

Gaps in Legal Protections Against Gender-based Violence for Transgender Persons in Bangladesh

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CONTEXT

The transgender community in Bangladesh experience various forms of disadvantage and discrimination in their daily lives. Members of the transgender community face significant social stigma; a 2015 survey by Bandhu¹ reported that all of its gender diverse participants 'were of the opinion that no transgender person would be accepted in their community.' For the transgender community visibility is also sometime life-threatening and isolating due to social stigma, religious beliefs and family values that create a hostile environment for them.²

Due to widespread stigma, transgender individuals are denied opportunity in a number of spheres of life. A high number of transgender individuals report facing harassment and mistreatment at educational institutions, on the street, from family, when seeking medical treatment and in workplaces.^{3,4} Such exclusion leads to high rates of poverty amongst transgender individuals and significant health and wellbeing disparities.⁵ During the Covid-19 pandemic, members of the transgender community reported their daily incomes dropping from 296 taka to 14 taka per day.⁶

These factors reinforce and exacerbate each other, leading to multi-faceted vulnerabilities for transgender communities and individuals.

Discrimination against individuals due to their other characteristics, e.g., their religion or cultural group, also compounds this vulnerability. For example, in a Bandhu study,⁷ 80% of the interviewed Rohingya gender-diverse people reported experiencing physical violence countless times; the highest percentage among all of the interviewed groups.

Significant marginalisation renders transgender people increasingly vulnerable to various forms of violence. 42.2% of the gender diverse population were the victims of rape, 26.1% of gang-rape, 55.3% of physical torture and 63.3% faced police arrest according to a 2015 survey by Bandhu.⁸ Another report stated that transgender individuals experienced high rates of physical, sexual and verbal violence and numerous forms of direct and indirect structural violence in relation to accessing basic services.⁹ In a 2019 survey, 90% of transgender people reported facing mental and sexual harassment when seeking access to health services.¹⁰ Despite high rates of

¹ Bandhu's Baseline Survey on Human Rights Violation and Socio-Economic Conditions of Sexual Minorities in Bangladesh, 2015

² Human Rights Watch, 'Bangladesh: Transgender Men Fear for Their Safety,' January 2018,

³ What About Us?" Bandhu Policy Brief 2021

⁴ Human Rights Watch, 'Bangladesh: Transgender Men Fear for Their Safety,' January 2018,

⁵ The Daily Star, September 2021, 'Health disparities of transgender youth: Still left in the lurch'

⁶ Bandhu, 'Covid-19: Quick Survey for Community Response for TG and Hijra' May 2020

⁷ Bandhu, Zobaida Nasreen, "Documenting Gender-Based Violence Cases for determining concerted response", June 2021

⁸ Bandhu's Baseline Survey on Human Rights Violation and Socio-Economic Conditions of Sexual Minorities in Bangladesh, 2015

⁹ Bandhu and FHI, Exploring gender based violence among MSM, male sex worker and transgender communities in Bangladesh and Papua New Guinea: Results and Recommendations

¹⁰ The Daily Star, September 2021, 'Health disparities of transgender youth: Still left in the lurch'

mistreatment, very few go on to take steps towards seeking justice formally; 60% of transwomen in a Bandhu study reported that they did not go anywhere to report violence against them.¹¹

Reports also indicate a misunderstanding of terms that explain different genders, sexualities, and cultural practices among officials, which can result in ineffective and harmful practices.¹² Although measures have been taken to improve the lives of those within the hijra community, some of these protections have not materialised.¹³ They also do not adequately protect the rights of transgender people who do not identify as hijra, such as transwoman, transmen, non-binary individuals or those that belong to other diverse identities.

Gender-based violence refers to the causing of harm to individuals or communities because of their gender, and includes sexual, physical, verbal, economic and psychological forms of violence.¹⁴ Although women and girls are seen as the primary victims of gender-based violence, transgender people are also vulnerable to such violence as seen from the above statistics. However, significant gaps exist within Bangladesh's law which construct barriers to justice for transgender communities such as the laws around gender recognition, discrimination, harassment, domestic, sexual, and economic violence, and the criminalisation of same-sex sexual conduct.

