

UPR Submission on harmful effects of criminalisation of sex work on sex workers' human rights in India

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Joint Submission by:

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Introduction

1. This report is jointly submitted by **CREA**¹, **Sexual Rights Initiative**², **TARSHI**³, **DMSC**⁴, **VAMP**⁵ and the **CPCJPS**⁶. It focuses on human rights and sexual rights violations faced by sex workers in India due to criminalization of sex work and the stigma associated with it. This report highlights how criminalisation of sex work allows the police to physically assault, abuse and extorts sex workers with impunity, and the State to exclude sex workers from health, labour and other human rights protections available to all citizens of India. The report also presents recommendations for the Government of India to protect, promote and fulfil all human rights of sex workers (female, transgender and male) available under the Constitution of India and other national and international human rights laws; to create enabling conditions to further the realisation of their human rights, including their sexual rights.

Background and Context

2. In India, although it is difficult to know the exact figure, it is estimated that 12.63 lakh female sex workers practice sex work. In addition, there are a significant number of male and transgender persons engaged in the occupation.⁷ Many of them are migrants from neighbouring countries like Nepal and Bangladesh. Stigma associated with their occupation coupled with other socio-economic marginalisations like gender, caste, class, religion etc., lead to further discrimination and violation of their rights.
3. Sex work *per se* is not illegal in India, but the criminalization of many of its outward manifestations, primarily under the Immoral Traffic (Prevention) Act, 1956, renders this occupation and those who practice it *de facto* criminal. This results in grave violations of human rights and sexual rights for sex workers creating obstacles for the realisation of labour rights, rights to health, livelihood, and protection from violence. The culture of discrimination perpetuated by law denies sex workers the guarantee of protection under India's Constitutional Fundamental Rights to equality (Article 14), non-discrimination

¹Creating Resources for Empowerment and Action (CREA) is a feminist human rights organization based in New Delhi, India.

²The Sexual Rights Initiative is a coalition including Action Canada for Population and Development (Canada), CREA (India), Federation for Women and Family Planning (Poland), Egyptian Initiative for Personal Rights (Egypt), Akahata (Argentina).

³Talking About Reproductive and Sexual Health Issues (TARSHI) is an NGO based in New Delhi, India. TARSHI works towards expanding sexual and reproductive choices in people's lives in an effort to enable them to enjoy lives of dignity, freedom from fear, infection and reproductive and sexual health problems.

⁴Durbar Mahila Samanwaya Committee (DMSC) is a collective of 65,000 sex workers and functions as an exclusive forum of female, male and transgender sex workers in West Bengal, India.

⁵Veshya Anyay Mukti Parishad (VAMP) is a collective of sex workers in Sangli, Maharashtra, India. It works to strengthen rights-based HIV/ AIDS interventions and fights violence against sex working women.

⁶The Centre for Penology, Criminal Justice and Police Studies (CPCJPS) at the Jindal Global Law School in Sonapat, Haryana, India engages in cross-disciplinary academic research at the interstices of law, sociology, critical theory and human rights. It also organizes legislative review, and trainings for law enforcement officers on rights-based policing practices.

⁷Lawyers Collective, "Sex Workers Meet Law Makers", National Network of Sex Workers and Lawyers Collective HIV/ AIDS Unit, March 1, 2011. Available at: <http://www.lawyerscollective.org/news/94-qsex-workers-meet-law-makersq-on-1st-march-2011.html>

(Article 15) and life and personal liberty (Article 21).

4. Despite several years of activism in India by sex workers' rights groups⁸ for full and equal citizenship rights, the State still does not extend basic human rights protection to sex workers.

