

Transgressing Boundaries: Decolonising Gender and Sexuality in India's Criminal Justice System in the Context of Transgender Rights and Sexual Violence

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ABSTRACT

The aim of this paper is to examine the intersectionality of gender and sexuality in India's criminal justice system, focussing on the impact the current laws against sexual assault have on the experiences of transgender persons. The colonial-era Indian Penal Code ('IPC') from 1860 has been replaced by the Bharatiya Nyaya Sanhita ('BNS') which came into effect on 1 July 2024. The former legal framework introduced a paternalistic approach to Governance which emphasised the need to "civilise" and "protect" Indian people, perpetuating harmful stereotypes against transgender and LGBTQ+ individuals. This paper investigates the enduring impact of colonialism on gendered violence in India, revealing that the historical legacy of colonialism continues to influence the legal framework for addressing crime and informs the criminal code's responses to gender violence. This paper contends that a decolonial approach to gender justice which can be achieved through decolonising intersubjectivity is essential to address the pervasive, ongoing systemic injustices perpetuated against the community from centuries of colonialism.

1. Introduction

The IPC (Government of India, 1860) was inherited by independent India from colonial times, and the text continues to have an affect on the current criminal justice system in India. Despite the significance of the legal framework, transnational and comparative critics claim that the expansive text is characteristic of how colonialism conceives law as a tool of domination and a mechanism of control that is characterised by force, violence, and command (Mawani, 2015).. In recent years, there has been a surge of scholarly inquiry from various theoretical perspectives that critically examines both the ongoing and residual affects of colonialism in institutions of crime control, where the criminal justice system is itself perceived to have a colonial dimension that perpetuates inequality and oppression against marginalised communities, which is of particular importance to "punishment and society" scholarship and epistemology (Aliverti et al., 2021; Godfrey & Dunstall, 2005; Mukherjee, 2003; Yu & Liu, 2024). Decolonizing gender and sexual citizenship demands a recognition of the profound and enduring effects of colonialism and imperialism on gendered lives. This requires nuanced understanding of gender

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as a complex and multifaceted experience that intersects with other social locations, such as race, class, caste, sexuality, disability etc., to produce unique and diverse experiences of gendered identity, belonging, and citizenship.

The Indian Penal Code (IPC) and its replacement, the new BNS, have been criticised especially by those advocating for LGBTQ+ rights highlighting the legacy and ongoing influence of British colonialism on contemporary law and policies (Uma, 2024). The colonial-era laws “governing” sexuality were shaped by medieval, Christian attitudes towards sex, as the Catholic Church both then and now condemns same-sex relationships, oral and anal sex in any gender combination and masturbation, as a way of establishing and preserving social control and moral code (Shing & Kher, 2003; Anderson, 2011; Nyanzi, 2013). The LGBTQ+ community has been vocal against the systemic violence and marginalisation stemming from the lack of legal protection and recognition in the text, which has led to stigma, violence, and discrimination especially against transgender persons.

A hallmark of the colonial legacy of the former Criminal Code used to be Section 377 which stated that: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with 1 [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.” (Government of India, 1860). The British era penal code thus criminalised all acts of oral and anal sex, along with homosexual activity, not just in India but across colonies of the British empire, where it still remains in force in countries such as Bangladesh, Malaysia, Myanmar, Pakistan, and Sri Lanka amongst other Commonwealth countries who continue on their struggle towards decriminalisation of consensual same-sex sexual behaviour (Chua & Hor, 2016).

However, the 2018 landmark judgement of the Supreme Court in the case of *Navtej Singh Johar v. Union of India* ruled consensual same-sex intercourse to no longer be criminal, having wider societal implications and signifying change in legal perspectives on gender, sexuality, and sexual autonomy (Dixit, 2020). While progress has been made in acknowledging the challenges faced by transgender individuals in India, a crucial question remains: is the current legal framework sufficient to effectively address the barriers and biases they encounter when seeking justice for sexual assault and other forms of violence?

1.1 Indigenous trans identities and Sexuality as Praxis

In order to gain an understanding of the position and experience of transgender people in society, one must begin by understanding the construction of trans personhood, how societal and familial norms shape such an identity, the legal protection offered to them, and the gendered norms that affect such a construction. The concept of gender identity is complex, dynamic and multi-faceted, integrating biological and social factors. Such an approach recognises that gender identity is shaped by both inherent biological characteristics and the social and cultural contexts within which individuals develop. Indigenous transgender identities in India are a vital aspect of the country’s rich cultural diversity, whilst simultaneously showcasing the concept of gender identity and expression as not being universally accepted across communities and indigenous groups who have their own traditional ways of understanding gender (Chakrapani et. al., 2017).

