3

A Critique of the Feminist Movement in Bangladesh: The failure to protect women against "*revenge porn*".

Ehsan A. Siddiq[1]

This article considers the theoretical basis of the feminist movement in Bangladesh using the Pornography Control Act, 2012 as its central focus. It examines the dominating influence of liberal feminism over the women's movement and how its failure to appreciate and utilise insights from other feminist approaches such as radical feminism has rendered it unable to conceptualise and deal with the issues surrounding pornography and prostitution. It considers how the Pornography Control Act which was intended primarily to criminalise revenge porn has been thwarted in its goals by the liberal approach of the legislature. The article also examines how third-wave feminist approaches towards pornography and prostitution, although favoured by some activists in Bangladesh is unlikely to gain much traction because of the restrictions contained in the Bangladesh Constitution.

Introduction

In 2011, there was cause for celebration in Bangladesh's entertainment industry. Two of its most bankable stars – Apurbo and Prova – had tied the knot. Whilst still engaged to her long term boyfriend, Prova had eloped with Apurbo to be married in a private ceremony attended only by a few close friends.[2] News of the marriage had been withheld from the press until the formalities were over. However within weeks of the announcement, Prova's ex-fiancé smarting from the very public rejection, posted explicit videos recorded by him during their relationship on the internet. It was only a matter of time before the videos went viral. People watched them, shared them and downloaded them onto their computers and even their

1 The author is an Advocate of the Supreme Court of Bangladesh. He was called to the Bar of England and Wales from the Hon. Society of Gray's Inn. He obtained his LL.B (Hons.) from the London School of Economics and Political Science, UK. The author can be reached at ehsan.siddiq@thelcounsel.com.

2 "Actors Apurbo and Prova Tie the Knot", August 20, 2010. Accessed on May 26, 2015. http://archive.thedailystar.net/newDesign/print_news.php?nid=151394. See also "A new beginning for Apurbo", Priyo News, July 15, 2011 http://news.priyo.com/entertainment/2011/07/15/new-beginning-apurbo-31911.html.

mobile phones. Soon, most Bangladeshis had either seen the videos or heard of them. Initially the couple put on a brave face, attending interviews and appearing in public together. But in the end, the explicit images proved to be too much of a strain on the relationship. The marriage ended within three months. Prova was humiliated. Offensive comments and messages were posted on her internet fan pages. Her career almost ruined, she went into a self-imposed exile. She made a come-back in 2014, but her career failed to take off.

Earlier in the same year, a teacher of one of Bangladesh's leading single-sex schools was arrested when he was discovered to have sexually assaulted his student.[3] To make matters worse he had recorded the assault on his mobile phone and threatened, if the student complained, to post the videos. The threat was also used to compel the student to submit to further abuses. However, the student finally plucked up the courage to complain, which resulted in criminal proceedings against the teacher.[4] In the first 6 months of 2011, there were 11 incidents of young men blackmailing women for money or sexual favours with explicit videos recorded during the relationship.[5] And by the end of 2011, "revenge porn" or non-consensual pornography had become a serious menace in Bangladesh.

The government responded a year later by framing the Pornography Control Act, 2012. This was consistent with the strategy of successive governments of placating the public through legislation. The government could now, irrespective of the efficacy of the law silence critics when faced with allegations of inaction. Yet despite the increasing number of laws dealing with gender specific crimes, violence against women has not subsided.[6] Successive governments have failed to identify and respond to the underlying causes of gender-related attacks. However, the purpose of many of these attacks – whether it is the posting of videos or the throwing of acid on women who have rejected the advances of men is quite clear. It is to send the message - "if I can't have you no one will;" it is an attempt to dominate and subor-

3 "Parimal indicted for raping student", *BDNEWS24*, March 7, 2012. Accessed on May 26, 2015. http://bdnews24.com/bangladesh/2012/03/07/parimal-indicted-for-raping-student.

4 Md Sanaul Islam Tipu, "Two Viqarunnisa teachers testify in rape case against Parimal." *Dhaka Tribune*, November, 12, 2011. Accessed on May 26, 2015. http://www.dhakatribune.com/law-amp-rights/2013/nov/22/two-viqarunnisa-teachers-testify-rape-case-against-parimal.

