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Revisiting the Legal Frameworks and Judicial Decisions against Discrimination in Bangladesh: An Intersectional Critique

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ABSTRACT: Though Bangladesh has become a party to major international human rights treaties that prohibit discrimination, its legal system still looks at the concept of discrimination in a limited way, focusing on only one factor at a time. Because of this, it cannot properly address the combined disadvantages faced by women, persons with disabilities, and other marginalized groups. This article undertakes a critical analysis of Bangladesh's constitutional and statutory anti-discrimination framework, and of the relevant jurisprudence of the Supreme Court of Bangladesh, through the theoretical lens of intersectionality as developed by Kimberlé Crenshaw and systematized for legal analysis by Shreya Atrey. Intersectional discrimination refers to the discrimination faced by a person based on multiple identities at the same time. Utilizing a mixed methodology, this paper finds five major weaknesses in Bangladesh's approach and shows how these problems affect real cases. Finally, the article suggests legal, policy, and institutional reforms to help Bangladesh move toward a fairer and more inclusive system that properly recognizes overlapping forms of discrimination.

KEYWORDS: Intersectional Discrimination, Anti-discrimination Law, Human Rights, Comparative Constitutionalism,

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1. Introduction

An individual can simultaneously occupy multiple social positions or identities. For instance, a disabled black Muslim woman possesses at least four distinct identities 1) disabled, 2) black, 3) Muslim, 4) woman, each of which may independently or in combination with others attract adverse treatment. It is to address this compound phenomenon that the concept of intersectionality was developed. Intersectional discrimination refers to the discrimination faced by a person based on multiple identities. As Kimberlé Crenshaw demonstrated in her landmark work, antidiscrimination principle structured around single identity categories such as race or sex systematically fails to capture the particular and qualitatively distinct disadvantage experienced at their intersection.[1]

Shreya Atrey has further demonstrated that the foundational idea of human rights itself demands an intersectional elaboration that moves beyond the traditional claim to universality.[2] As a comparatively recent doctrinal development, intersectional discrimination has not yet been incorporated into the positive law of most jurisdictions.[3] Bangladesh is not an exception to this practice, as will be shown in the later section. Nonetheless, international treaty bodies, regional human rights institutions, and certain national courts have made significant initiatives through interpretive and jurisprudential development. Likewise, the Supreme Court of Bangladesh (SCB), as the authoritative interpreter and custodian of the Constitution, has adjudicated a significant number of cases raising questions of discrimination.

This article employs a mixed methodology consisting of the doctrinal and normative analysis of the existing anti-discrimination legal frameworks and judicial decision from the critical and theoretical lens of intersectionality. Intersectionality emerged as a theoretical expansion and

[1] Kimberlé Williams Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *University of Chicago Legal Forum* 139, 140.

[2] Shreya Atrey, "Beyond Universality: An Intersectional Justification of Human Rights" in Shreya Atrey and Peter Dunne (eds), Intersectionality and Human Rights Law (Hart Publishing 2020) 67.

[3] Shreya Atrey, *Intersectional Discrimination* (OUP 2019) 1.

critique of feminist legal thought,[4] this analysis is conducted through a feminist theoretical lens. In addition, a comparative method has been employed to take lessons from the jurisdictions that have properly addressed the issue. The comparative methodology adopted is the 'bricolage' approach, which justifies the transplantation of ideas from diverse jurisdictional resources that are available at hand without requiring contextual or functional similarity.[5] Thus, the selection of South Africa, India, UK, etc. is well-justified by the bricolage methodology. Besides, as a global south and common law country Bangladesh can take lessons from the practices of India, South Africa, and UK as well.

The article proceeds as follows. Section II conceptualizes intersectional discrimination and distinguishes it from related doctrinal categories including direct and indirect discrimination. Section III examines how international human rights law has developed an intersectional framework. Section IV analyses Bangladesh's constitutional and statutory anti-discrimination framework. Section V examines key judicial decisions of the SCB. Section VI undertakes a gap analysis. Section VII advances a feminist critique. Section VIII draws comparative lessons from South Africa, India, and the United Kingdom. Section IX proposes reforms and concludes.

2. Conceptual Framework: Intersectionality as a Form of Discrimination

The term intersectionality was first coined by Kimberlé W Crenshaw in 1989.[6] Since its introduction, the concept has expanded gradually across academic, legal, and policy domains worldwide.[7] In her subsequent work, Crenshaw articulated a threefold positive definition of intersectionality. Structural intersectionality explains how different forms of oppression, such as those based on race, gender, or class, etc., work together to shape the real-life conditions of people who face multiple disadvantages. Political intersectionality shows how these people are often ignored in political discussions because issues are treated separately rather than as

[4] Crenshaw (n 1) 139. Intersectionality emerged as a critique of both antidiscrimination doctrine and mainstream feminist theory, each of which rested on single-axis assumptions that rendered the compounded disadvantage of multiply-marginalised groups invisible.