For example, in Southern India the transgender people self-identify as *Thirunagai* or *Aravani*, in Western and Northern India they identify as *Hijras* or *Kinnars*, in addition to *Joappa* in Western India (Reddy, 2005). It is essential to acknowledge that these identities are personal and subjective, existing on a spectrum of self-expression. For instance, a trans woman living Mumbai may not necessarily identify as Hijra, but rather as a transgender person, and her

individual experience and identity may not be bound by traditional categorisations or community expectations. At times, this has to do with the fact that an identity like “Hijra” has class connotations and is evocative of negative stereotypes in Indian society, as they have relied primarily on begging (at times by blessing during auspicious occasions), cruising or sex work for their livelihood (Chakrapani et. al., 2018). Due to this, trans women from working-class backgrounds challenge and resist labels such as “Hijra” or “Kothi” to locate themselves closer to middle class, “respectable” womanhood (Mount, 2020). Relations between members of the trans community appear to be both supportive but also complex, not always fluid or devoid of intra-community tensions around gender, respectability, and scalar hierarchies (Dutta & Roy, 2014).

References of “third gender” or “third sex” individuals can be found in India’s ancient religious traditions and thought from before the British era of colonisation, including Hindu, Jain, Buddhist, and later in Islamic texts during the times of the Mughal empire (Penrose, 2006; Kalra, 2012; Lal, 1999). Especially in ancient Islamic and Hindu traditions, the Hijras were usually male-born transvestites, who rose to high ranks in the royal courts as castrated men who were keepers and protectors of the Royal Harem (Mal & Mundu, 2018). The recognition of their (erstwhile) high status in society is still reflected today in Islamic tradition, where they are said to be the mediators between the Prophet and his devotees, and the guardians and protectors of the Prophet’s Tomb, thus venerated in Islamic traditions (Peletz, 2009; Marmon, 1995, as cited in Hossain, 2012).

In Hindu mythology, Hijras often identify with the sexual ambivalence of Lord Shiva, or *Ardhanarishvara* (literally translated as half man, half woman), whose most powerful symbol and object of dual gender manifestation is that of the phallus—which, however, is always united with the *yonis*, a symbol of the female genitals (Nanda, 1990, 1986). Not much unlike the Hijras, the Kothis are also part of a long-standing cultural tradition of being part of a community that embraces same-sex desires with some gender variance minus the hierarchal clan structures of the former group (Cohen, 1995, Reddy, 2005, Boyce, 2007, and Khanna, 2009, as cited in Dutta, 2013). Both groups have been historically entangled in a complex web of power dynamics, cultural norms, and social expectations without a fixed identity, rather embracing sexual and gender identities that are constantly negotiated and redefined, shaped by ongoing cultural, social, and political processes (Dutta, 2013).

The term “Hijra” is used to describe individuals who the colonial regime used to refer to as “eunuchs”, also known as *transvestite*, which was used as a pejorative as a way to label, control, and demean them (Preston, 1987; Hinchy, 2019). Just like transgender persons across the world, they face considerable stigma and discrimination within society and the family structure as well, and often live in “adopted” communities amongst one another or within their peer group. This notion of community is crucial for understanding the experiences of transgender persons lives in India, as it is often the only sense of support and belonging that allows them to survive the larger social fabric that marginalises and excludes them (Jose & Vinod, 2014). Thus, “transgender” as a term in the Indian context can be viewed as an evolving, unifying category resisting hegemony and binaries even within the LGBTQ+ umbrella for gender non-conforming individuals and groups as they collectively advocate for rights, equal citizenship, and social welfare (Chatterjee, 2018; Dutta & Roy, 2014).

2. Ethical Considerations and Methodology

The author has refrained from using gender binary suffix of women/ men while referring to transgender persons, also as a way of acknowledging and including subject-positions that do not always have rigid, coherent gender identities. The author has also tried to amplify research

from within the trans/ LGBTQ+ community where possible, in addition to studies from institutions that are trans friendly and work with the community.

Understanding the intricate ways in which colonial legacies continue to influence gendered experiences and notions of citizenship necessitates a comprehensive and nuanced analytical approach. To this end, this research adopts a multidisciplinary qualitative methodology, integrating critical legal analysis, decolonial theory, and gender studies perspectives. This approach enables an in-depth examination of the intersectionality of gender, sexuality, and the criminal justice system in India, drawing on statutory texts, legislative debates, judicial decisions, and policy documents. The interpretative framework is informed by decolonial theory to critically assess how legal structures either reproduce or challenge colonial gendered paradigms.

3. Decolonising the IPC/ BNS: A Case for Inclusive Legislation

The past few decades have seen a growing body of evidence detailing the pervasive and often brutal violence experienced by transgender and queer individuals, including physical and emotional abuse, sexual assault, and exploitation by family members, community members, and public officials. In *National Legal Services v. Union of India*, the Supreme Court of India identified and recognised that transgender individuals are disproportionately vulnerable to repeated instances of rape and sexual violence (Tyagi, 2022). As the community is inordinately affected by violence and discrimination, it also causes them to be a heightened risk of HIV infection (Setia et al., 2006, Chakrapani et al., 2011, Wilson et al., 2011, Shaw et al., 2012, as cited in Ganju & Saggruti, 2017). Those who engage in sex work, in particular, are vulnerable to a range of human rights abuses, including sexual and physical violence (Ganju & Saggruti, 2017).