5 Hameeda Hossain, "Create Spaces for Gendered Interaction" in *Rights and Realities*, 2nd Part, (Dhaka: Ain O Salish Kendro, 2014), 244.

6 Ibid.

dinate. In the first instance (cited at the beginning of this Article), the videos were used to control and determine the ex-fiancée's choice of partner. In the second, it allowed the teacher to control his student by coercing her to submit to abuse. But the rationale of the legislature in framing the Pornography Control Act was not to prevent or punish the attacks on women. In drafting the law, the legislature was guided by liberal principles which dictated that private conduct between two persons which led to the recording and use of explicit materials fell outside of the scope of legislation, while the harm done to the morality of public when viewing such materials fell very much within. Thus the stated purpose of the Pornography Control Act was to protect the public from the harms of pornography. This meant that the very wrong that the Pornography Control Act had set out to deal with, i.e. the victimisation of women with explicit materials remained unaddressed.

Although the media and the women's movement had in the months leading up to the promulgation of the Act been vocal about the effects of revenge porn on women, they seemed satisfied by a law which failed to recognise the harms suffered by women. There were no discussions or debates as to whether the law would be able to protect women by punishing and preventing incidences of revenge porn. The absence of any critique on the efficacy of the law was due to two reasons. Firstly, the large number of women's organisations operating within Bangladesh are *projectised* and NGO-*ised* and follow programmes dictated by donors.[7] The issue of revenge porn fell outside the scope of the donor driven programmes. Secondly and more importantly, the women's movement in Bangladesh, as I will show, has shown an excessive reliance on liberal feminist approaches. This has not only limited the movement's activism to the public sphere but it has also meant that it is unable to question the gender-neutrality of the legal system and legal tools on which it relies to implement its reforms. Thus the women's movement was happy to see the wrongs suffered by women in private translated into a harm suffered by the public, for the sake of legislative reform. Moreover, the failure to question the gender neutrality of the legal system meant that the women's movement was oblivious to the fact that the definition of pornography had been constructed from the male point

7 For more on the NGO-isation of the women's organisations and the impact on their activities, see Sohela Nazneen and Maheen Sultan, "Contemporary Feminist Politics in Bangladesh: Taking the Bull by the Horns" in *New South Asia Feminisms*, ed. Srila Roy, (London: Zed Books, 2012) and Lamia Karim, "Transnational Politics of Reading and the (Un)making of Taslima Nasreen", in *South Asian Feminisms*, ed. Ania Loomba and Ritty A. Lukose, (New Delhi: Zubaan, 2012), 208.

of view, something which as has been shown later, seriously eroded the protections made available to vulnerable women.

The purpose of this Article is to examine the theoretical underpinnings of the feminist movement in Bangladesh using the Pornography Control Act, 2012 as its central focus. Bangladesh has made huge strides in women's education[8] and employment.[9] A steady progress has also been made in involving women in the political process.[10] A liberal feminist approach has served Bangladeshi women well by identifying areas of discrimination and then removing them through legislation and the judicial processes to establish formal equality between the sexes. But there are limits to the liberal approach. The response of liberal feminism has not been satisfactory on issues such as sexual harassment, prostitution and pornography, the very essence of which is the gender of the victim. Granting of greater liberty and equality has not resolved these issues. These are issues to which liberal feminism has no appropriate answer. Yet legislators, the courts and activists have taken one-size-fits-all approach and have responded to the problems through liberally inspired laws. In the first part of this Article, I will show how liberal feminism has had a dominating and almost stifling influence over the law and activists in Bangladesh. It has been applied to the near exclusion of the developments and insights provided by other strains of feminism. Although pornography is better understood and dealt with in terms of radical feminism, the Pornography Control Act, 2012 fails to make use of its insights. In the second part I will show how the framers of Bangladesh's Pornography Control Act, 2012, were influenced by a liberal feminist approach and how this influence led unwittingly to the formulation of a definition of pornography (and revenge porn) from the male experience. And finally I will discuss some alternative approaches to conceptualising and framing a law to deal with pornography and revenge porn.