Legal Framework

5. The Immoral Traffic (Prevention) Act, 1956 (ITPA) is the central legislation that criminalises several aspects of sex work in India. The ITPA was amended in 1986 to make the law gender neutral and applies to both biological males and females. The law does not distinguish between minors and adults and wrongly conflates trafficking and voluntary sex work. Although the law aims to prevent trafficking by prosecuting traffickers, most of the arrests and convictions are against sex workers. Municipal and state laws are also invoked against sex workers. For example, section 110 (b) of the Bombay Police Act, 1951 which prohibits "behaving indecently in public", is often used to arrest or detain sex workers during solicitation on the streets.
6. ITPA restricts penalties to trafficking of persons for prostitution only. This leaves other sectors in which trafficking takes place unregulated. This narrow scope contravenes India's commitment under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, 2000 which mandates State parties to penalise human trafficking in all areas and not just commercial sex.
7. ITPA criminalises brothel keeping (sec. 15), living on earnings of sex work (sec. 4), procuring, inducing or detaining for prostitution with or without consent (sec. 5&6), and soliciting (sec. 8). These laws make the practice of sex work legally impossible.
8. Police have special powers to arrest (sec. 14) and search (sec. 15) without a warrant. In the name of prevention of trafficking, they also have powers to remove (sec. 16), detain (sec. 17) and evict (sec. 18) sex workers, through raid and rescue. Magistrates are authorised to close down brothels and expel persons from premises where sex work is carried out, including residence of sex workers. There is enough documentation to show widespread abuse of such powers by the police. 70% of sex workers interviewed in a survey reported being beaten by the police and 80% reported that they had been arrested without evidence. The police also often refuse to register complaints by sex workers which leave them with no effective legal or administrative remedies to ensure accountability and redress in cases of police violence.⁹

One man came and tried to hit me...I went to the police station to complain, but the policeman told me, "You drunk woman, you live on the footpath and you think that I am

⁸ DMSC and VAMP, the two largest sex workers collectives have been at the forefront of the sex workers' movement in India. They also spearhead the Indian Network of Sex Workers that has been demanding decriminalisation of sex work.

⁹Sangram, Point of View and VAMP (2002). "Turning a Blind Eye", in Of Veshyas, Vamps, Whores and Women: Challenging pre-conceived notions of prostitution and sex work. This report was cited in World Health Organization, Violence against Sex Workers and HIV Prevention, Information Bulletin Series, Number 3, available at: <http://www.who.int/gender/documents/sexworkers.pdf>

going to take your complaint?” He simply asked me to get lost! (Street-based sex worker, Mumbai, interviewed in CREA Count Me In! research¹⁰)

9. The legal powers granted to the police under this law, go against standard rules of criminal procedure (no arrest without warrant, need for female police, no arrest after sun-down etc.) and also violate the Fundamental Rights to Livelihood, Privacy, Due Process etc. guaranteed under the Constitution of India.
10. The ITPA criminalises adult family members of sex workers who live with them and are economically supported by them (sec. 4), including children above the age of 18, aged parents, siblings, partners and other close dependants. This provision, along with the widespread stigma and discrimination, is a barrier to the educational future of children of sex workers. If at all they are able to attain some education without dropping out of school, without financial support from their mothers, they are unable to pursue education beyond the secondary level.

Right to Protection from Violence

11. Sex workers in India are at a higher risk of violence due to the illegality surrounding their work. This pushes the occupation underground, and in the absence of any effective human rights safeguards, makes it difficult for them to seek protection from violence. This also intensifies violence and exploitation from the whole nexus of brokers, agents, police, clients and mafia.
12. Police violence is the most common experience for all the sex workers because they abuse their power regularly. The police conduct raids in venues where sex work is practised and arrest sex workers only to extort money and demand sexual favours from them. They resort to violence against sex workers during raids, in the process of arrests and in custody. A fixed monthly bribe (*hafta*) has to be paid to the police by all sex workers, irrespective of how much they earn. Street-based sex workers are more vulnerable to violence and stigma compared to brothel-based or bar-based sex workers since they confront the police more frequently during their work and even during day-to-day activities.¹¹

I have to pay bribe (hafta) because I am so scared of what they might do to me if I don't pay...even if I don't eat, I have to pay the bribe...(Street-based sex worker, Mumbai, interviewed in CREA Count Me In! research)

13. Many sex workers even equate the police with local criminals and consider the police to be as harmful as the criminals:

¹⁰CREA (2011), Count Me In! research on violence against marginalised women in South Asia.