This is compounded by the lack of access to safe and inclusive spaces, healthcare services, and legal protection which can exacerbate their vulnerability to violence and exploitation. Laws and legislations have evolved to provide greater protection and recognition of rights to transgender people, such as the Transgender Persons (Protection of Rights) Act of 2019 (Government of India, 2019). Amendments made to the (former) Indian Penal Code relating to sexual assault were made “to reflect the various kinds of sexual assault that women are subjected to in our country” (National Commission of Women, 2020). The Amendments were made after the case of *Sakshi v. Union of India* in 2004, to ensure that the laws against sexual assault covered offences against women and minor children, to include offences other than penile/ vaginal penetration. As per Section 375, 376, 354, and 509 of the IPC, the punishment for sexual assault may extend from 10 years to life imprisonment, and may also include a fine depending on the nature of the assault and the case.

Whereas as per Section 18 of the Transgender Persons (Protection of Rights) Act of 2019, “physical, sexual, verbal, and emotional abuse of transgender person is punishable by imprisonment of up to two years” (Government of India, 2019). This is a disturbing and discriminatory situation. The difference in punishment for sexual assault of a woman versus a transgender person in India is rooted in the country’s legal framework, historic context, and societal attitudes. Prior to *Navtej Singh Johar v. Union of India* in 2018, the IPC did not specifically address sexual assault against transgender individuals, by defining “rape” as an offence committed against a woman or a minor. Transgender individuals were not included in this definition. This meant that rape of a transgender individual was not considered a serious offence, and was often punished with a lighter sentence if at all. This is due to the fact that transgender individuals are often viewed as being outside the norms of gender and are subject to discrimination, violence, and abuse. Transgender individuals had a long history of

acceptance and respect in Indian society, with some even holding prominent positions in the royal courts until the downfall of the Mughal era. However, this societal tolerance and inclusion began to erode with the rise of colonialism in India, which ultimately led to the marginalisation and stigmatisation of transgender people which was upheld by the criminal justice system.

The Criminal Tribes Act of 1871 further institutionalised this persecution, allowing for the arbitrary arrest and imprisonment of transgender individuals who were deemed to be “dressed as a woman” in public or engaging in cultural practices such as dance or music. The act also required local authorities to register the names and addresses of transgender individuals suspected of crimes such as kidnapping or child castration, or those who were perceived as being involved in same-sex relations (Prakash, n.d.). Although the Criminal Tribes Act of 1871 was repealed by independent India in 1949, the stigma and marginalisation of the transgender community persisted, and they continued to face discrimination and violence for many years to come (Prakash, n.d.).

The evolution of the penal code particularly in the aftermath of *Navtej Singh Johar v. Union of India* which decriminalised consensual homosexual acts, has led to a more multi-faceted understanding on the issue of rights of LGBTQ+ individuals. While the introduction of changes to the BNS has brought about reforms to the legal landscape, particularly in relation to gender-related offences, it still falls short in addressing the inequalities faced by individuals who identify outside the gender binary, such as those in the LGBTQ+ community, by not adequately recognising, acknowledging, and protecting their rights within the framework (Shrivastava & Akhter, 2024; Kumar, 2023).

For instance, Section 377 of the IPC which was the section on “Unnatural Offences” which considered only peno-vaginal intercourse as natural, is not present in its entirety in the new BNS. While the intention is to create a legal framework that is gender neutral and eliminate the homophobia in Section 377, legal scholars argue (see for example Nanda, 2024) that it has resulted in the evolution of the law that disregards and is disconnected to the evolution of sexual offences in India, leaving out sexual offences committed on men, the LGBTQ+ community, men on men offences, men on transgender offences etc. The definition and understanding of gender and sexuality which impacts the scope of legal texts, is also further reflected for example in Section 141 of the BNS (against inbound trafficking of individuals), where the intent of being more gender neutral is reflected by replacing “importation of girl” in the text with “importation of girl or boy” (Bureau of Police Research and Development, 2023).

While seeking to work towards gender neutrality, the BNS aims to prioritise protection for women and children. However, it falls short by omitting a section on sexual offences against men and transgender individuals, perpetuating gender disparities. By maintaining rigid gender specifications for victims, it further perpetuates the notion that sexual assault is gender specific and can only be committed by a man on a woman/ child. In addition, despite landmark judgements that have recognised the entitlement of transgender persons’ to equality, the new BNS fails to extend the idea of inclusive language to transgender persons, and neglects to address the rights of LGBTQ+ individuals and their ongoing quest for comprehensive recognition and inclusion (Naik, 2024; Mankar & Pal, 2024).

4. Theorising the Boundaries of Knowledge in the Colonial/ Modern Gender System

Colonialism did not simply end with the end of the formal abolition of colonies, or the independence of former colonies. In his book *Transmodern Cinema and Decolonial Film*

Theory, Robert Beshara presents the idea of two forms of decolonisation: material decolonisation and ideological decolonisation (Beshara, 2024). Material decolonisation, as the name implies, involves “deoccupation, that is, undoing settler occupation” (Beshara, 2024) as what had occurred in the Indian subcontinent in 1947, when India gained independence from British rule. Material decolonisation without a simultaneous transformation of beliefs, value and culture—in other words ideological decolonisation—results in essentially a form of “neo-colonialism” which is signified by the continued political and economic dependence of post colonial nations on the former colonised nations in the Global North (Nkrumah, 1965, as cited in Beshara, 2024). Closely related to the idea, Anibal Quijano introduced the concept of “coloniality of power” (Quijano 2000, 2001), to describe the lasting impact of colonisation not only physically on its territories but also through the imposition of new epistemologies, power relations, and cultural (as well as legal) norms (Quijano 2000, 2001). Quijano further argues that such Euro-centered colonial domination introduced a lasting, formal structure of political domination of the colonised, and created colonial subjectivities (Quijano, 2007).