8 In 1990, 31.9% of the students who passed their secondary school examinations were females. By 2014, this has increased to 50.4%. These data have been obtained from the Educational Database of Bangladesh Bureau of Educational Information and Statistics at http://banbeis.gov.bd/data/index.php?option=com_content&view=article&id=316&Itemid=106. Accessed on May 26, 2015.

9 Statistics of 2010 from the Ministry of Public Administration show that 4503 are now employed by the Bangladesh Civil Service. However, it has been described as being below expectation, see Nazmunnessa Mahtab, Women, Gender and Development Contemporary Issues (Dhaka: A H Development Publishing House, 2012), 211.

10 If one considers the representation of women in the Union Parishads (i.e. a unit of local government) for instance, in 1973 there was only one female chairperson of a Union Parishad, while in 2003 there were 22, See ibid., 203.

The Liberal Feminist Tradition in Bangladesh

Liberal Feminism (The First-Wave)

Liberalism embodies within it the twin concepts of liberty and equality. The concept of liberty divides society into public and private spheres and argues that whilst the State is free to regulate the activities of individuals in the public sphere in the public interest, the conduct of individuals in the private sphere is off-limits. Regulation in the private sphere is however permissible, only where it is necessary "to prevent harm to others."[11] Liberal feminism is therefore restricted at very outset to operating mainly within the public sphere. This has limited liberal feminism's actions to areas such as employment and political participation. This is problematic as "women's lives have in many societies been lived to a greater extent than men's within the so-called private sphere."[12] Thus no matter how reprehensible the conduct of an individual may be in the private sphere, liberal feminists are restrained from insisting on state interference. This has called for a reconceptualisation of the public-private dichotomy by feminist lawyer, Nicola Lacey. Lacey relying on the works of Iris Marion Young argues that "the public" should be reconceptualised as openness to political debate and dialogue, while "the private" is to be regarded "not what the public institutions exclude but what the individual chooses to withdraw from the public view." This reconceptualisation, Lacey argues, is better equipped to protect human autonomy and deal with many of the issues around pornography that liberal feminists have failed to grapple with.[13]

For liberal feminism, the concept of equality means that "women, despite their physical differences, are equally capable of functioning in the public sphere, provided that the structured inequality in law and society can be removed. Thus, women are or could be 'just like men' and therefore accorded equality on that basis."[14] It is in this regard liberal feminists assume that the legal system and the various tools

11 John Stuart Mill, *Liberty and the Subjection of Women*, (London: Wordsworth, 1996), 13.

12 Nicola Lacey, "Theory into Practice? Pornography and the Public Private Dichotomy in Unspeakable Subject" *Feminist Essays in Legal and Social Theory* (London: Hart, 1998), 72.

13 See Ibid., 96 where Lacey argues that feminist critique has exposed the ways in which sexuality, an area of life traditionally constructed as private impacts in a way which should not be beyond the sphere of politics. Her reconceptualisation of the public private debate allows for a political critique of autonomy reducing sexual practices, which would otherwise have been ignored as a matter of private concern.

14 Hillaire Barnet, An *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing Limited, 1998), 126.

that are deployed by it to rectify the inequalities and eliminate discrimination are gender neutral. They work "within the dominant ideology and seek to eliminate gender-based discrimination – to achieve true equality for women in all walks of life – without challenging the ideology itself and while remaining faithful to the liberal ideal of equality and autonomy."[15] This approach is now subject to severe criticism and it has been said that liberalism's biggest fraud lies in its assumption that men and women are equal.[16] And according to radical feminist Catherine A. Mackinnon, equality law erroneously assumes that women are already socially equal to men[17] when in fact, society has been created unequally prior to the advent of the law and constitution and the role of law and the constitution (including the law of equality) has since been to maintain the status quo.[18]

