have to introduce sexual harassment policies

²³ Siddiqi, Dina M, note 3, p 17.

²⁴ Siddiqi, Dina M, note 3, pp 12-13.

²⁵ Siddiqi, Dina M, note 3, p 13.

and complaints procedures. Moreover, the government should also issue guidelines as to what workplace policies should contain and the steps to be taken to implement them, which can be drawn on by those employers who have yet to take action.²⁶

Experiences in many countries have shown that effective action against sexual harassment in the workplace requires a combination of legal frameworks as well as greater enforcement, adequately funded institutions and a greater awareness of the issues. Some examples of developments on this front are listed here. A number of national governments have adopted relevant legislative provisions that address sexual harassment in the workplace.²⁷

Legal provisions dealing with sexual harassment

Although there are a number of provisions in the Constitution of Bangladesh which deal with women related issue, there is no specific provision in the Constitution which deals with sexual harassment against women. Article 28 of the Constitution prohibits discrimination on the ground of sex and article 29 guarantees equal opportunity of women in the public sector.²⁸ Moreover, article 36 guarantees right of free movement to every citizen including both male and female. The rights guaranteed by these articles are fundamental rights which are available for every citizen of the country and the State as a result is obligated to ensure those rights. Further if the State fails to provide those fundamental rights to its citizens, article 44 of the Constitution grants any person aggrieved,

²⁶ Bala, Shashi, note 18, p 31.

²⁷ Bala, Shashi, note 18, p 38.

²⁸ Article 28 of the Constitution provides:

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
 - (2) Women shall have equal rights with men in all spheres of the State and of public life.
 - (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
 - (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.
- On the other hand, Article 29 of the Constitution prescribes-(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.
- (2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.
 - (3) 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 relating to any religious or denominational institution to persons of that religion or denomination;
 - (c) reserving 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.

whether man or woman, to move a petition before the High Court Division of the Supreme Court of Bangladesh under article 102 of the Constitution to enforce his fundamental rights. This right to move before the Supreme Court is also a fundamental right as guaranteed by article 44 of the Constitution.²⁹ However, article 28 (4) comes closest to deal with sexual harassment against women as it states that nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.³⁰ This allows the legislators to enact special laws to protect the rights of women and when required to protect them.³¹

The *Penal Code* 1860 also has no specific provisions dealing with sexual harassment. The two provisions which deal with sexual harassment are Section 354 which deals with actions involving assault³² and section 509 which deals with words, act or gestures insulting the modesty of women.³³ Both these penal code provisions are not effective in dealing with sexual harassment cases as it stereotypes women based on the concept of modesty. Section 509 assumes that fact that all women are modest and the law will only protect women when they will be considered modest. This type of stereotype might prejudice sexual harassment cases as this will create a criteria in regard to what constitutes modest and immodest, which is prejudicial to the victim of sexual harassment.³⁴ Further the *Bangladesh Srama Ain* 2006 also refers to modesty and honour of women. Section 332 of the Act, specifically refers to being respectful towards the modesty of women.³⁵ This is also another instance where the court would be bound to consider the modesty of the women in a sexual harassment case, since it is stated in the legislation to protect the labour rights of the workers.³⁶

²⁹ Article 44(1) provides the right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed.

³⁰ *Constitution of Bangladesh*, Article 28(4).

³¹ Rahman, Moshir, note 1, p 59.

³² Section 354 states that whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

³³ Section 509 provides whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

³⁴ Tania, SJ, "Special Criminal Legislation for Violence Against Women and Children"- A Critical Examination", Special Issue: Bangladesh Journal of Law, 2007 p199. Cited in Rahman, Moshir, note 1, p 60

³⁵ Section 332 of *Bangladesh Srama Ain* 2006 states that no person shall act in a way that violates the modesty and affects the dignity of a woman at work. The *Bangladesh Labour Act* 2006. Can be accessed at : http://bdlaws.minlaw.gov.bd/chro_index_update.php

³⁶ Rahman, Moshir, note 1, p 60.