These intersubjective constructions were introduced as “objective” and “scientific” categories, and still remains within societal frameworks legitimising social relations of classes (Quijano, 2007). Thus, Quijano argues that coloniality and modernity/ rationality are in fact not neutral, universal concepts but rather very specific products of Western culture and history that stem from European Enlightenment values which shape the hegemonies of the colonised. The colonial imposition of European gender norms resulted in the creation of a heteronormative, cisgendered society in the Indian subcontinent as well as other common wealth countries. As a result, traditional gender roles and binary gender categories were introduced which marginalised and silenced non-normative genders, including queer and transgender individuals.

Such an imposition erased the rich complexity of gender identities and experiences, which under colonial rule began being pathologised as non-normative identities and sexualities. By classifying and “labelling” what used to be known as third gender persons in pre-colonial India, the persecution of transgender individuals began as they were considered to be “sick” or “abnormal”. This practice and view was formalised and upheld by colonial era laws, such as Section 377 of the IPC, and the Criminal tribes Act of 1871.

4.1 Transcending Eurocentric Gender Constructs

While examining the complexities of gender and sexuality in India’s criminal justice system, particularly the (new) Indian Penal Code, it is essential to challenge the dominant frameworks that shape our understanding of what we have come to consider as normative identities and relationships. Intersubjectivity, as a theoretical concept, refers to the shared understanding and mutual recognition between subjects upon which identity and social relationships come to be established.

By interrogating the frameworks governing gender and sexuality in the Indian Penal Code, both former Indian Penal code and the current *Bharatiya Nyaya Sanhita*, we open the door to decolonial thought, which has long emphasised the need to recognise diverse subjectivities which have been marginalised under hegemonic Eurocentric frameworks. Decolonial thinkers such as Enrique Dussel, Anibal Quijano, Maria Lugones, Robert Beshara etc., question the very dominance of these Eurocentric narratives. Dussel’s work in particular critiques how “Euro-modernity” itself is built on the silencing and exclusion of colonised subjects, thus requiring a rethinking of subjectivity that allows a recognition of the plurality of experiences and identities that have always existed outside the paradigms of Euro-modernity (Dussel, 1993). Dussel argues that the systems of knowledge and power that have been perpetuated by Eurocentrism and centuries of colonialism, have resulted in the creation of rigid epistemic boundaries that

marginalise non-Western perspectives (Dussel, 1993). The replication and assertion of these (colonial) modes of thinking, understanding, and existence through the assertion of universal claims/ ideas thus marginalise other ways of knowing and being (Sundberg, 2017).

In "Eurocentrism and Modernity", Dussel argues that the colonial encounter was also an intersubjective encounter between two different forms of consciousness, leading to a symbiotic dialectical relationship with each influencing the other, but the coloniser's dominant discourse ultimately lead to the imposition of its own perspective on the world (Dussel, 1993). Similarly, in the 'Coloniality of Power', Quijano theorises that social categories including gender and sexuality continue to persist in contemporary times through the very history of colonialism, thereby influencing modern-day discrimination and violence, rooted in what he calls the "coloniality of power" which is founded on the racial social classification of the global population within a Eurocentric framework (Quijano, 2007; Lugones, 2007).

Lugone's concept of "worlds" is also highly relevant for rethinking intersubjectivity which asserts that the the modern/colonial world is built upon many worlds—with different practices, relations, and logics—thus encouraging us to contemplate how many different forms of knowledge and ways of being actually coexist (Lugones, 1987)? The multiplicity of "worlds" also includes different histories and knowledge systems including feminist, queer, indigenous, and other marginalised perspectives comes into conflict with dominant, colonial, Eurocentric narratives (Lugones, 1987). Not very much unlike Quijano, central to Lugones' thesis is also the idea that Colonialism has resulted in the establishment of hierarchies of and within worlds, privileging knowledge system of the West while devaluing and silencing other ways of knowing and being (Quijano, 2007 b; Lugones, 2007).

In addition, Lugones also asserts that identities are not always fixed, and are in fact influenced by multiple demographic factors such as gender, race, class, and sexuality, each influencing the other while shaping what has come to be known as "identity", acknowledging which allows for a more nuanced understanding of identities and the interconnectedness that it actually represents (Lugones, 1994). By acknowledging the multiplicity of realities that Lugones describes, a decolonial approach in legislature would enable us to challenge the monolithic narratives regarding gender and sexuality that are present not just in the Indian Penal Code and Bharatiya Nyaya Sanhita, but are also being kept alive in the legal systems of many of the former colonies. Invoking Lugones' concept of multiple "worlds", provides us with an alternative framework for understanding gender and sexuality which pre-date colonial ideological and legal impositions.

