

Architectures of Impunity and Structural Erasure: Deconstructing the Penal Asymmetry and Statutory Friction Governing Sexual Violence against Transgender Sex Workers in India

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Abstract:

Purpose of the paper: This study examines systemic jurisprudential, legislative and enforcement conflicts at the confluence of gender identity recognition, substantive criminal law, and the criminalization of informal survival economies in India. It addresses the statutory friction between the Bharatiya Nyaya Sanhita, 2023, the Transgender Persons (Protection of Rights) Act, 2019 and the Immoral Traffic (Prevention) Act, 1956. Its primary aim is to expose how the contemporary post-colonial state constructs architecture of structural impunity that systematically devalues the bodily autonomy of transgender sex workers. The research identifies a key statutory anomaly. The general penal law provides a minimum imprisonment with hard labour for non-consensual sexual penetration against women between ten years and life imprisonment. For transgender people, however, sexual violence is contained in special welfare legislation with a maximum sentence of only two years imprisonment. This paper looks at how this punitive disparity, along with anti-brothel legislation and public order statutes from the colonial period, denies transgender sex workers equal protection under the law.

Methodology: The research utilizes a qualitative, doctrinal and critical socio-legal methodology. It blends constitutional interpretation, statutory deconstruction and comparative jurisprudence. The paper analyses the constitutional legitimacy of differentiated sentencing regimes via the prism of the tests of reasonable categorization and apparent arbitrariness under Articles 14, 15 and 21 of the Constitution of India. The doctrinal research explores contrasting judicial precedents of various High Courts and the Supreme Court of India. Moreover, the research employs comparative legal analysis by juxtaposing India's statutory framework with international legal frameworks. It examines statutory models in the United Kingdom, the United States, and South Africa to evaluate the treatment of gender-neutral sexual violence, consent, and decriminalization of sex work in extraterritorial jurisdictions in the context of international human rights mandates.

Tentative Findings: The monograph shows that the statutory provision of a lesser penalty for sexual assault against transgender persons breaches the fundamental guarantee of equal protection before the law. It shows how anti-brothel laws under the Immoral Traffic (Prevention) Act, 1956 actively destroy traditional transgender kinship care networks (Gharanas), pushing sex workers into physical isolation

where they become targets for unpunished violence. In this paper, It is proposed a new constitutional paradigm, the Doctrine of Equal Bodily Sovereignty that argues that the legal protections from physical and sexual abuse must be attached to the human body unconditionally, regardless of gender markers or labor categories. Finally, it presents a comprehensive legislative agenda calling for gender-neutralization of general rape legislation, removal of disproportionate punishment ceilings, statutory protection of communal living areas, and complete decriminalization of voluntary sex work of adults.

Keywords: Penal Asymmetry, Bodily Sovereignty, Transgender Sex Workers, Structural Impunity, Survival Economies.

Introduction: Conceptual Background and Theory Framework

1.1 The Legal Paradox in Three Acts

India's current legal landscape contains an unresolved constitutional paradox regarding the legal status and physical security of transgender sex workers.¹ In one dimension, constitutional jurisprudence has recognized self-determined gender identity as an intrinsic element of human dignity and personal autonomy under Articles 14, 19, and 21 of the Constitution.² In a second dimension, substantive criminal law—specifically the Bharatiya Nyaya Sanhita, 2023³—maintains a rigid, cis-normative binary concerning offenses of sexual violence, restricting primary statutory protections against rape to female victims.⁴ In a third dimension, state regulation of commercial sex work via the Immoral Traffic (Prevention) Act, 1956⁵ and local police acts actively criminalizes the spatial and social survival mechanisms of gender minorities.

It produces an operating void of tripartite friction. When a transgender sex worker is subjected to non-consensual sexual violence, the criminal justice system becomes structurally paralysed. Police agencies and trial courts vacillate between recognizing the victim as a constitutional rights-holder and as an arrestable actor under anti-prostitution statutes. The state's protective framework then breaks down and criminal law becomes a means for state-sanctioned marginalization instead of an instrument of protection.⁶

1.2. Statement of the Problem

This study examines the legislative devaluation and structural impunity of sexual violence against transgender sex workers under the Indian criminal law. This problem is manifested in three main legal mechanisms:

Penal Asymmetry: The general penal law imposes a minimum sentence of ten years to life imprisonment for non-consensual sexual penetration against women, while sexual violence against transgender persons is regulated by specialized welfare legislation with a maximum penalty of only two years.⁷

Criminalization of Survival Kinship: Widespread discrimination in employment forces a large number of transgender persons into commercial sex work and traditional collective living arrangements (Gharanas)

¹ National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (India).

² *Ibid.* at 490; *see also* INDIA CONST. art. 14, art. 19 and art. 21.

³ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

⁴ The Immoral Traffic (Prevention) Act, 1956, s. 3, No. 104, Acts of Parliament, 1956 (India).

⁵ *Ibid.*

⁶ Danish Sheikh, Love and Rage: The Legal Adventures of a Queer Lawyer 82–88 (2020).

⁷ The Bharatiya Nyaya Sanhita, 2023, § 64, with The Transgender Persons (Protection of Rights) Act, 2019, s. 18(d), No. 40, Acts of Parliament, 2019 (India).

for economic survival and physical safety.⁸ Anti-brothel laws, however, redefine these communal housing spaces as illegal brothels and target elder mentors (Gurus) as human traffickers.⁹

Invalidating Consent: Defence attorneys will often use the victim's gender presentation and sex work to argue a fallacy of a "baseline of consent," stating that sex workers cannot be raped, or reducing non-consensual sexual assault to a simple contractual dispute in court.¹⁰

1.3 Objective of the Study

This study addresses the following specific research objectives:

To examine the constitutionality of the sentence gap between Section 63 of the Bharatiya Nyaya Sanhita, 2023¹¹ and Section 18(d) of the Transgender Persons (Protection of Rights) Act, 2019¹² in the context of the provisions of Articles 14, 15 and 21 of the Constitution.¹³

- To study the judicial discord among the state High Courts regarding the applicability of general penal provisions to transgender victims.
- To analyze how anti-brothel laws and colonial-era public order laws weaponized policing discretion against traditional transgender kinship networks (Gharanas).
- To perform a comparative legal analysis to assess solutions to gender binaries in the sexual offense legislation and the legal status of voluntary adult sex work in other jurisdictions.
- To articulate the Doctrine of Equal Bodily Sovereignty, and to set out a comprehensive statutory reform model for legislative implementation.

1.4 Research Hypothesis

Hypothesis 1: Statutorily prescribed a lesser penalty for sexual violence against transgender persons under special welfare legislation as compared to the severe mandatory sentences prescribed for the same physical acts against cis-gender women under general criminal law, violates the constitutional rights to equal protection and personal liberty.

Hypothesis 2: The use of anti-brothel laws to criminalize collective living spaces creates spatial isolation for transgender sex workers and directly makes them more vulnerable to unpunished physical violence and institutional abuse.

1.5 Review of Literature

Existing legal literature on transgender rights, penal reform and sex work in India can be categorized into three main bodies of work, each with unique analytical limitations:

1. Constitutional Jurisprudence and Gender Identification

The landmark NALSA verdict has received ample attention from scholars such as Dipika Jain and Brian Tronic, who have analysed its affirmation of self-determination under Article 21 of the Indian Constitution.¹⁴ Danish Sheikh has chronicled the socio-legal struggles of queer and gender-nonconforming communities in negotiating the Indian legal system.¹⁵ Yet this body of literature largely concerns itself with civil rights, non-discrimination in employment and recognition of identity, and the precise statutory mechanics of penal asymmetry in sexual violence cases are underexplored.

⁸ Centre for Law & Policy Research, *Trans Rights and Rape Law Loopholes*, CLPR Publications (2024).

⁹ Supra note 4

¹⁰ Ratna Kapur, *Erotic Justice: Law and the New Politics of Post-colonialism* 112–118 (2005).

¹¹ Bharatiya Nyaya Sanhita, No. 45 of 2023, s. 63, Acts of Parliament (India).

¹² Transgender Persons Act, No 40 of 2019, s. 18(d), Acts of Parliament (India).

¹³ Supra note 2

¹⁴ Dipika Jain & Brian Tronic, *Conflicting Judgments on Transgender Rights in India: A Constitutional Evaluation*, 28 Harv. Hum. Rts. J. 145, 149–152 (2015).

¹⁵ Sheikh, *supra* note 5, at 90.

2. Feminist Jurisprudence and Rape Law Reform

Feminist legal scholars like Ratna Kapur have critically examined the historical privileging of moral purity and patriarchal notions of female honour over individual bodily autonomy by Indian criminal law.¹⁶ This body of literature convincingly argues for rape legislation based on consent, but has focused primarily on cis-gender (who is not a trans person) female victims, not systematically addressing the operation of general penal codes when the victim is a transgender sex worker.

3. Policing and the Socio-Legal Study of Sex Work

Legal research institutions and civil society organizations have documented the use of the Immoral Traffic (Prevention) Act, 1956¹⁷ and local police acts by law enforcement to extort and arbitrarily detain sex workers.¹⁸ These studies, however, focus on police harassment in urban public spaces and tend to treat sex workers as a homogeneous group. In so doing, they fail to disentangle how gender non-conformity exacerbates the violence of policing or how anti-brothel laws unravel the traditional networks of transgender care.

