

# Legal Categorization of 'Third Gender' in Bangladesh: A Tale of Misrepresentation, Marginalization, and Politicized Recognition

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**Abstract:** *Hijras* in Bangladesh got formal recognition as 'third gender' in 2013, which symbolizes a positive reformist approach of the government towards this sexually diverse group. Though the new policy was designed to establish and ensure equal human rights of the *hijras*, it was based on the ground of 'gender disability' overlooking the idea of 'gender diversity' as attributed/claimed and nourished by the *hijras* themselves. This gives an imprint of societal performative and precarious action of misrepresenting and marginalizing this community over the years. Furthermore, even after 10 years of adoption, it wants considerable implementation and monitoring mechanisms. These ultimately put a question mark on this legal advancement and trace the existence of dominant sexual politics behind its promulgation. Hence, this article aims to critically explore this legal categorization of *hijras* in Bangladesh to investigate the underneath sexual politics thereto that reconfirms discrimination and deprivation to this sexually marginalized group.

**Keywords:** Hijra, marginalisation, misrepresentation, performativity, and precarity.

## 1. Introduction

Bangladesh Constitution has pledged to guarantee 'non-discrimination' irrespective of sex, caste, race, religion or place of birth<sup>1</sup>, inhabiting diversity in terms of ethnicity, religion, culture etc. Despite this, country faces lots of discriminatory approaches regarding the aforementioned identities. Notably, inequalities and marginalization encountered by the transgender people, locally known as *hijra*, due to their diversified sexual identities sometimes worse comparing to women, children and religious minorities. This is an identity-based category for people who identify themselves outside the binary sex/gender framework i.e., neither male nor female<sup>2</sup>, including people who "want to be presented as a gender that is different than the one which was assigned to them at

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<sup>1</sup> Constitution of the People's Republic of Bangladesh 1972, art. 27.

<sup>2</sup> Gayatri Reddy, 'Geographies of Contagion: *Hijras*, *Kothis*, and the Politics of Sexual Marginality in Hyderabad', [2005] 12 *Anthropology & Medicine* 3, 256.

birth based on genitalia or other criteria”<sup>3</sup>. Recent study reveals, numbers of the *hijras* in Bangladesh are biologically male whose inner psyches are similar to women, and their gender roles resemble those of females’<sup>4</sup>.

In 2013 Bangladesh officially adopted policy that identifies/recognizes *hijras* as ‘third gender’, considering this as a progressive step forward in the progression of sexual rights in a postcolonial Muslim-majority country. The actual purpose was to assure caring and congenial environment where, along with men and women, *hijra* as citizen of Bangladesh can lead a dignified life with equal enjoyment of their human, gender, and citizenship rights<sup>5</sup>. However, the recognition cannot keep substantial positive changes in their lives and, until today, *hijras* are highly marginalized in Bangladesh. Poverty, social exclusion and deprivation from minimum basic rights like health services, housing and work are the hard realities encountered by many of the *hijras*’ in Bangladesh<sup>6</sup>. This problematizes the ‘recognition’ itself revealing its underlying political dynamics. Therefore, this paper attempts to critically examine the new ‘labelling’ of *hijras* arguing that the very official recognition in Bangladesh is sexually politicized. In so doing, the article identifies and studies the primary research question- how far is the present legal/formal recognition of ‘third gender’ in Bangladesh influenced by the dominant sexual politics and upholds the societal misrepresentation and marginalization towards *hijra* community?

As conceptual framework, the write-up considers Jurich Butler’s notion of ‘gender performativity and precarity’<sup>7</sup>, Dean Spade’s focus on misinterpretation/ overlooking of ‘operation of power’<sup>8</sup> in the legal right framework causing its

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<sup>3</sup> Adnan Hossain, ‘Hijras in South Asia: Rethinking the Dominant Representations’ in Zowie Davy, Ana Cristina Santos, Chiara Bertone, Ryan Thoreson, R. and Saskia E. Wieringa, (eds.), *The SAGE Handbook of Global Sexualities* (Sage publications 1, 2020) 404.

<sup>4</sup> Paul Chaney, Seuty Sabur and Sarbeswar Sahoo, (2020), ‘Civil Society Organizations and LGBT+ Rights in Bangladesh: A Critical Analysis’, [2020] 15 *Journal of South Asian Development* 2, 188.

<sup>5</sup> Sharful Islam Khan, Mohammed Iftekher Hussain, Shaila Parveen, Mahabubul Islam Bhuiyan, Gorkey Gourab, Golam Faruk Sarker, Shohael Mahmud Arafat, and Joya Sikder, ‘Living on the Extreme Margin: Social Exclusion of the Transgender Population (*hijra*) in Bangladesh’, [2009] 27 *Journal of health, population, and nutrition*, 4, 451.

<sup>6</sup> Tove Stenqvist, ‘The Social Struggle of Being HIJRA in Bangladesh - Cultural Aspiration between Inclusion and Illegitimacy’ [2015], 12 <<https://dspace.mah.se/bitstream/handle/2043/18568/Stenqvist-T-DP15%20final.pdf?sequence=2>> accessed 15 June 2022.

