

Submission to the United Nations Special  
Rapporteur on Violence Against Women, its Causes  
and Consequences

Submitted by Sadhana Mahila Sangha in support of the thematic  
report on States' Responsibility to Criminalize and Prosecute Rape  
as a Grave and Systematic Human Rights Violation and a  
Manifestation of Gender-Based Violence Against Women, in line  
with International Human Rights Standards

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## Background

Public officials and private actors alike frequently and systematically rape sex workers in India with near total impunity. Rarely reported, and if reported, seldom prosecuted, rape further stigmatizes and marginalizes the identities of sex workers which, in turn, exacerbates their vulnerability as victims of sexual violence.

Despite the robust international legal framework addressing rape, victims-survivors face several domestic legal and institutional barriers that allow perpetrators to escape with impunity, leading to States' failures to uphold their human rights law obligations. Flaws in domestic legislation as well as police targeting of sex workers based on identity has resulted in systemic institutional failures. Perpetrators of rape are therefore not properly brought to justice. There is a clear lack of necessary measures to prevent and protect sex workers from the human rights violations they face.

India's domestic legislation, such as public nuisance laws<sup>1</sup> and the Immoral Traffic (Prevention) Act (ITPA),<sup>2</sup> shame, stigmatize and criminalize sex workers. India's abolitionist approach to sex work has produced a distortion of moral policing, sexual harassment and hyper-sexualization of women who remain in a position of heightened vulnerability while trying to work and provide for their families.<sup>3</sup>

Sadhana Mahila Sangha ("Sadhana") is a sex worker-led community-based organization that demands social welfare, health, education and social security for all women in high-risk informal sector occupations. For over fifteen years, the organization has advocated for dignity and a violence-free existence for all street-based women sex workers. Sadhana works primarily in the state of Karnataka, India. The organization is focused currently on demanding the realization of socioeconomic rights, such as health, housing, safety and an end to police violence against sex workers.

Sadhana members advocate for expanding forums of redress for violence inflicted on sex workers. For decades, the organization has been fighting for sex workers to live lives free from police violence. Sex work is a stigmatized labour identity that intersects with gender-based discrimination and violence. Sex workers are subjected constantly to state-perpetrated brutality, which eliminates many avenues for access to justice for women. Systemic failures, such as absence of police accountability, along with India's adoption of the prohibition or abolitionist model, places sex workers at the highest risk of sexual violence, including rape, with additional risks to safety when reporting or seeking legal redress.

As much as the abolitionist model undermines sex workers' autonomy, the greater trauma is how it reflects and perpetuates stigma against sex workers, forcing them further into positions of particular susceptibility to violence and rape. Law enforcement is at the core of the issue. Police officers, acting in their capacities as state authorities, are responsible for unlawfully detaining

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<sup>1</sup> PEN. CODE, 1860, § 268 (India) ("A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.").

<sup>2</sup> Immoral Traffic (Prevention) Act, 1956 (India).

<sup>3</sup> Jaya Sagade & Christine Forster, *Recognising the Human Rights of Sex Workers in India: Moving from Prohibition to Decriminalisation and a Pro-Work Model*, 25 IND. J. GENDER STUD. 26, 30 (2018).

women, extorting money, subjecting them to physical and sexual violence and explicitly sanctioning the cruel treatment of women assumed to be engaging in sex work.

When a sex worker is raped, the crime is rarely prosecuted, and convictions are almost impossible to secure. Impunity drastically increases leniency, and perpetrators are confident that they will get away with sexual violence and rape if their victim is a sex worker. Amendments to legislation responding to, or criminalizing, rape alone is far from any comprehensive response to this rampant form of gender-based violence where women are targeted because of their livelihood choices.

Sadhana's advocacy to repeal legislation that impairs the safety, dignity and autonomy of sex workers can greatly contribute to the Special Rapporteur on Violence Against Women, its Causes and Consequences' forthcoming thematic report. The submission is an important one because it will provide an assertion that, fundamentally, the act of rape is violence along a continuum for women. These acts are supported by patriarchal societies, conflating sex work and trafficking, and propping up legal structures that maintain hegemonies of caste, gender, class and autocracy.

### **Summary of Recommendations**

Sadhana Mahila Sangha requests that Special Rapporteur on Violence Against Women, its Causes and Consequences Ms. Dubravka Šimonovic include the following recommendations in her thematic report on "States' Responsibility to Criminalize and Prosecute Rape as a Grave and Systematic Human Rights Violation and a Manifestation of Gender-Based Violence Against Women, in line with International Human Rights Standards."<sup>4</sup>

1. States, particularly India, must repeal legislation that criminalizes sex workers.
2. States, including India, must strengthen prosecution and penalization of perpetrators including police officers, who commit acts of violence, abuse, torture and cruelty against sex workers.
3. States, including India, must be accountable to acts of violence committed against vulnerable groups, such as sex workers.
4. States, including India, must recognize sex workers as workers with labour protections, social security and access to welfare programs.
5. States, including India, must improve access to justice for vulnerable groups, such as sex workers.
6. States, including India, must enhance access to health services that are confidential, nondiscriminatory and safe for victims-survivors, including sex workers, of sexual violence.
7. India should consider amendments to include gender-neutral language for relevant sections of the Indian Penal Code ("IPC") that address rape, especially those that reference the gender of victims.
8. India must remove legal sanctioning of marital rape in Section 375 of the IPC.