The Gap in the Literature: This study is an important contribution to legal literature in combining these diverse fields of research into one analysis. It shows that the marginalization of transgender sex workers is not the result of individual police wrongdoing but rather of a comprehensive statutory structure in which substantive penal statutes, anti-trafficking regimes, and standards of proof converge to deny equal physical protection.

1.6 Theoretical Framework:

The Law's Ontology of the Transgender Body

In order to understand the legal position of the transgender sex worker, jurisprudence must look at the fundamental ideology of the criminal law system itself. The normative model on which modern criminal law is based is that of the "legitimate subject": a person whose gender presentation corresponds to biological assignment at birth, whose social relations adhere to traditional family forms, whose economic survival is ensured by state-sanctioned formal labor.¹⁹ The state accords this idealized subject full penal protection because they are the embodiment of social order and reproductive continuity.

The transgender sex worker is in violation of every aspect of this normative legal construct:

- Their self-determined gender presentation is an affront to the biological binary embedded in legislative wording.
- Their engagement in commercial sex work is a product of an informal survival economy generated via systemic exclusion from employment.
- Their social life is within non-biological kinship systems (Gharanas) that are oppositional to traditional bourgeois family units.

The transgender sex worker is ascribed a sub-legal position by living outside of these normative legal constraints. The legal system does not provide equal constitutional protection for this subject. Rather, it employs criminal law to control, discipline, and regulate their presence in public space.²⁰ When specialized statutes prescribe a maximum sentence of two years for sexual abuse against a transgender person, compared to a minimum sentence of ten years for identical acts against cis-gender²¹ women, the

¹⁶ Kapur, *supra* note 9, at 120.

¹⁷ *Supra* note 9

¹⁸ *Supra* note 8.

¹⁹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, 120–125 (India).

²⁰ *Ibid.* at 130.

²¹ *Supra* note 17

law establishes a clear valuation of trauma. It suggests that violence without consent against a body that disrupts normative gender binaries counts for no more than an administrative infraction, and not a serious breach of bodily sovereignty.

2. Statutory and Penal Asymmetry BNS Section 63 vs. Transgender Persons Act Section 18(d)

2.1 The Legal Hierarchy of Physical Integrity

The Bharatiya Nyaya Sanhita, 2023 (BNS)²² has been enacted to completely overhaul India's substantive penal code, replacing the colonial-era Indian Penal Code, 1860 (IPC).²³ However, in the context of sexual violence offenses, the legislature has preserved a gender-binary framework that excludes non-female victims from the general protections of rape. Section 63 of the BNS provides for the offence of rape, which is defined as sexual penetration without consent, committed by a man against a "woman".²⁴ To enforce this protection, Section 64 of the BNS prescribes a minimum punishment of ten years of rigorous imprisonment, which may extend to life imprisonment.²⁵ In the case of aggravated circumstances or multiple perpetrators, Section 70 of the BNS prescribes minimum sentences ranging from twenty years to life imprisonment or death.²⁶

In fact, when a transgender person or transgender sex worker is subjected to non-consensual sexual penetration, law enforcement agencies routinely refuse to register an offence under Section 63 of the BNS.²⁷ Instead, the police refer the matter to Section 18(d) of the Transgender Persons (Protection of Rights) Act, 2019.²⁸ Section 18(d) penalizes whoever harms, manages or endangers the safety, health or well-being of a transgender person or commits any act of physical, verbal, emotional, sexual or economic abuse, providing for a sentence of imprisonment from six months to two years.²⁹

This statutory scheme produces two very different legal consequences for the same physical act of non-consensual sexual penetration:

- If the victim is identified as a cis-gender woman³⁰ by the state, the violation is classified as a major felony under Section 63/64 of the BNS³¹ with a minimum ten-year sentence.
- Where it is a transgender victim, the same physical act is a minor offense under Section 18(d) of the Transgender Act³², punishable with a maximum of two years.

2.2 Articles 14 and 15: Constitutional review

Such a discriminatory punishment framework is violative of the fundamental right of equality before law under Article 14 of the Constitution of India.³³ Article 14 authorizes classification, but not class legislation. A statutory classification must pass through two cumulative tests in order to be constitutionally valid, the first of which is that the classification must be founded on an intelligible

²² Supra note 3

²³ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

²⁴ Supra note 11

²⁵ Ibid at s. 64.

²⁶ Ibid at s. 70

²⁷ Supra note 8

²⁸ Supra note 7

²⁹ Ibid

³⁰ Supra note 17

³¹ Supra note 11 with Supra note 26

³² Supra note 12.

³³ Supra note 2

differentia, and the second is that the differentia must have a rational nexus to the aim sought to be achieved by the statute.³⁴ The invalidity of this test is patently unconstitutional:

Intelligible Differentia: The gender identification is what divides cis-gender³⁵ people from transgender people. But this distinction is arbitrary in the case of physical sexual violence. The physical invasion, psychological damage and loss of bodily autonomy from non-consensual sexual intercourse are the same no matter the victim's gender identity.