¹¹CREA, Count Me In! Violence against Marginalised Women in South Asia, May 2011. Executive Summary of this research is available at <http://web.creaworld.org/ResearchSummary-F-2.pdf>

Goons and policemen hardly ever pay and have sex...they always force the girls to have sex with them. Ordinary people who come as customers don't do that... Policemen and local goons are really horrible. Girls don't even complain about the goons to the police... (Street-based sex worker, Mumbai, interviewed in CREA Count Me In! research)

14. In addition to criminal prosecution, sex workers experience severe violence from intimate partners, clients and the society at large. In a survey carried out in 2010, 98% sex workers in Chennai said that they had faced severe forms of violence by intimate partners. 62% reported attempts to burn/ strangle them in the past year; 61% reported severe physical assaults including kicking/ dragging; 38.5% reported threats with a knife/ gun/ weapon.¹² A 2009 report published by the Bill and Melinda Gates Foundation cited a survey done in Tamil Nadu where 52% of the female sex workers interviewed had reported facing emotional, physical or social violence.¹³
15. Law enforcers, policy makers, the legislature and civil society actors see trafficking as the only source of violence that needs addressing in the case of sex workers. Other forms of violence – domestic violence, police, client and intimate partner violence – are seen as lesser forms of violence and not deserving of policy attention. Studies have shown that sex working women face at least as much intimate partner violence as other women. However, as sex workers are seen as ‘public’ women, violence in their ‘private’ lives is neither addressed nor acknowledged. The violence they face from intimate partners is not considered ‘domestic violence’. In India, there is no special budgetary allocation or philanthropic resources available for supporting programs or services to address violence faced by sex workers; these interventions are usually self-funded by sex worker groups.¹⁴
16. Although there are State mechanisms -- like the right to Constitutional remedies to access the High Courts and Supreme Court for violation of fundamental rights, the National and State Human Rights Commissions, and the National and State Women’s Commissions – to address violence against women, sex workers are unable to make use of these mechanisms because of the stigma and illegality associated with their occupation.
17. Transgender and male sex workers are left out of any of these human rights protection mechanisms because of sodomy being criminal in India (Sec. 377 of the Indian Penal Code), and also because the narrow focus of these existing mechanisms is violence against women, and not the broader framework of gender-based violence.

Right to Non-Discrimination

¹²Subadra Panchanadeswaran et al, A Descriptive Profile of Abused Female Sex Workers in India, Journal of Health Population and Nutrition, Vol. 28, No. 3 (June 2010)

¹³Karnataka Health Promotion Trust, Integrated Biological and Behavioral Assessments among FSWs and MSM-TG in Selected Districts of Karnataka, unpublished Project report, 2006

¹⁴Bishakha Datta, Policy Review: Understanding Violence against Marginalised Women in South Asia: Mumbai, India, Society for Nutrition Education and Health Action, University College London, CREA, June 2011

18. Violence and discrimination faced by sex workers arise not only from the law, but also from societal stigma attached to their identities as ‘fallen’ women engaged in an ‘immoral’ profession. Stigma is one of the major factors why sex workers are unable to access public services, healthcare, education, and other basic human rights and face discrimination.

Whoever I approach looks at me with disgust...and asks me to get lost! They say, “go away”. I have become spoilt (“kharab”) now, so people treat me like that...people feel repulsed by me...they treat me with disgust as if I am dirty and cheap...(Street-based sex worker, Mumbai, interviewed in CREA Count Me In! research)

19. Sex workers are often referred to as “filthy”, “dirty”, “cheap”, “spoilt”, “whore” and “rotten”. Societal standards of morality make a distinction between ‘good women’ and ‘bad prostitutes’. These notions don’t stop at the ‘good women’ and ‘bad prostitutes’ distinction only but also result in ‘bad women’ being discriminated, stigmatized and violated with impunity; law enforcement mechanisms are merely an extension of the society and do not make any exceptions to this rule:

When I die, no one will even look at my dead body and claim it. The municipal corporation will just pick me up and throw me away somewhere...so don’t you think my whole existence is illegal?... (Street-based sex worker, Mumbai, interviewed in CREA Count Me In! research)

20. The intensity of ‘whore stigma’ is so acute in Indian society that it completely devalues the human existence of sex workers. This stigma also generationally passes on to children of sex workers and operates as a vicious cycle that becomes almost impossible to break out of. Children of sex workers are often refused admission in schools. In the Indian context, since marriage is considered to be crucial for women, the only option left for many sex worker mothers is to secretly marry off their daughters at a very young age to protect them from stigma. However, when their identity gets disclosed, these girls face grave forms of violence and stigma at the hands of their in-laws.¹⁵

Right to Health and Health Care

21. Criminalisation induced stigma and marginalisation also creates barriers for sex workers to access and enjoy their right to health. They are forced to carry out their occupation in clandestine and secretive ways due to fear of prosecution by the police. This increases the risk of violence, HIV/ AIDS and STIs, and creates obstacles for public health interventions to reach them. This also results in sex workers carrying on work in the most unhygienic locations. They are caught between facing client violence as a result of negotiating condom-use and the inability to call for police protection fearing arrest. This leaves sex workers in a limbo where in the face of physical and mental health hazards,