The application of Liberal Feminism in Bangladesh

The Bangladesh Constitution which was framed in 1972, sets a distinctively liberal tone for the women's movement in the country. Article 28(2) of the Constitution guarantees that "women shall have equal rights with men in all spheres of *State and public life*."[19] This Article is based on the public-private dichotomy of liberalism. Implicit in this Article is the desire not to upset the pre-existing hierarchical relations between the sexes in the private sphere.[20] Despite its limitations, feminists in Bangladesh have made significant progress operating within the liberalist tradition. They have not only managed to grant themselves increasing and more deeper access into the public sphere,[21] but as I will show have also successfully managed to bring about reforms in areas traditionally considered to be within the private sphere. These reforms have been made mainly, on the assumption of the gender-neutrality of the law, through legislative reforms. This is not only because

15 Ibid., 124.

16 Ibid.

17 Catharine A., Mackinnon, *Towards a Feminist Theory of State*, (Cambridge: Harvard University Press, 1989) 169.

18 Ibid., 163.

19 See Article 29(2) of the Constitution of the People's Republic of Bangladesh (*emphasis added*).

20 Although Article 28(4) of the Constitution permits the State to frame special laws remove inequalities faced by women, the legislation contemplated are those that would enhance a woman's ability to participate in public life. It is thus only a qualification of Article 28(2).

21 See for instance *Bangladesh Biman v. Rabia Bashri Irene*, 55 (2003) Dhaka Law Rep. (App. Div.) 132 where the Court struck down a provision fixing an earlier age of retirement for female flight attendants and *Shamima Sultana v. Bangladesh* 57 (2005) Dhaka Law Rep. 201, where the Court struck down a notification excluding female commissioners of a city corporation from taking part in certain functions.

liberal feminism's preferred course of action is through legislation but also largely because many of the leading feminists in Bangladesh are lawyers. This Lacey notes can be problematic as feminist lawyers tend to be lawyers first and feminists second, meaning that they seek legal remedies for many of the issues affecting women irrespective of the appropriateness of such remedies.[22]

In bringing about reforms in the private sphere, activists in Bangladesh have adopted two strategies– (i) identifying the harms due to non-regulation in areas considered to be within the private sphere and insisting in corrective measures and (ii) shifting issues out of the private and into the public sphere. The application of the first strategy is seen in the laws regarding the demand of dowry and the domestic violence associated with the demand. The works of activists have led to legal reforms that have criminalised not only the violence that attends a demand of dowry but also the demand itself.[23] Thus private arrangements of dowries between the families of the bride and groom are now well within the regulatory scope because of the harm that is caused to the bride and her family.

An important application of the second strategy can be seen in how Naripokkho, a country-wide women's organisation dealt with sex-workers facing eviction from their brothels in 1999. Prostitution which was never really regulated in Bangladesh[24] was considered a private arrangement between consenting individuals. It fell within private sphere and outside the regulatory scope of the State. However, activists have long been challenging this characterisation of prostitution and in 1999, the media provided coverage to the plight of the prostitutes facing eviction, bringing them into public attention. At the same time attempts were made to bring about a shift in terminology from "prostitutes" to "sex workers." This change, the activists argued meant that "we have changed the terms of the debate."[25] The change allowed (at least linguistically) to transform the issues surrounding prostitution to one of employment, an area which quite clearly falls within the public

22 (Lacey, 1997, 97), see note 12 above.

23 See section 4 of the Dowry Prohibition Act, 1980.

24 Although the Constitution imposes a duty upon the State to adopt effective measures to prevent prostitution, there are no laws prohibiting prostitution.

25 Shireen Huq, Sex Workers' Struggles in Bangladesh: Learning for the Women's Movement, *IDS Bulletin*, 37: (2006) 134–137 at 136. doi: 10.1111/j.1759-5436.2006.tb00315.x. See also Firdous Azim, "Keeping Sexuality on the Agenda: The Sex Workers' Movement in Bangladesh" in *South Asian Feminisms*, ed. Ania Loomba and Ritty A. Lukose (New Delhi: Zubaan, 2012), 276 and 282.