<sup>7</sup> According to Butler’s conception of ‘gender performativity’, gender is not something given/found rather a social construction that signifies ‘doing/constituting’ gender through infinite repetition of acts which produces the illusion of gender as stable identity, an expression of inner ‘core’. Thus, it determines how one should respond to one’s gender identity and also the counter response of society thereto. And ‘precariety’ implies the fusion of those social conceptions with gender and sexual norms which gives birth to a discriminatory and depriving protection system nurturing sexual politics. See further Judith Butler, ‘Performativity, Precariety and Sexual Politics’, [2009] 4 *Revista de Antropología Iberoamericana* 3.

<sup>8</sup> Spade opines the categorization, especially gender-based ones, of ‘proper’ and ‘improper’ subjects are the outcome/interplay of ‘disciplinary power’ that infuses into the society. The powerful ‘self’

insufficiency in addressing trans-issues, and the ‘intersectionality lenses’ between these two concepts to establish and substantiate the key claim/arguments. However, this study emphasizes on the dichotomies of legal recognition of ‘hijras’ only, instead of extending its ambit towards the whole LGBTQ community while addressing this as one of the shortcomings of this formal categorization. In so doing, the paper first attempts to historically situate the *hijra* community in Bangladesh focusing on its gradual diffusion through societal misrepresentation and marginalization, then it follows a brief overview of the social-justice movements ensuing the recognition. The subsequent part examines the central question of this paper through the lenses of sexual politics and finally concludes with some key findings.

## 2. Historical Situation of Transgender/Hijras in Bangladesh with its Gradual Diffusion into Misrepresentation and Marginalization, following Gender Performativity and Precarity

The term *hijra* is originated from the Arabic ‘hijr’ which means ‘leaving one’s tribe’, henceforth, analogically signifies someone who left or migrated from his own sexual identity, from ‘self’ to another part of ‘self’<sup>9</sup>; ‘eunuch’ or ‘hermaphrodite’<sup>10</sup> or ‘LGBT’ in English. In Bangladesh *hijras* have 200 years of rich history, not only restricted to Bangladesh but is a sub-continental cultural phenomenon<sup>11</sup>. *Hijras* socially known as ‘third sex’ in the royal courts of different Islamic regimes around the world, in particular, during the Mughal rule in Medieval India their role had much significance<sup>12</sup>. Their positions were well-known as diplomatic advisers, executive officials, generals and harem guards. They got well reputation as intelligent, optimistic, faithful and had easy access to any room and population, thus, kept remarkable contribution in empire building politics during the Mughal period<sup>13</sup>. However, with the advent of British colonization in erstwhile Indian sub-continent, Bangladesh was also a part, the history of misrepresentation and marginalization towards the *hijras* started. Colonial representations of *hijras*

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always needs an ‘other’ to uphold his supremacy and therefore legally categorizes transgender, homosexual, criminal, psychopath etc. See for details Dean Spade, ‘Rethinking Transphobia and Power—Beyond a Rights Framework’, in *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Duke University Press 2015).

<sup>9</sup> Faruk Ihsan and Sara Ali, ‘Khwaja Sira- Trans-identities in Pakistan’ (2022). <[https:// canvas. eur. nl /courses/ 37403/files...Lecture%20notes?preview=64716006](https://canvas.eur.nl/courses/37403/files...Lecture%20notes?preview=64716006)> accessed 17 June 2022.

<sup>10</sup> Susan Stryker and Stephen Whittle, *Transgender Studies Reader* (New York and London: Routledge 2006).

<sup>11</sup> Sujata Moorti, ‘A Queer Romance with the *Hijra*, [2016] 3 *QED: A Journal in GLBTQ Worldmaking* 2, 19 <<https://www.jstor.org/stable/10.14321/qed.3.2.0018>> accessed 16 June 2022.

<sup>12</sup> Serena Nanda, *Neither Men Nor Women: The Hijras of India* (second edition, London: Wadsworth 1999).

<sup>13</sup> Bangkok Post Public Company Limited, ‘Bangladesh Film Tackles Past Culture of Underage Sex’ (16 October 2012) <<https://www.bangkokpost.com/world/317273/bangladesh-film-tackles-past-culture-of-underage-sex>> accessed 14 June 2022.

evidenced an “aesthetic revulsion to *hijra* bodies and physical appearance, with assumption that they were immoral and obscene”<sup>14</sup>. The repetitiveness of moral outcry highlights the “performative quality of colonial encounters with *hijras*; and the ‘gender performative’ nature of colonial rule”<sup>15</sup>. With particular anxiety about the transgender *hijra* community, British started to marginalize them by labelling ‘habitual sodomites’ and ‘criminals’<sup>16</sup> promulgating Criminal Tribes Act, 1871 as ‘gender precarious’ action. This links the aforementioned performative misrepresentations with gender and sexual norms and increased *hijras*’ marginality due to not following ‘non-binary’ genders and not living their genders in ‘intelligible’ ways<sup>17</sup>. Moreover, the middle-class sections of the Indian sub-continent were almost reluctant to integrate *hijras* within “respectable” Indian society<sup>18</sup>.

