

**EQUALITY OF EMPLOYMENT IN BANGLADESH:
A SEARCH FOR THE SUBSTANTIVE APPROACH
TO MEET THE EXCEPTIONAL EXPERIENCE OF
WOMEN IN THE CONTEMPORARY WORKPLACE**

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I Introduction

EQUALITY OF employment entails identical and fair treatment of all equally qualified individuals in the access to, and the enjoyment of, all rights in public office.¹ The constitutional emphasis on *de jure* equality in Bangladesh while seeks to equate the equals in public services ignores the unequal educational and economic opportunities of men and women. Women's unique contributions in the household, pregnancy and childcare are overlooked by, or 'veiled' under, that equal approach.² By contrast, the protective legislation³ which purports to accommodate women's different needs proves counterproductive and has a devastating effect on them in Bangladesh since it imposes extra costs on the employer to be paid off.

This article argues that the legal approach to equality in Bangladesh is incomplete and even inept in many respects in dealing with women's employment. It also maintains that the protective legislation produces an additional barrier to women's work instead of remedying their specific

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1. Federal Court of Australia, *Equal Employment Opportunity Program 1993-1996*, 1 (Canberra: Australian Government Publishing Service 1994).

2. K Mahoney, 'Theoretical Perspective on Women's Human Rights and Strategies for their Implementation' 21 *Brooklyn Journal of International Law* 799 at part D (2) (1996).

3. 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 capacities. See for details J Mertus, *et al*, *Local Action Global Change*, (1999) UNIFEM and the Center for Women's Global Leadership at 8; see also, B A Babcock *et al*, *Sex Discrimination and The Law Causes and Remedies* 19 (Little, Brown and Company, Boston, 1975).



problems in employment and on some occasions, creates a 'trap' which reinforces their traditional subordination and domesticity. This work critically examines the *de jure* equality as guaranteed by the Constitution and the protective legislation of Bangladesh and elucidates ways in which law needs to be reconceptualised for the benefit of women. It concludes that the equal placement of women in the legal framework alone will not entitle them to employment unless they are enabled to overcome their real inequalities. In order to achieve the outcome of equality, a substantive approach is necessary which will opt for not only the *de jure* equality but also for the *de facto*. Such an approach will account for women's special needs and their traditional disadvantageous positions through searching for changes in laws and in the societal attitude, and for a pro-active role by the government.

II Defining Equality

'Equality' is a recurring and dominant theme in women's rights discourse, though its universal or accurate definition is yet to develop.⁴ At a similar time or in similar situation equality may require different treatment for different individuals to produce an equal result.⁵ Equality, as sharply opposed to discrimination and unfair adversaries, in its simplest expression, signifies an equal access to all benefits and opportunities guaranteed by the law.⁶ In another sense, equality might refer to the relationship of men and women and to the 'ways their roles are socially constructed'.⁷ Its broader expression is explained by R Abella J as '[equality] is evolutionary, in process as well as in substance, it is cumulative, it is contextual, and it is persistent. Equality is, at the very least, freedom from adverse discrimination.'⁸ In *Bliss v. Attorney General*

4. A F Bayefsky, "The Principle of Equality or Non-Discrimination in International Law: Implications for Equality Rights in the Charter" in L. Smith *et al* (ed.), *Righting the Balance Canada's New Equality Rights* 119 (The Canadian Human Rights Reporter Inc, 1986).

5. M S Kende, 'Stereotypes in South African and American Constitutional Law: Achieving Gender Equality and Transformation' 10 *Southern California Review of Law and Women's Studies* 3 at 11-13 (2000).

6. M Cavanagh, *Against Equality of Opportunity* 99-91 (Clarendon Press, Oxford, 2002).

7. The Federal Plan for Gender Equality, *Status of Women Canada*, (1995) an executive summary.

8. R S Abella, Report of the Commission on Equality in Employment 1984; see also K E Mahoney, 'Canadian Approaches to Equality Rights and Gender Equity in the Courts' in R J Cook (ed), *Human Rights of Women: National and International Perspectives*, 437 (hereinafter *Human Rights of Women*) University of Pennsylvania Press, Philadelphia, (1994).



of *Canada*⁹ equality before law is defined ‘as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation.’¹⁰ Given its diversities, a number of feminist theories has been developed worldwide to explore equality. Two central approaches to equality are sameness and difference.¹¹ They are based on the notions respectively, that likes should be treated alike and unlikes unlike. Sameness is predominantly focused on the formal approach to equality,¹² which presupposes the equal ability of men and women and claims for their identical treatment in enjoying all rights.¹³ This approach, however, does not recognise the same rights for all individuals but only for equals: ‘similarly situated individuals’. For example, this equality analysis can preclude a person with mental disability from being treated equally with a person without mental disability. Thus, the focus is not on their different status but on the different impact of law on each of them with an effect that is very unlikely to promote the already disadvantaged groups in society.¹⁴ Consequently, it ignores the socio-economic and political reality in a particular country which disfavors women.¹⁵ The Supreme Court of Canada observed that every differential treatment might not result in inequality; rather identical treatment may produce a serious inequality.¹⁶ For example, if a woman is required to undertake a similar strength test with a man to obtain a job, it will be very unlikely to bring an equal result for women because of their inherent physical conditions as was the issue raised in *Travail* case.¹⁷ An analogous situation was also demonstrated in *Lavell* in which the court failed to provide an equal remedy to a woman because of her marital status.¹⁸

9. (1979) 1 SCR 183.

10. *Id.* at 192.

11. C A MacKinnon, *Toward a Feminist Theory of the State* 216 (Harvard University Press, London, 1991).

12. See *supra* note 2 at para (11).

13. M J Frug, ‘A symposium on Feminist Critical Legal Studies and Postmodernism: Part One: A Diversity of Influence’ 26 *New England Law Review* 665 at 667 (1992).

14. R Kapur & B Cossman, *Subversive Sites: Feminist Engagements with Law in India* 177 (SAGE Publications, London, 1996).

15. *Id.* at 178.

16. *Andrew v. Law Society of British Columbia*, [1989] 1 SCR 143 at 164.

17. *Action Travail des Femmes v. Canadian National Railway*, [1987] 1 SCR 1114 at 1124-26, 1143-46.

18. Mrs Lavell was registered in the Indian Register after her birth. Subsequently her name was deleted from the Indian Register when she married a non-Indian. However, this provision was not applicable to male Indian. She ‘failed in an appeal from the decision of the Registrar deleting her name from the Register’. See, *The Attorney General of Canada v. Lavell-Isaac V Bedard*, [1974] SCR 1349 at 1350, 1364, 1366.



