

Research Monograph

On

"The Rights of Third Gender People Under t he Legal Framework in Bangladesh and Possible Solution"

Research Paper submitted in partial fulfillment of the requirements
of the degree of LL.B (4 years) under Sonargaon University

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ABSTRACT

Third gender community is one of the most deprived communities not only in Bangladesh but also in the world. Third gender rights are heavily suppressed in Bangladesh. Due to the traditional mentality of the predominantly conservative Bangladeshi society, negative attitudes towards those in the third gender community are high. Objectives of the study are to highlight the challenges of third gender (hijra) in Bangladesh, assess the international and domestic legal protection regarding third gender rights and identify the impediments on their rights. Only secondary sources have been used during the time of the study. This paper has identified numerous encounters regarding third gender rights in Bangladesh. In last stage of the paper it offers a few suggestions that might help to bring about some changes.

Keywords: Hijra, Third Gender, Transgender, Fundamental Rights, Bangladesh.

To Almighty Creator.

Thanks for -being kind to this slave

-giving me the curiosity to seek knowledge,

-giving me the strength to remain steadfast in the goal.

ACKNOWLEDGEMENT

All praise to the creator of the universe, who has given me all the strength, patience and grace required to complete this Research monograph successfully.

I am pleased to acknowledge the tremendous guidance, assistance, encouragement and help which I received from certain sectors during the writing of this research paper. I would like to express my deepest gratitude to my honorable supervisor **Sanjoy Pal,** Lecturer & Assistant Coordinator, Department of Law, Faculty of Arts and Humanities Sonargaon University (SU) for his sincere guidance and assistance for the accomplishment of this paper. His informative comments and suggestions have assisted me untiringly in my endeavor to complete this paper.

This research is dedicated to my beloved mother who is still waiting for my success and wants nothing else.

I hope that my work shall be satisfactory. If I have done any mistake, it might be unknowingly and in that I beg pardon.

.....

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CERTIFICATE BY THE THESIS SUPERVISOR

This is to certify that the Research Monograph entitled **"The Rights Of Third Gender People Under The Legal Framework In Bangladesh And Possible Solution"** is done by **Shehan Razzaue Sanchey** in partial fulfillment of the requirement for the degree of LL.B. from the Department of Law, Faculty of Arts and Humanities, Sonargaon University (SU). The Research Monograph has been carried out under my guidance, and it is a record of the bona-fide work.

Sanjoy Pal
Lecturer & Assistant Coordinator
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DECLARATION

I, **Shehan Razzaque Sanchey** would like to hereby do solemnly declare that this submission of research on **"The Rights Of Third Gender People Under The Legal Framework In Bangladesh And Possible Solution"** is my original and own work to the best of my knowledge and belief as a part of LL.B.(Hons) degree under the supervision of **Sanjoy Pal,** Lecturer & Assistant Coordinator, Department of Law, Faculty of Arts and Humanities Sonargaon University (SU).

I also declares that it contains no writings which were previously published or invented earlier, except where I have made due acknowledgement with proper references.

.....

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LETTER OF TRANSMITTAL

Date:

To

Sanjoy Pal

Lecturer & Assistant Coordinator

Department of Law

Faculty of Arts and Humanities

Sonargaon University (SU)

Subject: Submission of Research Monograph.

Dear Sir,

It is a great pleasure to submit my research monograph on **"The Rights Of Third Gender People Under The Legal Framework In Bangladesh And Possible Solution"**. I have given best efforts to finish the Research monograph Paper with relevant information that I have collected from various sources. I have concentrated my efforts to achieve the objectives of the work and hope that my endeavor will serve the purpose.

I shall be grateful and obliged if you kindly accept my research and evaluate it.

.....

Shehan Razzaque Sanchey

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CHAPTER 1

INTRODUCTORY

1. 1 Introduction

Bangladeshi hijra or a transgender person, which is known as the third gender globally, is considered physically and psychologically ambivalent and because of ambivalence people consider them freaks (hiding their sexual identity). They are physically, verbally, and sexually abused. Hijras have been stigmatized and marginalized to a large extent. Thus, from the ancient Bangladesh to the present day, Bangladeshi society made a distinction between Hijra and predefined gender category. The term Hijra encompasses a wide range of identities, appearances, and behaviours that blur and cross the biological gender lines in Bangladesh.[1] Hijras are physiological males who have a feminine gender identity, adopt feminine gender role, and wear women's clothing. They do not conform to conventional notions of male or female gender but combine or move between the two. Their vulnerabilities, frustrations, and insecurities have been historically overlooked by mainstream society.[2]

1.2 Objectives of the Study

Law may be termed as a behavioural science as it regulates human behaviour. Changes in society demand that law should move with the time if it has to remain alive and active. The objective of legal research is to find out lacunae or deficiencies in the existing laws and to suggest suitable measures to eliminate them. The objective sets the boundaries of a research problem. The main focus of the research proposal is to set its objectives properly. The proposed study focuses on legal status of women in Bangladesh.

The objectives of the proposed study are:

1. To elimination of gender discrimination,
2. To protect third gender people' rights in legal and social regime,
3. To find out the drawbacks of law and deprivation of some communities, and recommendations,
4. Determining Third Gender People's legal status in domestic law, etc.

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[1] Sibsankar Mal, "The hijras of India: A Marginal Community With Paradox Sexual Identity" (2018) 34(1) Indian Journal Social Psychiatry, p-79-85

[2] Anuja Agrawal, _Gendered Bodies: The Case of the _Third Gender' in India'' (1997) 31(2) Contributions to Indian Sociology 273-97 <https://journals.sagepub.com/doi/10.1177/ 006996697031002005> accessed 12 June 2019.