In addition to the *Penal Code* 1860 and the *Bangladesh Srama Ain* 2006, the government has also enacted some special laws³⁷ over time to protect the interest of women and to protect them from some special crimes. But, most of these laws have not been drafted taking sexual harassment against women into account. Most of these laws are knee-jerk reactions by the government to protect women subjected to particular crimes at a particular time. However, due to imperfect definitions of crimes and provisions, some of these laws have been repealed by subsequent legislations enacted several times³⁸ with a view to making the relevant laws more effective and compatible with the existing circumstances. Nevertheless, these laws are not working well to achieve the high ambition and intent of the law-makers due to several reasons³⁹.

Although the Government has over the years passed various forms of legislations to curb violence against women, there has not been any specific law dealing with the sexual harassment of women at workplaces. Moreover severe punishments including death penalty in respect to certain crimes committed against women have also failed to stop violence against women⁴⁰.

Further despite the Constitution providing gender equality, the provisions do not go far enough in combating sexual harassment on women. Until recently the vast majority of women were engaged in the private sphere – i.e. domestic and household labour. Therefore, the harassment and discrimination of women in the work place escaped the notice of the government. This explains the lack of legislation dealing with discrimination and harassment.⁴¹ Moreover, since there is also a lack of knowledge among most Bangladeshis about their constitutional rights, women have been slow to avail the protection provided to them by the constitution. This results in sexual harassment on women going unchecked at times.⁴²

³⁷ Some important legislations which are enacted to protect the interest of women are *The Dowry Prohibition Act* 1980 (This Act has been repealed by the *Dowry Prohibition Act*, 2018, *The Women and Child Repression (Special Provision) Act* 1995, *The Prevention of Women and Children Repression Act* 2000, *The Acid Crimes Control Act* 2002, the *Family Violence (Prevention and Protection) Act* 2010 and the *Dowry Prohibition Act* 2018.

³⁸ Tania, SJ, “Special Criminal Legislation for Violence Against Women and Children”- A Critical Examination”, Special Issue: Bangladesh Journal of Law, 2007, p199. Cited in Rahman, Moshir, note 1, p 60.

³⁹ The reasons behind the failure of these laws are many. However, the most obvious causes are that in most of the cases the prosecution lawyers fail to prove the cases beyond the reasonable doubt, negligence and corruption of the investigating officers in performing their duties of investigations of offences, wide spread practice of corruption by most of the public servant, existing adversarial procedural system where the prosecution is required to prove the case, lack of awareness of the victims etc.

⁴⁰ Rahman, Moshir, note 1, p 60.

⁴¹ Rahman, Moshir, note 1, pp 60-61.

⁴² Most women in Bangladesh do not report cases of sexual harassment unless and until it is serious in nature. See Mahtab, N., *Women in Bangladesh: From Inequality to Empowerment* (Dhaka: AHDPH, 2007) cited in Rahman, Moshir, note 1, p 60.

Section 10 of *Women and Children Repression Prevention Act 2000 (Nari O Shishu Nirjaton Domon Ain 2000)* has made sexual harassment a criminal offence punishable with rigorous imprisonment for a term which may extend to 10 years, but not less than 3 years and with fine also in addition to imprisonment.⁴³ This definition, in fact, includes the attempt of rape or outraging the modesty of a woman by actual physical contact. Again Section 76 of the *Dhaka Metropolitan Police Ordinance 1976* also deals with some issues which are very close to sexual harassment against women and makes certain acts crimes punishable with imprisonment for a term which may extend to one year or with fine which may extend to two thousand taka, or with both.⁴⁴

The Role of the Judiciary in dealing with Sexual Harassment Cases

As a result of Writ Petition No. 5916 of 2008 issued by the Bangladesh National Women Lawyers Association (BNWLA) under article 102 of the Constitution, the High Court Division of the Supreme Court of Bangladesh delivered a judgment on 14 May 2009 issuing guidelines against sexual harassment at educational institutions and workplaces. Further, the High Court Division directed the government to make a law on the basis of the guidelines. Until Parliament passed such law, the guidelines will be treated as law. It directed the concerned authorities to form a 5-member harassment complaint committee at every workplace & educational institution. Complaints office should be women-led & majority of committee members must be women. Committee recommend to the authorities to take action against the accused persons. The High Court Division also prohibited the authorities concerned from disclosing the names & addresses of the complainants and accused persons until the allegations are proved.