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<sup>4</sup> Office of the High Commissioner for Human Rights (OHCHR), Call for submissions to the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (SRVAW) thematic report on rape as a grave and systematic human rights violation and gender-based violence against women, *available at* <https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRVAW.aspx> (last visited Dec. 28, 2020).

## Significance of this Submission

Special Rapporteurs promote enforcement through their reports, publicizing and spotlighting international attention to possible human rights abuses and violations in specific regions and proposing remedies.<sup>5</sup> Avenues for redress and recommendations proposed by the Special Rapporteur on Violence Against Women, its Causes and Consequences carry significant legitimacy and persuasive authority due to the policy tenets of transparency, facilitation of dialogue and objectivity.<sup>6</sup>

In her report, Special Rapporteur Ms. Dubravka Šimonović will provide recommendations to States and other stakeholders on key international human rights standards on rape that should be integrated into national criminal justice responses in order to: harmonize them with accepted international standards; provide access to justice and support for victims of rape; break the cycle of perpetrator impunity; and prosecute perpetrators, ensuring that hidden domestic norms that are still part of criminal law or criminal procedure do not protect rapists or otherwise impede accountability for victims-survivors.

Sadhana Mahila Sangha, as a feminist advocacy organization working for the repeal and reform of harmful legislation that contributes to the perpetuation of violence against sex workers, can help the Special Rapporteur highlight the plight of sex workers as a vulnerable group. The continuous sexual violence that sex workers face at the hands of both state and private actors is emblematic of patriarchal hegemonies embedded within India's legal system and are a microcosm of the continuum of gender-based violence against women.<sup>7</sup> Sadhana will be responding to Question 26 of the survey: *Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the rest of the survey.*<sup>8</sup>

## International Human Rights Law, Gender-Based Violence and Sex Work

The mandate of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences outlines an understanding of what constitutes gender-based violence within the human rights framework.<sup>9</sup> Included under the definition of violence against women is systematic rape, sexual harassment, exploitation and trafficking in women, as well as gender bias in the administration of justice and in cultural practices.<sup>10</sup> Violence within the scope of the Special

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<sup>5</sup> Surya P. Subedi, *Protection of Human Rights through the Mechanism of UN Special Rapporteurs*, 33 HUM. RTS. Q. 201, 211 (2011).

<sup>6</sup> Human Rights Council, *5/2 Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, (June 18, 2007).

<sup>7</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>8</sup> Office of the High Commissioner for Human Rights (OHCHR), *Call for submissions to the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (SRVAW) thematic report on rape as a grave and systematic human rights violation and gender-based violence against women*, available at <https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRVAW.aspx> (last visited Dec. 28, 2020).

<sup>9</sup> Office of the High Commissioner for Human Rights (OHCHR), Res. 1994/45 (adopted Mar. 4, 1994).

<sup>10</sup> *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy*, U.N. Comm'n on HR., 52nd Sess., U.N. Doc. E/CN.4/1996/53 (1996).

Rapporteur's mandate has been construed broadly to encompass physical violence, economic violence, civil violence, political violence and religious violence, among other understandings of the term. The Special Rapporteur operates under a framework which is "cognizant of the multilayered violations of women," underscoring the expansive nature of the endeavor. The current scope, "the elimination of violence against women in all areas of life, the public, and the private" reflects the broad mandate and plays a central role toward actualizing sex workers' human rights.

The emergence of the Universal Declaration of Human Rights (UDHR) in the aftermath of World War II mass atrocities is a potent reminder of the need for human rights legal mechanisms to address violence. The international human rights law framework is designed to protect against violence that deprives individuals and groups of basic human rights.<sup>11</sup> The UDHR's mandate reflects this "meta-narrative" of violence juxtaposed against international human rights law.<sup>12</sup> The human rights framework empowers international monitoring bodies to act by bringing attention to abuses when there is a failure of respect for human rights.<sup>13</sup> The UDHR's Article 2 enshrines the keystone of the universal human rights framework, prescribing that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>14</sup>

Gender-based violence is situated within the human rights framework and is paradigmatic of the human rights violations that women endure. In addition to both state and private actors, gender-based violence is interwoven with socioeconomic and sociocultural institutional practices that perpetuate violence against women.<sup>15</sup> Women's experiences of violence are particularly deadly when compounded with other factors that heighten vulnerability, such as race, class and caste.<sup>16</sup> Both private and state actors perpetrate violence against sex workers—a particularly vulnerable group because of socioeconomic, sociocultural and institutional violence—in India.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) sets forth a specific "Bill of Rights" for women.<sup>17</sup> Among the numerous rights which CEDAW guarantees, it addresses gender-based violence under General Recommendation 19 in proclaiming that gender-based violence is a form of discrimination that hinders women's ability to enjoy equal rights.<sup>18</sup>

General Recommendation No. 35 expands on General Recommendation No. 19, asserting that twenty-five years of State practice and *opinio juris* suggest that this understanding of gender-based

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<sup>11</sup> Vasuki Nesiah, *The Spectre of Violence that Haunts the UDHR: The Turn to Ethics and Expertise*, 24 MD. J. INT'L L. 135, 137 (2009).