The 'difference' theory opposes the sex-blind notion of equality and represents women as a 'unique' class, demanding different treatment to achieve equality.¹⁹ This theory argues that the formal approach does not provide any remedy in special situations, such as in motherhood and pregnancy, that women alone experience. Applying this model, the US Supreme Court held that, because of women's reproductive characteristics and responsibilities, they should be accorded preferential treatment as long as it is consistent with the goal of achieving equality of employment opportunities.²⁰ In *Hoj Pederson v. Kvickly*²¹ the European Court of Justice (ECJ), even ruled for the employer to compensate the incapacity and loss of work of a woman which resulted from a pathological condition connected with her pregnancy. Nevertheless, this approach does not work always in favour of women. Maternity benefits legislation, for example, very often contributes to widespread discrimination against women in accessing and remaining in employment instead of eradicating it, since the legislation provides for 'non-wage cost' (payment without service) of the employer to be paid off.²²

Radical feminist theory is another approach to equality which argues that the sameness/difference models neither address the impact of law on women nor allow any examination of the way law is maintained or constructed.²³ This approach represents substantive equality by requiring laws to consider systematic and deeply rooted sex subordination and to develop a qualitatively different approach to address women's equality. It seeks to examine the impact, not the object of law and the particular context of women instead of using the male yardstick to measure their equality.²⁴ MacKinnon, a principal proponent of this theory contends that the 'difference approach misses the fact that the hierarchy of power produces real as well as fantasised differences: differences that are also inequalities.'²⁵ Mahoney regarded this understanding of equality as a

19. C Gilligan, *In a Difference Voice: Psychological Theory and Women's Development* 1982, mentioned in G Binion, "Human Rights: A Feminist Perspective" 17 *Human Rights Quarterly* 509 at 509 and 523-524 (1995); see also, A C Scales, 'The Emergence of Feminist Jurisprudence: An Essay' 95 *Yale Law Journal* 1373 at 1387-89, 1380-84 (1986).

20. *California Federal Savings & Loan Assn et al v. Guerra*, [1987] 479 US 272.

21. [1999] All ER (EC) 138 para (1).

22. J C Williams, 'Deconstructing Gender' 87 *Michigan Law Review* 797 at 801-2, 805-11 (1989).

23. *Supra* note 8 at 442.

24. See *supra* note 2 at para 48.

25. To quote her, 'If differentiation is discrimination, affirmative action, and any legal change in social inequality, is discrimination— but the existing social differentiations which constitute the inequality are not?' see C A MacKinnon, *Feminism Unmodified* 37, 42 (Harvard University Press, Cambridge, 1987).



'disadvantage', requiring judges to look into women's practical positions in a society that confront their legal rights.²⁶ She proposes that '...this approach has a much greater chance of achieving real equality and is consistent with the norms set out in the women's convention.'²⁷

The post-modern theory is another approach to equality which refuses to give consideration to a single category of 'female' or of relationship (men-women) in determining equality. It articulates the need to account for multiple images of women, 'resulting, for example, from the intersection of gender, race and class.'²⁸ This theory attempts to address the different realities of each individual or a group, rather than the totality of womanhood and it solicits for special rules to analyse the 'complex social practices' of a particular state.²⁹ Supporting this approach, the Supreme Court of Canada in *Moge v. Moge*³⁰ placed special emphasis on the personal background, physical and psychological conditions of an old separated woman in her own marriage context. The court compensated for her contributions as a homemaker and a mother during the course of marriage, and for her particular disadvantages that she suffered as a consequence of marriage.

Beyond the above four theories, 'equality' is further reconstructed as an 'acceptance'. It sees differences among women as diversity, instead of division and differences between women and men as opportunity, rather than as danger.³¹ Thus, it is submitted that no single approach to equality seems to capture the reality of women's experiences with regard to equal rights, therefore, the exploration of the diversity of approaches to equality is not only valuable but also essential to obtain equality.³² However, the following discussion only considers the first three approaches to equality in addressing women's employment rights in Bangladesh. The reason is that the substantive approach is yet to develop in administrative and judicial practices, and is in its infancy in the

26. *Human Rights of Women*, *supra* note 8 at 445.

27. *Ibid.*

28. C G Bowman & E M Schneider, "Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession" 67 *Fordham Law Review* 249 at 251-53 (1998).

29. *Supra* note 2 at para 77.

30. [1992] 3 SCR 813 at 861, 876,880, 882.

31. C A Littleton, an exponent of this model argues that ' "Acceptance" would reduce inequality not by eliminating women's differences, but by reassessing the value society accords to traditionally "female" occupations and lifestyles, and revaluing so as to render such value no less than that accorded to equivalent "male" activities.' See, C A Littleton, 'Reconstructing Sexual Equality' 75 *California Law Review* 1279 at 1279, 1312-38 (1987).

32. H Charlesworth, C Chinkin and S Wright, "Feminist Approaches to International Law" 85 *The American Journal International Law* 613 at 613 (1991).



legislative framework of Bangladesh. The final two modes are far too remote to be considered in the present context.

III Women's Employment Rights under the Constitution of Bangladesh

Article 29 of the Constitution of Bangladesh guarantees equal opportunities for women in the service of the Republic.³³ Discrimination on the grounds of sex is prohibited under article 28. The constitutional approach to equality is overwhelmingly influenced by the formal theory of equality, meaning equal treatment between the members of the same class of employees.³⁴ Upholding this formal approach, the Supreme Court of Bangladesh in *Parveen v. Bangladesh Biman*³⁵ endeavoured to equate the age limit of the petitioner in the service of Bangladesh Biman for retirement with that of her male colleague. This approach of legal enforcement concentrates on the elimination of discrimination, rather than on achieving equality.³⁶ More importantly, emphasis solely on equal rights to employment by the law ignores the fact that in order to enjoy that right at least one basic criterion needs to be satisfied. This is the educational qualification which demands an equal access to economic opportunity and equal attention from the family as well. The traditional outlook of the society in Bangladesh largely prefers to see women in their biological roles and is reluctant to invest in girls' education.³⁷ Thus, the guarantees offered in article 29 become meaningless those situations where most women experience these sorts of disadvantages. Women's unequal status debars them from competing with men in the very entry stages of the public service. The 'constitutional

33. *The Constitution of the People's Republic of Bangladesh 1972* (hereinafter: The Constitution).

34. *Parveen v. Bangladesh Biman*, [1996] 48 DLR at 132-36.

35. *Ibid* .

36. C McCrudden, "The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements" 13 *Oxford Journal of Legal Studies* 321 at 328 (1993).

37. In Bangladesh all social institutions ranging from the household, community and the state uphold the traditional patriarchal concept – a socially established process through men in general gain control over women. The social systems determine women's role within 'motherhood' which should encompass house-holding, all relevant activities and, keeping a family sound. A son as a future bread winner and parental provider always receives high value and preferential treatment with regard to access to education, better health care and nutrition. From early childhood a girl has to accept a sex-bias in the allocation of intra-family food, access to resources and opportunities. See for details, R Jahan, "Hidden Wounds, Visible Scars: Violence Against Women in Bangladesh" in B Agarwal (ed.), *Structures of Patriarchy: State, Community and Household in Modernising Asia*, 199-226 (Zed Books Ltd., London, 1988).



equality' fails to recognise this unequal status of women and, therefore, has failed to advance women's employment in the last 33 years.³⁸ As the Supreme Court of India maintained, '[equality] of opportunity for unequals can only mean aggravation of inequality'.³⁹ Women in Bangladesh occupy only 8.6% of the 1st grade (class) public jobs, compared to 91.4% by men, but their proportion in the 3rd grade is comparatively high.

