

Transgender Persons and Prostitution in India: A Socio-Legal Research Study

Aayuushi Pandey¹, Dr. Anoop Kumar Singh², Ashwary Ghuley³

¹Research Scholar, Government Law College, Rewa, MP

^{2,3}Government Law College, Rewa, MP

Abstract

Transgender individuals in India have historically occupied marginal positions in society, often pushed into stigmatized forms of labour, including sex work. Despite constitutional guarantees of equality and landmark judicial recognition of transgender rights, a large proportion of transgender persons continue to face structural discrimination that restricts access to education, employment, housing, and healthcare—factors contributing to their over-representation in sex work. This research paper examines the relationship between transgender identity and prostitution in India, analyzing the socio-economic drivers, legal frameworks, policing practices, human rights concerns, and policy gaps. The study draws from statutory law, judicial precedents, and socio-legal scholarship to propose reforms aligned with dignity, autonomy, and human rights principles.

1. Introduction

Prostitution in India occupies a complicated legal and moral space—neither entirely legal nor explicitly criminalized. While the law targets activities surrounding prostitution (such as brothel-keeping or soliciting), the act of sex work itself is not a criminal offense. Within this landscape, transgender persons—especially hijra and kinnar communities—are disproportionately involved in sex work due to structural marginalization. Despite recognition of transgender persons as a third gender in *National Legal Services Authority (NALSA) v. Union of India* (2014), societal stigma and institutional exclusion persist.

This research explores how intersecting forms of discrimination—gender identity, caste, class, and sexuality—shape transgender participation in sex work. It investigates the contradictions between protective legislation and punitive policing, ultimately advocating for rights-based legal reforms.

2. Historical Context of Transgender Communities in India

The hijra community has historically held cultural and religious significance, with references found in Mughal courts, Hindu epics, and medieval literature. Their traditional sources of livelihood—*badhai* (ritual blessings), *mangti* (alms), and performance—have declined because of societal changes.

Colonial laws, such as the *Criminal Tribes Act, 1871*, labeled entire communities as “habitually criminal,” setting a legacy of stigmatization. Many of these colonial prejudices still influence public perception, contributing to social exclusion and economic vulnerability.

3. Socio-Economic Factors Driving Transgender Sex Work

3.1. Structural Marginalization

Transgender individuals face:

- Family rejection and early homelessness
- School-based discrimination and dropout
- Limited access to formal employment
- Housing discrimination
- Denial of healthcare and social security

These factors create a cycle of exclusion, pushing many individuals towards sex work as a survival strategy.

3.2. Lack of Employment Opportunities

Despite judicial recognition, workplaces rarely implement inclusive hiring. Discrimination during recruitment, ridicule from co-workers, and absence of gender-affirming infrastructure (toilets, HR policies) further limit employment.

3.3. Economic Pressures and Community Networks

For many hijra communities, joining *gharanas* provides emotional and social support. However, traditional community structures often rely on sex work as a major income source.

3.4. Intersectional Vulnerability

Transgender sex workers often belong to Dalit or lower-caste backgrounds, compounding the vulnerability caused by gender identity.

4. Legal Framework Governing Prostitution in India

4.1. Immoral Traffic (Prevention) Act, 1956 (ITPA)

The ITPA criminalizes activities such as:

- Running a brothel
- Living on the earnings of prostitution
- Public solicitation
- Prostitution near public places (hospitals, schools, temples)

Although prostitution itself is not illegal, these provisions allow the police to target sex workers, particularly transgender persons who are more visible on the streets.

4.2. New Criminal Laws (2023) and Their Impact

India replaced the IPC, CrPC, and Evidence Act with:

- **Bharatiya Nyaya Sanhita (BNS), 2023**
- **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**
- **Bharatiya Sakshya Adhinyam (BSA), 2023**

Relevant provisions include:

- **Sexual offenses:** expanded definitions that recognize diverse identities, offering potential protections
- **Public nuisance & indecency:** continue to be used disproportionately against transgender sex workers
- **Expanded police powers under BNSS** may intensify harassment

No explicit protections for sex workers exist in the new criminal codes, leaving transgender persons vulnerable to moral policing.