<sup>12</sup> *Id.* at 138.

<sup>13</sup> *Id.* at 139.

<sup>14</sup> Universal Declaration of Human Rights, art. 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>15</sup> Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 488 (1990).

<sup>16</sup> *Id.* at 489.

<sup>17</sup> Universal Declaration of Human Rights, art. 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>18</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *CEDAW General Recommendation No. 19*, ¶ 1, adopted 11th Sess., 1992 (contained in U.N. Doc. A/47/38), 1992, A/47/38, available at <https://www.refworld.org/docid/453882a422.html> (last visited Dec. 28, 2020).

violence is customary international law.<sup>19</sup> The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that: acts of gender-based violence against women can constitute torture or cruel, inhuman or degrading treatment; gender sensitive approaches are required to understand the level of pain and suffering experienced by women; and the “purpose and intent” requirement of torture are satisfied when acts or omissions are gender-specific or perpetrated against a person on the basis of sex.<sup>20</sup>

The CEDAW Committee has yet to adopt a clear position recognizing women’s right to choose sex work.<sup>21</sup> The Committee, however, has articulated the obligations of states to address violence against women identified as “in prostitution” and consistently recommended that “women in prostitution” be decriminalized. This position was most recently reaffirmed in the Committee’s recently adopted General Recommendation No. 35 on gender-based violence against women. It was also noted that the continued criminalization of the sex sector has had a disproportionate, negative impact on women.<sup>22</sup> The Committee further expressed concern about “discrimination against women sex workers and the lack of State party’s action aimed at ensuring safe working conditions and exit programmes for those wishing to leave this activity . . . .”<sup>23</sup> In this context, the Committee recommended that the State party “. . . (a)dopt measures aimed at preventing discrimination against sex workers and ensure that legislation on their right to safe working conditions is guaranteed at national and local levels.”<sup>24</sup>

Sex workers are a vulnerable community of women who suffer violence and marginalization that is discriminatory based on their gender and choice of livelihood.<sup>25</sup> The violence that they experience is, under customary international law as well as CEDAW’s understanding of gender-based violence, discrimination against women. The CEDAW Committee’s concerns align with those of sex worker advocates: the conditions which promote rights and prevent abuse. Under this analysis, distinguishing when a sex worker is raped and when she is exchanging consensual sex is a clear way forward for the Committee and for all other institutions protecting and promoting human rights. Any other position would contribute to the continued marginalization of too many persons engaged in sex work for their livelihoods.<sup>26</sup>

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<sup>19</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, ¶ 2, U.N. Doc. CEDAW/GC/35, (July 17, 2017), available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf).

<sup>20</sup> *Id.* at ¶ 17.

<sup>21</sup> INT’L WOMEN’S RTS. ACTION WATCH ASIA PACIFIC, *FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 31* (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<sup>22</sup> CEDAW Committee, Concluding Observations, China, U.N. Doc. CEDAW/C/CHN/CO/6 (2006), ¶ 10; CEDAW Committee, Concluding Observations, Fiji, U.N. Doc. CEDAW/C/FJI/CO/4 (2010), ¶ 25; CEDAW Committee, Concluding Observations, Albania, U.N. Doc. CEDAW/C/ALB/CO/3 (2010), ¶ 29.

<sup>23</sup> CEDAW Committee, Concluding Observations, Hungary, U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013), ¶ 23(e).

<sup>24</sup> *Id.*

<sup>25</sup> Leonard Cler-Cunningham & Christine Christerson, *Studying Violence to Stop It*, 4 RESEARCH FOR SEX WORK 25-26 (2001); see generally JUHU THUKRAL & MELISSA DITMORE, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY, USA*, URBAN JUSTICE CENTER (2003) (examining the impact of law enforcement approaches to street-based sex work in New York City and proposing recommendations for reform).

<sup>26</sup> INT’L WOMEN’S RTS. ACTION WATCH ASIA PACIFIC, *FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 31* (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

Freedom from violence has been clearly understood as a fundamental right of all persons, with specific attention to the way that violence operates as both a cause and consequence of discrimination against women. The CEDAW Committee’s pioneering interpretation in General Recommendation No. 19 defining violence against women as a form of discrimination according to Article 1 of the Convention. The Convention is now a central tool in combating all forms of violence in public and private life, regardless of the perpetrator’s identity. Recognition of the many forms of violence, as well as its diverse perpetrators and sites of perpetration, is key to understanding how violence leads to other rights violations, including but not limited to: barriers to equality in private and public life, freedom of association, health and bodily integrity rights, as well as rights to family life.<sup>27</sup>

The Beijing Declaration and Platform for Action (“Beijing Declaration”) emphasizes that violence against women is “a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women’s full advancement.”<sup>28</sup> In addition to cultural barriers, the Beijing Declaration notes both insufficient legal prohibitions against gender-based violence, failure to reform existing laws perpetuating gender-based violence and inadequate enforcement of laws protecting against gender-based violence.<sup>29</sup> The Beijing Declaration sets forth a plan of action to “adopt laws, where necessary, and reinforce existing laws that punish police, security forces or any other agents of the State who engage in acts of violence against women in the course of the performance of their duties; review existing legislation and take effective measures against the perpetrators of such violence.”<sup>30</sup>

Beyond the Convention articles, several General Recommendations shed light on states’ legal obligations toward protecting sex workers’ right to equal protection of law and signal the development of the Convention over time. In General Recommendation No. 19, the Committee observed that “[p]rostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”<sup>31</sup> The Committee advised States to take action to ensure that the group is protected from violence, wage theft, or coercive services and other exploitative actions in the formal and informal workplaces.<sup>32</sup>

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<sup>27</sup> United Nations, Beijing Declaration and Platform of Action, *adopted at Fourth World Conference on Women*, Oct. 27, 1995, *available at* <http://www.un.org/womenwatch/daw/beijing/platform/> (last visited Dec. 28, 2020).