An empirical study on some selected autonomous bodies reveals that women occupy 36 posts (14.67 %) out of 218 in managerial positions, and among the executives they occupy 72 (4.23%), compared to 1628 positions by men.⁴⁰ In upper ranks of policy-making, women account for only 1.35% of total employees.⁴¹ Women's employment ratio in the grade implies that they are more 'suited' to non-skilled and low-paid jobs because of their lack of education. Formal equality regards this concentration on low-paid as individual choice, instead of as 'structural employment inequality to be redressed by the law'.⁴²

In addition, the Constitution and other state laws regarding employment do not provide any definition of equality or discrimination. Neither do these laws provide for any statutory action that is required to be undertaken by the employer to give effect to equal provision or to comply with this provision in the workplace. Given the legal flaws, employers adopt divergent recruitment policies sensitive to their needs and goals. Some of these policies are apparently neutral but discriminatory in effect. Therefore, women are grossly underrepresented in major establishments.

This underrepresentation is partly due to recruitment policies of the concerned establishments.⁴³ The defence services, for example, require a special training to be undertaken by all eligible candidates, where women are very unlikely to compete equally with men because of their physical characteristics. This policy is apparently neutral but has the

38. Bangladesh achieved its independence in 1971 after experiencing more than two hundred years of colonial domination and adopted its Constitution in 1972.

39. *Kerala v. Thomas*, (1976) 1 SCR 906 at 933.

40. In public service, 29 cadres exist in Bangladesh. Except for two cadre services, namely, Bangladesh Civil Service (BCS) Education and BCS Health, women's positions in the other 27 cadres are insignificant. See MM Khan, "Women in Public Administration and Management: Bangladesh Experience" 2 *Empowerment — A Journal of Women for Women* 63 at 74; H Hossain, *et al*, *No Better Option? Industrial Women Workers in Bangladesh*, 44 (University Press Limited, Dhaka, 1990).

41. S R Khan, *The Socio-Legal Status of Bangali Women in Bangladesh-Implications for Development*, 13 (The University Press Limited, Dhaka, 2001).

42. H Fenwick, 'From Formal to Substantive Equality: the Place of Affirmative Action in the European Union Sex Equality Law' 4 *European Public Law* 507 at 508 (1998).

43. See Agarwal, *supra* note 37 at 217.



capacity to disproportionately exclude women. In the contemporary complex practices of the workplace, such a policy is regarded as indirect discrimination. Such a practice is not legally challenged because of the low level of education and the lack of awareness of women and their economic powerlessness. Women's position in public jobs in Bangladesh thus suggests that formal equality does not work to realise their equal employment rights.

In several foreign jurisdictions, formal equality had been ineffective as well in providing remedies in favour of women.⁴⁴ Yet, to address the deficiency of formal equality and to achieve an effective remedy for women, numerous international and national instruments introduced different approaches where discrimination is split into two groups — direct and indirect discrimination. Direct discrimination is defined as any action, decision, condition or requirement of the employers which treat an individual or a group on the grounds of sex less favourably than others.⁴⁵ Indirect discrimination refers to those situations where 'an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex...'⁴⁶ Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)⁴⁷ includes both modes of discrimination, defining discrimination as:⁴⁸

44. For example, the Supreme Court of the United States (US), in *Wimberly v. Labor and Industrial Relations Commission of Missoleri*, denied the claimant unemployment compensation. The court reasoned that the Federal Unemployment Tax Act was designed to prohibit the state from 'singling out pregnancy for disadvantageous treatment, but was not intended to compel a state to afford preferential treatment for women on account of pregnancy.' See, 479 US 511 at 2. In *Bliss v. Attorney General of Canada*, the claimant was refused an unemployment insurance benefit during and after the pregnancy, '...to which she would have been entitled had she not been pregnant'. The Supreme Court held that '[any] inequality between the sexes in this area is not created by legislation but by nature.' See, [1979] 1 SCR 183 at 186. In another case, the Canadian court precluded a 30-year old woman from receiving pension until she reaches the age of 65. See, *Law v. Canada (Minister of Employment and Immigration)*, [1999] DLR LEXIS 35 at 85. In UK, in *Larsson v. Dansk*, a woman failed to get a remedy for her illness attributable to pregnancy. See, [1997] ECR I-2757 at 3.

45. See for example, The Sex Discrimination Act 1975 (UK) s. 1 (1) (a).

46. *Id.*, s. 1 (2) (b); see also, the Sex Discrimination Amendment Bill, 1995 (Australia) ss. 5(2) and (3).

47. Bangladesh ratified CEDAW on 6 November 1984 with reservation to articles 2, 13 (a), 16 (1)(c) and 16 (1) (f). In 1997, Bangladesh has withdrawn its reservations from articles 13 (a) and 16 (1) (f). See, State Parties to CEDAW, Division for the Advancement of Women. <http://www.org/womenwatch/daw/cedaw/state.htm> (27 August 2003).

48. The Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW) G A Resolution 34/180 of 18 December, 1979.



...any discrimination, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The concept of indirect discrimination also received strong recognition and expression in many judicial decisions across nations. In 1971, the Supreme Court of US in *Griggs*⁴⁹ examined the adverse impact of neutral policies of the Duke Power Company. In this case, African American employees were required to have a high school education or to pass a general intelligence test as a condition of employment in that company. The court held that the requirements may fairly measure the skills but operated to 'disqualify Negroes at a substantially higher rate than white...' since they have traditionally a lower level of education. It favoured the employees, finding that both requirements 'were not shown to bear a demonstrable relationship to the successful performance of the jobs for which the standards were used ...courts were required to look to the consequences of the employment practices, not simply the motivation.'⁵⁰ In Australia, two women were denied permanent appointments in the Australian Postal Commission due to lack of medical fitness as required for the appointment sought. The Court of Appeal held that the commission had engaged in discrimination by requiring the complainants to attain a specified body-weight measured by height and sex.⁵¹ In another case, eight female ironworkers were retrenched by the Australian Iron and Steel Pty Ltd (AIS).⁵² The AIS had been giving preference to male employees. In 1982, for commercial reasons, it adopted the 'last on, first off' principle (to retrench staff) that adversely affected women since they belonged to the 'last' category. The court compensated the women, maintaining that the principle itself was unobjectionable but has exposed women 'to threats of retrenchment and retrenchment more severely than men.'⁵³

In Bangladesh, the Constitution requires the public office to treat men and women equally when they are 'similarly situated'. However, '[one] can only be equal (in benefits or in privileges) if one is the same, or at least comparable',⁵⁴ therefore, it cannot benefit most women

49. *Griggs v. Duke Power Company*, [1971] 401 US 424 at 426.

50. *Ibid.*

51. *Dao v. Australian Postal Commission*, [1987] 162 CLR 317 at 318.

52. *Australian Iron and Steel Pty Ltd v. Banovic*, [1989] 168 CLR 165 at 166.

53. *Id.* at 205-08.

54. S J Kenny, "Pregnancy Discrimination: Toward Substantive Equality" 10 *Wisconsin Women's Law Journal* 351 at 356 (1995).



because of their practical inequalities in socio-economic lives. A full account of law must recognise these inequalities and provide a distinct approach in remedying the disparity. This approach will seek the promotion of women's traditional-underprivileged status through providing them with better education and economic facilities. Towards this end, equality needs to be measured by the actual capacity of women, rather than only by their legal entitlements. Accordingly, the constitutional provision of equality is required to shift its concentration from entitlements to practical opportunities.⁵⁵ However, given the socio-economic condition of Bangladesh as a developing country, one may argue how the government instantly cope with such a standard. Nevertheless, this argument should be undermined in reference to some positive practices of other jurisdictions and, even of neighbouring country India where almost similar socio-economic condition prevails.⁵⁶ These issues apart, taking into account women's marginalised positions in major industries, it is imperative to enact an anti-discrimination law in Bangladesh, to define and clarify 'discrimination' and describe the duties and liabilities of employers to eliminate discrimination. Under this law, employers should be prohibited from adopting recruitment policies that have the effect of unfairly excluding women from employment.

