



FROM RECOGNITION TO REALISING RIGHTS:
LEGAL PROTECTION OF GENDER IDENTITY
IN BANGLADESH LAW

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Introduction

In recent years, the Government of Bangladesh has taken several progressive steps to enhance social protection and inclusion of communities with diverse gender identities. In 2013, the Cabinet's decision to recognise the Hijra community and to reflect their presence in national identification documents and censuses¹ was the first step towards legal recognition. In 2014, the Ministry of Social Welfare (MSW) published a gazette notification regarding the Hijra community. In 2018, the Voter List Act 2009 was amended, to provide 'Hijra' as gender category in the voter registration form, in addition to 'male' and 'female'. In the meantime, in 2013, the MSW introduced several livelihood schemes for the Hijra community.² While these steps highlight the Government's willingness to engage with the Hijra community and ensure their constitutional rights, any other laws or policies expressly prohibiting discrimination on the basis of gender identity, are yet to be enacted.

This policy brief documents the positive measures to date to recognise diverse gender identities, and then to outline the remaining challenges in this respect, including the process for obtaining identity documents, and the reforms required in law and practice, to ensure gender identity is not narrowly defined.

The brief also recognises the need for such reforms as a first, crucial step towards addressing other existing gaps in the law that prevent these individuals from living with dignity, protection and freedom from discrimination.

¹ bdnews24.com (2013). 'Third gender' gets state recognition', 11 November 2013.

² BSS, Daily Ittefaq (2013). 'Govt implements programmes on hijra livelihood development', 08 June 2013.

Context

Official recognition

As noted above, in January 2014, the MSW published a gazette notification stating that the Hijra community "shall be recognised as the 'Hijra sex/gender' ('Hijra linggo').³ This recognition expressly refers to 'Hijra'. It does not deal with other communities and individuals who have non- normative gender and sexual expressions, and do not conform to the gender assigned to them at birth (transgender women and men), but do not belong to the Hijra culture. This reflects a prevailing confusion about the idea of 'gender', as the Hijra community is only one of many diverse communities, and being 'Hijra' is neither a biological characteristic nor a gender identity. It simply means that one is part of this community. In its current form, therefore, the gazette notification has the effect of recognising members of one specific diverse community, not a gender category with which gender diverse individuals can identify.

Identity documents

Neither the gazette notification nor the Cabinet decision set out or resulted in a clear explanation of the meaning of diverse gender categories. Thus different government authorities were free to carry out identification processes as they chose. For example, national identity cards now include a 'Hijra' category in addition to 'male' and 'female'. In contrast, passports include a category of 'other' in addition to 'male' and 'female'.⁴ Some government forms (e.g. account opening application forms of state-run banks) now include a category of 'third gender'.

Social inclusion schemes

The MSW has undertaken several social inclusion schemes under its Social Safety Net programme for the Hijra community, such as provision of a monthly allowance to individuals aged 50 years and above, scholarships for "Hijra children", and skill and capacity development trainings to engage in income-generating activities.⁵ These exclude individuals with other gender identities, such as transgender women or transgender men, who may not be part of the Hijra culture, but also face extreme vulnerability in terms of social stigma, discrimination and violence.

Physical examinations

In the absence of any guidance on how to identify members of the Hijra community and Hijra culture, relevant authorities often resort to carrying out physical examinations to verify whether a person is an 'authentic Hijra'. This happened in 2015, when ten members of the Hijra community were subjected to invasive and humiliating medical exams in

³ Government of the People's Republic of Bangladesh, Ministry of Social Welfare (2014), Bangladesh Gazette, Circular No. MoSW/'Kormo'1'Sha'/Hijra-15/2013-40

⁴ Department of Passports and Immigration, Bangladesh, Machine Readable Passport Application Form, pg. 12, section 12

⁵ Department of Social Services, Bangladesh, Development Program for Improving the Living Standard of Hijra Community

government hospitals, apparently carried out pursuant to a memorandum issued by the Ministry of Health requiring 'authentic Hijras to be identified through medical check-ups'. After the test, they were declared to be 'fake Hijras', on the grounds that they had male genitalia and were considered to be men pretending to be Hijras.⁶

Globally today, including in South Asia, the trend is to move away from using physical examinations to establish gender identity. Gender identity concerns the social and cultural behaviour and expression with which an individual feels most comfortable. It depends on many factors, such as personality, environment, intimacy and social inclusion. All these factors are important in shaping a person's gender identity. Gender identity is best understood through a spectrum, as there are a diverse range of identities beyond the 'male' and 'female' identities.