Below is an expanded and **much more detailed section on the New Criminal Laws (2023)** and their impact on transgender sex workers in India. If you want this inserted into the full research paper, formatted, or converted into a Word file, I can do that next.

India's new criminal law regime—effective **1 July 2024**—marks a major shift from colonial-era statutes. The **Bharatiya Nyaya Sanhita (BNS) 2023**, **Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023**, and **Bharatiya Sakshya Adhinyam (BSA) 2023** replaced the IPC, CrPC, and Evidence Act. While these new laws claim to modernize criminal justice, their implications for marginalized communities—especially **transgender sex workers**—are significant.

Although none of the new codes specifically target sex work, multiple provisions indirectly affect transgender persons engaged in prostitution through enhanced police powers, expanded definitions, and ambiguous language that can enable over-policing.

Bharatiya Nyaya Sanhita (BNS), 2023: Substantive Criminal Law

1.1. Public Indecency, Obscenity, and “Public Morality” Offenses

Although sex work itself is not criminalized, transgender sex workers face harassment under:

- **BNS Section 285:** *Acts endangering the public morality or decency.*
- **BNS Section 287:** *Public nuisance* through “obscene” or “indecent” acts.

These sections are drafted broadly, leaving interpretation to police discretion. Transgender sex workers who solicit clients on streets are frequently targeted for “public decency” violations due to moral prejudice, not actual criminal behavior.

Impact:

- Reinforces visibility-based policing: transgender bodies in public spaces are read as “obscene.”
- Increased scope for arbitrary detentions.
- Continuation of colonial morality embedded in the earlier IPC.

1.2. Kidnapping, Trafficking, and Exploitation Provisions

The BNS consolidates and expands trafficking-related offenses:

- **BNS Section 144–150:** Comprehensive anti-trafficking framework.
- Higher minimum sentences.
- Broader definitions of exploitation.

Implications:

- While intended to curb trafficking, authorities often conflate **consensual sex work** with **trafficking**.
- Transgender sex workers fear “rescue raids” leading to detention in government homes, which function as punitive confinement.
- Community gharanas may be wrongly classified as “organized exploitation.”

1.3. Sexual Offenses and Gender-Neutral Definitions

The BNS introduces:

- **Gender-neutral sexual assault provisions.**
- Definitions recognizing “any person” as a victim or perpetrator.
- Provisions covering digital/virtual forms of abuse.

Positive Developments for Transgender Persons:

- Transgender sex workers, who often face sexual violence, can now file complaints without having to fit binary gender categories.
- Recognizes rape and assault against transgender persons legally.

Challenges:

- Despite legal recognition, police often refuse FIRs from transgender victims.
- Social stigma leads to under-reporting.

1.4. Habitual Offender Provisions

BNS includes enhanced penalties for “habitual offenders.”

Because transgender persons are frequently arrested under nuisance or solicitation charges, they may be misclassified as habitual offenders.

Effect:

- Intensification of punitive measures for repeat arrests.
- Creates a cycle where transgender sex workers are disproportionately criminalized.

2. Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023: Procedural Law

BNSS replaces the CrPC and expands policing powers. This has major implications for transgender sex workers.

2.1. Expanded Police Powers of Search, Seizure, and Detention

BNSS strengthens police authority in several ways:

- Allows for **increased preventive detention**.
- Broadens search and seizure powers without warrant under “reasonable suspicion.”
- Introduces **electronic surveillance**, including digital tracking.

Impact on Transgender Sex Workers:

- Street-based workers become more vulnerable to arbitrary stops and searches.
- Police may confiscate condoms or phones as “evidence,” discouraging safer sex practices.
- Increased surveillance in red-light areas may push work underground.

2.2. Increased Pre-trial Custody Periods

BNSS allows:

- **Longer detention during investigation**
- More flexibility for police to delay filing chargesheets

This worsens the vulnerability of transgender sex workers who are often unable to access:

- Legal aid
- Bail
- Community support after detention

Detention can be traumatic, especially in male prisons where transgender women face violence and abuse.