Existing Gaps in Legislation Legal Gender Recognition

There have been measures taken to allow for legal recognition of 'hijra,' 'third gender' and 'other'¹⁵ gender identities on official documents. However, this is not inclusive of all transgender people who may not identify as hijra or third gender. It requires them to choose 'other,' if presented with the option to, which does not reflect their chosen gender identity. Some within the hijra community also see hijra as a cultural, not gender, identity.¹⁶

There are also no formal mechanisms established to allow individuals to change their gender on identity documents. As a result, there is potential for abuse through inconsistent and intrusive procedures for individuals that identify under the terms. There have already been incidents where hijra applicants for jobs experienced uncomfortable questioning about their identities or improper medical examinations.¹⁷

The absence of formal gender recognition procedures also means that transgender individuals cannot change their documents to fit their identity¹⁸, e.g., a trans woman would not be able to change her passport from male to female and may have to identify as 'other'. This lack of legal gender recognition increases transgender peoples' vulnerability and can be seen as a form of gender-based violence itself.¹⁹ In failing to provide recognition, the state fails to respect the dignity of transgender people as accepted and proper members of the community due to their gender identity. A transgender person's rights to freedom of identity, expression and privacy are also breached. It also exacerbates issues of discrimination and denial of opportunity; without

¹¹ Bandhu, Zobaida Nasreen, "Documenting Gender-Based Violence Cases for determining concerted response", June 2021

¹² "What About Us?" Bandhu Policy Brief 2021

¹³ BLAST, 'From Recognition To Realising Rights: Legal Protection of Gender Identity in Bangladesh Law,' December 2019

¹⁴ UNCHR, 'Gender Based Violence'

¹⁵ "What About Us?" Bandhu Policy Brief 2021

¹⁶ "ibid"

¹⁷ BLAST, 'From Recognition To Realising Rights: Legal Protection of Gender Identity in Bangladesh Law,' December 2019, Human Rights Watch, "I Want to Live With My Head Held High," 2016

¹⁸ Human Rights Watch, 'Bangladesh: Transgender Men Fear for Their Safety,' January 2018,

¹⁹ UNHR, Office of the High Commissioner "The struggle of trans and gender-diverse persons"

identification documents that match their identities, activities such as voting, applying for work, housing, or educational programmes, travelling and receiving healthcare are made more difficult.²⁰

There are also implications for the legal protections that are afforded to them as majority of laws addressing gender-based violence apply only to women and/or children.²¹ For example, a trans woman whose birth certificate states 'male' is unlikely to be treated as a woman and will not be able to seek justice, e.g., for rape committed against her, due to how the legislation is worded.

DISCRIMINATION AND HATE CRIME LAWS

The Constitution, in Article 28, "guarantees the right to equality and non-discrimination for every citizen of the country." However, there are no anti-discrimination laws to protect transgender individuals from being treated less well than others on the basis of their gender identity. In Australia, under the Sex Discrimination Act it is unlawful to discriminate on the basis of gender identity or characteristics in public life, including education, employment and access to services.²² In the UK, individuals are able to bring court challenges against discriminatory actions, policy or legislation under the Equality Act 2010; for example, a government department's actions can be challenged for being discriminatory through how it provides a service or in failing to take due regard of the need to eliminate discrimination and other factors.²³ The absence of similar legislation in Bangladesh means that there are no legal routes to challenge discriminatory

policies or behaviour, leaving transgender individuals with no formal protection against discrimination.

There are also no 'hate crime' laws tackling violence against transgender individuals. "Hate crime laws" are laws that explicitly outlaw acts of violence that are motivated by a prejudice against a certain group of people. For example, in the US, it is a separate criminal offence to cause bodily injury to a person because of their actual or perceived gender identity (or other named characteristics such as race, religion, disability or national origin) in certain circumstances.²⁴ Another approach is to outlaw specific harmful acts committed against transgender individuals; the Indian Transgender Protection Act makes it a criminal offence to deny transgender people access to a public place, to force a transgender person to leave their household or village or to endanger their life, safety or wellbeing.²⁵ Other similar 'hate offence' frameworks take the form of provisions that enable increasing the severity of punishment for causing harm if found to be motivated by hostility towards someone's gender identity. For example, in the UK, section 146 of the Criminal Justice Act 2003 requires judges to treat a finding that the offence was motivated by transphobia²⁶ as an aggravating factor. This may lead to an increase in the sentence passed for the offence.

The absence of any anti-discrimination or hate crime legislation in Bangladesh means that there is no explicit signal from the state that such action is considered unacceptable. There is also no recognition of the added harm that prejudice-motivated assault and harassment causes.