1. 3 Scope of the Study

The issue of legal status of women is multi-dimensional. It has several aspects e.g. human rights, legal, moral, sociological, criminological, economical, ethical, geographical, health, etc. to be researched. The focus of the study is mainly on legal aspect. So far comparative study on the existing laws relating to 'Rights of Third Gender People' has been done. The study has made an evaluation of laws relating to women. The relevant case laws of both the Bangladeshi and Indian courts have been used. All the relevant laws existing in Bangladesh & in international era have been used. For the study, up-to-date laws and laws framed (for three countries) till 2008 were used. Besides, the study made an investigation into the present situation of third gender people in law in Bangladesh.

1.4 Methodology of Study

Research on "**The Rights of Third Gender People Under the Legal Framework in Bangladesh and Possible Solution**" a new admiration has emerged among the judicial persons, educators, sociologists, psychologists and public interest, lawyers, politicians, scientists and many others. Peaceful, legal, moral, ethical happy life in the society is the vital issue for the mankind. So considering all the above factors this research works utilizes the following methodologies

- Case study method,
- Judicial method,
- Sociological Method,
- Statistical Method.
- Method used in this thesis

In this Paper both qualitative and quantitative methods have been included. Due to lack of time the qualitative method has been mostly utilized. Only secondary sources have been used during the time of the study. Books, Magazines, Newspapers, Articles/Journals and Websites are used as secondary source. The method is used in this dissertation is action oriented. The study has been conducted on the basis of two principal sources of data collection.

The basic data has been collected from the administrative source, legislative laws and historical events. Other data has been collected from judicial rulings and affected person's information. By focusing efforts on critical issues of authority concern, and the victim people's concern are the important sources of data collection.

1.5 Limitation of the Study

There are huge information in text books, journals and in internet it's not sufficient. I've got to also give concern about time and price. Furthermore, the current study is undertaken as a part of fulfillment of the wants of LLB degree. The researcher gets only 4 month to complete the Research.

Moreover, the research is directed to be within prescribed word limit. Therefore, there
Not much scope for doing a comprehensive study. Yet, I try my best to satisfy the objectives launched within the present study.

CHAPTER 2
CONCEPT & LEGAL INSTRUMENTS FOR 3rd GENDER

Introduction

Bangladeshi hijra or a transgender person, which is known as the third gender globally, is considered physically and psychologically ambivalent and because of ambivalence people consider them freaks (hiding their sexual identity). They are physically, verbally, and sexually abused. Hijras have been stigmatized and marginalized to a large extent. Thus, from the ancient Bangladesh to the present day, Bangladeshi society made a distinction between Hijra and predefined gender category. The term Hijra encompasses a wide range of identities, appearances, and behaviours that blur and cross the biological gender lines in Bangladesh.[3] Hijras are physiological males who have a feminine gender identity, adopt feminine gender role, and wear women's clothing. They do not conform to conventional notions of male or female gender but combine or move between the two. Their vulnerabilities, frustrations, and insecurities have been historically overlooked by mainstream society.[4]

The Article will try to assess the current situation of third gender in Bangladesh, identify the existing laws regarding protection of third gender in Bangladesh and highlight the current challenges of third gender in Bangladesh.

In this Paper both qualitative and quantitative methods have been included. Due to lack of time the qualitative method has been mostly utilized. Only secondary sources have been used during the time of the study. Books, Magazines, Newspapers, Articles/Journals and Websites are used as secondary source.

Definition of the term 'Hijra'

It is difficult to provide any specific definition of hijra. Basically hijra or third gender people are not male or female in exact sense. Their gender is not precise and they have both characteristics of male and female. It also includes a person who is transgender or is transitioning to another gender. The word 'hijra' comes from Semitic Arabic root through Urdu-Hindustani word means _leaving one's

[3] Sibsankar Mal, "The hijras of India: A Marginal Community With Paradox Sexual Identity" (2018) 34(1) Indian Journal Social Psychiatry, p-79-85

[4] Anuja Agrawal, _Gendered Bodies: The Case of the _Third Gender' in India'' (1997) 31(2) Contributions to Indian Sociology 273-97.

tribe‘ and has been borrowed into Hindi.[5] English word eunuch or hermaphrodite referred by Indian term hijra which generally means abnormality of male genitalia.[6]

Basically they are born with male physiology; some of them are born with male intersex variations. In Bangladesh hijra is a person who have all the principal features of both genders, male and female. In medical perspective, they are such persons whose body does not confirm to arbitrarily qualified‘ criteria either that of male or female physique and thus, confusing only so far. Majority of the hijras are born with male characteristics but few of them have intersex deviations.[7] So, it can be said that hijra is an individual being neither male nor female but has the characteristics of two.

International Legal Instruments for Hijra or Third Gender

The right to equality and non-discrimination are core principles of human rights, enshrined in the United Nations Charter, the Universal Declaration of Human Rights (UDHR) and human rights treaties. The opening words of the Universal Declaration of Human Rights are unequivocal: _All human beings are born free and equal in dignity and rights‘. The principle of equality and non-discrimination are the core part of UDHR and regardless of sexual orientation, sexual identity or other status the provisions under the UDHR applies to all people of the world. UDHR is the only legal instrument which ensure and protect the rights of the people on the ground of sexual orientation and it also impose state obligations to protect human rights for every human being. However the concept of sexual orientation and gender identity are encompassed by various human rights treaty bodies where equality and non-discrimination issues have been protected, some of them are; United Nations Human Rights Committee, the committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women. It is assumed that there are several international legal instruments exist regarding protection of hijra or third gender people. Some of instruments are given below-

[5] Mohammad T. Alhawary and Elabbas Benmamoun, *Perspectives on Arabic Linguistics XVII-XVIII: Papers from the Seventeenth and Eighteenth Annual Symposia on Arabic Linguistics* (John Benjamins Publishing, 2005).

[6] Serena Nanda, *Neither Man Nor Woman: The Hijras of India* (Wadsworth Publishing Company, 1999).

[7] Serena Nanda, *Deviant careers: the hijras of India*, Chapter 7 (1991).

