“India is Truly Independent”: Overview of the Criminal Tribes Act and Relevance for Gender Variant People in Contemporary India

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“The violence that we experience has less to do with us and more to do with our peoples’ own anxieties about gender and sexuality. Certainly, there were formations of gender norms and heterosexuality prior to colonization but what colonialism did was officially establish the gender binary and heteronormativity. What colonialism did was criminalize people for transgressing from[[1]](#footnote-1)

Prior to the colonial era, India had a long history of recognition and acknowledgement of gender-diverse individuals. However, with the advent of the colonial era, Victorian morality was thrust upon Indians. In order to maintain control over its colonies and mould society to reflect its beliefs, the British colonial administration attempted to impose its moral and social order on Indian culture by passing laws that made homosexuality and gender diversity illegal in an effort to bring it in line with Victorian ideals. India's legal system was intended to be aligned with British law and standards by the British colonial government. The Offences Against the Person Act of 1861, which made homosexuality a crime in England and Wales, was one of the laws heavily referenced when the Indian Penal Code (IPC) was being created. The Britishers introduced Section 377 of the IPC which made all carnal intercourses except peno-vaginal intercourse illegal. The Criminal Tribes Act, of 1871 (CTA) further imposed the Victorian morals of gender and sexual binary[[2]](#footnote-2).

While Section 377 has been talked about much in the media[[3]](#footnote-3), especially with its abrogation in 2018, CTA and its overarching impacts today have received far less attention. Therefore, the purpose of this paper is to examine the historical relevance of the CTA and how it affected gender-variant individuals in India. This overview of the Act's historical background looks at how gender identity and sexual orientation were regulated and viewed in society at the time it was in effect. It goes into further detail on the Act's lasting impact on current social norms and legal systems. Understanding this historical context can help us better comprehend the difficulties encountered by gender-variant people[[4]](#footnote-4) today and fight for their rights.

Historical Context: Gender Diversity in Pre-colonial India

In many post-colonial nations, like India, the treatment of gender and sexual diversity was significantly impacted by the installation and execution of colonial laws and regulations. It's crucial to remember that conversations regarding sexual orientation and gender identity may not immediately relate to pre-colonial communities in the modern sense. Over time, definitions and categories for understanding sexuality and gender have changed, and many cultures have varied perspectives on these topics.

Many communities had their own distinctive perspectives on gender and sexual variety before colonisation. For instance, a number of ancient literature and historical reports imply that many gender identities and non-binary expressions exist in India. Communities like the Hijras, Kinnars, Jogtas, Jogappas, and Aravanis, among others, have a long history in India and are made up of people who are born male but may identify as a different gender. Ancient Indian scriptures, artwork, and historical records have all acknowledged and chronicled them, and they frequently played religious and ceremonial roles in society. Hindu mythology's Iravan (also spelt Aravan) was a hero who was destined to marry Mohini before he passed away[[5]](#footnote-5). The Mahabharata epic's Krishna (a Vishnu avatar and the charioteer of warrior King Arjuna) turned into Mohini, wedded Iravan, and spent the night with him in order to fulfil the blessing because no other lady dared to become a widow overnight. Following the sacrifice, Mohini broke her bangles and beat her chest in accordance with Hindu tradition to demonstrate her sadness at Iravan's demise. She then returned to Krishna. The transgender (hijra) community in India celebrates this transformation occasion in opulent style each year[[6]](#footnote-6). Many Hindu temples still contain statues of Ardhanari, another manifestation of Lord Shiva who was split in half[[7]](#footnote-7). Lord Ayyappa, another well-known deity worshipped in southern India, is the offspring of the- union of Shiva and Mohini (the avatar of Vishnu). The story of Lord Ayyappa also portrays transgender women in the form of Mohini who could also give birth.[[8]](#footnote-8) Whether these texts are supportive or critical of gender-variant persons is debatable but they acknowledged the existence of gender-variant individuals in India.