The notion can be used even further to make a case for legal reformation that not just addresses how we look at gender and sexuality, but also how caste, class, and other marginalised identities such as disability shape the experiences of transgender individuals. A decolonial legal framework that acknowledges multiple worlds not only fundamentally shifts assumptions about gender and sexuality, but also would help in the creation of a legal system and discourse that is inclusive and equitable, while being reflective of the multiplicities that exist and are part of society and its diversity. María Lugones critiques the colonising tendencies within feminist theory itself stemming from its Eurocentricism arguing that feminist universalism often reinforces the same hierarchical and oppressive structures as colonial, capitalist, modern Western thinking, which reinforces colonial /modern logic of historic hierarchies that privilege dominant gender, racial, and sexual norms (Lugones, 1994; Mignolo, 2007). Thus, feminist universalism often replicates the same hierarchical and oppressive structures as colonial, capitalist, and modern Western thinking, which has historically privileged dominant gender, racial, and sexual norms (Lugones, 2010). This means that feminist universalism can

inadvertently perpetuate the same power imbalances and exclusions that have been embedded in colonialism, capitalism, and modernity.

This leads to a creation of an inter-subjectivity between the coloniser and the colonised, creating a conflict between the two opposing forces of capitalist colonial modernity, and decolonial materiality/ liberation theology (Lugones, 2007, 2010; Beshara, 2024). Thus, through centuries of colonialism, a profound alteration occurred in the sense of self-perception of the colonised when they were forced to adopt the perspective of the coloniser which can be understood as intersubjective domination—this includes following intersubjective logic also in social relations, dialogue, resistance, or legal discourse where the self cannot exist without the other (Sáñez, 2020). Pertinent to the current discussion of gender and sexuality within the broader context of Euro-modern influence on legislature, necessitates a decolonial approach that recognises and hears the voices of the subaltern, who have historically been rendered invisible in legislative discourse.

The enforcement of rigid epistemic boundaries is particularly evident in the legal and cultural frameworks surrounding gender and sexuality in many of the formerly colonised nations, where the rights of transgender individuals have been relegated to the peripheries of understanding, without much consideration to not just their specific experiences but also the violent nature of their victimisation which has evolved over centuries. The understanding of gender as enshrined in the Bharatiya Nyaya Sanhita as well as the former Indian Penal Code, has been shaped and retains its Eurocentric narrative and views on gender and sexuality stemming from the times of the Colonial era. Thus, the European gender perspective asserts itself not just as a normative standard, but also continues to perpetuate colonial legacies that have historically marginalised non-European experiences of gender and sexuality, viewing them as “other” or “deviant” (Nay & Steinbock, 2021).

This can be understood, for example, in the Penal Code’s reliance on a binary understanding of gender identity, placing limitations on the legal system on its response to violence and sexual crimes committed against individuals outside the “appropriate” gender binary. In the context of the criminal justice system of many of the former colonies, placing an emphasis on transgressing the boundaries of “modernity” could mean embracing alternate narratives and indigenous knowledge and perspectives, while also holding space and sensitivity within the legal system for intersectional experiences of minority communities such as the interplay of gender, caste, class, sexuality, poverty etc.

4.2 Decolonising Intersubjectivity

A decolonial approach to legislation would ofcourse then also necessitate a critical examination of existing laws through a social justice lens, in order to dismantle the prevailing narratives that reinforce systemic violence. By tracing our way through the introduction on the position, rights, history, subjectivities, and legal protection of transgender lives in India through the two types of decolonisation (ideological and material) as articulated by Robert Beshara in *Transmodern Cinema and Decolonial Film Theory* (Beshara, 2024), leads us to the heart of our discussion on coloniality/ modernity, and the histories of the oppressed and marginalised. This exploration makes a case for embracing the concept of *decolonising intersubjectivity*.

Decolonising intersubjectivity could be understood as a way of implementing ideological decolonisation, and would allow for example the transgender community to reclaim traditional respect, while challenging modernity's gaze. Such a conflict already seems to exist in the collective consciousness of individuals, as members of the transgender community are both respected (for example when their blessings are sought for new born babies and marriages), while at the same time also are highly discriminated against. This duality is further

compounded by the fact that the criminal justice system in many former colonies often perpetuate dominant narratives of gender and sexuality.

Decolonising intersubjectivity would subvert dominant narratives and challenge power imbalances that have enabled the perpetuation of discrimination against transgender individuals, whilst centering marginalised voices and experiences and recognising their agency, firstly by acknowledging that our understanding of gender and sexuality in legislature has in fact been influenced by our colonial histories. This has in turn lead to the imposition of rigid binaries and normative frameworks that are in dissonance with the lived experiences of diverse individuals and communities, including transgender individuals. Decolonising intersubjectivity would involve a re-examination, re-thinking, and re-structuring of how we perceive and engage with one another, with a nuanced and pluralistic appreciation of diversity and identities the way it was before centuries of colonialism.