¹⁵Oishik Sircar and Debolina Dutta, Beyond Compassion: Children of Sex Workers in Kolkata’s Sonagachi, *Childhood*, 18(3), pp. 333–349, Sage Publications

they have no/ minimal access to medical and psychosocial health care. When it comes to accessing health care facilities in public hospitals, sex workers are often refused treatment or receive poor quality treatment:

I go to N hospital...they don't even talk to me properly...I don't know why they don't think of us as good people...they always think of us as women who do sex work (dhanda)...they have no respect for us... they spit on us...(Street-based sex worker, Mumbai, interviewed in CREA Count Me In! Research)

22. Public health interventions have proven to be successful only when sex workers have collectivised to ensure healthcare for themselves.¹⁶ However, criminalisation makes it difficult for sex workers to engage in public health work. Many peer educators have reported that carrying and distributing condoms have led to their harassment and accusations of promoting prostitution.¹⁷
23. Under the ITPA, in the pretext of medical examinations [sec. 15 (5A)], 'rescued' sex workers are forcibly tested for HIV without counselling, consent and protection of confidentiality and results are openly disclosed in court. This is contrary to national policy, which requires consent, confidentiality and counselling for HIV testing.¹⁸
24. The HIV/ AIDS epidemic has added another layer of stigma and discrimination against sex workers. HIV/ AIDS and other public health interventions label sex workers as 'high risk' groups and treat them as diseased bodies that need to be kept under surveillance and quarantined to protect the health of the public at large. These interventions add to the societal stigma against sex workers and work against the creation of enabling conditions to facilitate or enhance sex workers' access to the right to highest attainable standards of health.
25. Moreover, almost all public health interventions for sex workers only focus on HIV/ AIDS. As a result their sexual health needs (access to safe abortion), reproductive health needs (access to pre and post natal care) and mental health needs (counselling to deal with violence and stigma) are neglected.
26. This combination of violence and AIDS-related stigma and discrimination also affects the psychological well-being of sex workers. It impacts adversely on their self perception. This often results in feelings of loneliness, sadness, lack of trust, withdrawal from social interactions, low self esteem, as well as "a feeling of being different from other women who are not engaged in sex work". Not knowing how to deal with stigma and

¹⁶UNAIDS (2000), Female Sex Workers HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh. Available at: http://data.unaids.org/publications/IRC-pub05-jc438-femsexwork_en.pdf

¹⁷Lawyers Collective, "Sex Workers Meet Law Makers", National Network of Sex Workers and Lawyers Collective HIV/ AIDS Unit, March 1, 2011. Available at: <http://www.lawyerscollective.org/news/94-qsex-workers-meet-law-makersq-on-1st-march-2011.html>

¹⁸Ibid.

discrimination, some sex workers prefer to isolate themselves from others.¹⁹

27. Given the accumulating evidence base within existing public health literature and ongoing advocacy by sex workers and their allies, UN agencies increasingly suggest that removing punitive laws and policies is a means of removing barriers to health service access for sex workers. Indian Prime Minister Manmohan Singh stated in 2008: “Strategies for tackling it [HIV] require more inclusive and less judgmental social approaches to questions of public health and personal hygiene... We should work to remove legislative barriers that hinder access of high-risk groups to services... The fact that many of the vulnerable social groups, be they sex workers or homosexuals or drug users, face great social prejudice has made the task of identifying AIDS victims and treating them very difficult.”²⁰ Yet there is no affirmative political action to decriminalize sex work, and repeal the anti-sodomy law (Sec. 377) in India.

