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# **Medico-Legal Assemblages Of Sexuality** **Crimes In Colonial India**

Authored By: Harshit Pande

This paper is divided into three parts. Part one will examine the relevance of the category of the 'medico-legal' in the context of sexuality. Part two will examine the utility of the category of the 'medico-legal' in analysing some aspects of the colonial period. Part three will delve into the deployment of the category of the 'medico-legal' in governing non-normative gender identity expressions and sexualities, including an analysis of the 'eunuch'/Hijrah and the 'homosexual' and the constitutive medico-legal assemblages that tended to criminalise the conduct of persons so labelled.

## **Part One: The Meaning Of 'Medico-Legal' In The** **Context Of Sexuality**

The use of medicine, like the use of sociology, as a means to gather information and produce knowledges on 'governing categories' was a crucial project that the colonial administration undertook in India (Levine, 2000). The information-gathering and processing were both constitutive and descriptive of governing categories subsequently produced, a complex process that involved sociological, medical and legal regimes aimed at aiding the administration in exercising a degree of control (real or imagined) over the lives and the bodies of its subjects.

The significance of the 'medical' as a tool of 'governmental' control has been explored by several scholars in several different contexts. Michel Foucault, most importantly, narrates the use of medicine (particularly psychiatry) as a means of control in several of his works, beginning with the *Birth of the Clinic*. In the paragraphs that follow, we revisit Foucault with the purpose of understanding the critical importance of the category of the 'medico-legal' and its deployment in / relationship with governing sexuality.

Foucault, in the first volume of his seminal *History of Sexuality* (1990), subverts the "repressive hypothesis" which tended to posit that the Victorians chose to silence and not talk about sexuality in general and non-normative sexuality in particular, and makes the claim that the scientific / academic /

criminological discourse on sexuality proliferated in the 19<sup>th</sup> century. Foucault maintains that the development of sexuality as a field of scientific research parallels the development of modern criminal law (in the sense that criminality became a field of scientific research, just like sexuality did). According to Foucault, the power that underlies the science of sexuality is not only external i.e. exercised by, say, the physician, the psychiatrist and the like, but also inverted and experienced internally, as the persons subjected to this knowledge regime internalise the norms of the science and self-scrutinise. They are, thus, controlled as objects of the disciplines so formed, and also as self-constituting subjects that engage in scrutinising their behaviour.

Foucault discusses how sexuality, thus formed as an area of inquiry, determines several other aspects of being (such as moral worth, health, desire, identity and intimacy), highlighting in particular how modern sexuality mimics the religious practice of confession. A therapist or a doctor thus dons the robes of a priest. Foucault highlights the link between sexuality and ‘truth’, noting how the discourse on sexuality appears as a means to inform the self of ‘scientific truths’ about the self. (Foucault, 1990, p. 59)

Foucault claims that our experiences and understanding of sexuality flows from specific cultural conventions and mechanisms of power and cannot exist independently of them. Foucault, in opposing the repressive hypothesis, characterises power as essentially productive, not repressive. Power operates not through repression but through producing (by means of cultural and scientific practices) the ways and conditions in which we experience our sexuality. Foucault arrives at the conclusion that power relations are “the internal conditions” of sexual identities. (Foucault, 1990, p. 94)

Foucault, thus, through an examination of sexuality, arrives at an important point. He says that the loci of power are spread (although unevenly) among the various intertwining, overlapping networks throughout the society. At the interstices of these networks, subjects are constantly in the process of being constituted / reconstituted. The idea of the medico-legal thus emerges from the complex interlinkages between medicine and the law, located within the framework of the knowledge/power paradigm. The medical and the legal regimes, thus, are instrumental in creating the category of the homosexual (or any other kind of sexual expression). Foucault, speaking about the development of the category of the sexual deviant, writes:

“This new persecution of the peripheral sexualities entailed an incorporation of perversions and a new specification of individuals. As defined by the ancient civil or canonical codes, sodomy was a

category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. *The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology.* Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature. *We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized-Westphal's famous article of 1870 on "contrary sexual sensations" can stand as its date of birth - less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.*" [Emphasis mine.] (Foucault, 1990, p. 43)

Medical and legal regimes constitute the category of the sexual deviant, differentiating between the sodomite (as a person who committed sodomy, i.e. a person performing an act) and the homosexual (as a person who is a homosexual person, i.e. as a way of being). Medical and legal regimes operating in Europe received a further 'bout' of inflexion when they operate in a colonial setting (marked by differentials of race, ethnicity, religion and other such categories).

