

Submission: report on Colonialism and SOGI

Bandhu Social Welfare Society, Bangladesh



Bandhu Social Welfare Society (Bandhu) has been a trailblazer in the struggle to bring positive changes in the lives of people with diverse sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) of Bangladesh since 1996. In the hope to build a society where people from all diverse gender and sexual identities enjoy quality life, Bandhu works towards ensuring a dignified life by protecting their human rights, promoting a sustainable livelihood, improving access to quality health care including sexual & reproductive health & rights (SRHR), & enhancing access to social security & gender justice.

With everlasting devotion, Bandhu always stood by the side of the diverse SOGIESC community for the last 26 years to attain their recognition, social acceptance, inclusivity, livelihood, SRHR, healthcare, social security, legal aid alongside other human rights related concerns.

Did the imposition and/or enforcement of colonial laws or policies on sex, gender and sexuality change pre-colonial treatment of sexual orientation and gender identity? What historical or anecdotal evidence is there available about the treatment of gender and sexual diversity before past or present experiences of colonization?

Since the pre-colonial time, people with their diversity of gender identity, specially the Hijra people were well-known and tolerated by the society. Hijra identity and culture is documented to have hijras held positions as servants for elite households, manual laborers, military commanders, political advisors, and guardians of the harem during the Delhi Sultanate (1226-1526) and Mughal Empire (1526-1707).^{1,2}

Unlike the case of hijras, Mughal Empire which was ruled by Islamic laws considered people of diverse sexual orientation as infidel to receive punishment for such act.³ Interestingly, in the Islamic literatures in that era, there were expression of homoerotic viewpoints reminiscent of bromances, but these were not explicitly homosexual in nature, however, poems and ghazals of some renowned poets represented homoeroticism developing a discourse of erotic commentary on young males.^{4,5,6}

According to the Kama Sutra, transgender and homosexuals have a documented history on the Indian subcontinent describing numerous homosexual relationships with love and trust and a variety of sex/gender "types" dating back to ancient times, before the advent of Islam.⁷ Sexual techniques used by masculine and feminine types of third-sex (Tritiya-prakriti) and homosexuals are clearly described.⁸ As per the descriptions, "*There are also third-sex citizens, sometimes greatly attached to one another and with complete faith in one another, who get married together.*" (KS 2.9.36).

¹ Shroff, Sara (2020). "Operationalizing the "New" Pakistani Trans Gender Citizen". In Roy, Ahonaa (ed.). *Gender, Sexuality, Decolonization: South Asia in the World Perspective*. Taylor & Francis. ISBN 9781000330199.

² Iyer, Nalini (2009). "Hijra". *Encyclopedia of Gender and Society, Volume 1*. SAGE. p. 421. ISBN 9781412909167.

³ "[How did the Mughals view homosexuality?](#)". History Stack Exchange

⁴ Khalid, Haroon (17 June 2016). "[From Bulleh Shah and Shah Hussain to Amir Khusro, same-sex references abound in Islamic poetry](#)". Scroll.in. Retrieved 7 September 2018.

⁵ "[Convention in the Classical Urdu Ghazal: The Case of Mir](#)". Columbia University.

⁶ "[Homosexual \(Pederastic\) Love in Pre-Modern Urdu Poetry](#)" (PDF). Columbia University.

⁷ Danielou, Alain. *The Complete Kama Sutra, Part Two, Chapter Nine, entitled "Superior Coition or Fellation [Auparishtaka]*. Rochester, VT: Park Street Press, 1994.

⁸ [Chapter 9, "Of the Auparishtaka or Mouth Congress"](#). Archived from [the original](#) on March 13, 2010.

Bangladesh as a part of the Indian Subcontinent in the precolonial and in the British colonial era, faced the imposition of colonial laws and policies on sex, gender and sexuality impacting the pre-colonial nuances of diversity in sexual orientation and gender identity.

What laws, policies, and practices regulated or influenced the shaping of or the socio-normative perception of sexual orientation and gender identity in colonial times? How were they introduced, promoted, administered or enforced? Examples could include prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).