The gender variance during the Mughal rule in India was also significant. Jahangiri art (a form of art during the Mughal Empire) points out the several Mughal warriors and intellectuals who were effeminate and lacked typical masculine qualities[[9]](#footnote-9). Gender-variant individuals i.e. khwaja siras (assigned male at birth and castrated) were an integral part of the Mughal rule. Typically, they were arranged in hierarchical structures, with the senior or chief eunuch overseeing the subordinate eunuchs beneath him. Khwaja siras worked as harem guards, army generals, and emperors' counsellors. Some even oversaw the princes' education. They were thought to be the best for protecting the harem women due to their infertility and perception of being sexually non-threatening, making sure that nobody unauthorised entered the seraglio. The lower-ranked khwaja siras often worked as messengers or watch persons. Therefore, gender variance was also accepted and respected to some extent within the Mughal Empire, though, it was mostly in relation to the possession of a penis and being non-threatening to women while also having some amount of masculine strength[[10]](#footnote-10).

Colonial Era and Victorian Morality

With the advent of colonialism, the recognition of gender-variant individuals was overturned and Victorian morality was imposed on the Indians. One such act imposed on Indians was CTA. Through CTA, the British used the anthropological and anthropometric concepts of caste and race to portray entire communities and groups as hereditary offenders without any actual legal or incriminating evidence. The CTA gave the government the authority to track down tribes, gangs, or classes that were "addicted to the systematic commission of non-bailable offences," and whose members were all required to register with the authorities, confine themselves to predetermined locations, and submit to routine inspections under penalty of arrest, imprisonment, whipping, and removal to reformatory settlements[[11]](#footnote-11). They called the groups "tribes" rather than "castes" in order to conjure up wildness and savagery in a way that "caste" could not[[12]](#footnote-12). According to this Act, everyone born into a certain caste or group is a criminal by nature, and secondly, a criminal is a criminal forever. As a result, the Act mandated the registration of all members—or any members—of any tribe or tribes designated as criminal tribes. Additionally, it mandated that these registered members report to the police authority at predetermined intervals and/or "to notify his place of residence and any change or intended change of residence, and any absence or intended absence from his residence," authorised the authority to restrict any Criminal Tribe or any part or member of such a tribe in its or his movements to any specified area, and mandated that it or he settle in the place of residence specified. Section 23 of the Act further stated: ' Whoever, being a member of any criminal tribe and having been convicted of any of the offences under the Indian Penal Code specified in Schedule I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary which shall be stated in the judgment of the Court, be punished

(a) on a second conviction, with imprisonment for a term of not less than 7 years, and

(b) on a third or any subsequent conviction, with transportation for life[[13]](#footnote-13).

Gender-diverse groups such as Hijras were included under the Act 27 of the CTA as a criminal caste or eunuch. The term "eunuch" under this act was deemed to encompass "all males who admit themselves, or who on medical inspection clearly appear to be impotent." This category included individuals who:

a.) “are reasonably suspected of kidnapping or castrating children, or of committing offences under section 377 of the Indian Penal Code, or of abetting the commission of any of the said offences;

b.) “appear, dressed or ornamented like women, in a public street or place; or in any other place, with the intention of being seen from a public street or place”, or

c.) “dance or play music, or take part in any public exhibition, in a public street or lace or for hire in a private house.”[[14]](#footnote-14)

Therefore, the Act effectively banned any form of gender variance or cross-dressing. Girls and boys, respectively, were allegedly sexually "corrupted" by gender-diverse gangs and employed as child prostitutes. Children who lived with ‘eunuchs’ were to be registered, removed, and "respectable" guardians were to be appointed, according to British officials. Although the Hijras were the main target of the Act, other groups were also covered, such as the zanana, or "effeminate men," who were not emasculated, frequently dressed as women, performed in public, and typically lived with biological and/or affinal kin and Khwaja sira[[15]](#footnote-15). Therefore, the British Empire in order to discipline the ‘savages’ and ‘sexually corrupt’ Indians and to instil the European sense of masculinity criminalised the Hijra bodies.