2.3. Use of Technology in Policing

BNSS encourages:

- Mandatory videography of arrests
- Digital recording of statements
- Use of electronic evidence

While these appear protective, transgender sex workers fear:

- Misuse of recordings of their identities
- Public exposure through leaked videos
- Police using video to justify targeted surveillance of areas known for transgender sex work

2.4. Increased Community Policing Through “Public Order”

“Public order” provisions allow police to disperse people or “remove nuisances.”

For transgender sex workers, this often means:

- Forced displacement from working areas
- Destruction of shelters, belongings
- Fines or detention for simply being present in a particular locality

. Bharatiya Sakshya Adhiniyam (BSA) 2023: Evidence Law

The BSA modernizes evidence rules, recognizing:

- Electronic evidence
- Digital footprints
- Metadata

While beneficial for proving abuse, these provisions also enable:

- Digital profiling of transgender sex workers
- Use of phone data to arrest clients, which indirectly affects workers
- Seizure of communication devices used for arranging clients

Transgender persons already face issues with Aadhaar mismatches, deadnames, and ID inconsistencies that make legal processes difficult. The new emphasis on identity verification may worsen this.

Why the New Criminal Laws Matter for Transgender Sex Workers

The new criminal codes **do not criminalize sex work**, but they:

. Expand Police Discretion

More power with less oversight often leads to:

- Targeted policing of marginalized bodies
- Extortion and bribery
- Intimidation under threat of “public indecency” charges

. Increase Surveillance

Digital surveillance disproportionately affects those working in public spaces.

. Reinforce Moral Policing

Under vague phrases like “public morality,” transgender sex workers—already visible minorities—are most vulnerable.

. Do Not Address Rights or Welfare

The new laws **do not include**:

- Protection from police violence
- Recognition of consensual sex work
- Labour rights
- Safe working conditions

4.3. Transgender Persons (Protection of Rights) Act, 2019

Key provisions:

- Prohibits discrimination in employment, education, healthcare
- Mandates welfare schemes
- Guarantees right to residence with family

However:

- The Act does not address livelihood options for those in sex work.
- It fails to decriminalize sex work or provide protection against police violence.
- The ambiguous definition of “forced labor” may be misused to criminalize consensual sex work.

4.4. Judicial Developments

NALSA v. Union of India (2014)

- Recognized transgender persons as a third gender
- Affirmed right to dignity, equality, and autonomy

Budhadev Karmaskar v. State of West Bengal (2011–2022)

- Supreme Court emphasized rehabilitation and human rights of sex workers
- Directed the government to ensure non-harassment and access to schemes

Although these decisions strengthen rights, they are not fully implemented at ground level.

5. Policing Practices and Human Rights Violations

Studies and reports consistently highlight:

- Arbitrary arrest under ITPA or public nuisance laws
- Police extortion and bribery
- Physical and sexual violence
- Forced “rescue” operations that function as detention
- Lack of legal representation

Transgender sex workers often hesitate to report crimes because they fear retaliation or re-victimization by police authorities.

6. Public Health Dimensions

Transgender sex workers face elevated HIV, STI, and mental health risks due to:

- Exposure to violence
- Limited access to gender-affirmative healthcare
- Fear of discrimination in hospitals
- Police raids disrupting condom distribution

Criminalization indirectly worsens public health outcomes by pushing sex work underground.

7. Human Rights Perspectives

International agencies (UNDP, WHO, OHCHR) recognize sex work as legitimate labor when performed voluntarily. Key rights include:

- Right to bodily autonomy
- Right to livelihood

- Protection from violence
- Access to health services
- Non-discrimination

India's partial criminalization model conflicts with these principles and disproportionately harms transgender persons.

8. Comparative Models: Lessons for India

8.1. Legalization (Germany, Netherlands)

Regulates sex work but often excludes migrant and transgender workers.