Inheriting the same legacy and being a mixture of many cultures, Bangladesh has also built transgender identity through these histories, re-inscribed the misrepresentations and reinforced the marginalization towards them after getting her independence. Bangladeshi culture places high value on close familial relationships, fulfilment of gendered (male and female only) expectations of family roles<sup>19</sup>, and performance of social duties in a comprehensible way to avoid humiliation in the society. Therefore, the disgrace of being ‘different individual’ other than traditional ‘male’ and ‘female’ and experiences of social exclusion often begin within the family itself during the early childhood of *hijras*<sup>20</sup> and lasts till the moment of their death. Society misrepresents them as abnormal community due to their ambivalence behavior<sup>21</sup>. Moreover, “societal taboo bounds these people either to assimilate and hide their gender crisis or to live the life of the most

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<sup>14</sup> Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c. 1850–1900* (Cambridge University Press 2019) 29.

<sup>15</sup> *ibid* 28.

<sup>16</sup> Jessica Hinchy, ‘the Eunuch Archive: Colonial Records of Non-normative Gender and Sexuality in India’, [2017] 58 *Culture, Theory and Critique* 2, 127.

<sup>17</sup> Butler (n 7) 2.

<sup>18</sup> Mahso Gichki, ‘Deconstructing Transgender Identities in Pakistan, India, and Iran in Colonial and Post-colonial Context’, [2020] 63 *Development* 1, 35. <<https://doi.org/10.1057/s41301-020-00243-3>> accessed 10 June 2022.

<sup>19</sup> Aditya Bondyopadhyay and Shale Ahmed, *Same-sex Love in a Difficult Climate: A study into the Life Situation of Sexual Minority: Lesbian, Gay, Bisexual, Kothi and Transgender Persons in Bangladesh*, (Dhaka: Bondhu Social Welfare Society Publication 2010).

<sup>20</sup> Abdul Aziz and Sameena Azhar, ‘Social exclusion and official recognition for *Hijra* in Bangladesh’, [2020] 9 *Journal of Research on Women and Gender* 1, 4. See also Bipul Kumar Sarker and Most. Tahura Pervin, ‘Socio-economic Status of *Hijra* Community: A Study on Dhaka City’, [2020] 4 *International Journal of Science and Business* 1, 278. Doi: 10.5281/zenodo.3746192 <<http://ijsab.com/wp-content/uploads/462.pdf>> accessed 12 June 2022.

<sup>21</sup> Sunjida Islam, ‘A Theoretical Analysis of the Legal Status of Transgender: Bangladesh Perspective’, [2019] 3 *International Journal of Research and Innovation in Social Science (IJRISS)* 3, 117. ISSN 2454-6186.

marginalized group”<sup>22</sup>. While around 1.5 million people are transgender in Bangladesh, Government registers and misrepresents 10,000 to 50,000/half a million<sup>23</sup>. This can be considered as a deliberate attempt of the society/State of abolishing *hijra* subjectivity following ‘gender performativity’, that determines “who can be produced as recognizable subject, a subject who is living, whose life is worth sheltering and when lost, would be worthy of mourning”<sup>24</sup>. Unfortunately, even those are shown as living subjects, most experience extreme marginalization being excluded from cultural, religious, political and professional spheres<sup>25</sup>

These marginalization get worse through the present ‘precarious’ actions in Bangladesh along with the pre-existing historical legal inputs. Bangladeshi law materializes, in practice, only two sexes of male and female, thereby, “discrimination on the basis of ‘sexual orientation’ or ‘gender identity’ has not been prohibited by any civil rights law”<sup>26</sup> in terms of any fundamental rights. Likewise, no legal protection exists to address harassment of the LGBTQ+ community. Furthermore, in 2009 High court division formulated guidelines to avoid sexual harassment of women and children at work places, educational institutions and on street without including harassment issues related to transgender people<sup>27</sup>.

Therefore, this hybridity of colonial project and societal perception caused historical abolishment, misrepresentation, dehumanisation and marginalization of the *hijras* in Bangladesh which perfectly exemplifies Butler’s theoretical conception of gender ‘performativity’ and ‘precarity’.

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<sup>22</sup> Lubna Jebin and Umme Farhana, ‘The rights of Hijra in Bangladesh: An overview’ [2015] 3 *Journal of Nazrul University* 1&2, 1.

<sup>23</sup> Sanjana Chowdhury, ‘Transgender in Bangladesh: First school opens for Trans students’ *BBC News* (Dhaka, 06 November 2020), <<https://www.bbc.com/news/world-asia-54838305>> accessed 8 June 2022. See also Damien Gayle, ‘Transgender Bangladeshis hold Dhaka’s first-ever pride parade to mark a year since their official recognition as a third gender’ *Mail Online* (11 November 2014), <[www.dailymail.co.uk/news/article-2829481/Transgender-Bangladeshis-hold-Dhaka-spride-parade-mark-year-official-recognition-gender](http://www.dailymail.co.uk/news/article-2829481/Transgender-Bangladeshis-hold-Dhaka-spride-parade-mark-year-official-recognition-gender)> accessed 11 June 2022. See further Shakil Bin Mushtaq, ‘Bangladesh Adds Third Gender Option to Voter Forms’ *The Diplomat* (19 January 2018), <<https://thediplomat.com/2018/01/bangladesh-adds-third-gender-option-to-voter-forms/>> accessed 27 May 2022.