Within this context, Hijras in Bangladesh are mostly individuals who were assigned as male at birth but identify as women. A few of them are now referring to themselves as transformed women (*rupantorito naari*). Their 'Hijra' identity is established by their induction into the Hijra tradition, their position as disciples and wards to a Hijra elder, known as their Guru. Hijras have their own culture and customs, and a community dialect known as *Ulti*. Other gender diverse people do not have the same culture, customs and beliefs as those held by the Hijra community.

⁶ Human Rights Watch, "I Want To Live With My Head Held High": Abuses in Bangladesh's Legal Recognition of Hijras', 23 December 2016.

Constitutional framework

The Fundamental Principles of State Policy set out in the Constitution mandate the state to provide the basic necessities for all citizens, including food, clothing, shelter, education and medical care,⁷ and guaranteed employment at a reasonable wage.⁸

Constitutionally guaranteed fundamental rights include that “all citizens are equal before law and are entitled to equal protection of law”.⁹ They include also the right of every person to protection of the law, to life and to, liberty, reputation and property.¹⁰ The Constitution clearly establishes the right to self-determination of each citizen, and also their entitlement to basic welfare provisions. These provisions apply to all citizens, which includes all citizens who are Hijra, transgender and other gender non-conforming communities. In practice, however, discrimination persists as access to education, healthcare, housing, employment and legal support continues to be impeded, particularly for individuals with lower socio-economic backgrounds.

The existence of gender diverse individuals is neither acknowledged nor mentioned in the Constitution and in most laws of the country. Laws that are gender specific, for example, personal laws on inheritance, apply only to give rights to individuals with ‘male’ and ‘female’ gender identities. The lack of any laws or policies expressly addressing issues of discrimination based on gender identity keep them perpetually marginalised.

⁷ The Constitution of the People’s Republic of Bangladesh, Article 15 (a).

⁸ Ibid, Article 15 (b).

⁹ Ibid, Article 27.

¹⁰ Ibid, Article 31

Challenges in implementation of the recognition

How do official documents recognise the Hijra identity?

Some official identification documents and institutional forms have been, or are currently being updated in light of the 'official recognition', providing for inclusion of the terms 'Hijra', 'other' or 'third gender' as a gender identity option.

The Department of Immigration and Passports has since 2014 provided for a third category of 'other', as a gender marker option on passport application forms, in addition to 'male' and 'female'.¹¹

In 2018, the Election Commission updated NID cards to include 'Hijra' as a gender identity by amending the Voter List Act 2009 and the Voter List Regulations 2012.¹² Hijras can now hold national identity cards¹³, where they can identify as 'Hijra'.

In June 2015, the Bangladesh Bank issued a circular requesting all scheduled banks and financial institutions to include the Hijra community within their SME (small and medium enterprises) loan activities.¹⁴ This step meant Hijra individuals could apply for bank loans to set up their own businesses.¹⁵ At least two state-owned commercial banks, Sonali Bank Limited and Janata Bank Limited, have 'third gender' (*tritiyo linggo*) as an option in their account application forms.

The Office of the Registrar General, Birth and Death Registration is currently in the process of updating birth and death registration forms to include the 'others' option.¹⁶

Challenges in implementation of the Hijra recognition and its impact on diverse gender identities

Gender-diverse individuals (including or other than Hijra) continue to face barriers in securing NIDs and in accessing services that require proof of gender identity.