sphere and hence subject to intervention by the State.[26] The re-characterisation of prostitutes as sex-workers was picked up by the High Court Division, when it recognised the legality of prostitution and directed the authorities to release the evicted sex-workers who had been detained as vagrants.[27] However, as Firdous Azim reveals the benefits of the re-characterisation stopped there. The "legal recognition has not helped women to re-occupy their brothels."[28] "[S]ex-workers and sex work has not been integrated into the labour discourse."[29] Women's groups have not involved sex workers in their movements for better pay and working conditions. And the garments industry, which contains the largest concentration of female workers, Azim notes, has not participated in the sex workers' movements.[30] Liberal feminism has therefore not had much success with prostitution. And in fact earlier in 1994, when the same activists proposed the slogan '*Shorir amaar shidhanto amaar*' (my body, my decision) using the liberal rights based contractual portrayal of prostitution to demand greater sexual autonomy, the slogan quickly became controversial and soon fizzled out.[31]

The liberal approach has also produced rather unfortunate results. In 2011, the Bangladesh National Women Lawyers Association (BNWLA) approached the High Court Division for the formulation of guidelines to deal with "eve teasing", a euphemistic term used in South Asia to describe a form of sexual harassment that takes place in public locations such as streets, parks, buses, etc. From the very beginning the Court appeared to have had difficulty in dealing with the definition of the eve-teasing, resorting at one point to Wikipedia.[32] The difficulty it seemed

26 The argument here is flawed. It is based on the theory of linguistic determination which argues that language affect the way we think. However, linguistic determination has long been discredited. The idea that language can affect thought is now described as an absurdity. See Steven Pinker, *The Language Instinct*, (London: Penguin Books, 1994), 55-67.

27 *Bangladesh Society for the Enforcement of Human Rights (BSEHR) v Bangladesh*, 53 (2001) Dhaka Law Rep 1, where the High Court Division using the term "sex-workers" and "workers" to describe prostitutes held that although prostitution was socially condemned, it is admitted in society as a profession.

28 (Azim, 2012, 280), see note 21 above.

29 Ibid., 272.

30 Ibid.

31 (Huq, 2006, 135), see note 25 above.

32 Wikipedia is an online encyclopaedia and its information may be entered by anyone with access to the internet. It has been thus been held by the Supreme Court of India that the information provide in Wikipedia is not authentic. See *Commissioner of Customs v. Acer India (P) Ltd.*, (2008) 1 SCC 382.

stemmed from the attempt of the Court to conceptualise eve-teasing within the liberal framework. The Court first clarified that teasing when done in the private sphere by friends and in a friendly manner was harmless and even states that when done to a younger sister-in-law it is acceptable. In dealing with teasing in the public sphere, the Court attempted to apply the liberal harm test to determine the nature of the conduct that should be proscribed as eve-teasing, and this is where the difficulty begins. Even with regard to the harassment that takes place in public (i.e. on the street) the Court appeared to treat it as private conduct between the perpetrator and the victim, distinguishing between cases when an offence would or would not be committed. It held that although eve-teasing would be the normal experience for a woman living in the more affluent areas, the same behaviour would be likely to cause harm to girls from rural areas who have a different mental or social make-up. [33] It concluded that whether or not a conduct falls within the definition of eve-teasing would depend upon the "recipient girl." The incorporation of the harm test therefore created an anomalous situation where women from affluent backgrounds are expected to tolerate eve-teasing while those from less affluent or rural backgrounds can expect protection against similar attacks by the guidelines on sexual harassment. And in fact more worryingly the Court held that "American and British females" are likely to find eve-teasing enjoyable, which not only exposes women from the expatriate community but also women with a preference to western lifestyles in Bangladesh at risk of being expected to find such harassment enjoyable.[34]

Thus while liberal feminism has served activists in Bangladesh well for some time and in some areas, it has, as shown above, been fraught with difficulties in areas such as prostitution and sexual harassment. Attempting to understand prostitu-

33 *BNWLA v. Bangladesh*, 31 (2011) Bangladesh Legal Decisions 324 para 11.