Since the start of the British Raj in the 1850s, hijras were viewed as "a breach of public decency" lacking capacity for "moral transformation" and integration, thus measures to exterminate the hijras were implemented by the colonial rulers.⁹

In 1861, the criminal offenses and penalties of homosexual act outlined during the Mughal era were replaced by Indian Penal Code section 377, by the British Raj.¹⁰ Although there were small number of cases prosecuted under Section 377, social norms were highly influenced by legal framework of the criminalization of diverse sexual orientations of homosexual as well as the hijra communities.¹¹

Hijras became subjected to this section to be prosecuted simply for existing. On top that, authorities of the North-Western Provinces (NWP) sought to enact a 'special law' against hijras in 1861, and by 1870, with the passing of anti-hijra laws tackling the "hijra problem" was put into place to support a violent anti-hijra campaign throughout the Indian subcontinent prohibiting castration, crossdressing, as well as other activities of hijras.¹² Criminal Tribes Act (1871) labelled hijras a "criminal tribe" making them subject to mandatory registration, stringent oversight, and stigmatization. They were also unable to be collectively excluded from colonial society due to economic reasons which were the primary driver of British colonialism in India.¹² In an effort to completely get rid of hijras, they were subjected to rigorous surveillance and were strategized for "extinguishment" and "extinction" framed by British Lieutenant-Governor Edmund Drummond (1814–1895) as a part of the anti-hijra campaign.¹²

These laws and policies were adopted by the cisgender-heterosexual society of the Indian people and shaped the socio-normative to establish an anti-SOGIE perception during this long period of colonialism. The examples of people and practices of diverse sexual orientation and gender-identity in the ancient history on Indian subcontinent which could potentially lead to an SOGIE community-tolerant society had perished due to this long colonial enforcement of anti-LGBT movement in this region.

What colonial laws regulating sexual orientation and gender identity are still in place today? How are they enforced? How are they being interpreted by national jurisprudence and customary law? What legal, moral, or socio-cultural explanations have been provided, if any, for their continued existence?

Bangladesh Penal Code 1860 directly adopts the British colonial law and section 377 as mentioned above stating "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or*

⁹ Preston, Laurence W. (1 April 1987). "[A Right to Exist: Eunuchs and the State in Nineteenth-Century India](#)". *Modern Asian Studies*. **21** (2): 371–387. doi:10.1017/S0026749X00013858. S2CID 145309265.

¹⁰ Srivastava, Ankit (1 March 2019). "[SECTION 377 AND LGBT ACTIVISM IN INDIA](#)" (PDF). *International Journal of Research and Analytical Reviews*. **6** (2).

¹¹ Ruhnke, Lauren (2018-05-01). "[Constructing Native Homosexuality in British India](#)". *Maneto Undergraduate Research Journal*. **1** (1). doi:10.15367/m:urj.v1i1.80. ISSN 2639-7617.

¹² Hinchy, Jessica (2019). *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900*. Cambridge University Press. ISBN 9781108492553.

animal, shall be punished with [imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section” based on the legislation of British anti-sodomy statutes which was already in place that time.^{13, 14}

Lack of characterization of the phrase "order of the nature" allows the legislation to be applied to any sexual act except the penovaginal penetration by a male, thus criminalizing sexual intercourses of homosexuals and hijra people. However, as it has been difficult to prove the diverse sexual activity between homosexual and hijra people under section-377, they have been framed and persecuted under different other legislative sections in Bangladesh.¹⁵

The government of Bangladesh rejected one recommendation on repealing section-377 in UPR second cycle stating- “Bangladesh considers that the laws of the land should be in conformity with the prevalent socio-cultural norms and values of the country. Activities subject to the concerned Article in the Penal Code are not a generally accepted norm in the country” and rejected 11 recommendations on this along with taking measures against violences against the SOSIE people stating- “The issue of LGBTI rights is a religious, social, cultural, moral, ethical issue for Bangladesh. While dealing with this issue, the Government takes into account the views, aspirations, sentiments and religious belief of the majority of its people. The government is committed to ensure fulfilling the rights of all citizens of the country. We do not see it necessary to create new set of rights, which is not universally accepted as a right.”¹⁶ The government indirectly refuses to take action against the discrimination and violence happening against the people with diverse sexual orientation and gender identity.