<sup>24</sup> Butler (n 7) 12.

<sup>25</sup> ‘Hard life for transgender people in Bangladesh’ *UCAnews* (16 May 2019), <<https://www.uca.news.com/news/hard-life-for-transgender-people-in-bangladesh/85136>> accessed 7 June 2022.

<sup>26</sup> Partha Sarker, ‘The Third Gender in Bangladesh’ in Alan Finlay (ed.), *Global Information Society Watch 2015: Sexual Rights and the Internet*, Association for Progressive Communications (APC) [online] (APC and Hivos 2015), p 62. <<https://www.apc.org/en/pubs/global-information-society-watch-2015-sexual-right>> accessed 28 May 2022.

<sup>27</sup> *ibid.*

### 3. Short Overview of Trans-Social Justice Movements in Bangladesh Ensuing the Recognition of 'Third Gender'

Suffering age-long misrepresentations and marginalization, the *hijra* groups' human rights activists and some human rights-based organizations have started to raise their voice and demand 'recognition' as 'distinct gender identity' which also backs to a long history<sup>28</sup>. During 2001, several Bangladeshi civic organizations namely LOSAUK, *Sustho Jibon*, *Badhon*, *Bondhu* working for transgender rights continuously struggled to have legal recognition through social justice movements<sup>29</sup>. Their sense of community and their own movement have given them strength and an evidence to this moral imperative becomes further evident in an initiative called the 'Integration of the Transgender (*hijra*) Population into mainstream society' led by a group of government officials in 2011.

This group along with the aforementioned transgender organizations initiated mass awareness campaign to change people's negative perceptions about the *hijras*' by organizing seminars, rallies and advertising campaigns. Finally linked this with demand for the legal recognition of the *hijra* with consistent, non-violent social justice movements using placards, banners and t-shirts emblazoned with similar messages. In the same year *Bondhu* organized a large demonstration of the *hijras* and hundreds of them dressed in colorful *sarees* (a common female attire) paraded along three-kilometer path in Dhaka, demanding rights of employment, education and, most significantly, recognition as 'separate gender'<sup>30</sup>.

Following these concerted social justice movements, legal recognition of the *hijras* was ensued in 2013 by the Bangladeshi Government in a cabinet meeting chaired by Prime Minister Sheikh Hasina<sup>31</sup>. This, eventually, allows the identification of *hijras* as 'third gender' along with male and female on all the government official documents, including passports, and promises to secure their equal human rights, enabling them to lead 'dignified' lives<sup>32</sup>.

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<sup>28</sup> Liton Hossen, 'Challenges of Right to Employment Faced by Transgender Hijra in Bangladesh'(Master of Arts thesis, Faculty of Graduate Studies, Mahidol University 2019) p 4. <<https://asiapacific.gchumanrights.org/wp-content...07/Liton-Hossen-thesis.pdf>> accessed 13 June 2022.

<sup>29</sup> Adnan Hossain, 'The Paradox of Recognition: *Hijra*, Third Gender and Sexual Rights in Bangladesh', [2017] 19 (12) *Culture, Health & Sexuality* 1422. See also 'Transgender rights promoted in Bangladesh' (KIOS Foundation) < <https://kios.fi/en/achievement/transihmisten-oikeuksia-edistetetty-bangladeshissa/>> accessed 27 May 2022.

<sup>30</sup> *ibid* 1424.

<sup>31</sup> Bipul Kumar Sarker and Most. Tahura Pervin, 'Socio-economic Status of Hijra Community: A Study on Dhaka City', [2020] 4 *International Journal of Science and Business* 1, 278. Doi: 10.5281/zenodo.3746192 <<http://ijsab.com/wp-content/uploads/462.pdf>> accessed 12 June 2022.

<sup>32</sup> Third gender is not a word, it is a Gender', in *Third Gender Recognition for Hijra Community-aftermath and way forward* (BSWS and NHRC 2015). <<https://www.bandhu-bd.org/third-gender-is-not-a-word-it-is-a-gender/>> accessed 11 June 2022.

#### 4. Examining the Legal Recognition of 'Third Gender' Through the Lenses of Dominant Sexual Politics Upholding the Societal Misrepresentation and Marginalization Towards *Hijra* Community in Bangladesh

Though some transgender, *hijras*, are legally recognized in Bangladesh; they still live and roam around being segregated from mainstream society<sup>33</sup>. Whilst this formal categorization has been viewed as liberal step, it lacks proper execution of any of the enshrined promises<sup>34</sup> even after passing ten years of recognition and these vitiate the fundamental philosophy and credibility of the official recognition. Therefore, this segment tries to examine the very recognition to find out any underlying political dynamics which is making this long-cherished achievement a continuous failure.