[5] The "bricolage" approach draws upon worldwide comparative resources irrespective of functional or contextual similarity. See Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108(6) *Yale Law Journal* 1225, 1228.

[6] Crenshaw (n 1) 140.

[7] Atrey (n 3) 1.

overlapping. Representational intersectionality focuses on how media and culture create and reinforce combined stereotypes about people who belong to more than one marginalized group.[8] The theory was animated by the lived experience of Black women in the United States, whose compounded disadvantage was captured neither by race-based antidiscrimination frameworks focused on Black men nor by sex-based frameworks focused on white women.[9]

As Crenshaw demonstrated, the structural invisibility of Black women in discrimination litigation arose directly from antidiscrimination law's insistence on disaggregating the grounds of discrimination.[10] MacKinnon later observed that intersectionality as method reveals how law systematically under-protects those most severely harmed by the compounding of multiple systems of inequality.[11] Building upon these foundations, Shreya Atrey developed a systematic legal framework for intersectional discrimination and aligned it with the normative architecture of international human rights law.[12] Atrey argues that intersectional discrimination must be understood as qualitatively distinct: its harms are not the sum or aggregate of individual identity-based disadvantages, but arise from the distinctive and mutually reinforcing way in which multiple identity characteristics interact.[13]

A further doctrinal distinction of critical importance is that between direct and indirect discrimination. Direct discrimination occurs where a person is treated less favourably than a comparator is, or would be, treated on account of a protected characteristic.[14] Indirect discrimination occurs where a *prima facie* neutral provision, criterion or practice places persons sharing a protected characteristic at a particular disadvantage compared with those who do not share it.[15] Intersectional discrimination may assume either form. Where a rule expressly targets

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[8] Kimbere W Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43(6) *Stanford Law Review* 1241, 1245-52.

[9] Ibid 1245-46; Anna Carastathis, "The Concept of Intersectionality in Feminist Theory" (2014) 9(5) *Philosophy Compass* 304, 306.

[10] Crenshaw (n 1) 139.

[11] Catherine A MacKinnon, "Intersectionality as Method: A Note" (2013) 38 *Signs* 1019, 1028.

[12] Atrey (n 3) 33.

[13] Ibid. The term "intersectionality" denotes the theoretical framework; "intersectional discrimination" refers to the discriminatory experience produced by the interaction of multiple identity grounds, qualitatively distinct from either ground operating in isolation.

[14] Sandra Fredman, *Discrimination Law* (3rd edn., OUP 2022) 157. Direct discrimination occurs where a person is treated less favourably than a comparator is, or would be, treated because of a protected characteristic.

[15] Ibid, 175.

people who possess a specific combination of identity characteristics, as in the Biman Corporation regulations examined below, the discrimination is direct. Where a *prima facie* neutral rule disproportionately burdens a particular intersection of identities, the discrimination is indirect. A legal framework that operates on a single-axis model will fail to apprehend the intersectional dimension in either case.[16]

3. International Human Rights Framework on Intersectional Discrimination

Before analyzing the domestic framework, this section investigates the international human rights framework from intersectional approach. Core treaties like CEDAW, ICCPR, CERD that have dealt with discrimination have been selected for the purpose of analysis in this section.

3.1. CEDAW and ICCPR: Treaty Body Developments

Although the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) and the International Covenant on Civil and Political Rights 1966 (ICCPR) do not explicitly reference intersectional discrimination, the treaty bodies charged with their implementation have made significant doctrinal advances. To illustrate, CEDAW General Recommendation No 28 declares that intersectionality is a basic concept for understanding the scope of the general obligations of States parties, and explicitly requires States parties to recognise the ways in which discrimination on the basis of sex and gender intersects with other forms of discrimination.[17] CEDAW General Recommendation No 25 on temporary special measures further acknowledges that certain groups of women face multiple forms of discrimination requiring targeted measures.[18]

The Human Rights Committee, the treaty body responsible for monitoring the ICCPR, engaged with intersectional discrimination in *Hebbadj v France*,[19] holding that France's criminal prohibition on face-covering in public spaces triggered simultaneous discrimination on grounds of gender and religion, constituting a form of intersectional discrimination against Muslim

[16] Atrey (n 3) 48.

[17] CEDAW Committee, General Recommendation No 28: Core Obligations of States Parties under Article 2, UN Doc CEDAW/C/GC/28 (2010) para 18 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CEDAW_General_Recommendation_28_en.pdf accessed 1 May 2024.

[18] CEDAW Committee, General Recommendation No 25: Temporary Special Measures, UN Doc HRI/GEN/1/Rev.7 (2004) para 12.