Along with this, there are several legislative sections which can potentially be applied on the diverse SOGIE people, like Dhaka Metropolitan Police Ordinances-1976¹⁷ [Section 74 (soliciting for purpose of prostitution), 75 (indecent behavior in public), 77 (obstructing or annoying passenger in streets), 80 (nuisance in or near street), 86 (found under suspicious circumstances e.g. disguised, between sunset and sunrise)] and Digital Security Act-2018 (section 24).¹⁸

The society of Bangladesh is extremely homophobic and transphobic due to the predominance of Salafist ideology of Islam in this country which is supported by the section-377 and other mentioned legislative sections. The social values, ethics, moral, regulations and laws are strictly cisgendered and heterosexual reflected in national jurisprudence and customary laws. Due to this extreme perception, two LGBT rights activist were brutally murdered by the extremist group in Bangladesh in 2016.¹⁹ Still today, research finding says that majority of the SOGIE people face extreme human rights violations in this country due to their diverse sexual orientation and gender identity.²⁰

¹³ Srivastava, Ankit (1 March 2019). "[SECTION 377 AND LGBT ACTIVISM IN INDIA](#)" (PDF). *International Journal of Research and Analytical Reviews*. **6** (2).

¹⁴ <http://bdlaws.minlaw.gov.bd/act-11/section-3233.html>

¹⁵ <https://archive.dhakatribune.com/bangladesh/dhaka/2017/05/19/29-suspected-homosexuals-detained-keraniganj>

¹⁶ <https://www.ohchr.org/en/hr-bodies/upr/bd-index>

¹⁷ <http://bdlaws.minlaw.gov.bd/act-511.html>

¹⁸ <http://bdlaws.minlaw.gov.bd/act-1261/section-47482.html>

¹⁹ <https://www.theguardian.com/world/2016/apr/25/editor-bangladesh-first-lgbt-magazine-killed-reports-say-roopbaan>

²⁰ *Understanding the Lives of Bangladesh's LGBTI Community*. <https://www.iri.org/resources/iri-conducts-innovative-mixed-method-lqbti-study-in-banqladesh/>

How, if at all, has the protection against violence and discrimination based on sexual orientation and gender identity been transformed and positively or negatively impacted by processes of decolonization?

Unfortunately, in Bangladesh, the perspective in colonial times against people with diverse sexual orientation and gender identity has not significantly changed by the process of decolonization. People in the mainstream society, authorities and state not only have adopted the colonial laws but also the mindset of the colonial rulers as mentioned in the previous sections. With the colonial mindset added with the religious extremism, the Bangladeshi society has clearly rejected the idea of protecting the SOGIE people from violence and discrimination due to their diverse sexual orientation and gender identity.

The government of Bangladesh has taken some initiatives for the hijra people, regarding their recognition²¹ in legal documents, livelihood development and social security programs²² schemes and others, however, requirement of medical test to identify real hijras has make a new issue regarding their identification and access to the government opportunities. In this scope, the other gender diverse people (non-hijra transwomen, transmen, genderqueer, agender, gender non-binary etc.) and sexually diverse people (lesbian, gay, bisexual, pansexual, etc.) are completely overlooked.

If no longer in place, when were colonial laws regulating sexual orientation and gender identity repealed? In what pretext were they abolished and what was the rational/explanation for their abolishment?

The colonial laws regulating sexual orientation and gender identity are still in place in Bangladesh.

How has the legal and social regulation of gender, sexual orientation and gender identity been relevant for imposing and maintaining colonial power?

The legal and social regulation of gender, gender identity and sexual orientation has always been in the benefit of sustenance of the patriarchal system of the society in the Indian Subcontinent as well as in the whole world. Society have always considered men as the first sex and gender with the superior position than the women who are considered as second sex and gender. The colonial authorities exercised the same patriarchal construct to rule the other gender and sexualities using different laws based on religious narratives and in the name of social values, ethics, and morals.

People with diverse gender identity has always been a threat to the patriarchal cisgender, heterosexist and gender-binary society where men were supposed rule and dominate other than him. This led to intolerance, disrespect and deny the very existence of gender- and sexually-diverse people in every part of the world since antiquity.