Legal Reforms

After India gained independence from British rule, efforts were made to repeal discriminatory laws, including the CTA. The process of abolishing the act began in the 1940s, and the act was finally repealed on August 31, 1952, after the adoption of the First Constitution of India and was replaced by Habitual Offenders Act. The repeal of the CTA aimed to end the stigmatization and discrimination faced by these communities and promote their social integration and upliftment[[16]](#footnote-16). The Indian bureaucracy made a minor step towards gender equality in 2005, when "eunuchs" were given the choice to enter their sex as "E" rather than either "M" or "F" in online passport application forms, despite the fact that no Central legislation in India explicitly recognised the third gender. Later in 2009, the Indian Election Commission allowed people who identified as "transsexuals" to mark their gender on ballots as "other," giving them a distinct identity. However, there was no recognition of gender-diverse individuals until the National Legal Services Authority vs Union of India judgement (NALSA Judgement hereafter) in 2014[[17]](#footnote-17). Gender-diverse individuals were stripped of basic human rights and coupled with societal conservativeness, most of them were forced into marginal occupations like begging or sex work[[18]](#footnote-18). These occupations invited more legal scrutiny as well as sex work was illegal in India until a Supreme Court verdict in 2022 that decriminalised sex work[[19]](#footnote-19). The NALSA judgement recognised some regional gender-diverse groups like Hijras, Shiv Shaktis, Aravanis, Jogtas, Jogappas among others as the ‘third gender’. While the usage of the term ‘third gender’ is contested due to its Western origins, the exclusion of groups like Kothi, Meitei, and Nupa Manbi among others and the rights of people on the transmasculine spectrum were not appropriately discussed by this judgement, this judgement could be considered as the first progressive step to grant basic human rights to gender diverse individuals and groups[[20]](#footnote-20).

Through this judgement, the Supreme Court ordered both the federal government and state governments to take the necessary actions to provide transgender patients with medical care in hospitals as well as separate public restrooms and other amenities. Additionally, they have been instructed to manage unique HIV/Sero-surveillance programmes for transgender people. The federal and state governments have been urged to allow the group to participate in various social welfare schemes and be classified as a socially and economically deprived class. Additionally, reservations have been asked for employment in government and educational organisations[[21]](#footnote-21). However, the implementation of the judgement has been very slow. It was hopefully expected that society would recognise them in a humanistic light however, the results were far away from this dream. the hijra community still faces low social standing. According to a survey report by National Human Rights Commission in 2017, 89% of gender-variant people faced unemployment despite having relevant education and skills[[22]](#footnote-22). Gender-variant people often face bullying and harassment in educational institutions, leading to many dropouts[[23]](#footnote-23).

Furthermore, the Transgender Persons Act, 2019 was passed by the Government despite facing criticisms from the gender-variant communities. In its earlier versions, it mandated that gender-variant people had to appear in front of the District Magistrate and prove that they are transgender which was later removed. Further, the earlier version of the bill defined transgender as both genders or neither leaving out the possibility of one identifying just as male or female[[24]](#footnote-24). Although the concept of transgender has been improved by the Act, the transgender population has been reduced to only include transmen, transwomen, Hijras, Jogtas, Kinnar, Aravani, and those with intersex variations. The Act does not apply to people who identify as gender non-conforming or members of other gender-variant communities, such as Kothis, Shivshaktis, and Nupa Manabi. The Act also restricted transgender identities to biological essentialism, necessitating medical procedures in order to identify as a man or woman on legal documents. In addition, the Act included provisions for non-discriminatory equal chances in education and work, but it did not impose any penalties for violations, making it a toothless tiger. The Act made any kind of sexual assault or harassment illegal, carrying a minimum punishment of six months and a maximum of two years. On the other hand, the minimum term for sexual assault or harassment of cis-women is seven years in jail, with a maximum sentence of life. Thus, it appears that this Act views transsexual people as less than human[[25]](#footnote-25). Therefore, even though, legally, India has made strides in recognising some groups of gender-variant people, there is still a lot that needs to be done by the Government to provide protection and security for all gender-variant individuals and groups.