[19] *Hebbadj v France* CCPR/C/123/D/2807/2016.

women. The CEDAW Committee confronted compound discrimination in *Alyne da Silva Pimentel Teixeira v Brazil*,[20] in which it acknowledged that the victim had experienced both common and unique forms of discrimination arising from the intersection of her gender, race, and socio-economic class. The Committee characterized this as compounded or multiple discrimination, moving materially in the direction of intersectional recognition.[21]

3.2. The CRPD: The Most Explicit Treaty Recognizing Intersectionality

Among the major international human rights treaties, the Convention on the Rights of Persons with Disabilities 2006 (CRPD) provides the most explicit textual recognition of intersectional disadvantages. Article 6(1) of the CRPD expressly acknowledges that women and girls with disabilities are subject to multiple discrimination and requires States parties to take measures to ensure their full and equal enjoyment of all human rights and fundamental freedoms.[22] The CRPD Committee's General Comment No 3 (2016) on women and girls with disabilities elaborates that women with disabilities face intersecting discrimination on grounds of gender and disability, frequently compounded by poverty, ethnicity, indigenous origin, migrant status, age, and other characteristics.[23] The Committee expressly states that existing frameworks, both on disability and on gender, have historically neglected the specific situation of women with disabilities, precisely because each framework operates on a single axis.

Bangladesh ratified the CRPD on 30 November 2007. However, its domestic implementing instrument, the Persons with Disabilities Rights and Protection Act 2013, does not reflect the CRPD's intersectional framework. The Act treats disability as a single-axis characteristic, without addressing the compounded vulnerability of women with disabilities or of disabled members of ethnic or religious minority communities, in direct tension with the CRPD obligations that Bangladesh has assumed.

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[20] *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Communication No 17/2008, UN Doc CEDAW/C/49/D/17/2008.

[21] Ibid, para 7.6. See also *Kell v Canada*, CEDAW Committee, *Communication No 19/2008* (2012); *RPB v Philippines*, CEDAW Committee, *Communication No 34/2011* (2014).

[22] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 6(1).

[23] CRPD Committee, General Comment No 3 (2016): Article 6 - Women and Girls with Disabilities, UN Doc CRPD/C/GC/3 (25 November 2016) para 4 https://www.refworld.org/legal/general/crpd/2016/en/112078 accessed 25 March 2026.

4. The Anti-Discrimination Legal Frameworks in Bangladesh

As the heart of this article, this section critically analyzes the existing anti-discrimination legal regime in Bangladesh demonstrating the constitutional loopholes and pertinent limitations from intersectional approach.

4.1. Constitutional Provisions: Promise and Structural Limitation

Articles 27, 28, and 29 of the Constitution of the People's Republic of Bangladesh 1972 constitute the primary constitutional guarantees of equality and non-discrimination. Article 28(1) specifies the prohibited grounds of discrimination, providing that the State shall not discriminate against any person on grounds only of religion, race, caste, sex or place of birth.[24] Article 27 guarantees equality before the law and equal protection of the law for all citizens.[25] Article 29(2) extends the principle of non-discrimination to public employment and office in the service of the Republic, prohibiting discrimination against citizens on the same enumerated grounds.[26]

These constitutional provisions are subject to two interrelated and fundamental critiques from an intersectional standpoint. First, the enumerated grounds of discrimination in Articles 28 and 29 seem to be exhaustive rather than illustrative. Grounds such as marital status, pregnancy, age, disability, belief, culture, language, and ethnicity find no place in Bangladesh's constitutional catalogue. This enumerative rigidity produces structural reluctance among courts to engage with novel or compounded grounds of discrimination. Second, and more fundamentally, the constitutional guarantee does not recognize intersectional discrimination. The phrase 'on one or more grounds', which Atrey has argued renders the South African equality guarantee truly intersectional in its reach,[27] is clearly absent. Section 9(3) of the Constitution of the Republic of South Africa 1996 expressly prohibits unfair discrimination on one or more grounds, followed by a non-exhaustive list of protected characteristics.[28]

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[24] Constitution of the People's Republic of Bangladesh 1972, art 28(1).

[25] Ibid art 27.

[26] Ibid art 29(2).

[27] Atrey (n 3) 15.

[28] Constitution of the Republic of South Africa 1996, s 9(3). The section reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy,

The Bangladesh Constitution authorizes special measures in favor of women under Articles 19(3), 28(4), 29(3), and 65(3).[29] However, the scope of the non-discrimination guarantee is largely confined to the public sphere, leaving private sphere discrimination, the domain in which women most frequently experience compounded disadvantage, with limited constitutional protection.[30] Protecting women against intersectional discrimination, which is most common in the home, workplace, and community, is structurally hampered by this public/private gap.