<sup>28</sup> *Id.* at ¶ 118.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at ¶ 124.

<sup>31</sup> U.N. Comm. on the Elimination of Discrimination against Women (CEDAW Committee), *CEDAW General Recommendation No. 19: Violence against Women*, 11th Sess., 1992, U.N. Doc. A/47/38 (1992).

<sup>32</sup> INT’L WOMEN’S RTS. ACTION WATCH ASIA PACIFIC, *FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 36* (2017), *available at* <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

## Labour Rights as Sex Workers' Rights

### I. International Labour Organization (ILO) Protections

Despite sex work satisfying the ILO's broad definition of work, the ILO has refused to recognize formally sex workers as workers, thereby precluding sex workers from ILO core principles and the many worker protections offered through its conventions. For the sex workers' rights movement, acceptance of sex work as work is key to advancing the workers' human rights. Analyzing sex work through a labour framework means that discussions are focused on improving the working conditions within the sex work industry rather than engaging in protracted moral debates about the acceptability and legitimacy of selling sex. It recognizes that there is nothing inherently violent or exploitative about sex work, but that violence and exploitation are a result of bad laws, policies and labour practices.<sup>33</sup>

Adopting a labour rights framework also is critical to ensure that sex workers are protected from sexual violence and rape by the state. Labour rights inherently demand dignity, acknowledgement of acts that amount to labour and protection of the physical body while simultaneously recognizing the right to protection from occupational hazards and social security. As workers, women who engage in sex work can be covered through anti-discrimination laws and sexual harassment in the workplace laws. They would also be eligible for compensation and damages and could partake in communities who uphold work conditions that protect freedom, equity, security and human dignity.<sup>34</sup>

The ILO's policy on Decent Work is a key labour rights framework that can be applied to sex work to better identify examples of labour exploitation.<sup>35</sup> Key indicators for what constitutes decent work include: that the work is productive and secure; that it provides an adequate income; that it offers social and legal rights protections; and that opportunities are given for collective action, including union participation.<sup>36</sup>

The demand to recognize sex work as work and provide decent work standards does not attempt to imply that all sex workers have positive experiences in sex work. Sex workers, like all workers in all industries, have diverse attitudes. Labour rights, however, are essential for all workers regardless of their individual attitudes to their jobs. The importance of addressing labour exploitation in all sectors, including sex work, is crucial to advancing human rights globally and

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<sup>33</sup> *Id.* at 15.

<sup>34</sup> INT'L LABOUR ORG. (ILO), TOOLKIT FOR MAINSTREAMING EMPLOYMENT AND DECENT WORK: COUNTRY LEVEL APPLICATION (2008), available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_172612.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_172612.pdf) (last visited Dec. 28, 2020).

<sup>35</sup> INT'L LABOUR ORG. (ILO), *Decent Work*, <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> (last visited Dec. 28, 2020).

<sup>36</sup> INT'L LABOUR ORG. (ILO), TOOLKIT FOR MAINSTREAMING EMPLOYMENT AND DECENT WORK: COUNTRY LEVEL APPLICATION (2008), available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_172612.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_172612.pdf) (last visited Dec. 28, 2020).

represents an area that, thus far, has received relatively little attention from States and the CEDAW Committee.<sup>37</sup>

The ILO's Standards on "Forced labour, modern slavery and human trafficking" ("ILO Forced Labour Standards") define forced labour as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily."<sup>38</sup> Women engage in sex work voluntarily, free of threat, and as a profession. By refusing to acknowledge sex work, the ILO discriminates against the employment that women have chosen for themselves.<sup>39</sup> The consequence of this rejection is that sex workers are burdened with the moral and social stigma of their livelihoods, marked singularly as either perpetual victims who need to be saved or sexual deviants who need to be purged. These labels increase vulnerability and human rights violations, including rape and other form of gender-based violence and discrimination.

Inherent to the right to a livelihood<sup>40</sup> under Indian constitutional law is the dignity rights of the person engaging in that livelihood. The Indian Constitution enshrines this protection within Article 21, providing that the "right to life means something more than survival of animal existence. It would include the right to live with human dignity."<sup>41</sup> For sex workers in India, this constitutional guarantee is a broken promise. The dimensions of an existence with dignity includes the freedom from violence and discrimination, as well as the rights to equality before the law, health and livelihood.<sup>42</sup>

## II. CEDAW Protections for Workers

CEDAW's overarching goal is to eliminate discrimination against all women and to promote equality between women and men, including in the workplace. Article 11 specifically charges states to "take all appropriate measures to eliminate discrimination against women in the field of employment."<sup>43</sup> This includes the right to freely choose one's work,<sup>44</sup> the right to social security<sup>45</sup>

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<sup>37</sup> INT'L WOMEN'S RTS. ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 17 (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<https://www.nswp.org/sites/nswp.org/files/framework-on-rights-of-sex-workers-cedaw-1.pdf>

<sup>38</sup> INT'L LABOUR ORG. (ILO), *What is Forced Labour, Modern Slavery and Human Trafficking*, <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> (last visited Dec. 28, 2020).