##### 4.1 Assessing the Replication of Butler's Conception of Gender Performativity and Precarity Within the Legal Recognition of *Hijras*

Through the concept of 'gender performativity' Butler identifies that, gender is not a given reality rather signifies 'doing/constituting' gender through infinite repetition of acts that produce the illusion of gender as stable identity, an expression of inner 'core'. She states, "one does not live ones' gender but acts it, which constituted through the repetition of culturally intelligible and stylized acts"<sup>35</sup>. Therefore, gender performativity is a socio-cultural construction, locating social perceptions as its central content, which determines how one should respond to one's gender identity and also the counter response of society thereto. And the notion of 'precarity' links or instrumentalizes those social conceptions with gender and sexual norms, resulting discriminatory protection system, deprivation of equal rights, criminalization in certain cases<sup>36</sup>, thus patronizes sexual politics.

History evidences, transgender identity in Bangladesh is determined by the socio-cultural-political influence on how trans-genders would act or 'perform', following the gender 'performativity'; and not on the reflection of *hijras* prior internal essence/desire. Neither the Government nor popular masses in Bangladesh view the *hijras* through their lens of LGBTQ or as part of transgender movement organized on the basis of either sexual orientation or gender identity<sup>37</sup>. Therefore *hijras* here are not conjured up the image of an alternative sexuality

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<sup>33</sup> Muhammad Kamruzzaman Mozumder, 'Validation of Bengali Perceived Stress Scale among LGBT+ Population', [2017] 17 *BMC Psychiatry*, 11.

<sup>34</sup> 'The Social Exclusion of the Hijra Community in Bangladesh' (Acume 2021). <<https://www.acume.org/blog/the-social-exclusion-of-the-hijra-community-in-bangladesh/>> accessed 10 June 2022.

<sup>35</sup> Butler (n 7) 1.

<sup>36</sup> *ibid* 2.

<sup>37</sup> Hossain (n 29) 1419.

rather considered as 'gender deviant' and 'gender disabled'<sup>38</sup>. Even laws cannot change the way they are made to act their gender and any mobilizations on the basis of sexual difference/marginality tie into popular negative constructions of *hijra* identity often increases their stigma and suffering<sup>39</sup>.

Unfortunately, the same has happened in the 2013 recognition of *hijras* in Bangladesh. The process of 'recognition' involves, "the discursive interpellation of *hijras* as "disabled" with innate genital difference viewed as disability, thus, understood to be special group of people delinked from sexual desire"<sup>40</sup>. This becomes evident from 2011 television interview of one spokesperson of the Government describing the *hijras* as 'victims of genetic defects' in supporting their legal recognition claim, which expressed the existing 'gender performative' expression. Moreover, in 2011, Bangladesh Parliament tabled proposals to rehabilitate them on the ground of their being 'disabled' and new package of disability allowances targeting 10,000 *hijra* was initiated which marked watershed in the conceptualization of *hijras* as 'disabled'<sup>41</sup>. The Bangla expression used by the State to recognize *hijras* is '*jouno o lingo protibondhi*' meaning 'sexually and genitally handicapped' and "cabinet also approved the proposal of recognition identifying them sexually disabled since birth"<sup>42</sup> which clearly exemplifies State's 'precarious action'. Furthermore, the very term "third gender" is also 'gender performative' as historically *hijras* in Bangladesh have social expression of 'third sex' which is not chosen by them<sup>43</sup>. Therefore, maintaining the 'status quo' of this term in legal document is another instance of gender 'precarious action' through the "instrumentalization of discriminatory performative system"<sup>44</sup>.

Hence, on account of recognizing such a discourse of innate genital difference as 'disability' and its consolidation as 'third gender', it can be claimed that the *hijra* recognition in Bangladesh is a socio-cultural paradox and sexually politicized. It illuminates Butler's idea of 'gender performativity' and 'precarity' by co-opting with the already constructed/performed transgender identity and role, linking through policies, as an attempt to streamline the *hijras*. It further posits 'double discrimination' towards *hijras*, in one way making them more stigmatized considering 'disabled' and also compelling them through enforced, dehumanizing medical examinations of their genitalia to prove that "disability" for getting legal protection under the 2013 recognition<sup>45</sup>.

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<sup>38</sup> *ibid* 1427.

<sup>39</sup> Reddy (n 2) 257.

<sup>40</sup> Hossain (n 29) 1419.

<sup>41</sup> *ibid* 1424

<sup>42</sup> *ibid*.

<sup>43</sup> Nanda (n 12).

<sup>44</sup> Butler (n 7) 2.

<sup>45</sup> Chaney et al (n 4) 199.