In the Indian Sub-continent where this diversity in gender identity and sexuality were acknowledged and somewhat celebrated (hijra tradition, folklores) in the society, has been turned back to hatred and rejection by the colonialists starting from the Mughals, the Portuguese, The Dutch, The French, The Danish and finally the British colonizers. They have shaped the ancient idea and perspective of this place of tolerance and harmony of people with diversity, and instigated division, hatred and segregation among people based on their sex, race, gender, sexuality, occupation, abilities and other factors to sustain their own colonial power and rule this land for their own benefit. Even today, people in this officially decolonized

²¹https://msw.portal.gov.bd/sites/default/files/files/msw.portal.gov.bd/notification_circular/d0afe7f4_5d47_4eff_8d11_ef54186ebe2c/%E0%A6%B2%E0%A6%BF%E0%A6%99%E0%A7%8D%E0%A6%97.pdf

²² <http://www.dss.gov.bd/site/paqe/e3108b96-8e64-4fb4-be8e-3f2f8e9d27bb/->

sovereign land, idealize and carry on the legacy of their colonial rulers, and mimic their ways of regulating gender, gender-identity, and sexual orientation to maintain their power as the same way.

What is the ongoing impact of gender- and sex-regulating colonial laws on the enjoyment of human rights by LGBT persons? How did the imposition of colonial laws on sex and gender shape social and moral ideas about sexual orientation and gender diversity?

Gender- and sex-regulating colonial laws exists in Bangladesh and impacts the enjoyment of human rights by LGBT person. Due to the discriminatory criminalizing law, people of the same sex cannot form a family and identify themselves with diverse sexual orientation, this also goes for the hijra and transgender people as many of them practices diverse sexual activity than the ideal penovaginal sexual intercourses, violating their basic sexual rights as inscribed in the human rights mandate.

Along with the colonial law, the Islamic laws and views of Islam stands against the diversity in gender identity and sexual orientation. Majority of the Muslim people in Bangladesh aligns with the anti-LGBT view of Islamic rules and the colonial law. Together these rules have shaped the social and moral values of people of the society to only accept being cisgender and heterosexual while rejecting the other gender- and sexual diversity considering as evil, perversion, mental instability, society-destroying and immoral.²⁰ Due to this, people with diverse gender identity and sexuality face tremendous rejection by their families, relatives, educational institutes, public services, and everywhere forcing them to hide their diverse identity.²⁰

This hostile perception from the society as an impact of the colonial laws discriminates them from getting acceptance in family and society, inheritance, education, healthcare, social and legal safety, livelihood, access to quality life and so on due to their diverse sexual orientation and gender identity.²³

Was there a relationship between colonial laws and policies that created unequal treatment and power relations affecting LGBT persons, paving the way to intersecting forms of discrimination, exclusion, racism, xenophobia and related intolerance, patriarchy, and other forms of discrimination and oppression? How did these laws and policies impact persons with multiple and intersecting identities such as LGBT persons with disabilities, older LGBT persons, LGBT children, LGBT persons of African descent, among others.

In Bangladesh there are provisions to protect the rights of people with disability^{24, 25}, older person²⁶, women and children²⁷ and indigenous people²⁸. However, none of these acts states about the intersectionality of LGBT person with disability, older LGBT person, LGBT children, or LGBT indigenous people as they are constructed on the lens of a cisgender and heterosexual perspective. Any LGBT person

²³ https://www.bandhu-bd.org/wp-content/uploads/2021/11/Policy-Brief_GBv-2021.pdf

²⁴ Bangladesh persons with disability Welfare Act-2001 (https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Bangladesh_Disability-Welfare-Act-2001.pdf)

²⁵ Persons with disabilities rights and protection act-2013 (<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/95795/118013/F51789448/BGD95795%20Booklet.pdf>)

²⁶ National policies on older persons ([https://www.unescap.org/sites/default/files/2.%20MIPAA%20Focal%20Point%20Presentation1%20\(Bangladesh\).pdf](https://www.unescap.org/sites/default/files/2.%20MIPAA%20Focal%20Point%20Presentation1%20(Bangladesh).pdf))

²⁷ Elimination of child labour, protection of children and young persons (https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=110524&p_count=3&p_classification=04)

²⁸ https://www.ilo.org/dhaka/Areasofwork/WCMS_447669/lang--en/index.htm

of any of the intersectionality receives violence and discrimination among their own communities due to the anti-LGBT perspective among those communities. The colonial laws shaping their social acceptance in their own different intersectional communities preventing them from receiving support and access to opportunities creating avenues for more discriminations.