First, the approach to incorporating gender identity options in various official documents is not uniform or inclusive. The 'Other' and 'Third Gender' options used in the above forms accommodate both gender non-conforming individuals identifying as Hijra and those not identifying as Hijra. In contrast, the 'Hijra' option only applies to those who are part of Hijra culture and identify as Hijra. This means that non-Hijra transgender individuals cannot apply for an NID and therefore cannot register as a voter. To have valid official documents, gender diverse individuals who are non-Hijra must choose the 'Hijra' option.

¹¹ Department of Immigration and Passports, Government of Bangladesh, Machine Readable Passport Application Form, serial number 12, page 2

¹² BSS, Dhaka Tribune (2018). 'EC adding 'Hijra' as a gender identity in voters' list', 13 January 2018; Islam S Md, Dhaka Tribune (2019). 'EC: Transgenders will be registered as third gender', 23 April 2019.

¹³ Editorial, The Daily Sun (2019). 'Flawless voter list for a peaceful society', 25 April 2019.

¹⁴ Bangladesh Bank (2015), SMESPD Circular No. 03, SME Credit Facilities for the Entrepreneurs Belonging to Rakhaine and other Tribal's, The Physically Disabled, Socially deprived entrepreneurs and the people of Third Gender Group

¹⁵ The Daily Star (2015), 'Hijras, ethnic groups to get SME loans', 10 June 2015.

¹⁶ Statement made by the Registrar General at a Consultation Meeting on 'SDGS: Inclusive Society', organised by the National Human Rights Commission, Bangladesh on 26 May 2019 (author's personal notes).

Second, the process of identification by different government bodies lacks a uniform, coordinated approach.

Each body has its own procedures for determining an individual's gender identity. At local government level, these methods have varied from district to district.¹⁷ Currently an individual has to undergo multiple processes of verification by government authorities, based on physical examinations, background checks by the police, and/or certificates from their local Ward Commissioner or Union Parishad, to be identified as 'Hijra' in any official document. These systems of verification are not informed by knowledge of the Hijra culture and its practices, the nuances of diversity in gender identities, the difference between biological sex characteristics and experience of their gender identity, or of particular challenges faced by Hijras in expressing their identity and practicing their culture.

This is compounded by lack of sufficient orientation and sensitisation on the part of government authorities responsible for carrying out verifications, and frontline officers responsible for providing services to gender diverse individuals. As a result, individuals who are part of the Hijra community may be excluded from accessing services, on account of not fitting into these authorities' preconceived understanding of 'Hijra'.¹⁸

The lack of a coordinated identification process, resulting in different gender identity categories being recorded in different identity documents, coupled with intervention by service providers who lack training on gender identity and gender sensitivity and are therefore highly non-responsive to gender diverse individuals, also act as barriers to accessing basic services, such as opening a bank account.

Shova's Story

When Anwar Hossain Shova, a gender-diverse individual and a Junior Advocacy Officer at BLAST, first approached a branch of the Sonali Bank to open an account, she was rudely turned down without any explanation. Later, another branch also denied her request stating that her NID and passport recorded a male name, while her job appointment letter additionally contained her preferred (female) name. The bank staff pointed out the discrepancy between the legal gender marker on her NID ('male') and her passport ('X'). Shova returned to the bank a third time, with her appointment letter modified to exclude her preferred name and dressed in male clothes, at the insistence of the bank employees. Only then was she allowed to open a bank account and to choose the 'third gender' option on the account application form.

¹⁷ Findings from FGDs with paralegals included that in Rajshahi, Hijras are required to undergo a medical examination to determine their gender identity when applying for an NID, while in Cox's Bazar, they just need to declare that their preferred gender identity is 'Hijra'. Paralegals in Chattogram division reported that verification from parents and other family members, as to 'Hijra' identity is necessary to get an NID, which is especially problematic as many Hijras have hostile relationships with family members or broken family ties (FGD reports on file with BLAST).

¹⁸ For example, being declared 'fake Hijras' and denied employment by MSW in June 2015 on account of having male genitalia; being treated as men and having applications for NIDs rejected when Hijras who practice the tradition are forced into marriages by their families and consequently have wives and children, or have jobs outside the Hijra community which requires them to conform to conventional gender norms (findings from FGDs with paralegals, on file with BLAST).