²⁰ Divan, V., Cortez, C., Smelyanskaya, M. and Keatley, J. (2016), Transgender social inclusion and equality: a pivotal path to development. *Journal of the International AIDS Society*, 19: 20803. <https://doi.org/10.7448/IAS.19.3.20803>

²¹ See below sections

²² Section 5B Sex Discrimination Act 1984, Australia

²³ Sections 29 and 149 of the Equality Act 2010, UK

²⁴ Section 249 The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C, USA

²⁵ Section 18 The Transgender Persons (Protection of Rights) Act 2019, India

²⁶ Transphobia is defined as fear, hatred, or discrimination of those who are or are perceived to be transgender.

HARASSMENT

Transgender individuals face significant harassment both on the street and in the workplace.²⁷ However, pre-existing legislation limits protection to women only. Section 354 and 509 of the Penal Code²⁸ which address gender-based assault and other street-based harassment only refer to “outraging” or “insulting” the modesty of any woman. Similarly, section 332 of the Bangladesh Labour Act 2006 applies only to behaviour that is “repugnant to the modesty or honour of that woman”. The guidelines set by the High Court Division²⁹ addressing sexual harassment in workplaces and educational institutions do not limit complainants to women, but the use of the pronoun ‘her’ implies that women are thought to be the only intended victims.³⁰ Therefore, although transgender victims of harassment could still benefit from normal laws governing assault, there are left without any legal recourse in cases of verbal or sexual harassment. There are also no mandated protections for transgender people against sexual harassment at the workplace or educational institutions.

ECONOMIC VIOLENCE

Significant numbers of transgender individuals report being subject to economic violence, e.g., denial of hereditary property and having to pay police or local leaders in order to continue working or living somewhere and in most cases, individuals are denied justice.³¹ The application of Sharia law³² impacts inheritance rights as women inherit half of what is inherited by men, which leaves individuals not falling within the gender binary in an unclear position. The government in 2020 signalled that they are considering reform in this area, but no draft bills or changes have been introduced.³³

DOMESTIC VIOLENCE

Among transgender individuals, family members were identified as one of the key perpetrators of violence.³⁴ Despite this, domestic violence legislation only extends protection to women and children, as outlined in section 3 of The Domestic Violence (Prevention and Protection) Act 2010. Physical injury inflicted by others is addressed through general laws criminalising assault and causing grievous hurt. However, greater protections and policies exist through domestic violence laws, for example, the obligations upon officers to share information for support services and procedures for protection orders.³⁵ There are Victim Support Centres across police stations nationally, and government shelter homes, however it is uncertain whether these are inclusive of transgender victims of violence. For example, the Dhaka Metropolitan Police Victim Support Centre only mentions providing legal

²⁷ “What About Us?” Bandhu Policy Brief 2021

²⁸ Penal Code, 1860

²⁹ Prevention of Sexual Harassment at all workplaces and educational institutions (Writ Petition No. 5916 of 2008), supplemented by Supreme Court of Bangladesh, High Court Division, Bangladesh National Women Lawyers’ Association (BNWLA) vs. Government of Bangladesh and Others, 31 BLD 324, 2011

³⁰ ILO, Taslima Yasmin, “Overview of laws, policies and practices on gender-based violence and harassment in the world of work in Bangladesh,” 2020

³¹ Bandhu, Zobaida Nasreen, “Documenting Gender-Based Violence Cases for determining concerted response”, June 2021

³² Through Section 2 of The Muslim Personal Law (Shariat) Application Act 1937

³³ Dhaka Tribune, ‘Transgenders to gain inheritance rights in Bangladesh’, November 2020

³⁴ Bandhu, Zobaida Nasreen, “Documenting Gender-Based Violence Cases for determining concerted response”, June 2021

³⁵ Chapter 3 and 4 of the Domestic Violence (Prevention and Protection) Act, 2010

assistance to repressed woman and children. Protections for children³⁶ also make no mention of arrangements for transgender youth. Without access to support services, transgender and other gender diverse victims of domestic violence are left in a more vulnerable position.

Individuals in traditional hijra communities also face risks of domestic violence occurring from their 'gurus' due to their reliance on them for shelter and community.³⁷ Domestic violence legislation does not extend to 'non-mainstream' living situations, leaving transgender or other gender diverse individuals who live in such communities with no protection.