## 4.2 Identifying Spade's Conception of Bypassing Structural Forms of Power and Gendered Rule of Law in the Legal Categorization of *Hijras*

Spade considers gender as an administrative category, categorized by different socio-political institutions<sup>46</sup>. The invention of various categories, especially gender-based ones, of 'proper' and 'improper' subjects is a key feature of 'disciplinary power' that pervades society. To maintain supremacy of powerful 'self' there always needs an 'other', therefore, "the creation and maintenance of such categories of people, for instance transgender, homosexual, criminal, psychopath etc., is important and it also urges to establish guidelines/norms like heterosexuality, monogamy etc. to regulate, keep surveillance"<sup>47</sup> on those "improper" categories through different institutions. He emphasizes, therefore, 'power' is essential for constructing accurate analysis of the arrangements and impact of transphobia, sexism, and homophobia and for conceptualizing methods of resistance.<sup>48</sup> He further argues, to address transphobia only through legal right framework or law reform without understanding/focusing these operations of power and other existing gendered laws, is a limited mechanism to establish trans-rights and improve their conditions.<sup>49</sup>

Similar to this, the legal recognition of *hijras* as "third gender" in Bangladesh creates a hierarchical position making them 'inferior' while considering the two 'gender-binaries' as 'superior', thus acknowledges or deliberately bypasses unequal power-play between the superior to inferior which is very common in nature. More specifically, "third gender" as a category is driven more by a desire to perpetuate the power/dominance of two sex/gender system and less by the lived lives of the people who constitutes this 'third'<sup>50</sup>, because in Bangladesh mainstream society accepts 'male/female' gender binaries as the 'proper self' and 'non-binaries' as the 'improper other'. Therefore, the hierarchical categorization of gender in legal documents reinforces 'heteronormativity' and "complicates/hides socio-political power relations"<sup>51</sup> that facilitate the formation and perpetual subjugation of 'third gender' while naturalizing and empowering the existing two gender systems<sup>52</sup>. Consequently it fails to uplift the conditions of *hijras*, even though conferring normative equality, instead leads them to more harassments and abuses by those in upper hierarchical power structure<sup>53</sup>.

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<sup>46</sup> Spade (n 8) 68.

<sup>47</sup> *ibid* 54

<sup>48</sup> *ibid* 67.

<sup>49</sup> *ibid* 68.

<sup>50</sup> Adnan Hossain, 'Beyond Emasculation: Pleasure, Power and Masculinity in the Making of Hijrahhood in Dhaka, Bangladesh' (PhD dissertation, University of Hull 2014).

<sup>51</sup> Spade (n 8) 51.

<sup>52</sup> M. Morgan Holmes, 'Locating Third Sexes', (2004) 8 *Transformations*, <[http://www.transformation.sjou.rnal.org/issues/08/PDF/Holmes\\_Transformations08.pdf](http://www.transformation.sjou.rnal.org/issues/08/PDF/Holmes_Transformations08.pdf)> accessed 07 June 2022.

<sup>53</sup> Sharful Islam Khan, Mohammed Iftekhher Hussain, Shaila Parveen, Mahbulul Islam Bhuiyan, Gorkey Gourab, Golam Faruk Sarker, Shohael Mahmud Arafat and Joya Sikder, 'Living on the

For instance, *Nazrul Islam Ritu*, a third gender, is the first elected mayor in Bangladesh<sup>54</sup> and media covered this news negatively by mocking the ‘masculinity’ of the opposite candidate that, how can he lose before a person who has ‘gender disability’ and ‘inferior’ to him<sup>55</sup>. It expresses serious dehumanization, stigmatization and social pressure on the *hijras* by those in hierarchical power<sup>56</sup>. Recent studies demonstrate, 42.6% of *hijras* are being subjects to be ‘attacked’<sup>57</sup> and about 74% of them have been victimized with several kinds of harassments in different institutions/spheres<sup>58</sup> even after getting recognition, as State bypassed the ‘practical inequalities’ in structural power frame when determining ‘legal equality’ to the *hijras*.

Moreover, as underlined by Spade, non-considering the existing ‘gendered rule of law’ of section 377<sup>59</sup> in Bangladesh contradicts the *hijra* recognition and increases vulnerability as it considers them ‘criminal/perpetrator’ by criminalizing transsexualities. Alan Freeman quoted in Spade, “the perpetrator perspective prevents us from looking at the ‘unequal conditions’ that entire populations experience because it focuses on intentional actions of individual discriminators”<sup>60</sup>. Furthermore, co-existence of these two self-contradictory systems within the same legal jurisdiction of Bangladesh confuses trans-lives and helps those in power structure to confiscate *hijras’* lands, stipends, overturn their inheritance rights etc.<sup>61</sup>

However, according to this analysis, it can be appealed that the legal right framework of recognizing *hijras* in Bangladesh bypasses the existing structural inequalities and gendered laws, as propounded by Spade. Thereby it reaffirms dominant sexual politics, disciplinary power and perpetuates social exclusion and violence towards the ‘whole group’ of this marginalized bodies.

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Extreme Margin: Social Exclusion of the Transgender Population (*hijra*) in Bangladesh’, [2009] 27 *Journal of health, population, and nutrition* 4, 441.

<sup>54</sup> ‘Bangladesh town elects country’s first transgender mayor’ *ALJAZEERA* (30 November 2021) <<https://www.aljazeera.com/news/2021/11/30/bangladesh-town-elects-first-transgender-mayor-lgbtq>> accessed 01 June 2022.

<sup>55</sup> Adnan Hossain, ‘Hijras in South Asia: Rethinking the Dominant Representations’, in Zowie Davy, Ana Christina Santos, Chiara Bertone, Ryan Thoreson and Saskia E. Wieringa (eds), *The SAGE Handbook of Global Sexualities* (Sage publications 1, 2020) 415.