Universal Declaration of Human Rights

Universal Declaration of Human Rights (UDHR) is the most important legal instrument regarding protection of human rights. Third gender or transgender peoples are also eligible to enjoy all the rights under the UDHR because they are also human being. Article 2 stated that any sorts of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status etc. are prohibited. Right to life has been ensured by the Article 3. Torture and inhuman treatment or punishments are forbidden by article 5. Equal protection of law has been ensured by article 7. UDHR also prohibits arbitrary arrest, detention by article 9. Right to private life has been protected by article 12. Freedom of thought and expression has been sheltered by the article 19. Right to freedom of peaceful assembly and association has been ensured by article 20. It can be said that third gender person as a general human being can enjoy all the rights under UDHR.

Convention on the Rights of the Child

Convention on the Rights of the Child is another legal instrument regarding protection of human rights, especially for the children. In article 2 of this convention said that _state parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discernment of any kind, regardless of the child‘s or his or her parent‘s or legal guardian‘s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status‘. It is submitted that third gender child is entitled to enjoy every rights under this convention.

International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights (ICCPR) is one of the leading instruments regarding protection of human rights. Article 2 of the ICCPR provides some responsibilities towards the state party. It also prohibits any types of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The right to life has been ensured by the article 6. ICCPR by article 7 also prohibits every sort of torture or to cruel, inhuman or degrading treatment or punishment. Article 9 of the ICCPR has been ensured the right to liberty and security of person. Right to privacy has been protected by article 17. Right to freedom of expression has been protected by article 19. The right of peaceful assembly has been ensured by article 21 and the right to freedom of association has been protected by article 22. Most important provision article 26 said that _all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status‘.

International Covenant on Economic, Social and Cultural Rights

International Covenant on Economic, Social and Cultural Rights (ICESCR) has prohibited various discriminations and given the state party some responsibilities. Article 2 of the ICESCR said that _the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status‘.

Convention Relating to the Status of Refugees

This convention has been treated as one of the prominent legal instrument regarding humanitarian issues. This convention has been also prohibited various discrimination. Article 33 of this Convention held that, _where any person‘s life or freedom would be endangered on the basis of his/her sexual orientation or sexual identity, State party shall not return (refouler) a refugee‘. It is assumed that a third gender person may be a refugee as well.

Convention against Torture

Convention against Torture is an important legal tool regarding protection of human rights. Torture is a common affair against the third gender person. So this convention is another safeguard for the protection of third gender person. In article 2 of this Convention said that, _to prevent any sorts of torture against a human being in any place under its dominion the state party shall take active legislative, administrative, judicial or other actions‘.

Yogyakarta Principles

The Yogyakarta Principles is a document about human rights in the areas of sexual orientation and gender identity, published as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. The Principles were supplemented in 2017, expanding to include new grounds of gender expression and sex characteristics, and a number of new principles. The Principles and the supplement contains a set of precepts intended to apply the standards of international human rights law to address the abuse of human rights of lesbian, gay, bisexual, transgender (LGBT) and intersex people. The Principles themselves are a lengthy document

addressing legal matters. A website established to hold the principles and make them accessible has an overview of the principles;[8] some of the important provisions are discussed here. The preamble of the Yogyakarta principles has been highlighted the issue of human rights violations based on sexual orientation and gender identity. The preamble said that human rights violations based on sexual orientation and gender identity, which undermine the integrity and dignity, establishes the relevant legal framework, and provides definitions of key terms.

Principle 1 to 3 of Yogyakarta Principles said that "the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition as a person before the law without sex reassignment surgery or sterilization'. Example: According to the UN Human Rights Committee; laws criminalizing homosexuality violate the international right to non-discrimination".[9]

Principles 4 to 11 speaks fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention, and human trafficking.[10] Examples: UN resolutions emphasizing that the death penalty may not be imposed for _sexual relations between consenting adults'. But in many countries death penalty continues to be applied for same sex sexual activity. For Example; from a gay bar eleven men were arrested and they captured for over a year. The UN Working Group on Arbitrary Detention concluded that the men were detained in violation of international law, noting with concern that _one of the prisoners died as a result of his arbitrary detention.[11]

Principles 12 to 18 signifies various rights where there will be no discrimination, such as; economic, social, cultural, employment, social security, education, health, sex reassignment therapy etc. Examples: There are various laws which prohibit gender reassignment surgery for third gender person. In this issue the United Nations High Commissioner for Human Rights has stated deep apprehension. Lesbian and transgender women are at increased risk of discrimination, homelessness and violence (report of United Nations Special Rapporteur on adequate housing). Discrimination and

[8] The Yogyakarta Principles are available at <www.yogyakartaprinciples.org/principles_ en_overview.htm>.

[9] United Nations Human Rights (UNHR), _Laws criminalizing homosexuality are incompatible with international human rights standards and fuel homophobia' <www.ohchr.org/EN/News Events/Pages/homophobia.aspx> 25 August 2019.

[10] Principle 11 reads: the Right to Protection from all form of exploitation, sale and trafficking of human being.

[11] United Nations High Commissioner for Refugees (UNHCR) and International Organisation for Migration (IOM), _Working with Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI).

expulsion from educational institutions are very common issue in the case of same sex affection by the girls.

Principles 19 to 21 highlight the significance on different issues regarding third gender people, such as; without state intervention freedom to express one‘s sexual identity, join peacefully in public gatherings etc.

Example: Police and national extremists tortured on an assembly for equal rights of irrespective of sexual identity. Report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia & related intolerance.[12]

Again Principles 22, 23 guaranteed right to asylum from persecution due to sexual orientation and gender identity.

Example: Refugee protection should be given to persons who are facing a well-founded fear of persecution due to sexual reasons.[13] Rights to participation in family, public affairs, cultural life are ensured for all without any discrimination which stated under principles 24 to 26.

Example: States are also endowed with duty not to differentiate on the basis of any sexual relationship.
Principle 27 acknowledges that the right to protect and promote human rights without distinctions on the basis of sexual orientation and gender identity, and at the same time States have also responsibility to protect the human rights defenders. Examples: The persons who are working on sexual orientation and gender identity issues in different countries and regions around the world, are regularly faced threat to death, raid, torture, attack on their family, sexual abuse etc. The major reason in this regard is the lack of seriousness.