4.2. Statutory Framework: Fragmentation and the Absence of an Intersectional Lens

Bangladesh has enacted several statutes addressing specific dimensions of discrimination, but these instruments operate in a fragmented, domain-specific manner. None adopts an intersectional framework, and none is designed with awareness of the compounded vulnerability of multiply-marginalized groups.

For instance, the Persons with Disabilities Rights and Protection Act 2013, enacted in implementation of Bangladesh's CRPD obligations, provides a dedicated framework for the protection of persons with disabilities.[31] However, it fails to address the compounded disadvantage experienced by women with disabilities, the subgroup specifically targeted by CRPD Article 6 and CRPD General Comment No 3, or by disabled members of indigenous, ethnic, or religious minority communities. The Act treats disability as a single-axis characteristic in direct tension with the intersectional obligations Bangladesh has assumed under the CRPD. The, the Women and Children Repression Prevention Act 2000 (as amended in 2003) is a criminal statute directed at specific acts of violence and exploitation.[32] It makes

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marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[29] See arts 19, 28(4), 29(3), 65(3) of the Constitution of the People's Republic of Bangladesh 1972.

[30] Constitution of the People's Republic of Bangladesh 1972, arts 19(3), 28(4), 29(3). See also Psymhe Wadud, "Locating Women within We the People in the Constitution" in Ridwanul Haque and Rokeya Chowdhury (eds), *A History of the Constitution of Bangladesh: The Founding, Development, and Way Ahead* (Routledge 2024) 193, 199.

[31] Persons with Disabilities Rights and Protection Act 2013 (Bangladesh), s 2(13) (definition of disability); s 16 (non-discrimination in education); s 17 (non-discrimination in employment).

[32] Women and Children Repression Prevention Act 2000 (Bangladesh) (as amended 2003), preamble. The Act is a criminal statute directed at specific acts of violence and exploitation. It makes no provision for structural or intersectional analysis.

no provisions for structural or intersectional analysis. It does not engage with the structural conditions that produce compounded vulnerability to violence experienced by women who are additionally identified by caste, class, disability, or religious minority status. Besides, the Bangladesh Labour Act 2006 contains provisions on maternity benefits and prohibits discriminatory dismissal,[33] but addresses sex-based discrimination in isolation from other identity characteristics.

Bangladesh has also enacted no comprehensive, unified anti-discrimination statute. No equality commission or analogous institution exists with a mandate to receive, investigate, and adjudicate intersectional discrimination complaints.[34] Therefore, it is submitted that a separate discrimination statute can be enacted to address intersectional discrimination as well. If a separate statute is not possible to enact, the relevant provisions of different statutes dealing with discrimination should be amended to deal with intersectional discrimination.

5. Judicial Decisions of SCB relating to Discrimination: Analyzing the Possibility of Intersectionality

This section explains the available constitutional decisions delivered by the Supreme Court of Bangladesh (SCB) relating to the discrimination provision in the Constitution. It eventually shows that the SCB has not yet properly addressed the issue of intersectionality even after the chance to create a jurisprudence in this regard.

5.1. The Biman Trilogy: Three Cases, One Partial Breakthrough

The most instructive series of discrimination cases adjudicated by the SCB arose from challenges to the Bangladesh Biman Corporation Employee (Service) Regulation 1979, as amended in 1984. Regulation 11(2) prescribed differential ages of retirement for male and female cabin crew: male flight stewards were required to retire at 45 years, while female flight stewardesses were compelled to retire at 35 years.[35] Regulation 11(3) further provided that a

[33] Bangladesh Labour Act 2006, ss 44-46 (maternity leave and benefits); s 345 (general prohibition on dismissal for discriminatory reasons).

[34] Sayeeda Anju, "A Study of Positive Discrimination of Women in Laws of Bangladesh" (2011) 53(3) *Journal of the Indian Law Institute* 491, 496.

[35] Regulation 11(2) of the Bangladesh Biman Corporation Employee (Service) Regulation 1979 (as amended by SRO of 5 February 1984) prescribed the following retirement ages: Flight Steward (Male) 45 years; Flight

female cabin crew member who already had two surviving children would, upon becoming pregnant for a third time, cease to be an employee of the Corporation.[36]

The first two challenges, *Jonaba Dalia Parveen v Bangladesh Biman Corporation*[37] and *Bangladesh Biman Corporation v Rabia Bashri Irene*,[38] concerned the constitutionality of the differential retirement ages under Regulation 11(2). The High Court Division held that setting the retirement age at 45 for stewards and 35 for stewardesses violated Article 28 of the Bangladesh Constitution. The reasoning deployed was a conventional single-axis sex-discrimination analysis. However, what remained entirely unexplored, by either counsel or the Court, was a further and analytically distinct dimension of Regulation 11(2): female pursers were required to retire at 40, while female stewardesses faced retirement at 35. This differential treatment between two categories of female employees, distinguished by occupational rank rather than sex alone, created a form of direct discrimination simultaneously grounded in sex and occupational position. This intersectional claim, self-evident from the face of the Regulation, went entirely unnoticed.