## **Part Two: The Meaning Of 'Medico-Legal' In The Context Of Colonialism (Medicine And Medico-Legal Jurisprudence)**

The deployment of the medico-legal in a colonial context offers interesting insights into the functioning of colonial power. Several scholars have utilised the category of the medico-legal in examining different aspects of colonialism. Mitra Sharafi (2021) uses 'medico-legal' as a standard with which to examine the development and enforcement of abortion law in India. Elizabeth Kolsky (2010), likewise, uses the category of the medico-legal to examine the development of rape jurisprudence since the codification of criminal (procedural and substantive) and evidence law. Sinha (1995) utilises the category of the medico-legal to examine the concerns surrounding the effeminacy of Bengali men. David Arnold (2004), in particular, highlights the racially charged, biologically essentialist narratives on the different races of Indians (as Europeans saw them), using a medical

vocabulary to foster racial and ethnic differences. Most interestingly, and most relevant to the task at hand, David Arnold's *Colonizing the Body* (1993) is an exploration of the medical regime in colonial India, with specific reference to several epidemics (smallpox, cholera and plague). Arnold utilises Foucault's power/knowledge paradigm to establish the fact that the practice of Western medicine in India was not an exercise in benevolence but a coercive exercise in control. Arnold analyses how prisons and barracks, which he referred to as "colonial enclaves" (Arnold, 1993, pp. 61-115) served as laboratories and observatories of medical practice. Arnold also refers to the practice by British medical professionals of "orientalising" India's tropical climate, that tended to highlight the vulnerabilities of the non-natives (Europeans, mostly) to several diseases to which the natives had (by virtue of their continued presence and adaptation to the local environment) attained a level of immunity. Arnold's analysis of colonial medicine provides important insights into the working of colonial power. Arnold writes: "The history of colonial medicine, and of the epidemic diseases with which it was so closely entwined serves to illustrate the more general nature of colonial power and knowledge and to illuminate its hegemonic as well as its coercive processes." Arnold highlights the critical importance of the 'body' as a slate upon which the forces of colonialism etched, calling it the "corporality of colonialism". The broader aims of western medicine, far from the benevolent public health uses of it, were directed towards colonising native bodies. Arnold writes: "Western medicine was intimately bound up with the nature and aspirations of the colonial state itself." (1993, p. 9)

According to Arnold, the practice of medicine maybe be located in a "diverse array of ideological and administrative mechanisms by which an emerging system of knowledge and power extended itself into and over India's indigenous society." (1993, p. 9) Arnold also notes that the nature of medical interaction between the colonial administration and the natives was almost always coercive. He also highlights the fact that western medicine was not just transplanted into the subcontinent but was developed and transformed by its presence and practices on the subcontinent.

Western medical practice viewed "orientalised India" as "a land of dirt and disease, of lethargy and superstition, of backwardness and barbarity", in sharp contradistinction to the "coolheaded rationality and science, the purposeful dynamism, and the paternalistic humanitarianism of the West." (1993, p. 292) Thus, western medicine was often deployed as a tool in the West's "civilizing mission". Biomedicine, thus, far from being a "universal truth" was rife with intrinsic contradictions brought about by the colonial impulses of "othering" the colonized. Thus, the history of western medicine in India is a history of coercive and hegemonic practices.

The field of forensics also forms a critical link between the medical and the legal. Singh (2021), in his article on the deployment of forensic sciences in colonial India, examines the coerciveness inherent in the practice of forensics. While the colonial administration relied on the field of forensics as a scientific means to gather reliable evidence in criminal processes, the repression inherent in the practice served to further the governmentalized operations of the colonial power. Not to mention the fact that the codification of evidence law gave weight to forensic evidence and expert witnesses in criminal proceedings, producing various categories of criminals such as “the infanticidal woman”, “the homosexual”, “the eunuch”, the prostitute, “the respectable” (as against the unrespectable “others”). While the practice may have been introduced with the seemingly innocuous goal of protecting innocent subjects and punishing the ‘criminal’, Singh documents rampant abuse, violence and repression in the practice of forensics. Evidentiary standards both produced criminal categories and paved way for their regulation or elimination. Arondekar (2009), quoting from Norman Chever’s *A Manual of Medical Jurisprudence for India: Including the Outline of a History of Crime Against the Person in India (1870)*, writes: “After long opportunity of becoming acquainted with the people of India, *we freely admit that these legal opinions upon their character are of infinite value in court—but nowhere else.*” [Emphasis mine]

### **Part Three: Criminal Law And The ‘Sexual Deviant’:** **Legal Control And Elimination**

Before we begin this section, bear in mind the two criminal statutes that penalised the conduct of the homosexual and the eunuch: Section 377 of the Indian Penal Code, and Part II of the Criminal Tribes Act. In addition, the evidentiary standards codified by means of the Indian Evidence Act are also relevant in considering the overall impact of criminal law and criminal procedure in creating criminal categories.