Rational Nexus: The Transgender Persons (Protection of Rights) Act, 2019³⁶ was enacted with the stated objective of protecting the rights of transgender persons and preventing them from being discriminated against.³⁷ Imposing a maximum of two years' imprisonment for sexual violence against transgender victims is contrary to this objective. Rather than offering enhanced protection to a vulnerable population, Section 18(d) of Transgender Act³⁸ affords diminished criminal responsibility to perpetrators when their victim is transgender.

This sentencing disparity also violates the prohibition against discrimination on the basis of sex under Article 15 of Constitution of India. In *NALSA v. Union of India*, the Supreme Court held that "sex" under Article 15 encompasses gender identity.³⁹ Denying transgender victims equal penal protection against sexual violence amounts to direct discrimination on the basis of gender identity.

2.3 Disagreement between High Court decisions

The separation between the general penal legislation and the specialized welfare legislation has led to conflicting judicial interpretations in the state High Courts⁴⁰:

The High Court of Uttarakhand in *Ms. X v. State of Uttarakhand* addressed a case where the police refused to register a rape complaint by a transgender woman under the general penal law. The High Court observed that under the principles enunciated in *NALSA*, gender identity is determined by self-determination. Hence a transsexual woman self-identifying as a woman can lodge a complaint under the ordinary rape statutes and thereby invoke the harsh minimum punishments of the main penal code.⁴¹ In contrast, the High Court of Himachal Pradesh adopted a more restrictive approach in *Bhupesh Thakur v. State of Himachal Pradesh*.⁴² In that matter, the court held that statutory definitions of "woman" under general penal provisions do not include "transgender persons." The court held that since Parliament enacted a separate, specialized statute, the Transgender Persons (Protection of Rights) Act, 2019⁴³, offenses against transgender persons must be prosecuted strictly under Section 18(d).⁴⁴ This judicial interpretation reinforces the penal gap, as it limits the legal exposure to the offender to a maximum sentence of two years.

Similarly, in *Anamika v. Union of India*, the High Court of Delhi spoke about the statutory exclusion of transgender persons from general provisions of assault.⁴⁵ Even though the executive authorities assured the court that the police will use the gender-specific provisions in a broad spirit of *NALSA*, the

³⁴ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India).

³⁵ *Supra* note 17

³⁶ *Supra* note 4

³⁷ The Transgender Persons (Protection of Rights) Act, 2019, Preamble.

³⁸ *Supra* note 33

³⁹ *Supra* note 1

⁴⁰ *Ms. X v. State of Uttarakhand*, 2022 SCC OnLine Utt 1024 (India).

⁴¹ *Ibid.* at 14

⁴² *Bhupesh Thakur v. State of Himachal Pradesh*, 2024 SCC OnLine HP 1842 (India).

⁴³ Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

⁴⁴ *Supra* note 45

⁴⁵ *Anamika v. Union of India*, W.P.(C) 11204/2020, High Court of Delhi (India).

operational realities depict that administrative orders cannot override clear statutory text in the trial court proceedings.⁴⁶

2.4 Police Gatekeeping and the Evidence Gap

The statutory gap between Section 63 of the BNS⁴⁷ and Section 18(d) of the Transgender Persons Act⁴⁸ vests extensive discretionary powers in the local police. Police gatekeeping is based on specific procedural mechanisms:

Statutory Downgrading: Station House Officers often check a victim's legal papers or physical appearance. Where the official identifiers do not indicate a female marker, officers downgrade the charge from BNS Section 63 to Section 18(d) of the Transgender Act or simple assault provisions.⁴⁹ Section 18(d) is punishable with a maximum of two years, thus making it a bailable offense in the ordinary course, allowing perpetrators to attain immediate station bail.⁵⁰

The “Consent Baseline” Fallacy: In defending against charges, defense attorneys regularly attack the credibility of victims by introducing evidence that they have engaged in commercial sex activity. While Section 53A of the Indian Evidence Act, 1872 (now Section 53 of the Bharatiya Sakshya Adhiniyam, 2023) prohibits evidence of the victim's character in terms of prior sexual experience in rape trials, courts routinely permit cross-examinations that reframe non-consensual sexual assault as an incidental financial transaction.⁵¹

3. Comparative Legal Analysis: Indian And International Frameworks

3.1 Comparative Outline of Legislative Structure

In this chapter, a comparative study is undertaken to assess the systemic shortcomings in India's criminal legal framework in terms of how foreign jurisdictions regulate gender identity within sexual offence statutes and how they deal with the legal status of voluntary adult sex work.