The third case, *Marzia Touhida v Biman Bangladesh Airlines*,[39] represented the most significant, though still incomplete, judicial engagement with intersectional discrimination in Bangladesh's legal history. The High Court Division held that Regulation 11(3) discriminated against female cabin crew in two analytically distinct respects: first, as between male cabin crew and female cabin crew; and second, between female cabin crew members who had no children or fewer than two surviving children, and those who were pregnant for a third time having already had two surviving children. The Court stated:

Stewardess 35 years; Purser and Chief Purser (Male) 50 years; Purser and Chief Purser (Female) 40 years; Junior Purser (Male) 45 years; Junior Purser (Female) 35 years.

[36] Regulation 11(3) of the Bangladesh Biman Corporation Employee (Service) Regulation 1979 (as amended 1984): "Notwithstanding anything contained in these regulations a female cabin crew having two surviving children shall, upon her becoming pregnant for third child, cease to be an employee of the Corporation."

[37] *Jonaba Dalia Parveen v Bangladesh Biman Corporation* (1996) 16 BLD (HCD) 357.

[38] *Bangladesh Biman Corporation represented by Managing Director v Rabia Bashri Irene* (2003) 55 DLR (AD) 132.

[39] *Marzia Touhida v Biman Bangladesh Airlines*, Writ Petition No 5157 of 2010 https://www.lawyersnjurists.com/article/high-court-division-hasan-foez-siddique-w-p-no-5157-2010/ accessed 30 April 2024.

> "[T]he impugned provision has made discrimination between the male and female cabin crews and in between the female cabin crews as well. This discrimination has been made between female cabin crews having two surviving children and female cabin crews having two surviving children and thereafter upon her becoming pregnant for third child."[40]

While the Court did not expressly invoke the language of intersectional discrimination, its reasoning implicitly engaged with the concept. The disadvantage identified was not reducible to sex alone: it arose from the compound identity of being female and possessing a specific reproductive history. This is a paradigmatic instance of intersectional direct discrimination. The decision represents a modest but genuinely important doctrinal advance over the earlier Biman cases, demonstrating that intersectional reasoning is achievable within the existing constitutional framework.

5.2. Employment and Marital Status: *Mosammat Nasrin Akhter v Bangladesh*

A further illustration of the potential for intersectional reasoning in Bangladeshi courts is furnished by *Mosammat Nasrin Akhter v Bangladesh*.[41] In this case, a job circular for government health assistants required female candidates to produce a marriage certificate but imposed no equivalent requirement on male candidates. The High Court Division, finding this violative of Articles 27, 28, and 29 of the Constitution, directed the re-advertisement of the post without the discriminatory clause. The discrimination arose simultaneously from sex and marital status, an intersectional dimension that the Court's single-axis analysis did not fully articulate, though the outcome was consistent with intersectional reasoning.

5.3. The Indian Contrast: *Air India v Nargesh Meerza*

The Indian Supreme Court's decision in *Air India v Nargesh Meerza*[42] provides an illuminating comparative contrast. That case concerned regulations requiring air hostesses to retire at 35, or upon first pregnancy, or upon marriage within four years of service. Despite the evidently intersectional nature of the discrimination alleged, combining sex, marital status, and reproductive status, the Court declined to consider the grounds in combination. This outcome

[40] *Marzia Touhida* (n 39) para 17.

[41] *Mosammat Nasrin Akhter v Bangladesh*, Writ Petition No 6309 of 2003 (HCD).

[42] *Air India v Nargesh Meerza* (1982) SCR (1) 438.

was driven by the textual constraint of Article 15(1) of the Indian Constitution,[43] which, in its use of the phrase on grounds only of, mirrors Article 28(1) of the Bangladesh Constitution. Atrey has described this as producing a bizarre outcome when measured against intersectional theory.[44] In this specific respect, the approach of the High Court Division in *Marzia Touhida* is appreciably more receptive to intersectional reasoning than the approach taken by the Indian Supreme Court in *Nargesh Meerza*.