Legacy of the CTA: Societal and Legal Implications

Besides the laws, gender-variant individuals continue to face harassment, bullying and discrimination from society as well. In spite of the repeal of the CTA in 1952, gender-diverse communities continue to face the wrath of the Act till the present day. The experiences of gender-variant people in India today are still shaped by the social and cultural repercussions of the CTA. These people are subjected to stigmatisation and discrimination that has its roots in historical prejudices that were upheld by the act and later laws. The colonial notion and the primary reason behind the inclusion of gender variant CTA as put forward by the colonial regime were to ‘save boys and girls from prostitution’ and the gender variant groups being criminals. The view upheld by the law is still dominant among the masses as Hijras and other gender-variant individuals are viewed with suspicion. The gender variant groups still continue to be viewed in the eyes of suspicion by the law and harassed by the police. One such incident happened in Kalyani in West Bengal, India where one person from the Hijra community was accused of stealing a gold necklace and in spite of no evidence against her, the police made her take off her clothes and stated that she is a ‘fake hijra’ because she has ‘male genitals’ and asked her to bring her biological parents upon which she will be released[[26]](#footnote-26). Gender-diverse people are often ostracised from their homes and many of them do not have any contact with their biological families[[27]](#footnote-27).

Rastogi also reported on one incident of violence perpetrated by the police in Delhi in 2018 after Section 377 was partially removed by the Supreme Court. One of the survivors claimed that two to three police officers had taken them into custody, mistreated them in detention, and then hung them up against walls. They were verbally abused for a long period before being sexually assaulted. One Kinnara woman's question, "Is it a crime to exist?" was featured in the report, which also emphasised the suffering experienced by Hijra and Kinnar people. “We beg for a living because no one wants to hire us because we are kinnaras. However, if the police see us talking to other people, they beat us or eject us, accusing us of prostitution and being a public nuisance” mentioned another survivor[[28]](#footnote-28). Hence, the view of gender-diverse individuals as criminals is still pervasive within the society and legal apparatus in India.

Conclusion

Gender variance was once recognised and accepted up to a certain degree in ancient and medieval India. However, that was overturned by the advent of colonial rule as Victorian notions of morality including bans on gender and sexual transgression were imposed on the Indians. This was achieved through the introduction of Section 377 of the Indian Penal Code and the CTA, of 1871 which outlawed any form of gender variance and transgression. The gender variant groups were categorised as criminal caste and required to register with the police and movements restricted. The Britishers introduced the notion that gender-variant groups especially Hijras abducted boys and girls and forced them into prostitution. The CTA was overturned in 1952 but there was no recognition of gender variant groups until 2014. Even though legislation such as the NALSA judgement and Transgender Persons Act, 2019 have been introduced, they have proven very less useful as harassment and discrimination against gender variant individuals continue to be rampant.