<sup>39</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>40</sup> Neepa Jani, *Article 21 of Constitution of India and Right to Livelihood*, 2(2) VOICE OF RESEARCH 63, 64 (2013), available at [http://www.voiceofresearch.org/Doc/Sep-2013/Sep-2013\\_14.pdf](http://www.voiceofresearch.org/Doc/Sep-2013/Sep-2013_14.pdf) ("While giving an answer to the question that whether the term 'life' as found in Article 21 would include right to work or right to be assured of adequate means of livelihood Supreme Court in the case of *Olga Tellis and others v. Bombay Municipal Corporation and others* reiterated that, 'As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Art. 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional.'").

<sup>41</sup> *Consumer Education and Research Centre v. Union of India*, A.I.R. 1995 S.C. 42, 3 (India).

<sup>42</sup> *Pt. Parmanand Katara v. Union of India & Ors*, A.I.R. 1989 S.C. 997(3), 2039 (India).

<sup>43</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13 (1980).

<sup>44</sup> *Id.* art. 11(c).

<sup>45</sup> *Id.* art. 11(e).

and the right to working conditions that do not put one's health and safety at risk.<sup>46</sup> Unfortunately, the rights of sex workers as a group are not acknowledged or addressed specifically in CEDAW's provisions themselves.<sup>47</sup>

### III. Acknowledging Sex Workers as Informal Workers

For years, sex workers in India have fought for the State to recognize their identities as workers. Despite ILO and CEDAW failures to recognize this identity on an international level, recent domestic progress has been achieved in India. The National Human Rights Commission (NHRC) advisory,<sup>48</sup> issued on October 7, 2020, formally acknowledged sex workers as “informal workers.”<sup>49</sup> Although the NHRC advisory is a response to the impact of COVID-19,<sup>50</sup> it proffers seven general recommendations for the State to extend assistance to sex workers, providing protections to them in a labour rights framework. This acknowledgement is nothing short of monumental because it is the first government-issued report from the NHRC that recognizes sex workers as legitimate workers.

For sex workers, this government acknowledgement is an overdue affirmation, one that will aid advocates to continue fighting for equal workers' protections for sex workers in the domestic and international spheres. This singular recognition in the context of COVID-19 is not enough as sex workers continue to experience extreme violence at the hands of police and lack the humanitarian support needed during the COVID-19 pandemic.

For example, sex workers in Karnataka State, including Sadhana, petitioned the Courts to force the government to provide them with dry rations and food extended to all other underprivileged groups. In spite of the NHRC advisory, the government's intentions remain clear: the suppression and even eradication of sex workers is preferred over providing them with any access to welfare

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<sup>46</sup> *Id.* art. 11(f).

<sup>47</sup> GLOBAL NETWORK OF SEX WORK PROJECT, THE SMART SEX WORKER'S GUIDE TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 7 (2019), *available at* [https://www.nswp.org/sites/nswp.org/files/smart\\_guide\\_to\\_cedaw\\_-\\_nswp\\_2018\\_0.pdf](https://www.nswp.org/sites/nswp.org/files/smart_guide_to_cedaw_-_nswp_2018_0.pdf).

<sup>48</sup> Indian National Human Rights Commission (NHRC), *Human Rights Advisory on Rights of Women in the Context of COVID-19*, File No. R-19/8/2020-PRP&P-Part (3) (Oct. 7, 2020).

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.* The recommendations are listed under the category of “Women at Work” as follows:

1. State Governments may provide assistance and relief to sex workers, especially lactating mothers  
...
2. Sex workers may be recognized as informal workers and should be registered so that they are able to get worker benefits.
3. Temporary documents may be issued that enable sex workers to access welfare measures . . . as many do not possess [identification cards] or other citizenry documents.
4. Migrant sex workers may be included in schemes and benefits for migrant workers.
5. Recognize that sex workers in non-traditional living arrangements are prone to domestic violence from partners and family members. [This memo] encourages Protection Officers to act on reports of violence against women.
6. [This memo] recommends that states ensure access to free testing and treatment for COVID-19 and also provide soaps, sanitizers and appropriate masks to all sex workers at different localities.
7. State should ensure access to healthcare services, especially for prevention of HIV and other sexually transmitted infections and their treatments.