5.4. Affirmative Action and Its Limits: Missed opportunities in *Shamima Sultana Seema*, *Farida Akhter*, and *BNWLA*

The SCB has affirmed the constitutional mandate of positive discrimination for women in several cases.[45] In *Shamima Sultana Seema v Bangladesh*,[46] the High Court Division held that ward commissioners elected to reserved seats had been assigned diminished powers compared with commissioners elected from general seats and found this discriminatory. The Court affirmed the legitimacy of affirmative action but did not examine how such measures interact with, or may fail to address, the intersecting grounds of disadvantage facing, for example, women with disabilities or women from ethnic minority communities in reserved seat schemes.[47]

In *Farida Akhter v Bangladesh*,[48] the Court similarly missed an opportunity to analyze the structural complexities of reserved seat arrangements through an intersectional lens.[49] In *Bangladesh National Women Lawyers' Association (BNWLA) v Bangladesh*,[50] the High Court Division issued guidelines for the prevention of sexual harassment in educational institutions and workplaces, drawing upon the extended definition of discrimination in CEDAW Article 1 to encompass gender-based violence.[51] The guidelines represent an important development but

[43] Constitution of India 1950, art 15(1): "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

[44] Atrey (n 3) 87.

[45] Anju (n 34) 496.

[46] *Shamima Sultana Seema v Bangladesh* (2005) 57 DLR (HCD) 201.

[47] Wadud (n 30) 199.

[48] *Farida Akhter v Bangladesh* (2006) 11 MLR (AD) 237.

[49] Ibid; Wadud (n 30) 199.

[50] *Bangladesh National Women Lawyers' Association (BNWLA) v Bangladesh* (2009) BLD (HCD) 415.

[51] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) para 6 <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed 30 April 2024.

fail to account for the heightened vulnerability to harassment of women who additionally belong to minority religious, ethnic, or disability communities. A framework that does not recognize compound vulnerability is likely to prove inapplicable in precisely those cases where protection is most urgently needed.

6. Analyzing the Structural Deficiencies in Bangladesh's Anti-Discrimination Framework

The foregoing analysis reveals five structural gaps in Bangladesh's anti-discrimination framework, each of which systematically undermines the protection of multiply-marginalised groups.

6.1. Single-Axis Model of Discrimination

The foundational deficiency is the reliance on a single-axis model of discrimination that adjudicates claims along one protected characteristic at a time.[52] A complainant who suffers discrimination as a disabled Muslim woman cannot articulate her claim within a framework that recognizes only sex-based discrimination, or only disability-based discrimination, in isolation. The particular form of her disadvantage, arising from the interaction of gender, religion, and disability, is rendered legally invisible by a legal framework that compels disaggregation.

6.2. Formal Rather than Substantive Equality

The formal equality model embedded in Article 28, treating like cases alike, is structurally insufficient to address disadvantage rooted in the compound effect of multiple identity characteristics.[53] Crenshaw showed that treating everyone "equally" in a formal way can actually keep inequality in place. This happens because the situation of the most disadvantaged people is often compared with that of the most privileged, making the privileged position seem like the normal standard.[54] The SCB's reliance on formal equality analysis in the Biman cases is a direct illustration: by focusing on male stewards as the appropriate comparator for female

[52] Atrey (n 3) 33-48.

[53] Fredman (n 14) 183-184.

[54] Crenshaw (n 8) 1249.

stewardesses, the courts masked the additional dimension of discrimination between different categories of female employees.

6.3. The Inflexible Comparator Test

The comparator test employed by Bangladeshi courts asks whether a person of a different sex would have been treated more favorably. This test is structurally ill-adapted to intersectional claims. Atrey suggests a more flexible way of comparing cases. [55] Instead of looking at just one identity (like only gender or only race), it asks whether a person without the same combination of identities would have been treated better. This approach helps identify discrimination that happens because of multiple overlapping identities, which the usual single-factor comparison often misses.

6.4. Fragmented Statutory Protection and Institutional Absence

The fragmentation of statutory protection across domain-specific instruments, the absence of a unified anti-discrimination law with intersectional reach, and the non-existence of an equality commission leave large categories of intersectional discrimination claims without institutional recourse. As Bond has argued, the reconstruction of the legal architecture of human rights, including at the domestic level, is a prerequisite for the effective realization of intersectionality theory.[56]

6.5. Lack of Judicial Intersectional Framework

Without explicit constitutional mandate or statutory guidance, courts are unlikely to develop robust intersectional jurisprudence independently. The nuanced reasoning of *Marzia Touhida* remains isolated and has not been built upon in subsequent decisions. The absence of a doctrinal framework means that intersectional claims depend on the will of individual judges rather than on principled legal development.

7. Another Critique from Feminist Perspective

Feminist theory in human rights challenges the assumption that human rights are always neutral and equally responsive to the experiences of women and men. It examines how laws and

[55] Atrey (n 3) 95.