Principles 28 and 29 emphasis on the accountability of human rights violators and the redress to victims. Example: Again the UN High Commissioner for Human Rights expressed his deep concern

[12] Amnesty International, _LGBT Pride 2010: Lesbian, Gay, Bisexual and Transgender Rights Are Human Rights!‘ Activist Resource Packet‘ <www.amnestyusa.org/files/pdfs/pridekit2010.pdf> accessed 24 August 2019.

[13] United Nations High Commissioner for Refugees (UNHCR), _UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity‘ <www.refworld.org/docid/ 48abd5660.html> accessed 24 August 2019.

for the crimes against LGBT persons, as it is equivalent to human rights violations and against humanity. So he imputed importance on the proper protection.

Additionally sixteen suggestive proposals have been made in these Principles given to National Human Rights Institutions, professional bodies, funders, NGOs, the High Commissioner for Human Rights, UN agencies, treaty bodies, Special Procedures, and others.

Example: The Principles have drawn a conclusion imposing a wide range of responsibilities on the actors who are responsible for the protection and promotion of human rights. Again a statement of 54 states, gives importance on the protection of human rights especially which are sexually oriented and drawn an attention of civil society.

The Yogyakarta Principles plus 10 was adopted on 10 November, 2017 to supplement the Yogyakarta Principles. The Yogyakarta Principles plus 10 documents emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity. The Principle 30 ensures the right to State protection from violence, discrimination and harm, due diligence in prevention, investigation, prosecution and remedies. Principle 31 recognizes a right to legal recognition irrespective of sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Moreover, Principle 32 recognizes a right to bodily and mental integrity, autonomy and self-determination, including a freedom from torture and ill-treatment. Again it ensures that no-one to be subjected to invasive or irreversible medical procedures to modify sex characteristics without their consent unless necessary to prevent harm. Principle 33 recognizes a right to freedom from criminalization or sanction, including in customary, religious, public decency, vagrancy, sodomy and propaganda laws. Principle 34 ensures the right to protection from poverty and social exclusion. Principle 35 ensures the right to Sanitation and hygienic facilities as well as Principle 36 confirms the right to Information and Communication.

The Principle 37 states the right to know true information about human rights violation and medical records of violations. Principle 38 calls on the right to practise and manifest cultural diversity. The YP give additional obligations to States, such as HIV status, access to sport, combating discrimination in prenatal selection and genetic modification technologies, detention and asylum, education, the right to health, and freedom of peaceful assembly and association.

Various Problems of Hijra

No doubt, hijra community is one of the most deprived communities not only in Bangladesh but also in the world. Hijras are human being and they have different sex and sexual orientation. They have body like man but mind like female. Their male organ is neither able to have sex with girl nor they want. Their breast size is not like girl but sometimes it is bigger than those of a boy. They are not able to do sex like other girls do, that's why they do anal sex, oral sex, blow job and hand job. As the physical identification is being changed a hijra finds her in a great problem. She is neither male nor female. No one likes her. Family, relatives and the whole society are against her. No one wants her in their locality. With this big pain they grow up with the new identity, hijra. They don't have any free access to educational facilities. Getting job in Bangladesh is too much difficult for a normal person let alone hijra. People have strong social stigma about hijra, moreover they have limited scope to be qualified enough to get a job. In maximum job-sectors there are no provisions for appointment of hijra in concerned posts due to their identity crisis.[14]

They have little agency and bargaining power and thus face massive encounters in the aspects of their daily lives. It is not uncommon, in some of the worst cases; even the family faces embarrassment and tries to hide them from others. In Bangladesh, Hijras, in general, do not enjoy both basic and citizenship rights, thus, they lead merciless lives in every aspect. Because of their physical appearance, the perception towards these people is so negative that everyone considers their presence uncomfortable and has negligible attention to hear anything about them. Not only the family but also mainstream people perceive that they are the burden of the society. Due to lack of education and job facilities eventually they are to beg, work as a labourer or sex worker etc. It is true that sometimes general people are being harassed by the Hijras particularly in the public places but one should keep in mind that only very few of them do this kind of wicked acts.

[14] Sadik Hasan Shuvo, _Life of Hijra in Bangladesh: Challenges to Accept in Mainstream' (2018) 5(3) International Journal of Natural and Social Sciences 60-67 <http://ijnss.org/wp-content/ uploads/2018/07/IJNSS-V5I3-9-pp-60-67.pdf> accessed 25 August 2019. Legal Protection of Third Gender (Hijra) in Bangladesh.

CHAPTER 3

CURRENT SITUATION OF HIJRA IN BANGLADESH

Employment and Health: Third gender rights are heavily suppressed in Bangladesh. Discrimination against third gender is a common affair in Bangladesh which stated by the Human Rights Watch.[15] Conservative mentality of the society is main reason behind this discrimination. From 2011 in Bangladesh a new provision of gender identification has been introduced on passport applications named ‗other'. The Government of Bangladesh in 2013.

Nearly 10,000 hijras are granted their sexual identity as third gender. However they cannot study in schools as the fellow students and even the teachers do not treat them well; they do not get good jobs as they are generally uneducated, they also deprived from that categories of jobs even where no need of literacy. These transgender people are mercilessly deprived from the medical services as doctors and stuffs feel uncomfortable to serve them. They are usually ousted to live with their families due to various reasons. The parents, siblings and other relatives feel shy to disclose their identity. So they bound to hide the fact about their sex and assimilate or to quit the family tie. Even in private medical services the scenarios are same as aforesaid. Moreover, most of the doctors have no basic knowledge about them. They are also vulnerable to STI/HIV infections through their sexual activities.

Human Rights and Penal Provision

Bangladesh is a signatory to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of diverse sexualities.