IV Women's Employment Rights under the Protective Legislation in Bangladesh and the Maternity Benefit Act, 1939

In recognition of the reproductive capacities of women and as an exception to a formal mode of equality, the Maternity Benefit Act (the Act) was enacted in 1939 by the British colonial government. Bangladesh incorporated it into the legal framework of the country, soon after independence in 1972. The Act purports to regulate women's employment during certain periods before and after the pregnancy and to provide

55. M A Freeman, "Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries" 5 *Berkeley Women's Law Journal* 110 at 116 (1990).

56. For example, at present '[there] are 189 Women's ITIs [Indian Technical Institute] and 211 women's wings in general ITIs...' and 45 Polytechnics exclusively for women. The National Women's Commission established under the National Commission for Women Act, 1990 is entitled to take *suo moto* notice of matters relating to the deprivation of women's rights such as the non-implementation of laws or non-compliance of policy decisions which aim to protect and improve women's rights. For details see, Initial reports of state parties, India, CEDAW/C/IND/1 10 March 1999 at 46 (para 173-174); 'National Commission for Women-Reaching Out-Legal amendments Proposed'. http://www.nationalcommissionforwomen.org/reaching_out/complaints_counselling_unit.html (16 October 2001).



paid maternity benefits. Section 3 of the Act prohibits an employer from employing a woman 'during the six weeks, immediately following the day of her delivery'. Under section 3(2), women are also not allowed to work within that period. Section 4 provides women with 12 weeks paid maternity leave but to claim the benefits, nine months continued previous service is required.⁵⁷ The Act, however, does not provide any provision stating at what point/stages of pregnancy women employees should quit work or claim their 12 weeks maternity leave. The important point here is that women are not allowed to work for six weeks commencing from the date of giving birth, and maternity leave stops at 12 weeks from the date of birth. Due to this restriction, women employees in Bangladesh usually take maternity leave at the last stage of their pregnancy.

Section 7(1) of the Act prevents employers from dismissing a woman from the job on the grounds of pregnancy. The rest of the provisions of the Act are concerned with the procedures for claiming maternity leave and benefits. Before examining its implementation in Bangladesh, a number of flaws in the Act can be outlined. Firstly, the legal requirement of nine months continued service unjustifiably excludes a woman from claiming the benefits of the Act if she manages to find a job immediately after conceiving the child.⁵⁸ This provision is unjustified because a woman has to suffer the double 'injuries': physical pain and additional economic loss merely for carrying the child. Moreover, these sufferings are not only for herself but for the 'child' as well from whom the community at large has some benefits to achieve.⁵⁹ The same is applicable to those situations where a woman experienced abortion or delivered a premature baby. She could have been qualified for that had the abortion or premature delivery not occurred, and the prevention of which might have been beyond her own control. Secondly, since 1939, the Act has remained mostly unmodified,⁶⁰ except for once when it restricted the maternity benefit for up to two children. The ILO raised objection to this limitation but the provision is still in operation to deny women benefits for more than two children.⁶¹ Thirdly, employer's liability for non-compliance with the Act is a fine of a meagre amount which only seems to encourage employers to violate the law. Fourthly, the procedures for recovering maternity benefits are very complicated and not easily

57. The Maternity Benefit Act, 1939, s. 4 (2).

58. For several reasons such as the low level of education and the negative attitudes of the community towards women's work, it becomes very difficult for a woman to obtain a job. In most cases, a woman is required to reveal her marital status as a condition of employment.

59. *Brooks v. Canada Safeway Ltd*, [1989] 1 SCR 1219 at (part VII).

60. The Act was amended in 1975 to incorporate existing section 4.

61. Comments of the International Labour Office, Draft Labour Code of Bangladesh, 1994, comment no. 23 (a).



accessed, especially for those women who are uneducated and unaware of them.^{61a}

For a series of reasons, the requirements of the Act for getting maternity benefits should be removed. Firstly, to provide due regard to the disadvantaged socio-economic condition of women in Bangladesh,⁶² the nine-months service requirement should be abolished. Women cannot reasonably be disentitled to their salaries on such grounds that exclusively result from carrying the children. As the Supreme Court of Canada observed, a woman who bears the children and benefits the society should not be unfairly disadvantaged. 'Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons'.⁶³ Rather, this restriction, if removed, will value women's unique sufferings and contribute to improving their economic independence in which they have traditionally lagged behind.

Moreover, in recent foreign judicial practices, pregnancy is regarded as an equivalent of a disability for which the preceding service is not necessary to claim employment benefits.⁶⁴ The disability of employees results in loss of works of the employer in a similar way but still they are entitled to specific salaries and other official benefits. Even from this point of view, recommendations for abolition of nine months service can be sustained. Secondly, for similar reasons, limitation on maternity benefits for more than two children must be removed; however, in abortion cases, the paid maternity leave may be granted only for six weeks since women do not have to provide care for a child in that situation. To support this recommendation, provisions under the Maternity Benefit Act 1961 of India may be a relevant reference. Section 9 of this Act provides that '[in] case of miscarriage or medical termination of pregnancy, a woman shall...be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks...' Section 10 further states that a woman who suffers from illness arising out of pregnancy, delivery and premature death of the child or the like problems shall be granted a

61a. More than 80% of women employees in the garment industries (which provide 90% employment for women) are less educated and rural migrants. See, F Islam, "Aspects of Women's Work and Employment in Bangladesh: International vis-a-vis Domestic Legal framework" 5 *The Dhaka University Studies* 159 at 178 (1994).

62. Nearly 80% of women in Bangladesh are poor. See the *Third and Forth Periodic Reports of Bangladesh to the CEDAW Committee* (Hereinafter CEDAW Report) CEDAW/C/BGD/3-4, 1 April 1997 at 7.

63. *Brooks* cases, *supra* note 59 at part VII.

64. See for example, US cases, *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).



maximum period of one month maternity leave in addition to that six weeks leave. Thirdly, given the economic constraints of Bangladeshi women and the non-availability of social support, it is submitted that regular payment be continued during the maternity leave. It is necessary for livelihood as well as for health reasons that result from pregnancy. Fourthly, to ensure the enjoyment of maternity benefits, the liability of the employers must be increased substantially so as to be a deterrent. The employers in Bangladesh, particularly in the garment industries (GIS)⁶⁵ in most cases refuse or are reluctant to pay the maternity benefits. The reason might be that they are well aware of the consequences of the violation of the Act. Such an extension of the penalty may help women realise the maternity benefits, and can make employers conscious that the non-compliance with the Act is a serious offence.