1. The Cake, “Poet Duo Darkmatter On How “Transmisogyny Is The Afterlife Of Colonialism,” And More”, Medium, September 5, 2015, accessed May 25, 2023. <https://medium.com/the-cake/poet-duo-darkmatter-on-how-transmisogyny-is-the-afterlife-of-colonialism-and-more-d8997df8e2b5> [↑](#footnote-ref-1)
2. Bret Boyce, “Sexuality and Gender Identity under the Constitution of India”, *Journal of Gender, Race and Justice* 18(2015):1. HeinOnline. [↑](#footnote-ref-2)
3. See Michael Safi, “Campaigners Celebrate as India decriminalises homosexuality”, *The Guardian,* September 6, 2018, theguardian.com/world/2018/sep/06/Indian-supreme-court-decriminalises-homosexuality; “What is Section 377 of the IPC?”, *The Indian Express,* September 10, 2018, indianexpress.com/article/what-is/what-is-section-377-homosexuality-lgbtq-supreme-court-india-5253460. [↑](#footnote-ref-3)
4. Gender-variant refers to all forms of gender variance including transgender people. I will use gender-variant in most cases except where the laws explicitly state ‘transgender’. This is because of the criticisms against using ‘transgender’ which does not account for the lived experiences and practices of the gender-variant people in India and in many other cultures [↑](#footnote-ref-4)
5. Devdutt Pattanaik. *The Man Who Was a Woman and Other Queer Tales of Hindu Lore* (Binghamton, NY: Harrington Park Press, 2002).  [↑](#footnote-ref-5)
6. Alf Hiltebeitel, "Dying before the Mahābhārata War: Martial and Transsexual Bodybuilding for Aravān" *The Journal of Asian Studies*, 54(1995):2, 1995: 447-473. <https://doi.org/10.2307/2058746>. [↑](#footnote-ref-6)
7. Govindasamy Agoramoorthy and Minna J. Hsu. “Living on the Societal Edge: India’s Transgender Realities.” *Journal of Religion and Health*, 54(2014):4, 2014: 1451–1459., <https://doi.org/10.1007/s10943-014-9987-z>. [↑](#footnote-ref-7)
8. Denise Cush et al., *Encyclopedia of Hinduism*. (London: Routledge, 2010). [↑](#footnote-ref-8)
9. Juan Cole, “The Imagined Embrace: Gender, Identity, and Iranian Ethnicity in Jahangiri paintings,” in Safavid Iran and Her Neighbors, ed. Michel Mazzaoui (Salt Lake City: University of Utah Press, 2003), 51. [↑](#footnote-ref-9)
10. Niccolao Manucci. *Storia de Mogor or Mogul India Vol. 2*, tr. William Irvine, (London: John Murray Publication, 1906) [↑](#footnote-ref-10)
11. Ibid. 2 [↑](#footnote-ref-11)
12. Rahul Ashok Kamble et al., "‘Ostracized by law’: The sociopolitical and juridical construction of the ‘criminal tribe’ in Colonial India." *History and Anthropology* (2023): 1-21., <https://doi.org/10.1080/02757206.2023.2204866>. [↑](#footnote-ref-12)
13. KM Kapadia, The criminal tribes of India. *Sociological Bulletin*, 1(1952):2, 99-125 [↑](#footnote-ref-13)
14. Amit Kumar Singh. "From Colonial Castaways to Current Tribulation: Tragedy of Indian Hijra." *Unisia* 40(2022): 2. <https://doi.org/10.20885/unisia.vol40.iss2.art3>. [↑](#footnote-ref-14)
15. Jessica Hinchy, “Deviant domesticities and sexualised childhoods: Prostitutes, eunuchs and the limits of the state child “rescue” mission in colonial India”. In Divine domesticities: Christian paradoxes in Asia and the Pacific, eds. Hyaeweol Choi and Margaret Jolly (Canberra, ACT: ANU Press, 2014), 247-249. <https://doi.org/10.22459/DD.10.2014.09>. [↑](#footnote-ref-15)
16. Andrew J. Major, "State and criminal tribes in colonial Punjab: Surveillance, control and reclamation of the ‘dangerous classes’." *Modern Asian Studies* 33(1999):3, 657-688. [↑](#footnote-ref-16)