[56] Johanna E Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 *Emory Law Journal* 71, 185.

institutions may reproduce gender inequality and argues for an approach that recognizes women's diverse experiences and structural disadvantages. A feminist critique therefore shows that formal equality may fail to address the different forms of disadvantage experienced by women. It calls for an approach that goes beyond comparison with men and considers the intersecting social conditions that shape women's experiences of discrimination. This section critiques and puts the legal frameworks and judicial decisions analyzed above under the feminist lens.

7.1 The Male-Norm Comparator and Its Limits

A feminist analysis of the framework reveals a foundational conceptual error: the construct of discrimination operative in Bangladeshi law is essentially comparative and male-referential. Women are guaranteed equality to the extent that they are treated no worse than comparable men. As Timothy Macklem has argued, discrimination is not simply a matter of treating women less favorably than men, but of denying women the conditions necessary to live successful and fulfilling lives as women.[57] There are meaningful, morally significant differences between men and women that a responsible equality law cannot ignore.[58] The male-norm comparator model is structurally incapable of recognizing harms that are specific to women's experience precisely because it treats male experience as the universal normative standard against which deviation is assessed.[59]

The cultural feminist stand of feminist legal theory affirms that there are meaningful differences between the sexes and argues that the law should respond to those differences not as deviations from a male norm but as legitimate bases for differentiated and enabling legal treatment, designed to allow women to live successful lives as women.[60] MacKinnon has further observed that by exposing the inadequacy of single-axis legal analysis, intersectionality

[57] Timothy Macklem, *Beyond Comparison: Sex and Discrimination* (CUP 2003) 1.

[58] Ibid, 2.

[59] Ibid, 1. Macklem argues that equality law's reliance on the male comparator as the normative standard of treatment is self-undermining: it grants women equality to the extent that they resemble men, rather than ensuring the conditions for women to live successfully as women.

[60] Eva Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19 *Human Rights Quarterly* 136, 138.

as method reveals how law systematically under-protects those most severely harmed by compounding systems of structural inequality.[61]

7.2. Intersectionality as the Necessary Corrective

A concrete illustration of the feminist critique's force arises when intersectionality is applied to the Bangladeshi context.[62] Two women in Bangladesh may both be Black, but one may be Hindu and the other Muslim. Although they share a racial characteristic, their respective religious identities generate distinct vulnerability patterns. If laws treat all women as the same group, without recognizing their different backgrounds, they may not protect everyone equally. As a result, both groups can face unequal outcomes, and in some situations, a Hindu woman may be affected more seriously due to her specific social and institutional circumstances. The feminist critique thus converges with the intersectional analysis: genuine equality demands attention not only to sex but to the full matrix of identity characteristics that determine each woman's specific social position and the particular risks of discrimination she faces.

The judicial decisions examined in Section V illustrate the practical consequences of this theoretical deficit. By constraining discrimination analysis to a single axis, courts have repeatedly failed to apprehend the lived reality of women whose vulnerability is compounded by disability, religion, ethnicity, or reproductive status. Intersectionality offers the doctrinal means of shifting judicial analysis from formal to substantive equality: from the question of whether women are treated the same as men to the question of whether women are afforded the conditions necessary for meaningful and dignified lives as women in all their social diversity.

8. Comparative Practices: Lessons for Bangladesh

[61] MacKinnon (n 11) 1028.

[62] A concrete illustration: in Bangladesh, a Black woman and a Hindu Black woman face differently patterned vulnerabilities. Although both share a racial characteristic, the added religious identity of the latter generates distinct risks of compound discrimination on grounds of sex, religion, and ethnicity simultaneously. Equality measures designed for "women" as an undifferentiated class will produce unequal outcomes for both and will structurally under-protect the latter.

This section analyzes two national constitutional court's views in dealing with intersectional discrimination and finally finds the South African and UK's approach towards intersectional discrimination useful for learning and transplanting the idea in Bangladesh.

8.1. South African Approach

At the national level, the Constitutional Court of South Africa has developed the most sophisticated national jurisprudence on intersectional discrimination. In *Hassam v Jacobs*,[63] the Court held that the exclusion of Muslim women in polygynous marriages from the operation of the Intestate Succession Act constituted unfair discrimination on the intersecting grounds of marital status, religion, and gender. The discrimination arose from the confluence of patriarchal norms governing polygynous marriages, the subordinated legal recognition accorded to Islamic marriages, and a historical pattern of discrimination against Muslims. No single ground, considered in isolation, would have captured the particular form of disadvantage experienced by these women.

In *Minister of Finance v Van Heerden*,[64] the Constitutional Court elaborated that substantive equality, as mandated by the South African Constitution, requires account to be taken of past patterns of disadvantage when assessing discrimination claims. Together, these decisions demonstrate a judicial model in which the interaction of multiple identity characteristics produces qualitatively distinct and irreducible forms of disadvantage that formal equality analysis cannot address.