*Id.*

benefits during the pandemic. The State overlooked most sex workers the distribution of rations as part of food security measures and police were stationed in spaces assumed to be frequented by sex workers to continue their targeted, violent attacks against them.<sup>51</sup> Sexual violence (including verbal, emotional and physical abuse) continues to be weaponized in these efforts.<sup>52</sup>

## **India's Responsibility to Prevent Rape and Other Gender-Based Violence**

### **I. State Responsibility to Prevent Rape under CEDAW**

CEDAW manifests the international human rights framework for addressing gender-based violence through an approach directed at both state and private actors. In doing so, CEDAW obliges the State to address its own conduct, rectify its legal provisions and police private individuals within the State to eliminate discrimination against women. State party obligations to CEDAW compel affirmative action towards eradicating gender-based violence actively in all social, political and cultural aspects of life.

States parties to CEDAW are legally bound to implement its provisions.<sup>53</sup> States parties agree “to pursue by all appropriate means . . . a policy of eliminating discrimination against women.”<sup>54</sup> The agreed policy encompasses incorporation of CEDAW principles into domestic constitutions through appropriate legislative measures. Ratifying States are further obligated to implement legal protections for women’s equality rights, such as refraining from engaging in discriminatory state practices, ensuring that state actors conduct themselves in accordance with CEDAW principles, repealing discriminatory legal provisions and preventing private individuals and institutions from discriminating against women.<sup>55</sup>

The CEDAW Committee’s jurisprudence demonstrates the standard to which State parties are held to eliminate gender-based violence. For example, in *S.L. v. Bulgaria*, the Committee explained that a State party’s failure to take all appropriate measures to prevent gender-based violence against women when “its authorities are aware or should be aware of the risk of such violence,” in addition to the failure to investigate, prosecute and punish perpetrators and provide reparations to victims and survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women.<sup>56</sup> Thus, State parties must prevent gender-based violence, as well as investigate, prosecute, punish and redress victims-survivors with due diligence when acts of gender-based violence occur.

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<sup>51</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>52</sup> *Id.*

<sup>53</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 (1980).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *S.L. v. Bulgaria*, CEDAW views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 99/2016, at 7.3 (Sept. 10, 2019).

## II. Due Diligence Obligation of the State

The concept of due diligence provides a measurement to determine whether a State has met or failed to meet its obligations in combating violence against women.<sup>57</sup> India has a responsibility to both criminalize and prosecute rape pursuant to its obligations under CEDAW. Under CEDAW, India must act with “due diligence” to modify domestic legislation and enforcement mechanisms.<sup>58</sup> On the basis of the practice and *opinio juris* outlined above, it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.<sup>59</sup>

The UN Security Council has recognized the pervasiveness of rape and sexual violence as “systematic” and called for sanctions in order to ensure compliance with international prohibitions of rape in armed conflict.<sup>60</sup> Under international law, India has responsibilities to close the impunity gap for perpetrators of rape, to prosecute perpetrators and remedy existing laws that act as legal barriers for redress.

Furthermore, India is obligated under CEDAW to ensure that cultural and societal practices which contribute to gender-based violence and rape are modified to ensure that women are free from violence.<sup>61</sup> In order to fulfill its obligations, India must regulate not only its conduct as a state and refrain from state-sponsored violence, but it must also regulate private actor’s conduct.<sup>62</sup> The CEDAW Committee imposes a positive obligation on India to act in order to address rape in both the public and private spheres.

In addition to its obligations under CEDAW, India is obligated to take action to criminalize and prosecute rape in accordance with customary international law and *jus cogens* norms. Acts of sexual violence and rape are already classified as *jus cogens* norms and prohibited under international law.<sup>63</sup> For example, the European Court of Human Rights in *Aydin v. Turkey* found rape to constitute torture under the European Convention on Human Rights.<sup>64</sup> The Inter-American

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<sup>57</sup> Yakin Ertürk, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Report of The Special Rapporteur On Violence Against Women, Its Causes And Consequences*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006), available at [https://digitallibrary.un.org/record/565946/files/E\\_CN-4\\_2006\\_61-EN.pdf](https://digitallibrary.un.org/record/565946/files/E_CN-4_2006_61-EN.pdf).

<sup>58</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (OP-CEDAW), art. 1 & 2, Oct. 15, 1999, U.N.G.A. Doc. A/RES/54/4 (2000); *S.L. v. Bulgaria*, CEDAW Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 99/2016, at 7.3 (Sept. 10, 2019).

<sup>59</sup> Yakin Ertürk, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Report of The Special Rapporteur On Violence Against Women, Its Causes And Consequences*, ¶ 29, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006), available at [https://digitallibrary.un.org/record/565946/files/E\\_CN-4\\_2006\\_61-EN.pdf](https://digitallibrary.un.org/record/565946/files/E_CN-4_2006_61-EN.pdf).

<sup>60</sup> S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).

<sup>61</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *CEDAW General Recommendation No. 19*, ¶ 12, adopted 11th Sess., 1992 (contained in U.N. Doc. A/47/38), 1992, A/47/38, available at <https://www.refworld.org/docid/453882a422.html> (last visited Dec. 28, 2020).

<sup>62</sup> Elizabeth Sepper, *Confronting the Sacred and Unchangeable: The Obligation to Modify Cultural Patterns Under the Women’s Discrimination Treaty*, 30 U. PA. J. INT’L L. 585, 638 (2008).

<sup>63</sup> Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms*, 34 CASE WEST. RES. J. INT’L L. 287, 294 (2002).

<sup>64</sup> *Aydin v. Turkey*, App. No. 23178/94, Case No. 57/1996/676/866 [ECtHR] ¶¶ 83-88 (1997).