The comparative study analyses the three international models vis-à-vis the Indian scenario:

- United Kingdom: The gender neutral framework of the Sexual Offences Act 2003.⁵²
- United States: The constitutional basis for hate crimes and equal protection under the Fourteenth Amendment.⁵³
- South Africa: The transformational constitutional model under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007⁵⁴

3.2 The United Kingdom: Statutory Gender-neutrality and Disaggregated Protection

In the United Kingdom substantive reform of the laws on sexual offenses was achieved through the passage of the Sexual Offences Act 2003.⁵⁵ Section 1 of the Act defines rape as non-consensual penile

⁴⁶ Ibid.

⁴⁷ Supra note 11

⁴⁸ Supra note 33

⁴⁹ Supra note 5

⁵⁰ The Code of Criminal Procedure, 1973, s. 436, No. 2, Acts of Parliament, 1974 (India); The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 478, No. 46, Acts of Parliament, 2023 (India).

⁵¹ Indian Evidence Act, No 1 of 1872, s. 53A (repealed), Bharatiya Sakshya Adhiniyam, 2023

⁵² Sexual Offences Act 2003, c. 42 (UK).

⁵³ U.S. CONST. amend. XIV, § 1; Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2835 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.)

⁵⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.).

⁵⁵ Ibid. s. 1.

penetration of the vagina, anus, or mouth of another person.⁵⁶ Importantly, while the act of penetration requires a male anatomical perpetrator, the statute defines the victim entirely in gender-neutral terms ("another person").⁵⁷ Further, Section 4 of the 2003 Act punishes non-consensual sexual assault without regard to the gender or anatomical configuration of either perpetrator or victim.⁵⁸ The UK has a partial decriminalization approach to sex work under the Street Offences Act 1959 and the Sexual Offences Act 1956.⁵⁹ Individual, indoor sex work is allowed, but public soliciting and brothel-keeping are restricted. But UK criminal law jurisprudence clearly states that the fact that a victim is a sex worker cannot be used in a court of law to create a presumption of consent or to reduce statutory punishment for sexual violence.

Non-cis-gender victims in the United Kingdom are not relegated to lower penalty tiers under specialized administrative statutes as in the Section 18(d) framework in India. Sexual violence without consent to any person regardless of gender identification is prosecuted under general criminal laws with penalties up to life imprisonment.⁶⁰

3.3 The United States: Equal Protection and Federal Hate Crime Enhancement

Criminal law is essentially a matter of state law in the United States, augmented by federal civil rights statutes. After extensive legislative reform, the vast majority of US state jurisdictions revised their penal codes to adopt gender-neutral definitions of sexual assault, replacing the traditional common-law definition of "rape" with gender-neutral terms such as "sexual assault" or "unlawful sexual contact."⁶¹

The of the Matthew Shepard and James Byrd, Jr. protection against targeted violence directed at transgender individuals is bolstered at the federal level by the Hate Crimes Prevention Act of 2009.⁶² This measure specifically expands federal hate crime legislation to acts of violence motivated by the victim's actual or perceived gender, sexual orientation, or gender identity.⁶³

In the US, there are no reduced punishments for those who physically or sexually assault a transgender sex worker under either federal or state legal systems. On the other hand, statutory sentence enhancements raise the penalty imposed on the perpetrator if the violence is demonstrated to be motivated by anti-transgender bias.⁶⁴ However, the US system is limited to a large extent in relation to the regulation of sex work. In several states, the continued criminalization of commercial sex and federal legislation like the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA-SESTA) have restricted digital safety platforms for Trans sex workers, demonstrating how partial criminalization continues to produce safety risks in jurisdictions.⁶⁵

3.4. South Africa: Transformative Constitutionalism and Global Bodily Sovereignty

South Africa's post-apartheid legal framework is among the most progressive statutory frameworks with regard to gender identification and bodily integrity. Section 9 of the Constitution of the Republic of

⁵⁶ Supra note 52, s. 1

⁵⁷ Ibid.

⁵⁸ Supra note 52, s. 4

⁵⁹ Street Offences Act 1959, 7 & 8 Eliz. 2 c. 57 (UK); Sexual Offences Act 1956, 4 & 5 Eliz. 2 c. 69 (UK).

⁶⁰ Supra note 7

⁶¹ N.Y. PENAL LAW s. 130.35 (McKinney 2024); CAL. PENAL CODE s. 261 (West 2024).

⁶² Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2009

⁶³ The Bombay Prevention of Begging Act, 1959, § 5, No. 10, Acts of Bombay State Legislature, 1950 (India).

⁶⁴ Supra note 8

⁶⁵ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA-SESTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018).