There has been a national consensus that in public employment women usually enjoy the maternity benefits up to the birth of two children. Yet, one study claims that government organisations have frequently violated the law and denied women paid maternity.⁶⁶ The situation is worse in private sectors, especially in the GIS where availability of maternity benefits goes to reduce women's possibilities of getting jobs. Even after getting jobs '[becoming] pregnant means losing job'.⁶⁷ In the absence of any monitoring body to oversee the implementation of the Act, employers take advantage to randomly sack pregnant women to avoid paid maternity.⁶⁸ One empirical study found twofold negative results. One result suggests that nearly 60% of the employers believe that women are less capable, in terms of job related skills and physical strength.⁶⁹ The paid maternity leave, and provisions

65. In the 1980s, the significant growth of the garment industries (GIS) generated an unprecedented waged employment for women in Bangladesh. Currently, 1.36 million women (93% of whom are migrants from rural areas are employed in the 2963 GIS, – a number more than 5 times higher than those of 1984-1985. This waged employment undoubtedly accords women economic identity, improved social status and access to civic facilities. Yet, the socio-economic gains of women are overshadowed by the exploitative practices of the GIS in contravention of laws. The exploitative practices include the non-payment of maternity benefits, the low wage and unscheduled work without payment, the dismissal of women on the grounds of pregnancy and so on. See for details P P Majumder, "Violence and Hazards Suffered by Women in Wage Employment: A Case of Women Working in the Export-Oriented Garment Industry of Bangladesh" 7 *Empowerment- A Journal of Women for Women* 1 (2000).

66. M M Khan, "Women in Public Administration and Management: Bangladesh Experience" 2 *Empowerment – A Journal of Women for Women*, 63 (1995).

67. Maternity Leave for garment workers (hereinafter Maternity Leave), PIB UNICEF feature, *The New Nation*, Dhaka, (28 May, 2002).

68. *Ibid.*

69. R S Rahman, "Determinants of the Gender Composition of Employment in Manufacturing Enterprises" 24 *The Bangladesh Development Studies* 25-58 (1996).



for separate sitting arrangements for women, discourage those employers from recruiting women.⁷⁰ Another finding shows that 40% of the employers give preference to women for being docile, ignorant and unaware of trade union and other laws,⁷¹ and they are, therefore, supposed to be more 'safe' than men. However, in the latter case, employers compensated their 'non-wage cost' by providing women with lower wages and less benefits.⁷² To put it other way, the employers' cost is compensated at the expense of practising discrimination in wages and other service conditions against women. Undoubtedly, neither of the two attitudes is conducive to women's work but rather is degrading and exploitative in nature. One survey further shows that 13 employers out of 37 provided maternity leave.⁷³ However, only three among 13 employers provided paid leave.⁷⁴

Thus, a conclusion can be reached, that the Maternity Act contributes further to women's vulnerability instead of remedying their different and disadvantaged situations in employment. The situation further exacerbates in the absence of any legal provision to make employers liable for practicing discrimination against women in employment. Neither does any administrative mechanism exist in the country to oversee employers' obligations to give practical effect to the constitutional guarantees of equal employment rights or the protective legislation in the workplace. Although there is a provision for inspection of the factory, under section 10 of the Factories Act, 1965, it is more concerned with the safety and cleaning than those of monitoring equal opportunities for women.

By contrast, in international law, under which Bangladesh assumes affirmative obligations to ensure equality in employment, the right to be free from discrimination on the ground of sex, began to achieve the status of *jus cogens*.⁷⁵ Since 1919, the International Labour Organisation (ILO) has been formulating ever expansive rules and regulations in the

70. *Id.* at 53.

71. *Id.* at 43.

72. *Id.* at 38-40.

73. *Id.* at 38; see also S C Zohir & P P Majumder, "Garment Workers in Bangladesh: Economic, Social and Health Condition" 18 *Bangladesh Institute of Development Studies* (1996).

74. Rahman, *supra* note 69 at 39.

75. '*Jus cogens* represent those rules of international law that are of "fundamental importance" to the international community.' and is usually considered synonymous to customary international law. Race discrimination, genocide, torture and war crime have been recognised as the violations of *jus cogens*. See for details, L Askari, "Girls' Rights Under International Law: An Argument for Establishing Gender Equality As a *Jus Cogens*" 8 *Southern California Review of Law and Women's Studies* 3 at 4-8 (1998).



forms of Conventions and Recommendations, setting minimum standards for prohibiting discrimination in employment.⁷⁶ The Universal Declaration of Human Rights 1948 and its two covenants adopted in 1966 along with the CEDAW repeatedly affirm women's right to freedom from discrimination in employment.⁷⁷ With regard to employment, the uniqueness of CEDAW lies in its recognition of elimination of discrimination in the private sphere and of achieving *de facto* equality.⁷⁸ Despite these facts, it is often argued that the structures and contents of international treaties aim to measure women's non-discrimination rights with the male-yardstick, and are based on a flawed assumption of equality.⁷⁹ Overlapping mandates, excessive use of reservations and the lack of authority make most of the international efforts merely aspirational.⁸⁰ Nonetheless, the international instruments and their substantive standards, their shortcomings notwithstanding, remain an important tool for advancing women's goal of equality,⁸¹ and their significance makes it possible 'to mandate proactive, pro-women policies and to dismantle discrimination.'⁸² Under international law, for example, states are increasingly held accountable for violation of women's employment or other rights.⁸³ Even state accountability for the violation

76. Article 1 (1a) of the Discrimination Convention 1958 defines discrimination as any distinction, exclusion or preference made on the basis of, *inter alia*, sex which has the effect of impairing equality of opportunity or treatment in employment. See generally, the Discrimination (Employment and Occupation) Convention 1958 (No-111) and its accompanying Recommendation (No-111) the Maternity Protection Convention 1919 (N0-3), including the revised one (No 103, 1952), the Night Work Convention 1990 (No 171) etc.

77. See for example, the *International Covenant on Economic, Social and Cultural Rights* (ICESC) art 7; CEDAW, *supra* note 48, arts 7 and 11.

78. Article 4 of the CEDAW obligates state to abolish social and cultural practices that are detriment to women's equality rights.

79. Charlesworth, *supra* note 32 at 621-630.

80. B Stark, "International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel" 19 *Harvard Women's Law Journal* 169 at 171-73 (1996).

81. A X Fellmeth, "Feminism and International Law: Theory, Methodology, and Substantive Reform" 22.3 *Human Rights Quarterly* 658 at 729 (2000).

82. See for example, for the impact of CEDAW on women, 'Bringing Equality Home-Implementing the Convention on the Elimination of All Forms of Discrimination Against Women-CEDAW' <http://www.unifem.undp.org/cedawen4.htm> (2 May 2002); the First CEDAW Impact Study reveals that '[its] legally binding and internationally accepted character renders the Convention the basic legal framework for a strategy to ... eradicate inequality and discrimination.' See, *The First CEDAW Impact Study: Final Report—Released During the Twenty-Third Session of the CEDAW Committee, New York, June 2000*.