In the absence of any specific guidelines in the Constitution and other relevant legislations, the High Court Division of the Supreme Court of Bangladesh in 2009 and in 2011 issued specific guidelines for the first time to deal with issues

⁴³ Section 10 of the Act provides- If any person, with a view to satisfy his/ her sexual desire illegally, touches the sexual organ or any other organ of a woman or of a child by any of his/ her organs or by any other objects or outrage her modesty, such act of the person will be termed as sexual harassment and for that act the person shall be punished with rigorous imprisonment for a term which may extend to 10 years, but not less than 3 years and with fine also in addition to imprisonment.

⁴⁴ Section 76 of the Dhaka Metropolitan Police Ordinance, 1976 provides whoever willfully and indecently exposes his person in any street or public place within sight of and in such manner as may be seen by, any woman, whether from within any house or building or not, or willfully presses or obstructs any woman in a street or public place or insults or annoys any woman by using indecent language or making indecent sounds, gestures, or remarks in any street or public place, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand taka, or with both.

relating to sexual harassment against women.⁴⁵ The court gave the guidelines in response to a public interest litigation filed before the court by Miss Salma Ali, head of Bangladesh Women Lawyers Association. The court in its judgement stated that these directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of article 111 of the Constitution.⁴⁶ As a result the court has taken it on itself to interfere in its constitutional capacity in order to protect the interest of the general public.⁴⁷

The court in the case of *Ms Salma Ali v Bangladesh* also stated that the objectives and functions of the judiciary include the following: a) To ensure that persons are able to live securely under the Rule of Law b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights and c) To administer the Law impartially among persons and between persons and the state.⁴⁸ The third objective of the court as stated in the judgment is the most significant aspect of the court interfering in order to promote equality among both men and women. The court saw the need to step in as the State had failed to give any guidelines through its legislative powers to protect women from sexual harassment. This aspect of the court is more akin to the liberal feminist approach which promotes the idea that there should be gender equality in respect of protecting the rights between both male and female. In this case it could be argued that the court tried to promote the equality between the genders.⁴⁹

Moreover, it could be argued by the radical feminists that the court had failed to identify the problem. The problem of sexual harassment arises out of the subordinate status of women and the victimization by men. Sexual harassment for radical feminism is but one manifestation of the victimization of women by men. Granting women greater equality does not solve the problem of sexual harassment, as according to radical feminists this is the outcome of the way that society is structured.⁵⁰

⁴⁵ The two landmark cases which set guidelines for sexual harassment are: *Ms Salma Ali v Bangladesh*, 29 BLD (HCD) 2009, 415 and *Bangladesh Women Lawyers Association v Government of Bangladesh*, 31 BLD (HCD), 2011, 324.

⁴⁶ Ibid.

⁴⁷ This action of the court is termed as Judicial Activism. Judicial Activism or Judicial legislation occurs where there is *casus omissus* (gap in the statute the court can fill in). However if there is no law and hence there is no question of filling in the gap then the judiciary can also take steps in the interest of the Society. Lord Reid in his article "The Judge as Law-maker", *The Journal of Public Teachers of Law*, 1972, stated that "when it was thought almost indecent to suggest that judges make law-they only declare it.....but we do not believe in fairy tales any more". See Rahman, Moshir, *supra* note 1, p 64.

⁴⁸ *Ms Salma Ali v Bangladesh*, 29 BLD (HCD) 2009, 415.

⁴⁹ Rahman, Moshir, note 1, p 65.

⁵⁰ Ibid.

The court also recognized that the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.⁵¹ The court also imposed an obligation on employers in both public and private sectors to take “appropriate steps to prevent sexual harassment” and provide for appropriate penalties against the offender.⁵² Employers in both the public and private sectors must provide procedures for deterring workplace sexual harassment.⁵³ Upon the creation of such workplace rules, the employer must notify all workers of the anti-sexual harassment policy.⁵⁴ As a result the court imposed an affirmative duty on the employer to prevent sexual harassment in the workplace. The court also directed that a complaint mechanism be created in the employer’s organisation to redress the complaint made by the victim and that such a committee should be headed by a woman.⁵⁵