Third gender people generally deprived from various basic rights due to inadequate legal provisions regarding hijra status, such as; property rights, employment, education health etc. has been observed by the National Human Rights Commission of Bangladesh and suggested to upgrade existing laws in this regard. On the way of the implementation of their sexual rights, the provision made under section 377 of the Penal Code 1860 is a prima facie impediment. In Bangladesh third gender people generally suffering from hate crime, discriminations due to lack of laws against hate crime and discrimination. Even hijra sex workers suffer various injustices by the criminals on regular basis and they have no legal assistance from law enforcing agencies. They hardly reported any incidents to

[15] Arafatul Islam, Interview with Riamoni Chisty, Gay Rights Activist, Bangladesh accessed 25 July 2019.

police because of fear of further harassments. The law enforcing agents either raped a hijra sex worker and/or burglarized earnings from sex trade… hijra are not safe in sex trade. They are forced to have unprotected sex with clients, local influential persons, and police free of charge.[16]

Constitution: Constitution is the supreme law of the land. The Constitution of Bangladesh has several provisions that could apply to third gender citizens. Article 27-43 of the constitution of Bangladesh deals with fundamental rights. That‘s mean third gender can avail the fundamental rights from the state. If anyone breaches the fundamental rights of a third gender then according to Article 102 of the constitution of Bangladesh aggrieved party can lodge a writ petition to enjoy fundamental rights. But it‘s a matter of great sorrow that maximum of the third gender person in Bangladesh unaware about their constitutional rights.

Inheritance: The much-needed discussion on right to inherit property of a transgender person is highly neglected in this territory. Alike most south Asian countries, also in Bangladesh, being biologically non-binary is socially considered to be a _gender disorder‘; hence at the birth or early childhood, most of the parents get rid of their transgender babies which also in the long run influence to form a mentality in both parents and transgender children that s/he is not a part of that family, hence not entitled to inherit property. However, by national law none can be deprived of getting his/her ancestral property due to their gender identity only. We should be mindful of the fact that the principle of equality and non-discrimination along with human dignity and social justice has been incorporated under the Constitution of Bangladesh. Moreover, article 27 guarantees _equality before law‘ and _equal protection of law‘ while article 28 prohibits any discrimination only on the grounds of sex, gender, race, place of birth, religion etc. This supreme law of the country empowers government to take special initiative in favour of underdeveloped and marginal people. Hence, denying right to inherit property from family on the basis of purely generic non-conformed gender identity is a clear violation of constitution, the supreme charter of the land.[17]

In Bangladesh most of the people believe in Islam. Islam is believed to be complete and comprehensive code of human life by its followers. It has not kept any human problem untouched. Where the holy Quran has not directly spoken about anything else, these are solved by mutual

[16] Khan et al (n 18).

[17] Raisul Sourav and Farzana Hussain, _Transgenders and property rights‘ *The Daily Observer* (Dhaka, 18 January 2018) <https://www.observerbd.com/details.php?id=117234> accessed 25 June 2019.

agreement by *Muztahid*. Like other creations of almighty Allah, the hermaphrodites are also the best creation like all other human beings. Though, the Holy Quran does not determine the specific way how to distribute the property among them.

But like all other solutions given by *Muztahid*, it is also solved by the way of *_Izma'*[18]. As the holy Quran says, _Allah is one who shapes you in wombs as He pleases[19] 'that is, all physical traits including sexual characteristics and
inclination of a human being, come with the pleasure and permission of Allah. Thus every child-male, female or even transgender has the equal right blessings of God and there is no justification for parents, courts or government to engage in gender-based ill treatment. So off-course they are whatever by names entitled to inherit the property from the deceased.

According to *Fiqh* or Islamic jurisprudence the one having both male and female multiplicative organs is called Khuntha or hermaphrodite or third gender.[20] All actions with regard to Islamic Law will be taken to determine the gender of hermaphrodite. One the gender is determined it will be considered as that gender for all legal rulings, including inheritance. Certain symptoms are essential to be analysed to regulate the sex of hermaphrodite, the first of which is the organ it uses to urinate. If it uses the male organ, he will be classified as a male and if it uses as female organ, she will be categorized as female. If the hermaphrodite urinates from both male and female organs, then the first one to release urine will determine the gender. These symptoms should be analysed at or immediately after birth to ascertain the sex of the hermaphrodite.[21] Based on their sexuality, they have been categorized as male and female.[22] If the Khuntha or hermaphrodite falls into the category of male or female, he or she will succeed to as a male or female accordingly in all cases.[23] But, if they are not classified as male or female who have both male or female genital features and cannot determine which sex is dominant in that child, then the Khuntha or hermaphrodite will not be assigned as a specific gender and treated as

[18] Ijm (Arabic:) is an Arabic term referring to the consensus or agreement of the Muslim scholars basically on religious issues.

[19] The Holy Quran (3:6)

[20] Mohi Uddin, _Inheritance of Hermaphrodite (Khuntha) under the Muslim Law: An overview' (2017) 8 Beijing Law Review 226-237.

[21] Amani Ali, Metwally Ali & Hanif Suhairi, _Simplify inheritance rights in Islamic law Hermaphrodite right to inheritance and Married (khuntha)' (2016) 10(7) (Special) Australian Journal of Basic and Applied Science 104-110.

[22] M Hirschfeld, _Die intersexuelleKonstitution; (1923) 3–27.

[23] M Uddin, *Muslim Law of Inheritance and Practice* (2000) Dhaka, Kitabmohol 100.

_hermaphrodite difficulty‘. It is clear that if the hermaphrodite is treated as male he will inherit the property like son, brother and paternal uncle and in cases of female they will inherit like daughter on the status of female. But in cases of hermaphrodite difficulty there is conflict between the jurists. According to Imam Abu Hanifa and Muhammad the general rule is that hermaphrodite or Khuntha difficulties will take the share as female unless as male he will get lesser share. In short lesser share would be given to hermaphrodite difficulties.[24] So, it is apparent that in Bangladesh there is no specific law regarding the inheritance of Hermaphrodite or Khuntha or third gender. Islamic principles of inheritance for hermaphrodite or Khuntha (hermaphrodite difficulty) are applicable in the country as per followers of different Imams.