Commission on Human Rights (IACHR) found rape to similarly constitute torture.<sup>65</sup> In both cases, rape is prescribed as a component of other crimes regarded as peremptory norms in international law in a similar manner to International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) findings.<sup>66</sup> Under international humanitarian law, the Geneva Conventions, as customary law, prohibit rape.<sup>67</sup> Rape has been interpreted consistently to establish conduct that proves elements of torture, slavery and genocide under international law.<sup>68</sup>

### **III. Conflating Trafficking with Sex Work Further Marginalizes Sex Workers**

Although CEDAW obligates States parties to act, sex workers' rights prescribed under CEDAW are at risk when state legislation aimed at fulfilling CEDAW obligations is flawed and in need of revision. Article 6 of CEDAW creates an obligation for States to address trafficking in women and the "exploitation of prostitution of women."<sup>69</sup> The operative word "exploitation," however, is undefined. The use of "exploitation" muddles the discourse with regard to sex workers because of the term's use in other treaties concerning human trafficking.<sup>70</sup> Further, without the clear and explicit acknowledgement of the vulnerability of sex workers, those who are devoid of labour protections, criminalized, robbed of economic rights, stigmatized, lacking in access to justice and disproportionately female, CEDAW falls short of identifying "exploitation" and offering adequate human rights protections to sex workers. For example, a prominent ideological viewpoint posits that all forms of sex work are inherently exploitative. Under this lens, even freely chosen sex work is coercive, whether economic, forced, or the result of other circumstances.<sup>71</sup>

There is general mistrust of sex workers by the police. They hold the assumption that non-trafficked sex workers are complicit in the exploitation of trafficked sex workers. The police's dismissive attitude is unfortunate and misleading, considering the commitment of many sex workers to stop trafficking.<sup>72</sup> When States enact legislation aimed at fulfilling their obligations under Article 6 of CEDAW, they tend to frame all sex work as inherently exploitative or assuming

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<sup>65</sup> Raquel Martí de Mejía v. Perú, Case No. 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996).

<sup>66</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment (Sept. 2, 1998); Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case No. IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (Feb. 22, 2001).

<sup>67</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 76, 1125 U.N.T.S. 3 (June 8, 1977).

<sup>68</sup> Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms*, 34 CASE WEST. RES. J. INT'L L. 287, 296 (2002).

<sup>69</sup> CEDAW, at art. 6 (obligating States parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.").

<sup>70</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter "Palermo Protocol"]; United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* Sept. 29, 2003.

<sup>71</sup> Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORD. INT'L L. J. 163, 187 (1994).

<sup>72</sup> GLOBAL NETWORK OF SEX WORK PROJECTS (NSWP), SEX WORK IS NOT TRAFFICKING, BRIEFING PAPER 4, *available at* <https://www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf>.

complicity of sex worker. These provisions may conflict with other CEDAW obligations, including protecting sex workers from state and private violence.<sup>73</sup>

Conceptualizing sex work as inherently exploitative undermines women's autonomy. Elsewhere in this submission, the personal testimonies of working women demonstrate that diminishing agency, autonomy and choice of women, even if choice creates other intersectional realities is fundamentally counterintuitive to the rights of women. Failing to recognize autonomy rights leads to the patriarchal state stepping in, in India's case, to isolate, harass and eliminate sex workers, including through systematic rape and other gendered forms of violence.

Each woman interviewed for this submission emphasized that they chose to enter and remain involved in sex work for various reasons.<sup>74</sup> States enacting legislation that targets sex work must take cognizance of this reality and promote, rather than hinder, women's autonomy. If States adopt frameworks viewing all sex work as inherently exploitative, this framework furthers neither women's labour protections nor protections from violence, including rape. Rather, this framework compounds stigma and discrimination against women. Instead, States must enact legislation that promotes women's autonomy and provides protections for workers against rape and other gender-based violence.

Sadhana's advocates noted that trafficking is intertwined with migrant labour and is not exclusive to sex work.<sup>75</sup> However, the organization has concluded that law enforcement raids frequently target sex workers because no distinction is made between women trafficked for sex work and those who do sex work voluntarily.<sup>76</sup>

#### **IV. Rape in Indian Law and Gaps in Access to Justice**

Indian law forms the definition of rape under Section 375 of the Indian Penal Code (IPC).<sup>77</sup> The interpretation includes "consent" defined as "clear, voluntary communication that the woman

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<sup>73</sup> *Id.* ("Members of NSWP report that raids fuel the already hostile and intolerant climate towards sex workers. They legitimate aggression, violence and hate crimes against female, male, transvestite and transgender sex workers. Further, they add to the tense relations between sex workers and law enforcers, thus diminishing hopes for cooperation. All workers in the sex industry are affected by raids. The livelihoods of sex workers' colleagues, managers, maids, assistants, and drivers are disrupted by raids. These individuals, as well as service providers who attempt to assist undocumented sex workers, risk being accused and/or arrested as traffickers.").

<sup>74</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>75</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>76</sup> PHILIPPA LEVINE, PROSTITUTION, RACE, AND POLITICS: POLICING VENEREAL DISEASE IN THE BRITISH EMPIRE 9 (2003).