South Africa, 1996 specifically forbids discrimination on the basis of sex, gender or sexual orientation by the state and private actors.⁶⁶

In an attempt to bring penal law in line with constitutional imperatives, South Africa passed the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.⁶⁷ Section 3 of the Act defines rape as any act of non-consensual sexual penetration perpetrated against another person, regardless of the sex of the perpetrator or victim.⁶⁸ The law completely eliminated gender-binary language, meaning that non-consensual sexual violation of a transgender woman, Trans man, or non-binary person is prosecuted under the same exact statutory provision and subject to the same exact mandatory minimum penalties as crimes against cis-gender victims.⁶⁹

Moreover, the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* held that criminal laws that maintain discriminatory distinctions based on sexual orientation or gender presentation violate the core constitutional rights of dignity and equality.⁷⁰

3.5 Comparative Synthesis: The Deficit of Indian Statutory

A comparative study of these overseas models brings up the structural weaknesses of the Indian legal system:

- Failure of Statutory Gender-Neutrality: India's Bharatiya Nyaya Sanhita, 2023, did not follow the footsteps of the United Kingdom and South Africa, which amended their substantive penal codes to define victims in gender-neutral terms. Section 63 of the Sanhita retained a female-specific definition of rape and consequently non-female victims have no direct coverage under primary penal provisions.
- Development of Asymmetrical Penalty Tiers: Hate crime statutes in the US increase punishments for bias-motivated violence against transgender persons, but the Transgender Persons Act, 2019 in India takes the opposite approach, with the maximum sentences for sexual abuse of transgender victims capped at two years under Section 18(d)⁷¹ thereby providing a statutory discount to offenders.
- The Survival Economy Trap: While foreign jurisdictions are progressing towards the decriminalisation of voluntary adult sex work (e.g. New Zealand under the Prostitution Reform Act 2003),⁷² India continues to use anti-brothel laws under the Immoral Traffic (Prevention) Act, 1956 to target communal living arrangements, robbing transgender sex workers of shared housing security.

4. Criminalization of Survival Economies, Spatial Profiling and Recent Statutory Amendments

4.1 Anti-Brothel Legislation and the Challenge to Traditional Kinship Systems

In South Asia, transgender people have traditionally depended on care networks, Gharanas or Jamats, because of their widespread rejection by biological families and systemic exclusion from formal housing and employment markets.⁷³ These social structures function through a mentorship arrangement (Guru-Chela system), where elder community members (Gurus) offer housing, physical safety, legal assistance

⁶⁶ Sec. 9 -- guarantees equality before the law and prohibits unfair discrimination, while allowing affirmative action to redress past disadvantages.

⁶⁷ Supra note 54.

⁶⁸ Ibid. sec. 3

⁶⁹ Supra note 17

⁷⁰ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC) at 35–40 (S. Afr.).

⁷¹ Supra note 33

⁷² Prostitution Reform Act 2003, s 3 (NZ).

⁷³ Supra note 6

and social integration to younger transgender individuals (Chelas).⁷⁴ But the legal framework of the Immoral Traffic (Prevention) Act, 1956 (ITPA) renders these vital networks of social care illegal.⁷⁵

- Section 3 of the ITPA criminalizes the management or operation of a “brothel.”⁷⁶ The law defines brothel broadly to mean any house, room or place used for commercial sexual exploitation.
- Section 4 of the ITPA makes it an offence for any person over the age of eighteen to knowingly live, wholly or in part, on the earnings of another person's prostitution.⁷⁷
- Section 18 of the ITPA allows magistrates to issue executive orders for the summary eviction of occupants of any premises suspected of being used for commercial sex work.⁷⁸

In practice, law enforcement agencies invoke Section 3 of the ITPA⁷⁹ to declare shared residence of two or more transgender sex workers in a rented apartment or traditional Gharana home as an illegal brothel.⁸⁰ When an elder Guru receives pooled household rent, maintenance funds, or living costs from Chelas involved in sex work, police arrest the elder for “living off the earnings” of prostitution in accordance with Section 4.⁸¹

This design of the statute puts the transgender sex workers in a precarious position: either they have to live together in a Gharana for the sake of physical security (thus exposing themselves and their elders to prosecution under the ITPA), or they have to live in physical isolation (where they are at a greater risk of unpunished assault, extortion and violence).⁸²

4.2 Public Order Statutes from the Colonial Era as Proxy Enforcement Tools

Even when superior courts have issued directions preventing police from harassing adult sex workers who are acting consensually,⁸³ law enforcement agencies often circumvent these orders by invoking broad, colonial-era public order statutes.⁸⁴

Such statutory tools include:

- Public Nuisance: Section 290 of the BNS (previously Section 290 of the IPC) criminalizes “public nuisance,” giving police officers wide power to detain persons whose public appearance or gender presentation violates cis-normative expectations.⁸⁵
- State Police Enactments: Local police legislation (e.g. the Karnataka Police Act, 1963 or the Bombay Police Act, 1951) gives executive officers extensive authority to arrest any person who is “loitering,” “behaving indecently,” or “causing obstruction” in public thoroughfares.⁸⁶
- Anti-Begging Laws: Local laws, derived from the colonial Bombay Prevention of Begging Act of 1959, criminalize being in a public place without proof of a legitimate source of income from the government.⁸⁷ As transgender sex workers are often excluded from private commercial spaces and

⁷⁴ Ibid. at 110

⁷⁵ The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India).