17. Kunjana Mittal and Seema Garg. "Transgender in India: New developments and enactments." *International Journal of Multidisciplinary Research and Development* 2(2015):11, 402-405. [↑](#footnote-ref-17)
18. Venkatesan Chakrapani et al., “Hijras/Transwomen and Sex Work in India: From Marginalization to Social Protection”, In Transgender, Sex Work and Society, ed. Larry Nuttbrock (New York: Harrington Park Press, 2018). [↑](#footnote-ref-18)
19. Deepika Ganju and Niranjan Saggurti. "Stigma, violence and HIV vulnerability among transgender persons in sex work in Maharashtra, India." *Culture, health & sexuality* 19(2017):8, 903-917. [↑](#footnote-ref-19)
20. See Aniruddha Dutta and Raina Roy, “Decolonizing transgender in India: Some reflections." *Transgender Studies Quarterly* 1(2014):3, 320-337; Aniruddha Dutta, "Contradictory tendencies: the Supreme Court's NALSA judgment on transgender recognition and rights." *Journal of Indian Law & Society* 5(2014), 225-235; Ahmed Ibrahim, “Under Empire and the Modern State: Unravelling 'Queer Precarities' Inside Global Assemblages.” In *'Queer' Asia*, eds. J. Daniel Luther and Jennifer Ung Loh (London: Zed Books, 2019), 29–44; Gee Imaan Semmalar, “Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India.” *WSQ: Women's Studies Quarterly*, 42(2014):3-4, 286–291., <https://doi.org/10.1353/wsq.2014.0063>. [↑](#footnote-ref-20)
21. Swakshadip Sarkar, *Transgender People And Employment In The Era Of Diversity And Inclusion* (Paris: Human Development Research Initiative, 2022), <https://hdevri.com/2022/05/10/transgender-people-and-employment-in-the-era-of-diversity-and-inclusion/>. [↑](#footnote-ref-21)
22. Kerala Development Society, *Study of Human Rights of Transgender as Third Gender* (Delhi: National Human Rights Commission, 2017), <https://nhrc.nic.in/sites/default/files/Study_HR_transgender_02082018.pdf>. [↑](#footnote-ref-22)
23. See Swakshadip Sarkar and Vishwadeep Mane, “Magnifying the Left Out Sections in the Pandemic by Swakshadip Sarkar and Vishwadeep Mane”, Planet DIVOC-91, 2021, <https://planetdivoc91.com/article-by-swakshadip-sarkar-and-vishwadeep-mane/> [↑](#footnote-ref-23)
24. Sayan Bhattacharya, “The Transgender Nation and Its Margins: The Many Lives of the Law.” *South Asia Multidisciplinary Academic Journal*, 20(2019). <https://doi.org/10.4000/samaj.4930>. [↑](#footnote-ref-24)
25. Ibid. 21 [↑](#footnote-ref-25)
26. Nadia Ranaghat Sampriti, “আজকে কল্যাণী স্টেশনে ট্রেনে ভিক্ষে করে এমন একজন হিজড়ে গোষ্ঠীর মানুষকে পুলিশ ধরে উলঙ্গ করেছে এবং যথেচ্ছ ভাবে মেরেছে….”, Facebook, October 9, 2021, <https://www.facebook.com/story.php?story_fbid=pfbid022RVyyBAG3qhEygUSf7Wj2VZrNEfUjfCQSdLoh6JMswJVsLwYx6BumogPqewTtLJxl&id=106978471186138&mibextid=Nif5oz>. [↑](#footnote-ref-26)
27. Venkatesan Chakrapani, *HIJRAS/TRANSGENDER WOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIAL EXCLUSION* (UNDP India, 2010), <https://archive.nyu.edu/bitstream/2451/33612/2/hijras_transgender_in_india.pdf>. [↑](#footnote-ref-27)
28. Vartika Rastogi “Transgender Community Face Increasing Violence Since 377 Ruling”, *The Citizen*, September 18, 2018, [www.thecitizen.in/index.php/en/NewsDetail/index/7/15000/Transgender-Community-Face-Increasing-Violence-Since-377-Ruling--](http://www.thecitizen.in/index.php/en/NewsDetail/index/7/15000/Transgender-Community-Face-Increasing-Violence-Since-377-Ruling--). [↑](#footnote-ref-28)