34 It is difficult to appreciate what led the High Court Division to such a conclusion regarding American and British women. Note how an American author whilst describing the universality of the experience of street harassment by women wrote, that "constant sexual appraisal is exasperating and degrading. Yet we want to feel good about our bodies, and we do not want to give up our freedom to walk anywhere or to wear what we like." Melissa Klein, "Duality and Redefinition: Young Feminism and the Alternative Music Community" in *Third Wave Agenda: Being Feminist, Doing Feminism*, ed. Leslie Heywood and Jennifer Drake (Minneapolis: University of Minnesota, 1997), 218. See also Nuara Choudhury, "An Immodest Truth: An Evaluation of the Measures Taken to Combat Sexual Harassment in Bangladesh," *Bangladesh Law Journal* 12 (2012): 137 which provides a scathing criticism of the assumptions made by High Court Division regarding western women.

tion and sexual harassment in terms of liberal feminism is problematic. In these areas liberal feminism has at best produced no result and at worst rendered women more vulnerable than before. These issues are better dealt with by other feminist approaches. They are better understood in terms of violence against women and subordination/dominance by men. Pornography too falls within this category. Insistence on formal equality between men and women is neither relevant to nor will it solve the problems of pornography. And it is in this context that the Pornography Control Act, 2012 is considered in the following section.

Liberal Feminism and the Pornography Control Act, 2012

The Pornography Control Act, 2012 prohibits the "production, storage, marketing, carriage, supply, purchase, sale, broadcast or exhibition of pornography."[35] The Act begins with a justification based on the liberal harm principle for interference in the consumption of pornography, which the Act implicitly assumes to be within the private sphere. The preamble to the Act provides the following liberal justification:-

> *"Whereas, the display of pornography has resulted in the deterioration of moral and social values and is responsible for various offences and social unrest; and whereas, it is necessary to prevent the deterioration of moral and social values; hence, the following Act is promulgated."*

From the liberal perspective, pornography is *"a form of representation of sex, which, without proof of substantive harm to an identifiable subject, should remain legally unregulated in the interests of individual liberty."*[36] The substantive harm that was identified by the legislature in the preamble of the Act, was to the values held by society. Thus although the Pornography Control Act sets out to deal with the harassment that women were facing with revenge porn, the liberal tradition of the legislature forced it to frame a solution in compliance with liberal principles of legislation, i.e. the public-private dichotomy had to be respected. Thus for the Act, private recordings between adults fell outside the scope of legislation. This is also apparent from

35 See Section 4, Pornography Control Act, 2012.

36 (Barnet, 1998, 124), see note 14 above.

the definition of pornography which has been drafted in liberal terms as -

> "(1) any *obscene* dialogue, drama, pose, naked or semi-naked dance recorded in the form of motion pictures, video images, audio-visual images, graphics or by any other method capable of being exhibited, which *arouses sexual excitement* but has no artistic or educational value;
>
> (2) *Obscene* books, periodicals, sculptures, idols, statutes, cartoons or leaflets that *arouse sexual excitement*; and
>
> (3) Negative of soft versions of the materials described in clauses (1) and (2) above."[37]

It is immediately clear from the above definition that the content of pornography is implicitly assumed to be prepared for the consumption of the public. It is required to be in the form of a performance – i.e. a pose, dance, drama or dialogue. The contents of revenge porn are unlikely however, to constitute drama, pose or dance. The content is invariably the private conduct between individuals recorded during a relationship, which happens to be abused by one of parties when the relationship ends. Thus the definition of pornography excludes revenge porn which is a source of the victimisation of women and which was a major concern that led to the promulgation of the Pornography Control Act. Since the legislature was guided by liberal principles it refrained from legislating on private conduct. Hence, the content of neither of the two recordings described at the beginning of this Article would fall within the definition of pornography under the Act.

Moreover, in order to fall within the definition of pornography, the material is required to be both obscene and arouse sexual excitement. However, neither obscenity nor the capacity to arouse sexual excitement is susceptible to objective determination. The classic definition of obscenity laid down by Cockburn CJ in *R v Hicklin*,[38] which has been adopted in Bangladesh[39] involves a determination of