SEXUAL VIOLENCE

Rates of sexual abuse against gender diverse individuals are high; for example, 42.2% of gender diverse people reported being victims of rape.³⁸ However, laws addressing sexual violence are limited to child and/or female victims. Section 9 of the Nari-o-Shishu Nirjatan Daman Ain (Women and Children Repression Prevention Act) 2000 refers to 'whoever commits rape with a woman or a child' and section 10, regarding sexual oppression, refers only to the 'sexual or other organ of a woman or a child'. This excludes victims of other genders from seeking justice for sexual violence committed against them.

Although section 9 mentions 'whoever commits rape,' penetration is generally understood by the courts as peno-vaginal intercourse.³⁹ Therefore, only those with a penis can be perpetrators of rape. Through restrictively defining who can be a victim or a perpetrator of sexual offences, sexual violence

laws fail to provide equal protection of the law for all citizens.

CRIMINALISATION OF SAME-SEX SEXUAL ACTIVITY

Section 377 of the Penal Code criminalises 'carnal intercourse against the order of nature' according to the law. This is interpreted to refer to all same sex sexual activity. This presents a barrier towards justice as gender-diverse individuals may avoid reporting sexual violence in fear of being charged under section 377 themselves. Although no convictions have resulted from this act, individuals report being targeted under the provision.⁴⁰ For example, 27 men were arrested for "homosexuality" in 2017 and a lesbian couple was arrested in 2013.⁴¹ The continuing existence of such a provision also legitimises ongoing stigma and violence towards transgender individuals through seeing alternative sexual/gender roles as inherently 'wrong' and worthy of criminalisation.

RECOMMENDATIONS A TRANSGENDER PROTECTION ACT OR POLICY

The enactment of a Transgender Protection Act would help uphold the rights of the transgender community. The law should clearly define who is included within the legislation and be inclusive of a wide range of identities. For example, in the Indian Transgender Persons (Protection of Rights) Act 2019, a transgender person is defined as

³⁶ Under The Children Act 2013, e.g., section 54 about special rights when children come in contact with the law

³⁷ BLAST, 'Diverse Gender Identities, Sexualities and The Law in Bangladesh' 2018 pg. 72

³⁸ Bandhu's Baseline Survey on Human Rights Violation and Socio-Economic Conditions of Sexual Minorities in Bangladesh, 2015

³⁹ as the Definition of Rape given in the Penal Code of 1860 (which is also adopted by the Nari-o-Shishu Nirjatan Daman Ain) does not define the term penetration.

⁴⁰ "What About Us?" Bandhu Policy Brief 2021

⁴¹ Human Dignity Trust, Country Profile: Bangladesh

someone whose gender does not match with their assigned gender at birth and includes socio-cultural identities such as hijra and kinner, among others.⁴² Protections included in the legislation could involve prohibiting discrimination on the basis of gender identity, the establishment of victim support services, shelters/safe homes and ensuring legal aid and assistance for transgender people. The legislation should also consider the creation of a board to advise, monitor and evaluate the government on policy to ensure that the rights of the transgender community are being respected, similar to the Indian National Council for Transgender Persons.

In the alternative, there should be a national policy aimed at reducing deprivation and disadvantage in the transgender community. This policy should have an inclusive definition of the gender identities covered and aim to set guidelines for non-discrimination against gender diverse individuals and access to basic services, e.g., employment, housing and education. This policy can be modelled upon the national “Gender Policy Plan,” which aims to increase women’s participation in society and remove barriers to advancement,⁴³ and build upon existing efforts in the National Social Safety Strategy 2017⁴⁴ which tackles social exclusion for hijra communities among others. Any policies or legislation ought to be created in consultation with affected groups.



CREATING INCLUSIVE GENDER RECOGNITION PROCESSES

The development of legal mechanisms and policies that allow individuals to change their official gender on legal documents is key in ensuring protections for transgender individuals. Any mechanisms and policies should be consistent between private and public sectors and ensure that the rights of transgender individuals are maintained. Notably, there has been a move towards a ‘self-identification’ model in some countries where the gender/sex can be changed on documents through statutory declaration without the need for medical examination/diagnosis.⁴⁵ In India, the requirement of sex-reassignment surgery to be able to change gender markers has also been held illegal,⁴⁶ despite recent reforms continuing to require them.

⁴²Section 2(k) Transgender Persons (Protection of Rights) Act 2019, India

⁴³Bangladesh: National Women Development Policy 2011

⁴⁴National Social Safety Strategy, 2017, General Economics Division, Planning Commission, Govt. of Bangladesh, 276.