This critical reframing would also permit one to delve upon the relationship between self and community, challenging the Euro-modern gaze that has historically reduced transgender individuals to marginalised subject positions. In doing so, it encourages us to unite in a conscious reflection of our rich history and culture, fostering a shift in the the narrative of transgender individuals being viewed as victims to empowered individuals with agency. T

his critical reframing would also serve as an incentive for both civil society and the legal system to acknowledge and take into account diverse voices whilst framing policy and legislature, by ensuring the legal system not just affirm but rather also celebrate the existence of transgender individuals as an integral part of social fabric, as it once were. Further, the concept also promotes a rethinking of community and solidarity amongst marginalised groups creating spaces where marginalised individuals express experiences and grievances without fear of discrimination. A supportive legal system that embraces pluralistic understanding of gender, one that embraces a spectrum of identities and promotes equality and social justice, would be essential for building bridges to our traditions and history whilst continuing to dismantle colonial legacies that have corroded the rights, identities, and inclusion of transgender individuals in India and many of the former colonies.

Such as paradigm shift that centres the agency of marginalised individuals would enable not just legal reform but also encourage social change that recognises and celebrates the rich tapestry of diversity in society—something our forefathers have known and celebrated, and as a concept continues to exist generation after generation in a relegated part of our collective consciousness. Lastly, the concept of decolonising intersubjectivity could be used to draw from histories and subjectivity of transgender individuals to argue towards a praxis of liberation that centres pluralistic ways of being and becoming, whilst critically rethinking how we practice being community.

5. Challenging legacies and Conclusion

Euromodernity is a historical and cultural context that has lead to the erasure of non-western forms of being, knowing, thinking, and becoming. The evolution of this discussion is evident from the way transgender people in India have been treated, criminalised, and discriminated against during the colonial times. The negation of the humanity of the other has been upheld and perpetuated in the criminal justice system and continues to cloud the very way in which they are perceived in the eyes of the non-other. *Decolonising intersubjectivity* involves recognising the embodied and embedded experiences of transgender persons as a valuable form of knowledge and understanding the experiences of marginalised communities.

Doing so and shifting the borders of the “normative Euromodern non-other”, would allow us to work beyond the narrative of transgender rights as being the sole of issue of an individual or a community, to understanding the complex interactions of factors, both social and biological, that shape an individual’s experience of discrimination, oppression, and marginalisation.

In this sense, *decolonising intersubjectivity* would enable us to shift away from the hegemonies of hierarchy and domination, to rethink and reposition our ideas of normativity thus shifting the burden of inclusion away from the shoulders of the marginalised just as we shift power and “normativity” away from the colonial/modern. Thus forms a new symbiosis that addresses the notion central to ideological decolonisation, which is shifting at a conscious level away from coloniality/ modernity by rethinking who the *other* in *non-other* shall be, leading to new ways of co-creating intersubjectivity.

References

- Aliverti, A., Carvalho, H., Chamberlen, A., & Sozzo, M. (2021). Decolonizing the criminal question. *Punishment & Society*, 23(3), 297–316. <https://doi.org/10.1177/14624745211001652>
- Ambedkar, B. R. (2014). *Annihilation of caste*. Navayana.
- Anderson, J. (2011). Conservative Christianity, the global south, and the battle over sexual orientation. *Third World Quarterly*, 32(9), 1589–1605. <https://doi.org/10.1080/01436597.2011.607690>
- Beshara, R. K. (2024). *Transmodern cinema and decolonial film theory: A study of Youssef Chahine's Al-Masir*. Bloomsbury Publishing.
- Bureau of Police Research and Development. (2023). *Ready reckoner: Tougher laws for sexual offences*. <https://bprd.nic.in/uploads/pdf/202401261019259420204Tougherlawsforsexualoffences.pdf>
- Chakrapani, V., Newman, P. A., Shunmugam, M., & Dubrow, R. (2011). Barriers to free antiretroviral treatment access among kothi-identified men who have sex with men and aravanis (transgender women) in Chennai, India. *AIDS Care*, 23(12), 1687–1694. <https://doi.org/10.1080/09540121.2011.558338>
- Chakrapani, V., Vijin, P. P., Logie, C. H., Newman, P. A., Shunmugam, M., Sivasubramanian, M., & Samuel, M. (2017). Assessment of a “transgender identity stigma” scale among trans women in India: Findings from exploratory and confirmatory factor analyses. *International Journal of Transgenderism*, 18(3), 271–281. <https://doi.org/10.1080/15532739.2016.1153268>
- Chakrapani, V., Newman, P. A., & Noronha, E. (2018). Hijras/ transwomen and sex work in India: From marginalization to social protection. In L. Nuttbrock (Ed.), *Transgender Sex Work and Society* (pp. 214–235). Harrington Park Press.
- Chatterjee, S. (2018). Transgender shifts: Notes on resignification of gender and sexuality in India. *Transgender Studies Quarterly*, 5(3), 311–320. <https://doi.org/10.1215/23289252-6939107>
- Chua, L. J., & Hor, M. (2016). Focus: The life and future of British colonial sexual regulation in Asia. *Hong Kong Law Journal*, 46(1), 1–8.
- Dixit, P. (2020). Navtej Singh Johar v. Union of India: Decriminalising India’s sodomy law. *The International Journal of Human Rights*, 24(8), 1011–1030. <https://doi.org/10.1080/13642987.2020.1766101>