The Hindu epics, Puranas and mythology mentioned in detail stories of the courageous activities of hermaphrodite who have been referred to as people of the _third sex‘ within the scriptures. In the ancient text of Mahabharata it has been mentioned that, during the near end days of exile period of five sons of Pandu, their most talented warrior Arjun, took the name of Brihannala, transformed his identity as an eunuch to avoid being caught. Actually it is said that Brihannala was a teacher of fine arts such as dance to princes Uttara, daughter of the King Virat of matsya kingdom.[25] In fact these activities of Arjun have become the custom of hijras to be carried out by them in the present age. In Hindu culture as well, Hijras were socially recognized and held a special status, especially they were employed as trusted servants, informers or messengers of the king in the administrative part of the country.[26] They were also considered to hold religious authority and were sought out for blessings particularly during religious ceremonies. However, with the time, this elevated position of the Hijra community fell low, relegated to dust and incarceration. During the British regime, third gender people were likened to a deadly deceased and criminalized the hijra community through various laws.[27]

According to Hindu *Shastras*, they (hermaphrodite/*hijras*) have been provided with social status, respect and dignity. But the question is how they have been treated in case of inheriting property from the deceased person. Observing the rules of inheritance under Dayabhaga school of Hindu Law,

[24] M Ullah, *The Muslim Law to Inheritance* (1940) University of Allahabad, Law Publishing (Company) 206-208.

[25] Debayan Bhattacharya, _What was the status of the third gender or say hijras in ancient Indian society?‘ (2016)

[26] Dipayan Chowdhury and Atmaja Tripathy, _Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India‘ (2016) 3(3) BRICS Law Journal, 43-60 accessed 28 May 2019.

[27] Sridevi Nambiar _A brief history of hijra, India‘s Third Gender‘ (2017) accessed 30 June 2019.

it is seen that on the basis of gender, male and female are capable to inherit of the deceased property. As the hijras are not categorized either male or female, they are being excluded from receiving property. Again as per Orthodox Hindu Law of inheritance, an heir will be excluded from inheritance due to blindness, deafness, dumbness and for want of any limb or organ, provided the defect is both congenital and incurable.[45] It includes the case of congenial impotence also which is inherent and congenial to hermaphrodite people. In Bangladesh it may be treated also a ground of exclusion from the inheritance.

In Christian world natural eunuchs by birth are not entitled to get ancestral property. But such denial of inheritance is not true of these who made themselves eunuch for Christ.[28] Bible verses regarding that is _for there are some eunuchs, which were so born from [their] mother's womb: and there are some eunuchs, which were made eunuchs of men: and there be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive [it], let him receive [it].[29] There have some rules of inheritance laid out in the old testament of the Bible. Deuteronomy states that eldest son was to inherit father's estate with a double portion as first born.[30] If there are no sons, daughters were allowed to inherit their fathers land.[31] Genesis states that no inheritance is allowed to illegitimate son.[32] Genesis also states that in the absence of the direct heirs, a favoured servant or more distant kinsman could inherit the land. Now the Christians of Bangladesh are governed by civil law in terms of inheritance and take ancestral property under the Succession Act 1925. Husband, wife, father, mother, child or children, lineal descendants and kindred are entitled to get property of the deceased Christian. To gain the right of inheritance it is essential for a Christian to be related with the deceased either to marry or to have a blood relationship as well as categorized as male and female. The eunuchs in Bangladesh are not categorized as male or female and do not have any right to marry, so they are deprived of getting the property of deceased.

[28] M. A. Haque, *Hindu Law in Bangladesh: Theory and Practice* (first edn, University Publications) 200.

[29] Peter Karavites, *Evil, Freedom and the Road to Perfection in Clement of Alexandria* (Brill) 89.

[30] Deuteronomy: 21:15-17.

[31] Numbers 27: 8.

[32] Genesis: 21-9-12.

Challenges

In Bangladesh, although the Hijras have a very strong community of their own, they are deprived of all kinds of benefits entitled to a female or male citizen. In fact, mainstream people do not talk to them let alone accepting them as friends/peers. When the Hijras appear on the street or in any public spots, people look at them so strange that it makes them feel like aliens or animals in the zoo. In addition to that, they are not welcomed to attend events like marriage ceremony, traditional festivals, the celebration of national occasions etc. Likewise, they cannot even perform religious activities generously. These are the indicators that may give us a glimpse how the Hijras are being neglected in every aspect of their lives. It definitely makes the Hijras feel uncomfortable and also clearly indicates that the Hijras are mocked and outcaste from the mainstream society.[33]

If a child of the third gender is born, he has to face many problems from birth to death, because any child of the third gender is viewed with a crooked eye by any person in the society. If a child of the third gender is born, then the parents who give birth to the third gender child have to hear many things from the people around them in the society. When the child of the third gender goes to school for education, he is also harassed by his classmates. Children of the third gender are degraded in society at every step. Their sexual desire is questioned, their social status is questioned, everything is questioned to humiliate them. If a third gender child is born in the society, then that family is looked down upon.

1. The concepts of human rights and equal rights have been an issue of the 20th century. However, hijras of Bangladesh commonly known as human beings who are neither male nor female. Most of the people regard them as person incapable of sexual sensation. Right to education is still a fundamental principle of state policy of our country. Truth is that many people of our country are deprived partially of right to education. But the matter of regret is that the hijra communities of this country are entirely excluded from this right.[34]

2. Due to lack of education hijra cannot find any impressive occupation in the society.

[33] Md. Reazul Haque and Md. Mofazzol Karim, ‗Hijra: Story of Never-ending Battles in Bangladesh' *Daily Sun* (Dhaka, 18 April 2018) <https://www.daily-sun.com/printversion/details/ 302813/2018/04/18/Hijra:-Story-of-Neverending-Battles-in-Bangladesh> accessed 1 September 2019.