The purpose of the category of the ‘medico-legal’, of course, is to render the body (that is sought to be governed) ‘legible’. Anderson (2004) has delved into the concept of making bodies legible through her study of the “tattoos” inscribed on the bodies of prisoners. Forensic knowledge tends to discharge a similar burden of rendering the body ‘legible’ for the purposes of a court of law. The intricate and detailed forensic descriptions of the bodies suspected of committing offences such as those of sodomy (and other crimes against persons) made it easier for colonial courts to reach their decisions as regards the criminality of the suspects. Arondekar (2009, pp. 89-90) writes: “...medical jurisprudence’s

narrative precision (the exact shape of the wound, the types of angles) makes unnatural offences visible (and invisible) in a language that no criminal court can deny.” *Queen Empress v. Khairati*, ILR (1884) 6 All 204 was a case where one Khairati was arrested and prosecuted under Section 377 of the IPC on the suspicion that he was a “habitual sodomite”. While the Allahabad High Court later acquitted him/them for lack of adequate evidence, the Sessions Judge reached his decision based on expert reports filed by the civil surgeon. The Judge had made the following statement, which exemplifies the intersection of the medical and the legal and its association with criminalising an identity: “... ‘This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. ***Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite—the distortion of the orifice of the anus into the shape of a trumpet—and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.***” [Emphasis mine.]

The case, quoted above, relied significantly on the evidence provided by the civil surgeon’s examination of the person’s body. Arondekar writes, “Medical jurisprudence provided the most irrefutable testimony against Khairati, a testimony that spoke the “truth” of the body even as the body eluded the judicial requirements of its crime. To a large extent, medical jurisprudence, as in the Khairati case, became the most reliable truth technology of a colonial legal system ravaged by disputes over witness unreliability, codification, and orders of evidence. That is, as legal medicine gathered disciplinary force, it mobilized distinctly ethnographic knowledge to produce its truth value in court.” (Arondekar, 2009, pp. 85-90)

With regard to sexual deviance within prisons, the “colonial enclaves” of prisons offered the colonial administration the opportunity to test their theories of sexuality in controlled settings. Ludwig (2013) notes how the colonial engagement with “unnatural vice” was essentially an exercise in knowledge gathering and production, that fed into European theories of sexual identities. Ludwig’s research has revealed the various issues surrounding sodomy in the Port Blair prison and how the colonial administration used the prison as an opportunity to create ethnic differentials, where Pathans, Sindhis and Burmans were categorised as “naturally addicted to ‘unnatural vice’.” (Ludwig, 2013, p. 10) Arnold’s “colonial enclaves” served as laboratories within which sociological and scientific theories of sexualities could be tested, and information gathering could occur.

This, of course, was in addition to the colonial task of creating governing categories and applying the criminal law on them to produce “regulable” or “exterminable” subjects. The subverted masculinities of the eunuchs and the homosexuals, and the insistence / resistances of the people so labelled posed serious challenges to colonial administration in much the same way as prostitution did. (Ludwig, 2019) The colonial project ran into difficulties when it stumbled upon the ‘uncategorizable’, the deviant. As Levine (2000) has detailed, the colonial officials found it incredibly difficult to outline what constituted a “common prostitute”, but this difficulty of being unable to categorise did not impact their ability to create a set-up of informal categorisations and taxonomies that aided their attempts to regulate prostitution. The colonial administration took note of the subversion of gender and sexual norms by the homosexuals and the eunuchs. The ‘otherizing’ instinct that tends to permeate the colonial administrator’s mind takes particularly virulent forms when it comes across the body of the homosexual and the body of the eunuch. Closely associated with the will to count (or the will to document) is the will to regulate/register and the will to extirpate. The “extirpative” impulse that abounds colonial governmentality sought ways to ‘discover’ the eunuch and ultimately render ‘it’ sterile, non-existent, no longer posing a threat to the colonial order. Jessica Hinchy (Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900, 2019) has written extensively about the category of the ‘eunuch’ or the *Hijrah* in colonial India.