83. J Bol, "Using the Inter-American System to Pursue International Labour Rights: A Case Study of the Guatemalan Maquiladoras" 55 *University of Toronto Faculty of Law Review* 351 at 361-63 (1997).



of employment rights by private actors is gradually expanded in national and international laws.⁸⁴

Various legislative and administrative measures have been developed worldwide that might provide useful guidelines for dealing with women's employment in Bangladesh. In Australia, for example, the CEDAW provides the basis of a series of laws which are designed to promote women's employment. These laws include the Sex Discrimination Act, 1984 and its Amendment in 1995, the Affirmative Action (Equal Employment Opportunity for Women) Act, 1986 and the Equal Opportunity for Women in the Workplace Act, 1999 (Workplace Act 1999). These Acts deal with a wide range of issues including an eight-step compliance guideline to be followed by the employer to close the gender gap gradually in employment and with remedial measures for discriminatory practices.⁸⁵ Under the Workplace Act, 1999, all employers with 100 or more employees are required to develop and implement workplace programs by submitting annual reports on the progress of women employees.⁸⁶ Pursuant to the Sex Discrimination and Affirmative Action Acts, the Human Rights and Equal Opportunity Commission was established in Australia to examine, *inter alia*, the consistency of the objects and compliance of the Acts with the employment practices, and to investigate the complaints of discrimination cases.⁸⁷

Similarly, Canada enacted the Employment Equity Act in 1986. It was amended in 1995, requiring all employers with more than 100 employees to submit the annual report on the representation of women with the concerned ministry.⁸⁸ The objectives are to oversee whether employers facilitate women's participation and whether their statements are consistent with the prescribed instructions of the Act. In addition, the Employment Equity Act (EEA) 1995 of Canada empowered the Canadian Human Rights Commission to investigate compliance audits of employers of both public and private sectors.⁸⁹ Under the EEA, the failure to file annual reports imposes a \$50,000 fine on the employer.⁹⁰ In UK, the Sex Discrimination (Indirect Discrimination and Burden of

84. See for example, *Swedish Engine Drivers' Union v. Sweed*, [1976]ECHR 5614/72 para (50) For India, *Labourers Working on Salal Hydro Projec v. State of Jammu and Kashmir*, (1984) 3 SCC 538. See also, Meron, *Human Rights and Humanitarian Norms as Customary Law* 162-65 & 215-17 (Oxford: Clarendon Press, 1989).

85. See the Affirmative Action (Equal Employment Opportunity for Women) Act, 1986, s. 3. This Act was replaced by the Workplace Act, 1999.

86. Equal Opportunity for Women in the Workplace Act, 1999 ss 3, 6, 8, 13 and 13A.

87. The Sex Discrimination Act, 1984, s. 48.

88. The Employment Equity Act, [1995, c.44] ss. 3, 5, 9, 10, 18-21.

89. *Id.*, ss. 22-24.



Proof) Regulations 2001, among other things, places the onus of proof of discrimination on the employer.⁹¹ India can be another example of enacting special laws to deal with women's employment right. The Equal Remuneration Act, 1976 aims to, *inter alia*, ensure women's rights in employment and to monitor the representation of women and the nature and hours of work in the concerned establishments.⁹² Importantly, to make the Act more effective, an advisory committee, half of the members of whom are women, has been established to monitor the compliance of 'equality-provisions' in all establishments. South Africa also established the Commission for Gender Equality entrusted with the power 'to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.'⁹³

All these efforts have a particular significance for the enhancement of women's participation in employment. In Australia, for example, an evaluation report on a particular academic institution, under the Workplace Act 1999, subject to the varying degrees of results on women at different Levels, shows that the percentage of women has increased up to 7% in 2002.⁹⁴ According to the report, the percentage of academic women located at Level B increased from 48% in 1999 to 54% in 2002.⁹⁵ The Australian Bureau of Statistics 2003 reveals that women's participation in employment was increased by nearly 6% from 1987 and they constituted 55.5% of the total labour force in 2002.⁹⁶ Although the percentage increase is small considering the time frame (1987-2002), the ratio reflects almost an equal distribution of employment which can be regarded as an important achievement for women, compared to other countries including Bangladesh. The statistics of Canada from 2003 demonstrate that women's participation increased by 15% (from 1976) in employment and by 8% (from 1987) in the senior management in 2002.⁹⁷ In India, women's ratio has also increased to 13.8% in public

90. *Id.*, ss. 7-8.

91. The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations, 2001, s. 5.

92. The Equal Remuneration Act, 1976, ss. 4 and 6.

93. The *Constitution of the Republic of South Africa* 1996 s. 187.

94. See generally, "Arrangements for Dealing with Sex-Based Harassment' in James Cook University", Report to the Equal Opportunity for Women in the Workplace Agency 1 April 2001-31 March 2002 at 1-60.

95. *Id.* at 31-32.

96. Australian Bureau of Statistics, 6104.0 Labour Statistics in Brief, Australia 2003 at 2 <<http://80-www.abs.gov.au.ezproxy.uow.edu.au/lookup/B8005CE4A21A70CFCA256888002052D9>> (3 September 2003).

97. Statistics Canada, Women in Canada: Work Chapter updates 2003 at 6, 112 & 21 <<http://www.statcan.ca:80/english/freepub/89F0133XIE/free.htm>> (23 September, 2003).



employment in 1997 in public employment in 1997 from 8% in 1971.⁹⁸

Essentially, the practices of other jurisdictions illustrate positive ways of how the employers can be made accountable for practising discrimination against women in the workplace, and reinforce the urgency for incorporating such a provision in Bangladesh's legal framework. To this end, an equal employment opportunity (EEO) policy should be adopted under which all public and private sectors be obligated to ensure women equal participation and legal opportunities in employment, and to comply with this policy by submitting annual reports. In particular, these reports have to provide a detailed description, highlighting what initiatives employers have undertaken to promote women's positions and to eliminate discrimination in work. Additionally, it should include future plans of how they intend to achieve women's equality of employment. More significantly, there must be a provision that punitive actions will apply as in other jurisdictions where the employers fail to comply with the law.

The above foreign practices also suggest that the only meaningful way to implement the EEO policy in the workplace is to establish an independent national administrative body with the proper authority and ability to monitor the compliance of the policy and other prevailing laws with employment practices. Towards this end, a ten-member equality commission, of which one-half shall be women, as in India, should be established in Bangladesh. Along with monitoring roles its prime responsibilities may include: (i) analyse and study the situation of women in employment; (ii) detect the areas of discrimination; (iii) improve women's skills by conducting suitable education and employment programs at national and local levels; (iv) raise awareness among all employers and employees about the legal consequences of all sorts of discrimination, including sexual harassment, by launching seminars and by disseminating information; (v) remove barriers to women's participation in employment through developing a culture where males feel encouraged to regard the domestic and child care responsibilities as also for them; (vi) take cognizance of complaints; and (vii) change social attitudes about women's work through undertaking different programs and policies.

V Other Protective Legislations in Bangladesh

Women in Bangladesh are prevented by a number of laws from doing work in certain places such as in mining, hills and underground

98. *Platform for Action Five Years After- An Assessment* 40 (Dept. of Women and Children. Development, Government of India, June 2000).



areas. Article 29 of the Constitution reserves some appointments relating to any religious or denominational institution and to particular offices only for men on the grounds that these are considered by their nature to be unsuited to women.⁹⁹ Under the Mines Act, 1923 and Mines and Mineral (Regulation and Development) Act, 1967 women are not allowed to carry weight of over 20 kg. The Factories Act, 1965 obligates all organisations working in Bangladesh to provide separate canteens, rest rooms, toilets and special sitting arrangements for women. The Factories Act, 1965 also requires a factory to provide and maintain adequate accommodation for the use of children, including, suitable arrangements for feeding, washing and changing their clothing. The Factory Rules, 1979 set out provisions regarding child care facilities for women workers. In addition, section 23 of the Shops and Establishment Act, 1965 imposes restrictions on women's work beyond the hours from 7 am to 8 pm without making any alternative employment arrangements for them. The aims of this protective legislation sound favourable in recognizing and accommodating women's different needs but the objectives appear to stereotype to women.¹⁰⁰ While allowing exceptions for working women to ensure their biological roles, it supports patriarchal division of labour and reinforces the notion that motherhood though natural,¹⁰¹ is counterproductive because the parental responsibility results in reducing working hours. This responsibility, along with women's exclusion from certain jobs, in turn limits their employability. Employers feel discouraged to recruit women due to special costs as prescribed by protective legislation.