37 Section 2(c), Pornography Control Act, 2012 (*emphases added*)

38 [1868] LR 3 QB 350

39 See Sreeram *Saksena v.The Emperor,* AIR 1940 Cal 290 and *Yaqub v. The State,* (1960) 12 Dhaka Law Rep (WP) 45.

whether the tendency of the material is "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."[40] Revenge porn when recorded (and privately viewed) does not fall within the *Hicklin* definition, as it does not proscribe private recordings made for private consumption. Further, even when the content of revenge porn is abused, the purpose and effect is the embarrassment and distress to the victim[41] and not the depravity and corruption of the minds of the public. Once again through the concept of obscenity the legislature introduced the public-private dichotomy, willing only to intervene where the conduct has an adverse effect on the public. Thus hidden within the definition of obscene is the liberal restraint on the regulation of private conduct, i.e. the public-private dichotomy, which prevents the definition of pornography from being used for the benefit of the women who are the real victims of revenge porn.

The second limb of the definition of pornography involves determining whether the obscene content is capable of "arousal of sexual excitement". But sexual arousal of the consuming public cannot be objectively measured and the intention of the author or photographer in this regard can be contentious.[42] No doubt the Bangladesh Courts will attempt to adopt the test of the reasonable person. However, this test presents greater difficulties in the determination of sexual excitement than in the determination of obscenity. Is the reasonable person to be regarded as male or female, i.e. should the reasonable person belong to the category of the victim or the offender? It could be argued that by making sexual excitement an essential element of the definition of pornography, the legislature has defined in terms of

40 This is an objective test which is judged according to the standards of a reasonable person. The reasonable person is defined as "a normal man" who is "neither an artist, nor the lover of art, nor a physician, nor a surgeon, nor on the other hand a sexual pervert and the mentally depraved." This is a notoriously difficult test to apply, which led the judge in this case to replace the custodial sentence with a fine observing that there was "sizable diversity of opinion even amongst the highly educated people with regard to the fact whether these pictures were obscene." See *Yaqub*, see note 39, above at paras 13 and 17. Note also with regard to the definition of obscenity how a US Supreme Court judge observed rather casually "I know it when I see it," *Jacobellis v. Ohio*, 378 US 184, 197 (1964) per Stewart J.

41 A UK Government Circular while creating awareness about a new law criminalising revenge porn described it as "the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405286/revenge-porn-fact-sheet.pdf.

42 Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989), 119

the male experience. Thus just as rape is defined in action by what the male does so too has pornography been defined in phallocentric terms. Legitimate questions may therefore be raised about the morality of a law that judges an offence from the viewpoint of the offender. Moreover, if the reasonable person is considered to be heterosexual - given that homosexuality is criminalised in Bangladesh and a reasonable person cannot be regarded as a person with criminal proclivities – would pornographic material catering to homosexuals be considered capable of "arousal of sexual excitement? These problems arise as the underlying structure of society that informs the law is both male and heterosexual. It is this gender and orientation bias within the law that liberal feminists fail to question that has allowed laws to be drafted from the male point of view. By making the definition of pornography dependent on "arousal of sexual excitement," many instances of revenge porn are likely to be excluded, as it is conceivable that the content of revenge porn may cause distress to its victims without being of a nature to arouse sexual excitement of a reasonable person.

The Committee on Obscenity and Films Censorship in the United Kingdom had worked around this problem by introducing the concept of explicitness, which is more susceptible to objective evaluation than obscenity or sexual arousal. As Carol Smart notes, the more explicit a material, the more arousing it is. Hence, explicitness can be used as an important test for reading off arousal.[43] The Minneapolis anti-pornography ordinance drafted by radical feminists, Catherine Mackinnon and Andrea Dworkin also incorporated the concept of explicitness. However the Bangladesh law fails to do so, leaving the courts to grapple with issues of obscenity and arousal, the determination of which are likely to be highly contentious.

Section 9 of the Pornography Control Act introduces a restriction on the definition of pornography. Religious images and scriptures are specifically kept outside the definition of pornography. However, this section is superfluous. Even under the flawed definition of pornography, religious art would not fall within the definition of pornography as it would not satisfy the first limb of the definition. Religious art would not by any stretch of the imagination be described as obscene under the *Hicklin* test. The same reasoning applies to medical books. Though the images in anatomy books may conceivably be cause for arousal of sexual excitement for some,

43 Ibid.