The impulse to exterminate was not hidden. Hinchy highlights the explicit motives with which the law surrounding the registration and regulation of the Hijrah identity was operationalised. (Hinchy, ‘The Sexual Politics of Imperial Expansion: Eunuchs and Indirect Colonial Rule in Mid Nineteenth Century North India, 2014) She writes, “British administrators claimed that Hijras – or ‘eunuchs’ in colonial parlance – were ‘habitual sodomites’, beggars, an obscene presence in public space and the kidnapers and castrators of children.” As per her archival research, Hinchy reveals that in 1865, the “North Western Province declared that its aim was to ‘reduce’ the number of ‘eunuchs’ and thus ‘gradually lead to their extinction’. The province launched an anti-‘eunuch’ campaign that had the explicit goal of ‘extirpating’ or ‘exterminating’ the Hijra community.”

The process of elimination was codified in 1871 with the passing of the Criminal Tribes Act. While Part I of the Criminal Tribes Act deals specifically with “criminal tribes” i.e. tribes whose members were considered hereditary criminals owing to the caste that they belonged to, it was crucially Part II of the Criminal Tribes Act that focused on the registration and eventual elimination of the Hijras. By means of this Act, the colonial administration sought to closely monitor and police the gender performance, domestic arrangements and livelihoods of the Hijras.

Under the Criminal Tribes Act, the police were empowered to surveil the activities of people who were “reasonably suspected” of committing sodomy and who were thought to indulge in kidnapping and castration of children. The surveillance powers of the police extended to registering persons so suspected and preventing them from wearing women’s clothes, preventing their public performances, removal of children from the households of the people concerned. (Hinchy, *Deviant Domesticities and Sexualised Childhoods: Female Prostitutes, Eunuchs and the Limits of the State Child “Rescue” Mission in Colonial India*, 2014) The Act was also meant to disrupt the traditional Hijra practice of discipleship and succession. It was clear that the short term aims of the Act were to eliminate public presence of the Hijras by removing them from public square and denying them their gender expression, and the long-term aim of the Act was to eliminate the category of the Hijra itself. (Hinchy, *Troubling bodies: ‘eunuchs,’ masculinity and impotence in colonial North India.*, 2013)

The Hijra question, more than the homosexual question, is interesting for several reasons. While the homosexual was an individual, the hijra or the eunuch, on the other hand, was a community bound by traditions such as the guru-chela relationships and complex socio-cultural histories that varied across the subcontinent. The colonial administration, including the natives that formed a part of the colonial administration, saw Hijras as a “race” that posed a threat to the broader community. There was moral panic surrounding a number of perceived threats from the Hijra community, such as abduction and castration of children, subverted gender performances and perceived issues of hygiene. It was believed that the Hijra community “reproduced” by means of castration. Of course, the act of castration was penalised under the Indian Penal Code (sections relating to bodily harm), but special attention was paid to the act of castration in relation to the Hijra community because it was believed that the community could increase its numbers / population by means of castrating young boys. Hinchy notes, “The nineteenth-century privileging of the conjugal family unit is part of the story of why khwajasarais were labelled politically “corrupt,” and why hijra households and kothas were derided as “deviant” domesticities.” Hinchy notes the anxieties surrounding the protection of children that led to colonial interventions in Hijra households. (Hinchy, *Deviant Domesticities and Sexualised Childhoods: Female Prostitutes, Eunuchs and the Limits of the State Child “Rescue” Mission in Colonial India*, 2014)

The use of criminal law and, in particular, the reliance on medical and forensic standards to prosecute suspect categories established a regime of medico-legal documentation and surveillance that sought to control the lives and the bodies of the homosexuals and the eunuchs.

The eunuch and the homosexual were produced at the interstices of criminal law and medical and forensic sciences. The medico-legal regimes were instrumental in constituting these new criminal categories. When sexual deviance intersected with differentials of race and ethnicity, it produced conditions suitable for operationalising the new sciences in aid of the colonial state's objectives. The category of the medico-legal (as a domain of historical inquiry) thus offers a useful lens to examine the production / constitution of newer criminal categories, and the operation of colonial baggage inherited by the postcolony.

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