In support of this negative trend, numerous academics of other countries also claim that the protective legislation has been marginalising women and contributing to employers' stereotyping. William, for example, contends that different treatment 'is inaccurate and potentially destructive.'¹⁰² Franklin maintained that providing special rights is not a suitable way to promote women, rather it creates 'competitive advantage among employers, who escape their cost by simply not hiring women'.¹⁰³ As Mertus observed:¹⁰⁴

99. The Constitution, art 29 (3b)and (3c).

100. C J Ogletree & R de Silva-de Alwis, "When Gender Differences Become a Trap: The Impact of China's Labor Law on Women" 14 *Yale Journal of Law and Feminism* 69 at 73(2002).

101. J Mertus, "Human Rights of Women in Central and Eastern Europe", 6 *American University Journal of Gender, Social Policy and the Law* 369 at 372 (1998).

102. William, *supra* note 22 at 801.

103. R J Franklin, "Jefferson's Daughters: America's Ambiguity Towards Equal Pay for Women" 11 *Southern California Review of Law and Women's Studies* 233 at 247 (2001).

104. Mertus, *supra* note 101 at 374.



These deeply ingrained social practices had long-term consequence on women's images as workers, limiting their chances of being hired for posts that are more prestigious and reducing their opportunities for promotions...Managers came to view women as less "reliable" and more "expensive".

Hence, it may be submitted that both the formal and informal approaches to equality have failed to ensure equal rights or to eliminate discrimination in employment in favour of women in Bangladesh. Thus a substantive approach is necessary to produce a real outcome of equality for women in Bangladesh.

VI Substantive Approach to Equality

The substantive approach denotes some special measures¹⁰⁵ to improve the abilities of women to enjoy the benefits of formal/different modes of equality. It recommends something more than the two modes of equality to redress women's unequal positions and to promote their equal opportunities in employment. This approach urges activist reforms of social practices and the pro-active roles of the state to eliminate socio-economic and educational inequalities and to develop women's skills to compete in the job market.¹⁰⁶ It also requires the flexible and dynamic roles of the judiciary in interpreting equality laws to provide broader remedies to meet the reality of women.¹⁰⁷ The equality law of the European Council (EC), for example, displays adherence to the concept of formal equality, however, some of its notions reflect the approach.¹⁰⁸ To this end, section 15 of the Canadian Charter of Rights and Freedoms 1982 was expanded to include three additional rights [with the right to equality before the law] as developed under a number of Human Rights Codes in Canada since 1960. These are: the right to equality under the law, the right to equal protection of law and the right to equal benefit of the law.¹⁰⁹ The Constitution of South Africa, beyond formal equality and affirmative action, places an onus on the government

105. Here the special measures signify some socio-economic advantages exclusively for women granted by the government to overcome their traditional unequal status in employment, and the preferential treatment and shared parental responsibility.

106. M Bhattacharyya, "From Non Differentiation to Factual Equality: Gender Equality Jurisprudence under the German Basic Law" 21 *Brooklyn Journal of International Law* 915 at 915-16 (1996); see also Kapur, *supra* note 14 at 175-77.

107. A Abanulo, "Equal Pay for Work of Equal Value: The 'Results-Oriented' Approach that Never Was" 28 *Industrial Law Journal* 365 at 370 (1999).

108. Fenwick, *supra* note 42 at 509.

109. The Canadian Charter of Rights and Freedoms 1982, s. 15.



to support equal achievement of the rights for women.¹¹⁰ It also places the burden of proof on the government, providing that *prima facie* proof of discrimination (whether direct or indirect) shall be presumed to be sufficient proof of unfair discrimination unless the contrary is established.¹¹¹ Substantive equality can be achieved through two basic ways; affirmative action and shared parental responsibility.

An affirmative action is defined as ‘a systematic means, determined by each employer in consultation with management, employees and unions, of achieving equal employment opportunities for women...’¹¹² It requires states to adopt different strategies and positive action¹¹³ suitable to a particular context to balance women’s ratio in various sectors where they are under-represented¹¹⁴ of the parts of an affirmative measure, Bangladesh incorporated a provision for special measures for women in its constitutional framework.¹¹⁵

Shared parental responsibility assumes that inequalities in family life are one of the basic causes for women’s under representation in employment.¹¹⁶ ‘As long as there is no understanding of sharing household work between men and women’, women cannot escape the potential adversaries in the workplace.¹¹⁷ This concept has been regarded as an effective means of promoting women’s equality in employment.¹¹⁸ It aims to restructure the workplace in a way that must not see ‘mothering’ in conflict with that of women’s employment.¹¹⁹ It also requires employers to provide parental leave and encourages male employees to share parenting and household responsibilities by conducting appropriate education and training programmes.

110. The Constitution of the Republic of South Africa 1996, s. 44.

111. *Id.*, ss. 44 8(4).

112. Affirmative Action Implementation Manual (1985) Affirmative Action Resource Unit, Office of the Status of Women, Commonwealth of Australia at 1.

113. Positive action embraces all measures aiming to counter the effects of past discrimination and to promote equal opportunity for women. See for details, *Kalanke v. Bremen*, [1996] All ER (EC) 66 para (9).

114. K Cox, ‘Positive Action in the European Union: From Kalanke to Marschall’, 8 *Columbia Journal of Gender and Law* 101 at 105 (1998).

115. Art 28(4) of the Constitution of Bangladesh supports for making special provision in favour of women for their advancement.

116. C McGlynn, “Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy” 7 *Columbia Journal of European Law* 241 at 247-48 (2001).

117. S R Babu, “Third Shri Akella Satyanarayana Memorial Endowment Lecture on Gender Justice—Indian Perspective” 5 SCC (*Jour*) 1 at 5 (2002).

118. McGlynn, *supra* note 116 at 241.

119. Ogletree, *supra* note 100 at 93.



VI Suggestions for Improving Women's Participation in Employment in Bangladesh

In Bangladesh, the constitutional approach to equality as observed, is inadequate and on some occasions is inefficient in dealing with women's unequal positions in employment. On the other hand, the protective legislation fails to address the negative beliefs/apprehensions of employers about women's work and lacks proper implementation. Again, even when women have the requisite qualification to avail themselves of jobs as per quota, the quotas remain unfilled. In other words, women's right to employment fails to be implemented when it is formally available. The situation is essentially a complex one and difficult to resolve overnight. However, some of the problems can be remedied through enacting legislation which seeks to promote equal opportunity for women in employment by outlining the duties and liabilities of employers (as mentioned) and of the government. Under this law, the onus should be placed on the government to accelerate women's *de facto* equality through developing academic programs and employment institutions exclusively for them as in other jurisdictions.¹²⁰ Having regard to the constitutional mandate about special measures for women, it should become a legal imperative for employers to give preference to female applicants where the qualification of male/female is equal and females are under represented.¹²¹

The introduction of paternity leave with the reconciliation policy may help reduce adverse attitudes of the employers in recruiting women. Paternity leave would ease the burden of the domestic workload of working women and increase their leisure time and working hours; and eventually, it will enhance their work-efficiencies and skills for which they often suffer discrimination at the workplace. The introduction of paternity leave, however, should not be regarded as an idealistic or impracticable recommendation for Bangladesh taking into account the gradual involvement of women in employment, especially in private sectors and the practices of India. Indeed, to make those provisions beneficial to women, an improved socio-economic and educational atmosphere is essential.