The measures directed by the court in order to protect women from sexual harassment might be read with scepticism if analysed from the radical feminist perspective. However, CEDAW, which is the basis for the court’s sexual harassment guidelines, is regarded as a radical feminist convention. Article 5(a) of CEDAW intends to “modify the social and cultural patterns of conduct of men and women.” Hence it shows that the guideline is trying to promote consciousness in the society regarding sexual harassment. However it can be argued that since the guideline relies so much on radical feminism; it is flawed as all women do not want to be perceived as victims.⁵⁶

Both the 2009 and 2011 cases is significant for Bangladesh because of its recognition of the problem of sexual harassment and the fact that it is an experience many women are almost routinely subjected to in the workplace. These two cases could be considered as transformative despite their being no legislation dealing with sexual harassment cases in the country.⁵⁷

Social Barriers against Enforcement of Laws relating to Sexual Harassment

Despite there are various laws in Bangladesh prohibiting sexual harassment or conducts that would amount to sexual harassment, we have failed to prevent this social problem. According to information gathered by Odhikar, in 2017, a total

⁵¹ *Ms Salma Ali v Bangladesh*, 29 BLD (HCD) 2009, p 419.

⁵² *Ms Salma Ali v Bangladesh*, p 425.

⁵³ *Ms Salma Ali v Bangladesh*, p 425.

⁵⁴ *Ms Salma Ali v Bangladesh*, p 426.

⁵⁵ *Ms Salma Ali v Bangladesh*, p 427.

⁵⁶ Rahman, Moshir, note 1, p 66.

⁵⁷ Rahman, Moshir, note 1, p 68.

of 242 girls and women were victims of sexual harassment. Of them 17 committed suicide, four were killed, 42 were injured, 42 were assaulted, three were abducted and 134 were victims of stalking. During this time, 12 men were killed, 70 men were injured, one was assaulted and one woman was killed, 22 women were injured, one woman was assaulted by the stalkers when they protested such acts⁵⁸. According to *Odhikar*, the numbers of reported rape victims in each of last 3 years have been over 700 including 818 in 2017.⁵⁹ Further, there have been about 200 or more gang rape victims in each year of the last decade. A study entitled 'Roads Free from Sexual Harassment' conducted by BRAC found that an astounding 94% of women commuting in public transportation have experienced some form of sexual harassment.⁶⁰

It is often argued that there are a number of flaws with regards to the laws prohibiting sexual harassment in Bangladesh. A common criticism focuses on the haphazard nature of sexual harassment and the lack of a single legislation capturing sexual offences. Certainly, such criticism may be justified because Bangladesh lacks a legal framework comprehensively designed specifically to address sexual harassment. However, it is unlikely any such single legislation alone would have any significant effect in preventing sexual harassment. For instance, in India, despite the introduction of Protection of Children from Sexual Offences 2012 specifically intended to protect women and children against sexual offences and implementing various procedural safeguards,⁶¹ the National Crime Records Bureau of India indicates that incidents against children have increased since 2014 and India has been recently identified as the most dangerous country for women.⁶²

The failures of India's legal reforms do not indicate that the law has no purpose to play. However, laws in many jurisdictions regulating sexual harassment are merely outcome-oriented. They are simply intended to prevent such conduct. This approach almost ignores the process of enforcing any law attempting to prevent sexual harassment. Laws aim to prevent wrongful behaviour by using the threat of punishment. Before an offender is punished, the prosecution process must be initiated. Usually, this will require the victim or witness to

⁵⁸ *Bangladesh Annual Human Rights Report 2017* published by Odhikar, Bangladesh-based human rights organization that was founded in October 1994; Available at http://odhikar.org/wp-content/uploads/2018/01/Annual-HR-Report-2017_English.pdf; accessed on 21 February 2019.

⁵⁹ 'Rape: January 2001-May 2018' (Odhikar); Available at http://odhikar.org/wp-content/uploads/2018/06/Statistics_Rape_2001-May-2018.pdf; accessed on 21 February 2019.

⁶⁰ 'Study: 94% Women Victims of Sexual Harassment in Public Transport' (Dhaka Tribune, March 7, 2018) Available at <https://www.dhakatribune.com/bangladesh/crime/2018/03/07/study-94-women-victims-sexual-harassment-public-transport>; accessed on 21 February 2019.