⁴⁵For example, the New Zealand Births, Deaths, Marriages, and Relationships Registration Bill. Spain has also approved a draft bill allowing for self-identification. (Reuters, “Spain moves step closer to gender self-identification”)

⁴⁶National Legal Services Authority v. Union of India Writ Petition (civil) No. 604 of 2013

INTRODUCTION OF ANTI-DISCRIMINATION LEGISLATION

The enactment of an anti-discrimination law would also ensure protection for transgender and other gender diverse individuals. This could be through passing the existing draft Anti-Discrimination Bill formulated by the National Human Rights Commission in 2013.⁴⁷ The draft Anti-Discrimination Bill outlaws discrimination against any individual or community on various grounds, including religion, faith, caste, custom, culture, occupation, sex (man, woman, third gender), sexual orientation, age, disability, pregnancy, marital status, place of birth, etc. It also creates a series of criminal offences for discriminatory behaviour. However, the draft has not attracted strong support in favour of enactment and is still awaiting legislative review. Any anti-discrimination law should be formulated through consultation with affected communities and experts within the area.

Alternatively, many countries separate anti-discrimination laws into actions that attract civil liability (i.e., for refusing to rent a house to someone) and those that attract criminal liability (i.e., hate crimes). For example, the UK Equality Act 2010 sets out provisions for civil liability for discrimination and Section 146 of the Criminal Justice Act 2003 enables increasing sentences for violence that is found to be motivated by transphobia.

AMENDING LAWS SURROUNDING GENDER- BASED VIOLENCE

The reform of the definition of harassment, sexual offence, and domestic violence laws such that they are explicitly inclusive of gender-diverse individuals is also crucial to ensuring protection of gender diverse individuals from harm. This could be done by adding “and any gender-diverse person,” interpreted as including trans men and women, hijras, non-binary people and any other relevant gender-identities to ensure that gender-diverse individuals can be considered as victims of the relevant crimes and so benefit from formal justice procedures.

REPEAL OR REFORM OF SECTION 377

Section 377 should be repealed to uphold all individual's rights against discrimination. The UK decriminalised same-sex sexual activity in 1967⁴⁸ and India has also since outlawed a similar section within their laws.⁴⁹ Alternatively, the section could be amended to criminalise non-consensual sexual intercourse where the victim is not a woman or a child. Such an amendment to the section will make the provision more aligned with gender-equality norms and would provide a forum where sexual offences committed against a male or a transgender person can be addressed in the criminal law.⁵⁰

⁴⁷ Draft Anti-Discrimination Bill 2013 Bangladesh

⁴⁸ The Sexual Offences Act 1967, UK

⁴⁹ Navtej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice AIR 2018 SC 4321

⁵⁰ Unpublished Study Report, Taslima Yasmin (2020), 'Analysis of the discriminatory laws in Bangladesh from a gender perspective', Study Commissioned by UN Women Bangladesh.

CAPACITY BUILDING

There should be greater awareness and training amongst relevant actors, such as police, judges, government officials, aid workers, about the rights and circumstances of the transgender community. This is particularly significant as mistreatment from official figures that are responsible for enforcing laws is likely to continue to dissuade transgender people from pursuing formal justice. Without adequate sensitivity training and expert knowledge, legal reform alone is unlikely to adequately redress the vulnerabilities of the transgender community. This training should also inform policies to ensure that they are inclusive of all genders and cater to the needs of the transgender community.

MANDATORY POLICIES

Obligations should be introduced to mandate public and certain private sector organisations to implement policies about ensuring fair treatment of transgender individuals. This requirement could be similar to the High Court guidelines requiring workplaces and educational institutions to implement policies addressing sexual harassment. The policies should address aspects such as training for staff, ensuring that harmful behaviour is clearly identified and subject to redress procedures, and that any arrangements in the institutions are gender inclusive.

FURTHER RESEARCH

Further research should also be undertaken on the legal gaps in protection and barriers facing the transgender community specifically. Currently, research into gender diversity in Bangladesh focusses primarily on hijra communities. In particular, there appears to be limited information available on the support services available to the transgender community, e.g., whether there are safe homes for transgender victims of violence and their experiences navigating support spaces. Added research into the specific experience of Rohingya gender diverse persons, or those from other groups, should also be undertaken to ensure that any reforms adequately address their circumstances. For example, for Rohingya GDP, local leaders were the main perpetrators of violence against them, which should be considered when implementing any new reform. There should be consultation with the community to identify their experiences with the law and what reform they feel would make a positive difference to their lives.