As part of the initiatives to improve women's economic condition, the women's organizations (WOs) have made significant efforts in the

120. Some countries such as UK and Africa placed the onus of achieving women's equality in employment on the government. In Germany, the constitution was amended in 1994 which requires the state and the judiciary to eliminate unequal social structures and institutions to enhance women's participation in employment, See the Constitution of the Republic of South Africa, 1996, s. 44.

121. Examples of such types of preferences are found, *inter alia*, in Germany. See, Cox, *supra* note 114 at 115-16.



last decade to implement the CEDAW as it is being considered a benchmark for realizing women's equal rights in Bangladesh.¹²² Women's equal rights to inheritance have predominantly led to the movement of WOs but the government cited a religious bar to the implementation of equality in the private sphere.¹²³ The CEDAW obligates state parties to ensure equal rights in family relations.¹²⁴ However, the religion of Islam does not allow equal inheritance rights to women.¹²⁵ In all capacities a woman receives one half of a man's share.¹²⁶ From religious point of view, the reduced share is justified as woman inherit properties without any commitment to their families. By contrast, men are exclusively responsible for all concomitant obligations towards their families.¹²⁷ There has been a growing body of academic debate as to whether Islam perpetuates women's subordination or grants equal rights to them.¹²⁸ However, this controversy is beyond the scope of this paper. Nevertheless, even without going into the depth of this controversy, for a number of reasons, it is hard to concede in the context of Bangladesh that providing equal inheritance right will bring a significant change to women's economic lives. Firstly, existing equality rights to employment cannot be ensured in the public sphere. Secondly, if equal rights to inheritance are given, it may bring an immediate benefit to unmarried women but in the long run, it may produce an undesirable result for them, especially when they will face harsh treatment from their in-

122. See for example, T Islam, "Rights-Bangladesh: 'Women Demand Equality, Govt Cites Religious Bar'", *The World News* (14 June 1999); [CEDAW] Women in Bangladesh demand equal rights to property' <http://www.sdn.undp.org/ww/lists/cedaw/msg00095.html> (1 October 2001).

123. *Ibid.*

124. CEDAW, *supra* note 48, art. 16.

125. Bangladesh is predominantly a Muslim country (88% of population are Muslim), see CEDAW Report, *supra* note 62 at 5.

126. See, the Holy Quran 4: 11-12; 4: 176.

127. A woman after being married is entitled to be thoroughly maintained by her husband even though she may have means of maintaining herself. The sacred Quran provides that '[men] are the protectors and maintainers of woman...' With a particular share of properties as heirs women are also entitled to dower (amount of money as a consideration of marriage). See, the Holy Quran 4:34; 4:34; See also, A Begum, 'Rights of Women under Muslim Law: Principles and Practices in Bangladesh', 1 *Islamic University Studies* at 26 (1999); B A Venkatraman, 'Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Comparable? 44 *The American University Law Review* 1949 at 2003 (1995).

128. See, A al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' 12 *The American University Journal of International Law & Policy* 1 at 2-3 (1997).



laws,¹²⁹ because giving equal share to women will proportionately reduce the share of their paternal kin. This will eventually work for losing their sympathy for them (women) since most of the people in Bangladesh lack sufficient economic ability to live on. Moreover, traditionally the men in Bangladesh are not mentally prepared to accept an equal share, in contrast to the western culture. Therefore, such a demand is very unlikely to gain support from relatives and even from the community in a conservative culture of Bangladesh, as happened in few instances in India.¹³⁰ Thirdly, after the death of parental relations, very little property may remain for distribution among heirs as nearly 50% people of Bangladesh are living below the poverty level.¹³¹ In that case, equal inheritance right cannot be a 'protective shelter' for women in Bangladesh since nearly 80% of them belong to those families.¹³² Fourthly, CEDAW is often viewed by the Muslim countries as culturally biased and sensitive to western values.¹³³ The CEDAW when seeks to equalize inheritance rights, overlooks the fact that such an attempt will frustrate the goal of equality since the religious dictates are deeply entrenched in the social fabric of Bangladesh which regards equal rights as destructive to family ties.¹³⁴ Without any proper understanding of the specific situation or any attempt to create a congenial atmosphere, particularly at local levels, the prompt adoption of 'alien' strategies, therefore, cannot bring any social change.¹³⁵ Women who live in very 'traditional' communities "cannot and should not be invited to subscribe to a supposedly "international" feminist vision without enabling them, at the same time, to live in harmony with their immediate environment. It is irresponsible and inhumane to encourage these women to move too fast...without due regard to the full implications of such action."¹³⁶

Moreover, achieving equality as per the prescription of the CEDAW does not always mean to enact laws or abolish the authentic values of a

129. C I Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' 41 *Harvard International Law Journal* 381 at 416, (2000).

130. *Ibid.*

131. World Development Report 2003 at 11, <http://www.Adobe.com>.

132. CEDAW Report, *supra* note 62 at 7.

133. J. Dimauro, 'Towards a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law' 17 *Women's Rights Law Reporter* 333 at 343 (1996).

134. T. Monsoor, *From Patriarchy to Gender Equity – Family Law and its Impact on Women in Bangladesh* 4 (The University Press Limited, Dhaka, 1999).

135. E. G. Mountis, "Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context" 15 *Dickinson Journal of International Law* 113 at 141-42 (1996).

136. A An-Na'im, "The Rights of Women and International Law in the Muslim Context" 9 *Whittier Law Review* 491 at 516 (1987).



specific religion.¹³⁷ Rather, a viable route can be to introduce a dialogue at national and local levels to, *inter alia*, separate the traditional patriarchal concept from the core values of Islam such as ‘*Islam prohibits women’s education*’ or other *fatwas* (decision of Muslim leaders) in the name of religion that have no relevance to Islam in the modern world and are detrimental to women.¹³⁸ International and western women’s organizations can held the process effectively by providing financial support and proper monitoring.¹³⁹ Alternatively, national WOs campaign should be intensified to put pressure on the government to ensure women’s rights such as right to dower¹⁴⁰ and maintenance under the personal law. Most of the disadvantaged women (90% of the total) do not enjoy these rights in cases of divorce or of separation.¹⁴¹

137. Nyamu, *supra* note 129.

138. Al- Hibri *supra* note 128 at 44; V. Narain, “Women’s Rights and the Accommodation of “Difference”: Muslim, Women in India” 8 *Southern California Review of Law and Women’s Studies* 43 at 71-72 (1998).

139. Mountis, *supra* note 135.

140. Dower is an inevitable part of a Muslim marriage. It is a sum of money or other property given by the husband as a token gesture to the wife and it is obligatory under Muslim Law. See for details, JJ Nasir. *The Status of Women Under Islamic Law* 46-59 (Graham & Trotman, London, 1994).

141. Sobhan observed that in Bangladesh ‘[there] has been no case of the dower debt being paid on divorce nor any wife receiving any maintenance...’ See, S Sobhan, *Women Issues in Bangladesh*, 2 (1982-83).