8.2. The UK's Approach

The United Kingdom's Equality Act 2010 represents an advanced statutory model for the recognition of combined discrimination. Section 14 of the Act, which would have extended protection to combined discrimination based on two protected characteristics, was enacted but never brought into force.[65] The UK Supreme Court in *Essop v Home Office*[66] decided that, in cases of indirect discrimination, a person does not need to prove why a rule or practice causes disadvantage to a group. It is enough to show that the group is actually disadvantaged. This

[63] *Hassam v Jacobs* 2009 (5) SA 572 (CC).

[64] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [2004] ZACC 3, para 29.

[65] Equality Act 2010 (UK), s 14. Section 14 was enacted but never brought into force by a commencement order. The coalition government announced in 2011 that it would not be commenced. See Fredman (n 14) 185.

[66] *Essop v Home Office* (UK Border Agency) [2017] UKSC 27, [2017] 1 WLR 1343, paras 24-27 (Lady Hale).

approach is useful for Bangladesh, where strict requirements to prove the exact cause of discrimination often make it harder for people to bring successful claims.

9. Suggestions

In light of the foregoing analysis, this article advances the following five reform suggestions for Bangladesh. First, the Bangladesh Constitution should be amended to replace the strict enumeration of prohibited grounds in Articles 28(1), 28(2) and 29(2) with an illustrative list accompanied by an open-ended residual clause, and to incorporate the phrase 'on one or more grounds' so as to bring intersectional discrimination expressly within the constitutional guarantee of non-discrimination. This amendment would provide the textual foundation necessary for the development of intersectional jurisprudence by the SCB.

Second, a comprehensive unified anti-discrimination statute should be enacted, providing a single statutory basis for claims of intersectional discrimination across both public and private spheres. Such legislation should incorporate: (a) a flexible intersectional comparator test, asking whether a person who did not possess the relevant combination of identity characteristics would have been treated more favourably;[67] (b) a burden-shifting provision placing the evidential burden on the respondent upon the establishment by the complainant of a *prima facie* case of intersectional disadvantage; (c) explicit recognition of indirect intersectional discrimination; and (d) a power to award transformative and structural remedies as well as individual compensation.[68]

Third, an independent National Equality Commission should be established, following the unified anti-discrimination statute with a mandate to receive and investigate intersectional discrimination complaints, conduct public interest inquiries, develop binding guidance on intersectional discrimination, and engage in strategic litigation in cases that may generate doctrinal development.

Fourth, judges of the SCB should engage themselves in intersectionality theory and comparative equality jurisprudence. The reasoning in *Marzia Touhida* demonstrates that intersectional analysis is within the capability of Bangladeshi courts. With structured doctrinal guidance and exposure to the international and comparative jurisprudence examined above, the

[67] Atrey (n 3) 188-194.

[68] Ibid, 91.

SCB could develop a coherent intersectional framework within the existing constitutional text, pending constitutional reform.

Fifth, the Persons with Disabilities Rights and Protection Act 2013 should be substantively amended to incorporate the intersectional obligations flowing from CRPD Article 6 and CRPD General Comment No 3. The amendments should expressly recognize the compounded disadvantage experienced by women with disabilities and by disabled members of minority communities, require intersectional approaches in disability policy design and implementation, and create specific causes of action for intersectional disability discrimination.

10. Conclusion

This article has demonstrated that Bangladesh's current anti-discrimination legal framework is structurally incapable of recognizing or redressing intersectional discrimination. The constitutional guarantee in Article 28(1) provides a fixed list of prohibited grounds and lacks the 'on one or more grounds' formulation that would render it genuinely intersectional in reach. The statutory landscape is fragmented, domain-specific, and correspondingly unresponsive to compound disadvantage. The judiciary, while showing emerging statement to intersectional considerations in *Marzia Touhida*, has not developed a coherent doctrinal framework. Across all three branches, the framework is anchored to a formal equality model that measures women's rights against a male comparator rather than asking whether the conditions necessary for women's genuine flourishing are in place. As Bond has argued, the reconstruction of the normative and institutional architecture of human rights law is a prerequisite for the effective realization of intersectionality theory.[69] In the context of Bangladeshi constitutionalism, the constitutional placement of women has historically been shaped by assumptions that fail to account for women's diverse and compound social positions.[70] The five reforms proposed above constitute together the programme for legal reconstruction that substantive intersectional equality demands. The ultimate objective of this reconstruction is not formal equalization but substantive transformation: to ensure that women, persons with disabilities, and other multiply-marginalised groups in Bangladesh are afforded the legal conditions necessary to lead meaningful, self-determining, and dignified lives. Intersectionality is not merely a theoretical aspiration; it is the irreducible minimum requirement of genuine equality.

[69] Bond (n 56) 185.

[70] Wadud (n 30) 199.