- Dussel, E. (1993). Eurocentrism and modernity (Introduction to the Frankfurt Lectures). *boundary 2*, 20(3), 65–76. <https://doi.org/10.2307/29762421>
- Dutta, A. (2013). An epistemology of collusion: Hijras, kothis, and the historical (dis)continuity of gender/sexual identities in eastern India. In *Gender history across epistemologies* (pp. 305–329). <https://doi.org/10.1002/9781118508206.ch14>
- Dutta, A., & Roy, R. (2014). Decolonizing transgender in India: Some reflections. *Transgender Studies Quarterly*, 1(3), 320–337. <https://doi.org/10.1215/23289252-2682578>
- Ganju, D., & Saggurti, N. (2017). Stigma, violence, and HIV vulnerability among transgender persons in sex work in Maharashtra, India. *Culture, Health & Sexuality*, 19(8), 903–917. <https://doi.org/10.1080/13691058.2016.1248748>
- Godfrey, B., & Dunstall, G. (Eds.). (2005). *Crime and empire 1840–1940: Criminal justice in local and global context*. Willan.
- Hinchy, J. (2019). *Governing gender and sexuality in colonial India: The Hijra, c. 1850–1900*. Cambridge University Press. <https://doi.org/10.1017/9781108592208>
- Hossain, A. (2012). Beyond emasculation: Being Muslim and becoming hijra in South Asia. *Asian Studies Review*, 36(4), 495–513. <https://doi.org/10.1080/10357823.2012.733422>
- Government of India. (1860). Indian Penal Code. <https://www.indiacode.nic.in/repealedfileopen?filename=A1860-45.pdf>
- Government of India. (2019). *The Transgender Persons (Protection of Rights) Act*. <https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf>
- Government of India. (2024). Bharatiya Nyaya Sanhita. <https://bharatiyanayayasanhita.online/bns/>
- Jose, J. P., & Vinod, V. C. (2014). Sexual identity and psychosocial disabilities of transgender women in India: A social exclusion perspective. *Voice of Dalit*, 7(1), 95–104. <https://doi.org/10.1177/0974354520140106>
- Kalra, G. (2012). Hijras: The unique transgender culture of India. *International Journal of Culture and Mental Health*, 5(2), 121–126. <https://doi.org/10.1080/17542863.2011.570915>
- Kumar, A. K. S. (2023). The Bharatiya Nyaya (Second) Sanhita 2023: An integrated perspective—a comprehensive study and analysis. *Jus Corpus LJ*, 4, 350.
- Lal, V. (1999). Not this, not that: The Hijras of India and the cultural politics of sexuality. *Social Text*, (61), 119–140.
- Lugones, M. (1987). Playfulness, “world”-traveling, and loving perception. *Hypatia*, 2(2), 3–19. <https://doi.org/10.1111/j.1527-2001.1987.tb01062.x>
- Lugones, M. (1994). Purity, impurity, and separation. *Signs: Journal of Women in Culture and Society*, 19(2), 458–479. <https://doi.org/10.1086/494893>
- Lugones, M. (2007). Heterosexualism and the colonial/modern gender system. *Hypatia*, 22(1), 186–219. <https://doi.org/10.1111/j.1527-2001.2007.tb01156.x>
- Lugones, M. (2010). Toward a decolonial feminism. *Hypatia*, 25(4), 742–759. <https://doi.org/10.1111/j.1527-2001.2010.01137.x>
- Mankar, D., & Pal, K. (2024). A spectrum of rights: A legal odyssey of LGBTQIA+ rights in India. In: *The Palgrave Handbook of Global Social Problems* (pp. 1–15). Springer International Publishing. https://doi.org/10.1007/978-3-030-68127-2_566-1