⁶¹ 'What Is POCSO Act?' (The Financial Express April 21, 2018); available at: <https://www.financialexpress.com/india-news/what-is-pocso-act/1140766/>; accessed on 21 February 2019.

⁶² Thiagarajan K, 'India Reforms Its Anti-Rape Laws - To Mixed Reaction' (NPR May 4, 2018); available at: <https://www.npr.org/sections/goatsandsoda/2018/05/04/608516694/india-reforms-its-anti-rape-laws-to-mixed-reaction>; accessed on 02 January 2019.

report the conduct to the relevant authorities. Yet, as indicated by recent studies explain that there are various social barriers that prevent the victims from initiating the legal process.⁶³ In the context of sexual harassment, the victim must identify his/her experience of sexual harassment. In societies where marginalized groups—such as women in patriarchal societies—may tolerate a higher degree of unwanted behaviour, it may not be particularly obvious to the individual that he/she is a victim of sexual harassment. The author further explains the victim must then attribute that injurious experience to the fault of another (blaming). Similarly, identifying fault in sexual harassment incidents depends on social and psychological factors. Considering reports suggesting victims often blame themselves for such incident, it is unlikely they would always perceive the need to seek reparation through the legal system. However, even if the victim has gone through the process of accepting that he/she has been sexually harassed and has identified another individual to blame, they must make the decision to voice their grievance to the legal system (claiming). In this regard, a research conducted by the Bangladesh Legal Aid and Services Trust (BLAST) identified various social barriers which prevent rape victims from reporting incidents.⁶⁴ The main barriers included social stigma against victims of sexual violence, significant pressure of society leaders to resolve the issue within the community, and the lack of awareness of court processes.

In instances where the prosecution process is initiated, the social barriers mentioned above continue to manifest in pre-trial stages. For instance, the women rights' organization, *Naripokkho*, found that there were 20,228 cases filed under the *Prevention of Women and Children Repression Act 2000* across Bangladesh and only 19 of these cases resulted in a conviction.⁶⁵ In 2018, it was reported the conviction rate under the *Children Repression Act 2000* was .3%.⁶⁶ Such low conviction rates was attributed to a variety of barriers including stigma and abuse against the victim while filing at the police station, undergoing medical tests, and during cross-examination of the victim by the defence lawyer. The social barriers that prevent conviction against the offender is also evidence that it is not the availability of laws to prosecute the offender, but rather

⁶³ Felstiner et al, 'The Emergence and Transformation of Disputes' (1981) 15 *Law and Society Review* 631

⁶⁴ Zaman N, 'Concept of Consent Is Horribly Misunderstood in Bangladesh' (New Age | The Outspoken Daily December 16, 2018); available at: <http://www.newagebd.net/article/58990/concept-of-consent-is-horribly-misunderstood-in-bangladesh>; accessed on 02 January 2019.

⁶⁵ "Women and Children Repression Cases Conviction Rate at 0.3%" (Dhaka Tribune on 07 September 2018) Available at: <https://www.dhakatribune.com/bangladesh/law-rights/2018/09/07/women-and-children-repression-cases-conviction-rate-at-0-3>; accessed on 02 January 2019.

⁶⁶ According to a report published in the Daily Star on 30 March, 2018, there is no conviction in 97 percent rape cases in Dhaka alone and most of the accused persons have been acquitted. Available at: <https://www.thedailystar.net/frontpage/many-rapists-escape-thru-loopholes-1555585>; accessed on 21 February 2019.

prevalent social dynamics that prevent its enforcement. Therefore, any policy intervention that does not address these complex, multi-faceted social dynamics will inevitably fall short in preventing sexual harassment.