<sup>56</sup> Chaney et al (n 4) 199.

<sup>57</sup> ‘Bangladesh: Transgender Men Fear for Their Safety- Transgender Men Face Threats and Widespread Discrimination’ (Human Rights Watch 2018). <<https://www.hrw.org/news/2018/01/19/bangladesh-transgender-men-fear-their-safety>> accessed 7 June 2022.

<sup>58</sup> Ayesha Siddiequa Daize and Essaba Masnun, ‘Exploring the Socio-economic and Cultural Status of Third Gender Community in Bangladesh’, [2019] 9 *Jagannath University Journal of Arts* 2, 188.

<sup>59</sup> Penal Code 1860, s 377.

<sup>60</sup> Spade (n 8) 51.

<sup>61</sup> Human Rights Watch (n 57).

#### 4.2.1 Finding 'Intersectionality' Lenses of Butler and Spade, Influencing the Recognition of 'Third Gender'

Butler and Spade corresponds while focusing on the intersectionality between sexual identities and structural inequalities of power, those having lifetime material consequences towards the sexually marginalized communities. For both, gender is a social/administrative construct that is shaped by forces/power that are external to it, thus, is deeply seated with hegemonic power relations exerted by those having dominant sexual identities<sup>62</sup>. Butler's 'gender precarity' reveals the broader relations of power in creating age-long gender performative 'sexual identities' and also 'the operation of power' through linking these with gender and sexual norms<sup>63</sup>. Spade confirms this 'precarity' by mentioning the 'life changing/reforming policies' or 'legal right framework' which also reifies this intersectionality by misunderstanding or overlooking structural inequalities of power advantaging those confirming gender binaries. Then, those falling in the upper gender hierarchy always do have strong voice in any right framework/precarious action compared to 'sexually marginalized', as they have both dominant sexual identities and hegemonic power. Therefore, Spade urges to stop believing what the law says about itself, is true and what the law says about transgender, is what matters<sup>64</sup>. Finally, both of them urges to understand the clearer connection between 'sexual identity' and 'operation of power' in concerned precarious actions/right-based legal frameworks to speak for the unspeakable people having marginalized sexual identities thus less power, like transgender, along with their way to claim rights<sup>65</sup>.

Both the scholars' intersectionality lenses between marginalized sexual identities and structural unequal forms of power can be claimed as manifested and influenced in the legal recognition of *hijras* in Bangladesh. Here 'transgender' being perceived as 'gender disabled', i.e. sexually marginalized, have less power and representation<sup>66</sup>. Consequently, it becomes easier for those in higher 'sexual stratification'<sup>67</sup>, for instance gender binaries/heterosexuals, to incorporate their own understanding of 'trans-sexuality' into normative framework making the

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<sup>62</sup> Butler (n 7) 6. See also Spade (n 8) 54.

<sup>63</sup> Butler (n 7) 3.

<sup>64</sup> Dean Spade, 'Trans Law and Politics on a Neoliberal Landscape', in *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Duke University Press 2015) pp. 29-30.

<sup>65</sup> Butler (n 7) 6. See further Spade (n 8) 68.

<sup>66</sup> 'Transgender rights promoted in Bangladesh' (KIOS Foundation) < <https://kios.fi/en/achievement/transihmisten-oikeuksia-edistetty-bangladeshissa/> > accessed 27 May 2022.

<sup>67</sup> According to Gayle S. Rubin, sexual 'stratification' is the society performed/perceived sexual 'hierarchy' or 'the charmed circle' where gender binaries or heterosexuals are positioned in the upper position considering those as having good, normal, natural and blessed sexuality. For details see Gayle S. Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Richard Parker and Peter Aggleton (eds), *Culture, Society and Sexuality: A Reader*, (London and New York: Routledge 1999) 153.

*hijras* more marginalized and maintaining structural inequalities. Therefore, the very recognition however rigorous may be is insufficient to ensure mainstreaming of transgender, as it is not based on a nuanced understanding of gender categories and structural unequal forms of power contributing thereto.

### 4.3 Ascertaining Identity Politics in Limiting Subjectivity While Recognizing and Avoiding Proper Implementation Mechanisms

Although some non-binary people identify as transgender but recognizing only *hijras* as ‘third gender’ excluding other sexual identities within LGBTQ, “implies a system of ‘identity politics’ where “representation” as a trope itself erases more complex analyses of political and economic injustices”<sup>68</sup>. It was a deliberate attempt so that the recognition may not be interpreted to offer protection to any other sexually marginalized groups than culturally recognized *hijras*<sup>69</sup>. Even it excludes other non-conforming ‘trans-feminine’ groups and ‘transgender-men’ whose male gender is not recognized by the society<sup>70</sup>. Ahmed reaffirms, “this Neoliberal approaches to rights, for instance, the recognition of *hijra* rights have been misappropriated into narrow understanding of gender and trans struggle, also leaving out those having less financial resources to take part in the queer scene”<sup>71</sup>. Hence, it can be argued that this recognition ascertains ‘identity politics’ to uphold heteronormative supremacy under the veil of *hijra* recognition. As wider scope of recognition might have potential for community building and providing individuals the freedom to identify as more broadly ‘queer’, what would have been vital to avoid “neo-colonial trap” of heteronormativity<sup>72</sup>.