Have any laws, policies, or psycho-social support or legal remedies been put in place to recognize and provide reparations and redress for the legacy of colonialism in relation to the enjoyment of human rights? Do these take into account violence and discrimination based on sexual orientation and gender identity?

In Bangladesh, there have been some policies on hijra peoples' development as stated above regarding their recognition, social security and livelihood. There have some provisions in government policy talking about the mental healthcare of the LGBTI people²⁹, however, there are no clear indication about the implementation of this strategies regarding the people with diverse sexual orientation and gender identity. The government took National strategies and initiatives to prevent HIV/STD among men who have sex with other men (homosexual and bisexual man) and transgender people from the concern of public health issues.³⁰ Apart from these, National Human Rights Commission and Ministry of Social Welfare actively works for the betterment of Transgender and hijra population in Bangladesh with the help of Civil Society Organizations (CSOs), Community-based organization (CBOs) and other SOGIE-rights organizations. There are some small positive changes are now visible regarding the betterment of hijra and transgender people in Bangladesh. However, the pace needs to be accelerated and inclusion of sexually diverse people (homosexual, bisexual and others) is a must for holistic protection of rights of all SOGIE people from discrimination and rights violation.

How, if at all, should reparatory justice for the lasting consequences of colonialism include measures to address discrimination and violence based on gender, gender identity and sexual orientation?

Enacting a Transgender Persons' Rights Protection Act will support the rights of the transgender community by providing a clear legal definition and including a broad spectrum of identities as a first step. The law's protections may forbid discrimination based on gender identity, provide victim support services, shelters and safe houses, and guarantee legal help and support for transgender persons. The legislation should also take into account the establishment of a board, such to the Indian National Council for Transgender Persons, to advise, supervise, and assess the government on policy in order to guarantee that the rights of the transgender community are being upheld.

A national policy to lessen inequality and disadvantage for the transgender and sexually diverse population attempting to provide rules for nondiscrimination against SOGIE people and access to essential services, such as work, housing, and education, and should contain an inclusive definition should be established. Additionally, it can build on current initiatives in the National Social Safety Strategy of 2017, which addresses social exclusion for hijra communities among other things.

Legal frameworks and regulations that let people to alter their legal gender must be developed. The rights of transgender people should be upheld, and all systems and rules should be consistent throughout the

²⁹ National mental health strategic plant (2020-2030) (<http://nimh.gov.bd/bangla/wp-content/uploads/2023/01/Bangladesh-National-Mental-Health-Strategic-Plan-2020-2030.pdf>)

³⁰ 4th National Strategic Plan For HIV and AIDS Response 2018-2022 (https://www.unicef.org/bangladesh/sites/unicef.org.bangladesh/files/2018-10/NSP%204th%20%202018-2022_draft-250517-2.pdf)

public and private sectors. The "self-identification" model adopted by several nations, where the gender or sex on papers can be changed by a legislative declaration without the necessity for a medical evaluation or diagnosis should be ensured.

Anti-discrimination legislation protecting SOGIE population can be enacted that prohibits discrimination against any person or group based on a number of factors, including race, ethnicity, gender identity, sexual orientation, age, handicap, pregnancy, marital status, place of birth, and caste. To ensure people with diverse gender identity and sexual orientation are protected from harm, it is also essential to modify the definitions of harassment, sexual offenses, and domestic violence statutes so that they expressly include SOGIE individuals. In order to ensure that SOGIE people can be considered as victims of the relevant crimes and thus benefit from formal justice procedures, it could be done by adding "and any person with diverse SOGIE," which is interpreted to include trans men and women, hijras, non-binary people, lesbians, gay, bisexual and any other relevant diverse gender- and sexual identities.

Section 377 need to be completely removed or modified to make it illegal to engage in non-consensual sexual activity with a person which would make it more consistent with equality standards and give the criminal justice system a place to handle sexual offenses perpetrated against males or transgender people. Other legislatives potential to persecute SOGIE people based on their diverse sexual orientation and gender identity should be modified not to cause harm to the SOGIE population.