8.2. Decriminalization (New Zealand)

Removes criminal penalties, focuses on labour rights and safety.

8.3. Nordic Model (Sweden)

Criminalizes clients, not workers—criticized for pushing work underground.

India requires an approach tailored to its socio-cultural context, with emphasis on rights and welfare.

9. Policy Recommendations

1. **Decriminalize consensual adult sex work**, including soliciting and brothel-keeping.
2. **Amend the Transgender Persons Act** to explicitly protect sex workers' rights.
3. **Create anti-discrimination employment policies** with affirmative hiring.
4. **Sensitize police** through gender and human rights training.
5. **Provide safe housing schemes** for transgender individuals.
6. **Expand access to healthcare**, including hormone therapy and HIV services.
7. **Recognize sex work as labor** under labor laws.
8. **Ensure community-led policymaking** by involving transgender collectives.

10. Conclusion

Transgender participation in prostitution in India must be understood not as an issue of morality but as one of structural inequality. Criminalizing the environment around sex work further victimizes transgender individuals who already face societal exclusion. A rights-based approach—grounded in dignity, autonomy, and social justice—is essential for addressing the vulnerabilities of transgender sex workers.

Legal reforms, combined with social welfare initiatives and community empowerment, can create pathways for transgender individuals to live with dignity—whether within or outside sex work.

Meaningful reform requires recognizing their agency, eliminating structural barriers, and ensuring equal access to opportunities.

References

1. **National Legal Services Authority v. Union of India**, (2014) 5 SCC 438.
2. **Budhadev Karmaskar v. State of West Bengal**, (2011) 10 SCC 283; subsequent orders (2016–2022).
3. Chakrapani, Venkatesan, et al. *The Impact of Social Exclusion on HIV Vulnerability Among Transgender People in India*. UNDP India, 2013.
4. PUCI-Karnataka. *Human Rights Violations Against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore*. People's Union for Civil Liberties, 2003.
5. Majumder, Deepa. "Legal Status of Sex Work in India: A Human Rights Perspective." *Journal of Indian Law and Society*, vol. 6, 2015.
6. Narrain, Arvind & Chandran, Vinay. *Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity in India*. Bangalore: NLSIU, 2015.
7. Puri, Jyoti. *Sexual States: Governance and the Struggle Over the Antisodomy Law in India*. Duke University Press, 2016.
8. Government of India. *The Immoral Traffic (Prevention) Act, 1956*.
9. Government of India. *Transgender Persons (Protection of Rights) Act, 2019*.
10. Government of India. *Bharatiya Nyaya Sanhita, 2023; Bharatiya Nagarik Suraksha Sanhita, 2023; Bharatiya Sakshya Adhiniyam, 2023*.
11. UNDP, UNFPA, and UNAIDS. *The Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion*. 2012.
12. World Health Organization. *Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations*. WHO, 2016.
13. Singh, R. & Dasgupta, R. "Gender, Sexuality, and the Law: Examining the Status of Transgender Persons in India Post-NALSA." *Asian Journal of Comparative Law*, vol. 12, no. 2, 2017.
14. Kinsella, Elizabeth. "Sex Work, Criminalization and Human Rights: A Global Perspective." *Human Rights Quarterly*, vol. 41, no. 2, 2019.
15. Babu, Remya Raj. "Policing and Sexuality: Experiences of Transgender Sex Workers in India." *Economic and Political Weekly*, vol. 54, no. 32, 2019.
16. Supreme Court of India. *Committee on Sex Workers Rehabilitation – Minutes and Directives*. 2022.
17. NALSA. *Annual Report on Legal Services for Marginalized Communities*. New Delhi, 2021.
18. Humsafar Trust. *Transgender Rights and Access to Healthcare in India*. 2020.
19. National Human Rights Commission. *Study on Human Rights of Transgender Persons in India*. NHRC Report, 2018.
20. Government of India Ministry of Social Justice & Empowerment. *Report of the Expert Committee on Issues Relating to Transgender Persons*. 2014.