Additionally, this shadow recognition suffers from proper implementation, even not endorsed in their national identity cards and passports as keep space only for male/female<sup>73</sup>, thus confirms ‘identity/categorization politics’<sup>74</sup>. Therefore, they are facing difficulties in accessing health care<sup>75</sup>, education, housing and often fallen into sex trade<sup>76</sup>, being eliminated from labor markets<sup>77</sup> etc., turning the rights conferred by legal recognition as mere ‘paper-right’, lacking of ‘justiciability’, which can be equivalent to ‘legal injustice’ as well.

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<sup>68</sup> David Valentine, ‘I know what I am: Gender, Sexuality and Identity’, in *Imagining Transgender: An Ethnography of a Category* (Durham & London: Duke University Press 2007) 137.

<sup>69</sup> Hossain (n 55) 417.

<sup>70</sup> *ibid* 418

<sup>71</sup> Ibtisam Ahmed, ‘Decolonizing Queer Bangladesh: Neoliberalism against LGBTQ+ Emancipation’ (2019) *E-International Relations*, 5. <<https://www.e-ir.info/2019/08/16/decolonising-queer-bangladesh-neoliberalism-against-lgbtq-emancipation/>> accessed 11 June 2022.

<sup>72</sup> *ibid*.

<sup>73</sup> Jebin and Farhana (n 22).

<sup>74</sup> Ihsan and Ali (n 9).

<sup>75</sup> Md. Akramul Islam, ‘Right to Education of The Third Gender of Bangladesh: An overview’, [2016] 21 *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 9, 33.

<sup>76</sup> *UCAnews* (n 25).

<sup>77</sup> Aziz and Azhar (n 20) 11.

In-sum, this non-compliance to implement the rights and limiting subjectivity within the legal right framework reiterates sexual politics in the very recognition which does not truly aim to benefit the *hijras*, rather to reproduce structural inequalities of power that can ever marginalize the 'third gender' giving no socio-political space where they can lead life of a human being with dignity.

## 5. Conclusion

Bangladesh witnesses historical stand of misrepresentation and discrimination towards the sexually marginalized groups even having Constitutional promises to ensure equality regardless of their diversified sexual identities. The highly valued family culture, gendered expectations of family roles in Bangladesh always identify someone as man/woman considering 'variations' over 'social traditions/perceptions' as 'deviance'<sup>78</sup> which ultimately corresponds to Fausto Sterling's claim of "labeling someone male/female is a social decision, we may use scientific knowledge to make decision, but only our beliefs about gender-not science-can define our sex"<sup>79</sup>. However, in 2013 Bangladesh has taken liberal approach in recognizing the 'Transgender'<sup>80</sup>, *hijras*, as separate category, even though after passing many years it lacks proper application and the discriminations and deprivations are ongoing<sup>81</sup>.

A critical examination of this recognition finds its foundational standpoint into the age-long 'gender performative' concept of 'gender disability' instead of the lived experience of *hijras* as 'gender diversity'. Thus, the very recognition, being a precarious action, romanticizes and reinforces the 'heteronormativity' by creating gender hierarchies, misrepresents and marginalizes the *hijras* considering the recognition as the solution bypassing dominant structural unequal forms of power and the remaining vulnerabilities in the existing legal framework. Furthermore, it endorses 'identity politics' by excluding the rest of the LGBTQ community from the legal ambit of this framework and not taking minimal steps to materialize the ensured rights in practice. Thereby this formal categorization keeps inconsequential outcomes to uplift normal, civic lives of the *hijra* community in Bangladesh. While the outpouring of enthusiasm for legal recognition continued among a pocket of dominant civil society and sexually politicized discourses have taken root, how such legal recognition may benefit the *hijra* in the long term is a serious issue to think. The picture emerged through this recognition is one in

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<sup>78</sup> *ibid* 4, See further Sarker and Pervin (n 31) 278.

<sup>79</sup> Anne Fausto Sterling, 'Dueling Dualisms', in *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books 2000) 3.

<sup>80</sup> Humaira Anjum, Rifa Tamanna, Subrina Reza, Suraiya Kamol and Tanzum Abid Khan 'Ensuring Human Rights for the Gender Diverse Population in Bangladesh: The Protection Perspectives', [2021] 12 *Beijing Law Review* 2, 342. Doi: 10.4236/blr.2021.122020.page 342.

<sup>81</sup> Acume (n 34).

which both the civil society and the State are constantly trading the marginality of the *hijras* and further disenfranchising them.

In-concluding, belonging to separate gender is not curse rather it's a sexual identity, source of pride<sup>82</sup>. Respecting this truth, this paper tries to create a critical outlook towards the legal recognition of *hijras* in Bangladesh to find out its causal drawbacks which need serious attention and material intervention, instead of providing recommendations only without pointing the underlying problems. However, finding out effective solutions to make this recognition meaningful by purely focusing on *hijra* community's own 'identity' and 'need' might be relevant for further research.

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<sup>82</sup> BSWS and NHRC (n 32).