⁷⁶ The Immoral Traffic (Prevention) Act, No. 104 of 1956, s. 3, Acts of Parliament (India).

⁷⁷ Ibid. at s. 4.

⁷⁸ Ibid. at s. 18

⁷⁹ Supra note 77

⁸⁰ Supra note 8

⁸¹ Ibid.

⁸² Ibid.

⁸³ Budhadev Karmaskar v. State of West Bengal, (2011) 10 SCC 283 (India).

⁸⁴ Supra note 6

⁸⁵ Supra note 3, s. 290

⁸⁶ The Karnataka Police Act, 1963, s. 92, No. 4, Acts of Karnataka State Legislature, 1964 (India); The Maharashtra Police Act, 1951, s. 110, No. 22, Acts of Bombay State Legislature, 1951 (India).

⁸⁷ The Bombay Prevention of Begging Act, 1959, s. 5, No. 10, Acts of Bombay State Legislature, 1950 (India).

formal housing, their everyday social and economic interactions take place largely in public spaces. Police use public nuisance and anti-loitering rules as a proxy to target, search, and detain and extort transgender people without having to prove the legal elements of commercial solicitation under the ITTPA.⁸⁸

4.3 Police Accountability and Spatial Profiling Invalidated

This system of discretionary policing generates an atmosphere of impunity for law enforcement officers. Police personnel themselves have been empirically documented as a major source of physical violence, illegal incarceration, extortion and non-consensual sexual abuse against transgender sex workers.⁸⁹

When a transgender sex worker attempts to report physical or sexual violence carried out by a police officer, law enforcement agencies routinely counter-actively apply public nuisance or anti-loitering charges.⁹⁰ The victim is re-classified as an offender or illegal solicitor. The procedural dynamics discourages victims to officially report their cases against law enforcement officers, therefore leading to almost zero registration of police abuse cases under general penal codes.⁹¹

4.4 Recent Legislative Developments and Legislative Growth

This structural vulnerability has been compounded by recent legislative proposals, such as the Transgender Persons (Protection of Rights) Amendment Bill, 2026.⁹² The Bill criminalizes “compelling” or “inducing” individuals to present as transgender or to engage in public solicitation, begging or informal commercial labour, with severe penalties of imprisonment between five to ten years.⁹³ Civil rights organizations note that these broad formulations, couched as anti-trafficking protections, are aimed at traditional transgender support networks.⁹⁴ Reframing communal shelter, economic pooling, and gender mentorship as illegal inducement or solicitation destroys the limited community care structures that shield transgender sex workers from extreme poverty and physical harm.⁹⁵

5. Summary, Findings, Recommendations and Legislative Framework

5.1 Summary of the main results

The study provides a complete legal and statutory analysis of the structural mechanisms that govern sexual violence against transgender sex workers in India.

The main results of the research are as follows:

Penal Asymmetry: In substantive criminal law, there is an unconstitutional disparity in sentencing between cis-gender⁹⁶ women and transgender victims. Section 63/64 of the Bharatiya Nyaya Sanhita, 2023⁹⁷ provides for a minimum of ten years to life imprisonment for non-consensual sexual penetration against women, but similar violence against transgender persons is covered under Section 18(d) of the Transgender Persons (Protection of Rights) Act, 2019⁹⁸, with a maximum punishment of two years.

⁸⁸ Supra note 8

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Supra note 38

⁹³ Ibid. cl. 8

⁹⁴ Vidhi Centre for Legal Policy, *The Transgender Persons Amendment Bill, 2026, and its Discontents*, Vidhi Blog (2026).

⁹⁵ Ibid.

⁹⁶ Supra note 17

⁹⁷ Supra note 11, Supra note 26

⁹⁸ Supra note 33

Constitutional Invalidity: This differential sentencing regime fails to satisfy both the prongs of the reasonable classification test under Article 14 of Constitution of India.⁹⁹ Applying statutory punishment to sexual violence against a vulnerable group is contrary to the stated protection goals of specialized welfare legislation and infringes Article 15's¹⁰⁰ prohibition against sex-based discrimination.

Criminalization of Kinship Networks: Sections 3, 4 and 18 of the Immoral Traffic (Prevention) Act, 1956¹⁰¹ criminalizes traditional communal living spaces (Gharanas) as illegal brothels and reclassifies elder mentors (Gurus) as human traffickers, forcing transgender sex workers into physical isolation.