Role of the Society and Government in Preventing Sexual Harassment

In order to overcome the existing circumstances of our society where our women including child, girl and adult women are not safe and are suffering from sexual harassment and other types of violence, every conscious citizen, whether male or female he or she is, of country should bear responsibility as well as the government should take proper initiatives taking the existing socio-economic and cultural circumstances into consideration. Here, we should bear in mind only the government cannot solve this intolerable problem by taking some steps, if other individual conscious member of our society does not come ahead to protect our women, even the victims also have some responsibility to get appropriate remedy and justice against the perpetrators of sexual harassment. Again the women themselves cannot deny their duties and responsibilities to save themselves. To prevent the occurrence of this harassment, the following steps may give us a positive result-

1. Every conscious citizen should take an active stand against sexism and avoid making sexist jokes and encourage others to do the same. Jokes, comments, pornography and any form naked and video which objectify or sexualize women foster a “rape culture” and often provoke commission of rape and sexual harassment.
2. Every guardian of the families should teach their male children from their childhood that everywoman is somebody’s sister, daughter, mother or wife etc. By nature every male member of a family wants that the women who are close to them be treated appropriately but some male members of our society often fail to afford the same treatment to other women. And should also remember that everyone should treat all women as he want in the case of women close to him.
3. Every conscious citizen of the country should take a public stand against sexual assault and harassment. The editors of newspapers, columnists, writers and researchers should write and participate in anti-violence marches and rallies to create awareness among the mass people against this social headache. Not enough men’s voices are heard in the public arena in support of a non-violent community. All men are ethically and morally responsible for influencing the behavior of the few men who do commit violence against women. Especially the guardian of every family and mother should teach their children from childhood how to behave with others and how to treat both men and women.

4. The NGOs and other organizations working for protecting women and children should play a vital role to prevent sexual harassment and other violence prevailing in society by creating awareness among women against this problem and making the movement for stronger women's security and establishing rape crisis centre to provide comprehensive help in the situation of sexual violence.

5. All the concerned authorities including both public and private strengthen the security for the women in every aspect of life especially at educational institutions and working places and take proper actions to reduce social instability.

6. Social Media and voluntary organization can also play an important role by organizing different awareness programme to create awareness among the general people and the public authority about the adverse impacts of sexual harassment upon the victims and the society at large.

7. The government and other relevant authority must have to control and manage alcohol and other drug use. The vast majority of occurrences of sexual harassment and rapes involve alcohol or other drug use on the part of the perpetrator and/or victim. Research studies demonstrate that alcohol increases male sexual aggression by exacerbating the effects of testosterone and most of the persons intoxicated by alcohol and other intoxicating drugs lose their ordinary sense and commit any types of offences especially sexual harassment and rape.

8. The government should also make appropriate policy to increase awareness, morality and proper education among the young people and modify educational curriculum in all levels of education which can change the mentality of young perpetrators.

9. The government must need to make appropriate amendment in the relevant legal provisions to make the laws more suitable in the existing socio-economic and cultural conditions of the country and repeal conflicting provisions and implement National action plan or strategy.

10. The government should also give special protection to witnesses and victims of sexual harassment so that they can give their testimony without any fear from the part of perpetrator.

Conclusion

In conclusion we can assert that sexual harassment is such a problem of our society which affects not only the victims but also the society at large. It is a serious violation of human rights which reminds us of taking proper steps including enactment of appropriate laws and their implementation to save our women. To solve this problem properly and save our women, effective measures and initiatives should be taken. However, the current design of the existing laws is incapable of addressing the issue properly. It requires a multi-dimensional approach which is aware of the social complexities that operates in the backdrop. Any legal provision to be effective in protecting women against sexual harassment, it must be enacted taking the socio- economic and cultural conditions of the country into consideration and it also need to address the issues relating to its proper implementation. However, only making appropriate laws is not enough, they must be implemented. Again, making legislations and their implementation cannot prevent sexual harassment unless the government, society, law-enforcing agency, and all the members of our society especially our conscious citizens do not go ahead to overcome the existing problem and take proper initiatives needed to be taken from their own instances. To that end, it is evident that legal instruments alone are not sufficient. Rather, policy intervention must take the form of awareness programs designed to change deeply rooted patriarchal ideologies and other social barriers that have created obstacles in enforcing rights of the sexual harassment victims. In addition, to prevent sexual harassment incidents policy intervention should be made in our educational system which may promote certain important concepts such as equality, partnership between women and men and respect for human dignity are essential in all stages of the socialization process. Educational systems should also promote self-respect, mutual respect and cooperation among all individuals of our society.