[34] Md. Akramul Islam, ‗Right to Education of the Third Gender of Bangladesh: An overview' (September 2016) 21(9)7 IOSR Journal of Humanities and Social Science (IOSR-JHSS) 29-34.

3. There is fallacy that rights of the Hijras are not specifically defined, specially the right of inheritance.[35]

4. Hijra remain socially excluded, living on the fringes of society, in ghettoized communities, harassed by the police and abused by the public. Most make a living by singing and dancing at weddings or to celebrate child birth, many have moved to begging and prostitution. Violence against hijras, especially hijra sex workers, is often brutal, and occurs in public spaces, police stations, prisons, and their homes.[36]

5. Due to lack of laws recognizing hijra status in Bangladesh, these people have often been excluded from basic rights associated with citizenship such as property rights, inheritance, employment, education and health care. Legal Protection of Third Gender (Hijra) in Bangladesh.

6. Bangladesh has no anti discriminatory laws that specifically protect sexual minorities or laws that recognize the diverse gender identity.

7. As Bangladesh being Muslim majority country, Muslim personal law is applicable in case of the matter of inheritance. The rights of inheritance have been ensured for the hermaphrodite by Qiyas. But the application of it seems to be very far because of having gap between the society and the hermaphrodite community and they are not let to know their fact of inheritance for them.

8. Under Hindu Personal Law, they (hermaphrodite) have given a lot of respect and honor because of getting blessing from God. But they are not provided with any religious provision by which they can claim inheritance under their personal law.

9. In Christian Law, they are totally deprived of getting property from the ancestors according to the verse of the religious scriptures as well as the existing civil laws of inheritance.

[35] Mahmood (n 8).

[36] Farzana Hussain, _Ensure rights of the third gender‘ *Dhaka Tribune* (7 January 2015) accessed 24 July 2019.

10. Most of the Third gender (Hijra) people do not have adequate knowledge on their constitutional rights.

11. Existing laws and legal system are not user friendly for the third gender people.

12. Third gender people are currently involving with various offences.

13. Absence of comprehensive efforts for the betterment of the third gender community from Legislative, Executive and Judiciary branches of the government.

CHAPTER 4
LEGAL STATUS OF HIJRA IN OTHER COUNTRIES

Legal Status of Hijra in Other Countries

Non recognition of Hijra as a separate gendered human being is one of the root causes behind their most of the sufferings. It undermined them from upholding their human potentiality and dignity.[37] The glaring examples of the legal status of the hijra in different countries are mentioned below: Nepal: A third gender category has been recognized by the Supreme Court of Nepal in the year of 2007 on the basis of Self Feeling and not the opinions of medical professionals or courts.[38]Through self-identification, several identity categories have fallen under the third gender category including an array of sexual orientation and gender identity labels.[39] In 2011, Nepal added the third gender category to its national census, and since October 2015, Nepali citizens have been successfully traveling abroad carrying passports marked _O' for other' instead of 'F' for female' or 'M' for male.[40]

India: In 2014, India's Supreme Court ruled that transgender people can be legally recognized as a third gender, declaring that this _is not a social or medical issue' but a human rights issue.[41] The court upheld that medical report should not be a basis for legal recognition of gender identity. In 2015, the Delhi High Court reinforced the ruling, emphasizing: _Everyone has a fundamental right to be recognized in their gender' and that gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom.[42] The government introduced

[37] Sharful Islam Khan et at, _Living on the Extreme Margin: Social Exclusion of the Transgender Population (Hijra) in Bangladesh' (2009) 27(4) Journal of Health, Population and Nutrition 441– 451 <www.ncbi.nlm.nih.gov/pmc/articles/PMC2928103/> accessed 24 August 2019.

[38] In 2015, Nepal adopted a new constitution that reads at article 18 that [n]othing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of . . . gender and sexual minorities. Furthermore, article 42, titled Right to Social Justice, specifically includes gender and sexual minorities, and article 12 entitles each Nepali to a citizenship certificate based on lineage and gender identity.

[39] Michael Bochenek and Kyle Knight, _Establishing a Third Gender Category in Nepal: Process and Prognosis' (2012) 26 Emory International Law Review 11.

[40] Kyle Knight, _Nepal's Third Gender Passport Blazes Trails' Human Rights Watch commentary, (26 October 2015) <www.hrw.org/hu/node/282644> accessed 25 June 2019.

[41] Human Rights Watch, _India: Enforce Ruling Protecting Transgender People' (5 February 2015) <www.hrw.org/news/2015/02/05/india-enforce-ruling-protecting-transgender-people> accessed 18 August 2019.

[42] *Shivani Bhat v State of NCT of Delhi and Ors.*, Dehli High Court, 5 October 2015.

a bill in parliament on August 2, 2016 to support implementation of the Supreme Court ruling. Neither wholly male nor wholly female is the core part of the definition of transgender person and to get legal recognition they have to choose either male or female category which is contrary against their right to dignity and self-definition, as upheld by the Supreme Court verdict.[43] The bill forbids compelling or enticing a transgender person to indulge in the act of begging'. The bill also fails to include a clear definition of discrimination, or to provide education and job benefits for transgender persons as directed by the Supreme Court, among other concerns.[44]

Pakistan: The Supreme Court of Pakistan in the year of 2009 ordered to all provincial government to approve the rights of transgender people. The Supreme Court of Pakistan directed to ensure more communication with transgender communities and well coordination of their cases by police department. The social welfare departments are also endowed with duty to include transgender people in civil registration process. It furthermore directed to provincial government to protect their inheritance rights and to register their names in the voter list. To ensure the right of transgender people to basic education, employment, and protection are also ordered to the relevant authorities.