- Mawani, R. (2015). Law and colonialism: Legacies and lineages. In: *The Handbook of Law and Society* (pp. 417–432). <https://doi.org/10.1002/9781118701430.ch27>
- Mignolo, W. D. (2007). Delinking: The rhetoric of modernity, the logic of coloniality, and the grammar of de-coloniality. *Cultural Studies*, 21(2–3), 449–514. <https://doi.org/10.1080/09502380601162647>
- Mount, L. (2020). “I am not a hijra”: Class, respectability, and the emergence of the “new” transgender woman in India. *Urban Affairs Review*, 34(4), 236–272. <https://doi.org/10.1177/0891243220932275>
- Mukherjee, U. (2003). *Crime and empire: The colony in nineteenth-century fictions of crime*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199261055.001.0001>
- Naik, Y. (2024). *The Bharatiya Nyaya Sanhita (BNS): A critical examination of India's new penal code*. SSRN. <https://doi.org/10.2139/ssrn.4884622>
- Nanda, S. (1986). The hijras of India: Cultural and individual dimensions of an institutionalized third gender role. *Journal of Homosexuality*, 11(3–4), 35–54. https://doi.org/10.1300/J082v11n03_03
- Nanda, S. (1990). *Neither man nor woman*. Wadsworth Modern Anthropology Library.
- Nanda, V. R. (2024). Beyond Navtej Singh Johar judgement: Analysing the persistent ambiguity in Section 177. *Indian Journal of Integrated Research in Law*, 4(3).
- National Commission for Women. (2020). *Amendments to laws relating to rape and related provisions*. <https://ncwapps.nic.in/PDFFiles/Amendments%20to%20laws%20relating%20to%20women.pdf>
- Nay, Y. E., & Steinbock, E. (2021). Critical trans studies in and beyond Europe: Histories, methods, and institutions. *Transgender Studies Quarterly*, 8(2), 145–157. <https://doi.org/10.1215/23289252-8890509>
- Nyanzi, S. (2013). Dismantling reified African culture through localised homosexualities in Uganda. *Culture, Health & Sexuality*, 15(8), 952–967. <https://doi.org/10.1080/13691058.2013.798684>
- Peletz, M. G. (2009). *Gender pluralism: Southeast Asia since early modern times*. Routledge. <https://doi.org/10.4324/9780203880043>
- Penrose, W. (2006). Colliding cultures: Masculinity and homoeroticism in Mughal and early colonial South Asia. In: *Queer Masculinities, 1550–1800: Siting Same-Sex Desire in the Early Modern World* (pp. 144–165). Palgrave Macmillan UK. https://doi.org/10.1057/9780230524156_9
- Prakash, S. (n.d.). Recognising transgener Rapes in India. *Legal Service India E-Journal*. Retrieved from: <https://www.legalserviceindia.com/legal/article-6137-recognizing-transgender-rapes-in-india.html>
- Preston, L. W. (1987). A right to exist: Eunuchs and the state in nineteenth-century India. *Modern Asian Studies*, 21(2), 371–387. <https://doi.org/10.1017/S0026749X00013858>
- Sundberg, J. (2014). Decolonizing posthumanist geographies. *Cultural Geographies*, 21(1), 33–47. <https://doi.org/10.1177/1474474013486067>
- Quijano, A. (2007). Coloniality and modernity/rationality. *Cultural Studies*, 21(2–3), 168–178. <https://doi.org/10.1080/09502380601164353>

- Rajah, V., Palmer, J. E., & Duggan, M. (2022). The personal is political and so is discomfort: Intersectional, anti-racist praxis in feminist criminology. *Race and Justice*, 12(3), 548–568. <https://doi.org/10.1177/21533687221101793>
- Quijano, A. (2007b). Questioning “race”. *Socialism and Democracy*, 21(1), 45–53. <https://doi.org/10.1080/08854300601116704>
- Reddy, G. (2005). *With respect to sex: Negotiating hijra identity in South India*. University of Chicago Press. <https://doi.org/10.7208/chicago/9780226707549.001.0001>
- Sánchez, M. (2020). *Pueblo and exteriority. On the thought of Enrique Dussel*. In S. H. Hosseini, J. Goodman, S. C. Motta, & B. K. Gills (Eds.), *The Routledge handbook of transformative global studies*. Routledge. <https://doi.org/10.4324/9780429470325-9>
- Setia, M. S., Lindan, C., Jerajani, H. R., Kumta, S., Ekstrand, M., Mathur, M., ... & Klausner, J. D. (2006). Men who have sex with men and transgenders in Mumbai, India: An emerging risk group for STIs and HIV. *Indian Journal of Dermatology, Venereology and Leprology*, 72, 425. <https://doi.org/10.4103/0378-6323.29338>
- Shaw SY, Lorway RR, Deering KN, et al. (2012). Factors associated with sexual violence against men who have sex with men and transgendered individuals in Karnataka, India. *PLoS ONE*, 7(3): e31705. <https://doi.org/10.1371/journal.pone.0031705>
- Shing, L. J., & Kher, C. (2003). Saying no: Sections 377 and 377A of the Penal Code. *Singapore Journal of Legal Studies*, 209.
- Shrivastava, H., & Akhter, S. (2024). A comparative study of the Indian Penal Code and the Bharatiya Nyaya Sanhita's gender-related provisions. *Statute Law Review*, 45(2). <https://doi.org/10.1093/slr/hmae033>
- Tyagi, A. (2022). Transrights against sexual offences in India: Is protection from Rape still a far cry? *The Criminal Law Blog*. <https://criminallawstudiesnluj.wordpress.com/2022/01/29/trans-rights-against-sexualoffences-in-india-is-protection-from-rape-still-a-far-cry/>
- Uma, S. (2024). Why the Bharatiya Nyay Sanhita is a missed opportunity for gender justice. *The Wire*.
- Wilson, E., Pant, S. B., Comfort, M., & Ekstrand, M. (2011). Stigma and HIV risk among Metis in Nepal. *Culture, Health & Sexuality*, 13(3), 253–266. <https://doi.org/10.1080/13691058.2010.524247>
- Yu, P., & Liu, J. (2024). The theoretical contributions of Asian criminology in reconstructing criminology. *International Journal for Crime, Justice and Social Democracy*, 13(2), 33–44. <https://doi.org/10.5204/ijcjsd.2950>