Discretionary Policing and Proxy Enforcement: Law enforcement officers commonly use public order laws, vagrancy laws and public nuisance provisions (BNS Section 290)¹⁰² from the colonial era as proxy provisions to profile, extort and arbitrarily detain transgender sex workers in public settings.

International Statutory Gap: Comparative analysis indicates that foreign jurisdictions (e.g. South Africa under Criminal Law Amendment Act, 2007 and the United Kingdom under Sexual Offences Act 2003)¹⁰³ have adopted gender-neutral definitions of sexual violence that guarantee equal penal protection, without reducing statutory minimums based on gender identity.

5.2 Anticipated Effects of the Proposed Reforms

The implementation of the recommendations elaborated in this study will lead to the following legal and social consequences:

Revising Penal Disparities: Updating general penal laws to include all victims, regardless of gender, will guarantee that statutory sanctions for non-consensual sexual violence are uniform across all populations.

Protection of Community Housing – Exemption of voluntary communal care networks from anti-brothel legislation will ensure housing rights for transgender persons, reducing physical isolation and vulnerability to violence.

Autonomy Separated From Labor Status: Under the proposed jurisprudential doctrine, trial courts will no longer use a victim's livelihood to negate consent or reduce statutory penalties for sexual assault charges.

5.3 Study Limitations

The research admits certain unique methodological and institutional limitations:

Data Underreporting: Most sexual violence incidents against transgender sex workers go unreported due to fear of police retaliation, social stigma and procedural barriers. Therefore, official national crime statistics (e.g., reports by National Crime Records Bureau) do not capture the whole reality of the occurrences of offences.

Jurisdictional Scope: The major doctrinal study is based on the federal statute framework of India. Different local policing tactics between states may influence operational outcomes, however state police acts and regional High Court opinions were studied.

Limited Empirical Court Record Access: Many judicial districts have limited access to lower trial court transcripts and Magistrate Court records, which is a barrier to measuring unreported bail orders under Section 18(d).¹⁰⁴

⁹⁹ Supra note 2

¹⁰⁰ Supra note 40

¹⁰¹ Supra note 77, 78, 79

¹⁰² Supra note 86

¹⁰³ Supra note 54, s.3 with Supra note 52, s. 1

¹⁰⁴ Supra note 12

5.4 Recommendations for the Future and the Legislative Context

To remedy these structural problems, significant legislative reforms have to be undertaken by Parliament, judiciary and executive authorities:

[LEGISLATIVE SHAKEUP PROPOSED] |

||| [BNS Sec. 63 Re-Drafting] [Repeal of Sec. 18(d) TG Act] [ITPA Structural Amendments]

Gender neutral definitions Remove lighter 2 year cap Decriminalize consenting sex for victim & perpetrator. For sexual assault, work & repeal Sec. 3/4 traps. Sec. 3/4 catches.

1. Re-Drafting of Section 63 of the Bharatiya Nyaya Sanhita, 2023

Parliament should amend section 63 of the BNS to use gender neutral language for both victims and perpetrators in order for non-consensual sexual penetration against any person to be prosecuted under the primary rape provisions. Amendment Text Proposed:

“Sec.63. A person is guilty of rape who has sexual penetration of any degree of another person without that person's explicit and voluntary consent...”

2. Section 18(d) of the Transgender Persons Act formally repealed

Section 18(d) of the Transgender Persons (Protection of Rights) Act, 2019, should be formally repealed. All physical and sexual abuse against transgender persons should be directly prosecuted under the general penal provisions of the BNS with same sentencing ranges and mandatory minimums.

3. Structural changes to the ITPA

Amendments are needed to Sections 3, 4 and 18 of the Immoral Traffic (Prevention) Act, 1956 so that the definition of brothel-keeping and human trafficking explicitly includes voluntary adult sex work and traditional communal housing spaces (Gharanas).

4. Judicial Guidelines on Character Evidence

The Supreme Court of India should promulgate binding guidelines that instruct trial courts to strictly apply Section 53 of the Bharatiya Sakshya Adhiniyam, 2023¹⁰⁵, which prohibits the use of evidence regarding the victim's sex work to establish a presumption of consent or to mitigate statutory penalties.

5.5 Closing Remarks

A constitutional state that is committed to human dignity cannot uphold a statutory legal regime that gives uneven value to physical integrity depending on gender identity or labor status. A statutory two-year cap on sexual violence against transgender people, compared to a ten-year minimum punishment for the same offenses against cis-gender women, is an intolerable failing of equal constitutional protection. Only by abandoning moralistic labor controls, adopting gender-neutral penal definitions, and enacting the Doctrine of Equal Bodily Sovereignty can the legal system honour the constitutional promise of NALSA: that every individual will be able to live free from state-sanctioned violence, structural impunity, and legal erasure.

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