Key concerns

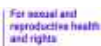
1. *Different gender markers are currently in use across different official forms and identity documents, such as 'Hijra' / 'others' / 'tritiyo linggo' (third gender).*
 - (i) *It is not clear which specific gender identities are included within the 'other' and 'tritiyo linggo' categories, accordingly it is also unclear who will be entitled to apply for these gender markers.*
 - (ii) *It is not clear who decides which gender category to select on official documents– the individual applying for the document, or the authority issuing this.*
 - (iii) *It is not clear on what basis this selection is made.*
2. *The process of identification for individuals with diverse gender identities is not clearly set out. There is no standard procedure for identification, and different departments are approaching this process individually and inconsistently.*
3. *Hijras have been subjected to invasive and unscientific medical tests to verify their gender identity when applying for government jobs. There appears to be no defensible rationale behind these tests.*
4. *There is insufficient information on whether and how human resource policies of public and private organisations address the rights of Hijras and transgender individuals. For example, job application forms may not include the 'Hijra' or 'others' gender category. There does not appear to be any directive for private organisations to ensure gender inclusion.*
5. *Since the recognition in 2014, the Government does not seem to have issued any clear directives on recognition of gender identity and of Hijras or transgender individuals for government servants who are responsible for providing services, including frontline staff.*


Recommendations for policy makers

1. *Develop guidelines to clarify the meaning of the official recognition of the 'Hijra' community in 2014, to enable inclusive and coherent reform of existing laws in accordance with the international human rights framework.*
2. *Develop appropriate and inclusive definitions for the full spectrum of gender identity categories, through collaboration between relevant Ministries (Social Welfare, Education, Health and Family Welfare, Labour and Employment and Public Administration), gender diverse community members and human rights organisations.*
3. *Adopt a clear plan of action, setting out the steps to ensure reflection of gender identity recognition in laws and policies, and to eliminate discrimination against gender diverse communities.*
4. *Ensure a system is in place to amend birth certificates to reflect a person's gender identity, as names can be changed or corrected legally through filing an affidavit in court.*
5. *Disseminate knowledge and provide gender-inclusive sensitivity training to public institutions who are working with gender diverse communities.*
6. *Hold consultations on the Draft Anti-Discrimination Law, with affected communities and experts, and revise it to prohibit discrimination based on gender identity and/or sexual orientation, provide clear definitions of diverse gender identities, and to include specific provisions on non-discrimination in cases of gender identity recognition, identification, and access to basic services.*

BLAST is a leading legal services organisation, providing legal aid from the frontlines of the formal justice system, in the village courts and magistrates' courts, to the highest court. It provides support to women, men and children living in poverty or facing disadvantage, disability or discrimination. It also provides legal aid, advice and representation across a range of areas, including civil, criminal, family, labour and land law, and on constitutional rights and remedies, through access to judicial remedies alongside alternative dispute resolution wherever appropriate. BLAST undertakes public interest litigation as a key part of its advocacy for law, policy and institutional reforms to ensure effective access to justice. BLAST is also committed to advocating for the human rights, social protections and advancement of individuals and communities with diverse gender and sexual identities.

The **Right Here Right Now Bangladesh Platform** is a country platform comprising nine national organisations, one network and one alliance, which seeks to promote young people's sexual and reproductive health and rights irrespective of their sexual orientation and/or gender identity, and access to comprehensive youth-friendly services and SRH information, free of stigma, discrimination and violence, and space for young people's voices.





In 2014, the Ministry of Social Welfare published a gazette notification recognising the Hijra community as the 'Hijra gender', which initiated the process of updating official forms and identity documents to reflect this change. However, challenges in the recognition of diverse gender identities remain, through the lack of clear definitions, inclusive gender categories in documents, and a coordinated identification process.

This policy brief analyses existing laws and policies dealing with gender identity, and recommends reforms required to ensure the process of recognition and identification is inclusive, non-discriminatory and gender sensitive, and acknowledges all diverse identities. It would be of use to researchers, lawyers and activists concerned with securing recognition of gender identity.

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