The long history of criminalising Hijras

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In September 2018, LGBT communities across India celebrated a historic court judgement. The Indian Supreme Court ruled that Section 377 of the 1860 Indian Penal Code (IPC)—which criminalised sex "against the order of nature", and was used against the LGBT community – could no longer apply to consensual adult sex. While the judgement was seen as a major victory for LGBT people, efforts to control, regulate and criminalise sexuality and gender expression continue in many forms, including the Transgender Persons (Protection of Rights) Bill (TPPR), which the recently re-elected Bharatiya Janata Party (BJP) government has announced it will reintroduce in Parliament. The bill, which activists have argued would legitimise violence and discrimination against transgender, intersex and gender non-conforming people, is an example of how colonial laws continue to be replicated in new legislation.

The 2018 TPPR bill criminalises gender diverse people in ways that resemble sections of the 1871 Criminal Tribes Act (CTA) that targeted 'eunuchs', a stigmatising colonial term for Hijras (or Kinnars). The 1871 law provides an important example for examining continuities in the policing of gender and sexuality, because even as the anti-Hijra provisions were repealed in 1911, their language and spirit has been echoed in postcolonial legal and policing practices.

An ungovernable population

The first part of the CTA targeted so-called "criminal tribes"—diverse, socially marginalised groups that the British labelled criminals by hereditary caste occupation—which are today known as Denotified Tribes or *Vimukta Jati*. Some communities were labelled 'criminal tribes' because of their nomadic lifeways, and others because of their apparently unproductive use of land and forests. Another aim was to dismantle indigenous policing systems. The CTA—which was repealed by the government of independent India in 1949, and replaced with the Habitual Offenders Act of 1952—continues to be studied for its implications in treating entire communities as 'habitual offenders'.

However, Part II of the CTA, which criminalised gender non-conforming people as 'eunuchs', has received less scrutiny and comment, partly because this part of the law was repealed in 1911. Nevertheless, it continues to inform the treatment of Hijras by the Indian state, and parts of the original act have been reintroduced through legislation adopted by different states in independent India. The second part of the CTA required the police to register 'eunuchs' who were "reasonably suspected" of sodomy, kidnapping and castration. People identified as 'eunuchs' were deemed suspect merely if they wore women's clothing or performed in public. This had wide-reaching impacts on Hijras' everyday lives.

India's British colonisers viewed Hijras as a multi-faceted threat to colonial authority—as a population that was ungovernable in manifold ways. Misgendering feminine Hijras as men, colonial officials viewed Hijras as "professional sodomites" who challenged the colonial legal system, which was based on heterosexual, reproductive sexuality and the family. In the colonial view, Hijras were an "obscene" public nuisance that undermined the order of public space—a discourse that ignored the cultural significance of Hijra *badhai* (donations collected at births and weddings) and performance. Though generally sedentary, Hijras were labelled as "wandering people", due to their (typically) short-distance travels to nearby villages for *badhai* collection. The British had long associated mobility with criminality and tended to collapse different patterns of migration into the singular category of "wandering people", as was also evident in the 'criminal tribe' panic. Colonial administrators additionally claimed that Hijras were the kidnappers and castrators of children.

In fact, adults as well as children were initiated into the Hijra community as disciples of senior gurus. Official records do suggest that some 19th-century Hijras had been enslaved as children and subsequently sold to other Hijras, though enslavement was not a static status in Southasia.

The applicability of the CTA was limited to the North-Western Provinces (NWP)—present-day Uttar Pradesh and Uttarakhand—and Punjab, although it was only enforced in the NWP. The law potentially impacted all Hijras, because under government policy, key Hijra cultural practices (namely, performance and feminine clothing) were defined as proof that an individual could be "reasonably suspected" of kidnapping, castration and Section 377 offences, and thus should be registered by police. Moreover, the real impetus for the act was evident from correspondence between colonial officials on the need to bring about the "gradual extinction" of the Hijra community.

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