Labour Rights and Right to Livelihood

29. Sex work is not equivalent to sex trafficking. While sex trafficking is a violation of human rights, sex work is a form of adult consensual sexual labour. Article 6 of the International Covenant on Economic, Social and Cultural Rights protects “the right to freely chosen, gainful work” and directs State parties to take steps to safeguard this right. Article 6 of the Convention on the Elimination of all forms of Discrimination against Women also calls for the protection of sex workers from exploitation from violence. It does not require states to criminalise consensual, adult sex work. Having ratified both these international human rights law instruments, India is obligated to decriminalise sex work, and put in place legislative recognition of the labour rights and the right to livelihood of sex workers.
30. Sex workers are not recognised as workers under standard labour laws in India because they are not recognized as engaging in a legitimate form of work. They are denied access to State benefits and other occupational health and safety protections that apply to employees in other industries. All agreements related to sex work (agreement with a client, rent agreement between the sex worker and the brothel owner etc.) are not legally enforceable.
31. Legal recourse is further jeopardised because sex workers are not enumerated in the census. A sex worker from Orissa quoted in a Times of India report said, “Earlier [in the census] prostitution and begging were put in the same category. We are not beggars. We must get counted as prostitutes.”²¹ In the 2011 census, sex workers have been included in the *other* category, which also includes people with mental illness, prisoners, and residents of charitable institutions. Categorization is important because it is a basis for deciding which constituency can access what kind of rights.

¹⁹CREA, Count Me In! Violence against Marginalised Women in South Asia, May 2011

²⁰Office of the Prime Minister (June 30, 2008). PM's remarks on the release of the Report of the Commission on AIDS in Asia. (<http://pmindia.nic.in/speech/content.asp?id=691>, accessed 25 September 2010).

²¹*Sex workers beg to differ with census category*, Times of India, February 12 2011

32. Frequent demolition of brothels violates sex workers right to livelihood, and forces them to carry on their work in unsafe conditions. In 2003, based on a high court judgment, brothels in a red-light area in Goa were demolished and “rehabilitation” of the sex workers was authorised. This disrupted existing support and advocacy networks, and made sex workers vulnerable to violence and exploitation due to unsafe working conditions.²²
33. The Indian Constitution does not recognise the right to housing. This leaves homeless sex workers at a heightened risk of violence at the hands of the police. An expanded interpretation of the Right to Life by the Supreme Court of India in the Olga Tellis case guarantees the homeless not to be evicted from a location from where they carry out their livelihood.²³ Yet, this guarantee does not extend to sex workers because of the illegality surrounding their work.

Recommendations

34. The State must decriminalise adult consensual commercial sex work to ensure sex workers’ rights to livelihood and other labour rights by repealing the Immoral Traffic (Prevention) Act, 1956.
35. The State must ensure that all anti-trafficking programmes run by governmental and non-governmental agencies distinguish between sex trafficking and voluntary sex work to ensure that anti-trafficking policies do not come in conflict with the right to livelihood of sex workers and are founded on a rights-based approach.
36. The State must enact a separate law on trafficking to end trafficking in all sectors and not just commercial sex. The State must do so to fulfil its obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, 2000 which mandates State parties to penalise human trafficking in all areas and not just prostitution.
37. The State must decriminalise adult consensual commercial same-sex sex work by repealing Section 377 of the Indian Penal Code. Sec. 377 was read down in 2009 by the Delhi High Court, but presently there is an appeal pending against this judgement in the Supreme Court.
38. The State must safeguard sex workers’ rights to legal protection, with regard to various hazards such as violence, general occupational risks and labour exploitation by ensuring that sex workers are able to claim their rights under existing labour legislations.
39. The State must take immediate actions to end police violence against sex workers by

²²Bishakha Datta, Policy Review: Understanding Violence against Marginalised Women in South Asia: Mumbai, India, Society for Nutrition Education and Health Action, University College London, CREA, June 2011

²³[1985] 2 Supp SCR 51

putting in place an effective, accessible and non-discriminatory complaint mechanism to register complaints against police officials for the commission of acts of violence as well as the omission to protect sex workers from violence by others.

40. The State must ensure that mechanisms for the protection of human rights must broaden the framework of violence to include gender-based violence and not just violence against women.
41. The State must ensure that health services are provided to all persons engaged in sex work irrespective of their gender identities, sexual orientation, caste and religious denominations.
42. The State must take measures to guarantee the Right to Education under Article 21(A) of the Indian Constitution to children of sex workers and by ensuring that government and private run educational institutions don't discriminate against them.
43. The State must ensure that all state laws and policies on sex work must always include sex workers as stakeholders to assist policy makers and legislators in decision making.
44. The State must ensure that all public health interventions for sex workers must be based on a right-to-health approach that does not compromise on the rights to privacy, consent and confidentiality of sex workers.
45. The State must implement sensitization training/workshop for all health service providers who work with sex workers in order to change their negative attitudes towards sex workers and eliminate the stigma and discrimination against sex workers.