Sri Lanka: Sri Lanka is in the midst of developing a gender recognition procedure. The Health Ministry, working with the National Human Rights Commission, has proposed a _gender recognition certificate' which would allow individuals to change the gender indicated on official documents. This development is an important step forward. However, the certification's requirements include evidence of medical treatment and certification from a psychiatrist, which falls short of international best practice that recommend that a medical, surgical, or mental health treatment or diagnosis should not be necessary for legal gender change.[45]

[43] 25 International Commission of Jurists (ICJ), _India: The Transgender Persons (Protection of Rights) Bill, 2016' (August 2016) ICJ Briefing Paper < www.icj.org/wp-content/uploads/2016/_

[44] Dhrubo Jyoti, _Activists in India are Up in Arms over the New Transgender Bill. Here's Why' *Hindustan Times* (5 August 2016) <http://www.hindustantimes.com/india-news/activists-in-india-are-up-in-arms-over-the-new-transgender-bill-here-s-why/story-RMqjgjxZv1ElzJKuoDxE PN.html> accessed 18 August 2019.

[45] Human Rights Watch, _All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka, August 2016 accessed 18 August 2019.

South Africa: All sorts of discrimination on the ground of sexual identity have been prohibited by the Constitution of South Africa and it also reaffirmed by the Constitutional Court that trans sexuality is also included under sexual orientation.[46] From the constitutional obligations the parliament of South Africa in 2003 have legislated an Act named Alteration of Sex Description and Sex Status Act. This Act allows the transgender people who have undergone medical or surgical transformation to obtain birth record or birth certificate from the department of Home affairs and it may be used for all purposes for their sexual identification.[47]

Furthermore various countries in Europe have provided an opportunity for transgender people to change their birth certificates including first name. A number of countries in Europe have recognized the right to marry according to their post-operative sex. Some of the countries which recognized this rights are; Croatia, Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, Spain, and the United Kingdom etc.

United Kingdom: Any kind of distinction on the basis of anatomical sex has been prohibited by the Sex Discrimination Act 1975. This Act also affirmed not to make any discrimination on the basis of sexual orientation in employment, education, housing, goods, facilities and services.[48] In Scotland through the Equality Act 2006 it is ensured gender equality strictly. Later on gender reassignment as a protected characteristic has been included by the Equality Act 2010.

The European Court of Human Rights (the Court) has issued judgments with regard to the recognition of a transgender person‘s gender identity. The Court has ruled that a state‘s failure to alter the birth certificate of a person who has undergone gender reassignment, and to recognise the _new‘ gender, constitutes a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR). The Court found, in *B. v France* and in particular in *Christine Goodwin v the United Kingdom*, that the refusal by a state to legally recognise a completed sexual reassignment constituted a violation of Article 8.[49]

[46] Pierre De Vos, _Christine, give them hell!‘ (14 July 2010) accessed 19 August 2019.

[47] Alteration of Sex Description and Sex Status Act 2003 (South Africa) 15 March 2004

[48] Equality and Human Rights Commission, _Transgender: what the law says‘ (2015) accessed 25 July 2019.

[49] Court judgments, *B. v France*, No. 13343/87 (1992); *Goodwin v the United Kingdom* and *I. v the United Kingdom*, Nos. 28957/95 and 25680/94 (2002).

CHAPTER 5

CONCLUDING REMARKS

Recommendations

We want a law for third gender people like the Parental Maintenance Act, because third gender people have the same rights as a normal person. A third gender child has the right to grow up with the love and care of his parents just as a normal human being grows up with the love and care of his parents. So a law needs to be made logically so that after giving birth to a third gender child, the parents should not give the child to someone else or abandon the child.

What steps we should take to ensure the rights of third-gender children are mentioned below:

a. Third gender people should have free educational facilities from primary level to university level. Separate system may be introduced in the education institution for the third gender people.
b. Every government and non-government office should provide job to the eligible third gender people. For their job opportunity third gender quota system may be introduced strictly.
c. The government can make a unitary inheritance system for the third gender people according to their religion.
d. Every health institution should provide free medical facilities to the third gender people.
e. Government should need to enact an anti-discriminatory law to protect sexual minorities like third gender people.
f. Awareness rising programs such as; seminar, symposium, advertisement, digital campaign etc. need to arrange by the government and private institution, so that third gender people can understand their constitutional and legal rights.
g. Existing laws should need to modify and separate provisions regarding third gender people rights violation should need to add in the current laws.
h. Government should need to legislate separate law or rules for the third gender offender so that they can be a subject for administration of justice procedures.
i. There are need comprehensive efforts from legislative, executive and judiciary branches of the government to protect and uphold the rights of third gender people.

j. There is a need to enact modern laws to ensure that the child of the third gender cannot be changed by his parents, ensuring that the law obliges the families of the three gender society not to be harassed.
k. There is a need to enact modern laws so that third gender children cannot be denied by their parents.
l. It is necessary to ensure the proper implementation of the law so that the children of the third gender are not harassed by the society.
m. The government has to undertake a specific thirty or forty year project.
n. Care should be taken to ensure that children of the third gender get financial benefits.
o. It should be ensured that children of the third gender get the same educational rights as normal children.
p. It should be ensured that the third child gets all social facilities and their workplace.
q. There have to implement all the facilities and they get social status.

Conclusion

Hijra or third gender people are helpless because they are excluded from the family, society and hassled by the general people. Even law enforcing agency does not play any role to protect their rights. Though most of them are involved in singing and dancing at weddings or child birth as a part of their traditional Badhai culture but few of them are in begging and sex trade. They face extreme discrimination in health, housing, education, employment, immigration, law, and any bureaucracy that is unable to place them into male or female gender categories.

However the government of Bangladesh has recognized hijra as third gender in the year of 2013. On the basis of that recognition it is assumed that their rights will be protected which will facilitate them to exercise their gender rights as 'hijra' in all government documents, including passports apart from allowing them to identify their gender as 'hijra' when personal information needs to be furnished. However they are suffering from various challenges in current time. It is submitted that government is trying to establish a strong system for the protection of third gender people rights. For a fruitful results there are need an inclusive efforts from the government.

Finally we can say that it is very necessary to increase public awareness about the third gender people in our country, to ensure the rights of the third gender people, it is very important to make appropriate laws as well as take steps.

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