<sup>77</sup> PEN. CODE, 1860, § 375 (India). Under this Section:

[Rape is] sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 18 years of age.

It's rape if it falls under following categories:

1. Against her will.
2. Without her consent.
3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
4. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

gives for a certain sexual act. Marital rape is an exception to giving consent as it is not a crime under the Indian Penal Code, as long as the woman is above 18 years of age.”<sup>78</sup>

The understanding and application of IPC Section 375 has been left to courts that have further defined rape. The Indian Law Commission’s 172nd Report recommended widening the scope of rape law to make it gender neutral.<sup>79</sup> India’s rape law remains gender specific as the perpetrator of the offence can only be a “man.”<sup>80</sup> The LGBTIQ+ community is excluded, resulting in the sanctioning of extreme violence ranging from the abuse they face as sex workers to “corrective rape.”<sup>81</sup> Several general recommendations of the CEDAW Committee, including: General Recommendation No. 28 on core obligations of states parties,<sup>82</sup> General Recommendation No. 33 on women’s access to justice,<sup>83</sup> General Recommendation No. 35 on gender-based violence against women<sup>84</sup> and General Recommendation No. 36 on the right of girls and women to education<sup>85</sup> affirm that discrimination against women can be inextricably linked to other factors, including being lesbian, bisexual, transgender or intersex.<sup>86</sup> A clear amendment in the IPC would demonstrate intention within the legislative framework to prohibit faulty investigations and lack of prosecution of sexual violence perpetrated against the LGBTIQ+ community.

India has also failed to amend the law to recognize marital rape as rape. Exception 2 of Section 375 of the IPC reads “sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”<sup>87</sup> This law permits violence against women on the basis of their

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5. With her consent, when, at the time of giving such a consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

6. With or without her consent, when she is under sixteen years of age. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

*Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Law Commission of India, Report No. 172: Review of Rape Laws (Mar. 25, 2000), available at <http://www.bareactslive.com/LCR/LC172.HTM> (last visited Dec. 28, 2020).

<sup>80</sup> Fatima Khan, *Year after Homosexuality was Decriminalised, Equality a Distant Dream for LGBTQ Community*, THE PRINT (Sept. 6, 2019), <https://theprint.in/india/year-after-homosexuality-was-decriminalised-equality-a-distant-dream-for-lgbtq-community/286312/>.

<sup>81</sup> Rohini Chatterji, *Horrifying: Parents in India are Using “Corrective Rape” to Cure Homosexual Children*, FIRSTPOST.COM (June 1, 2015), <https://www.firstpost.com/india/horrifying-parents-india-using-corrective-rape-cure-homosexual-children-2273030.html>.

<sup>82</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶¶ 18, 31, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

<sup>83</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 33 on Women’s Access to Justice*, ¶¶ 8, 49, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015).

<sup>84</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, ¶¶ 12 & 29(c)(i), U.N. Doc. CEDAW/GC/35 (July 17, 2017), available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf).

<sup>85</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *CEDAW General Recommendation No. 36 on the Right to Girls and Women to Education*, ¶¶ 45, 46(i) & 66, U.N. Doc. CEDAW/C/GC/36 (Nov. 27, 2017).

<sup>86</sup> Hum. Rts. Watch, *Human Rights Watch Submission to the U.N. Special Rapporteur on Violence Against Women* (May 22, 2020), available at <https://www.hrw.org/news/2020/05/22/human-rights-watch-submission-un-special-rapporteur-violence-against-women#> (last visited Dec. 28, 2020).

<sup>87</sup> PEN. CODE, 1860, § 375(4) (India).

marital status and is therefore inconsistent with Article 1 and is direct discrimination. General Recommendation No. 35 requires states to “ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances.”<sup>88</sup> State failures to criminalize marital rape represent an encouragement or de facto permission for this crime, and falling short of the due diligence obligation.<sup>89</sup>

## V. India Must End Impunity and Prosecute Perpetrators of Rape

Although women have equal protection under the Indian Constitution, they are not fully protected—and in fact are degraded—under India’s penal laws. Justice Saghir Ahmad is quoted in *Redefining the Rape Laws in India: A Constructive and Comparative Approach*, stating: “[u]nfortunately a woman in [India] belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have therefore, been victims of tyranny at the hands of men with whom they, unfortunately, under the Constitution enjoy equal status.”<sup>90</sup>

India’s approach to criminalization of rape implements a resistance model.<sup>91</sup> For example, in cases of attempted rape, unless the Court is satisfied that there was determination by the accused “to gratify his passion at any cost, and in spite of all resistance,” such person is not charged.<sup>92</sup> When rape does occur, the victim is allowed to be questioned about her sexual history.<sup>93</sup> Furthermore, there is an exception for marital rape where the wife is older than fifteen years old.<sup>94</sup> All of these models ensure that even though constitutionally women are equal to men, in practice men are exempt for the crime of rape when the woman did not resist enough, if she is not sexually “pure,” or if she is married. These allowances normalize gender-based violence against women, which reverberates far beyond these expectations. The Indian government must urgently enact national

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<sup>88</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, ¶ 33, U.N. Doc. CEDAW/GC/35 (July 17, 2017), available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf).

<sup>89</sup> Surya Rajkumar, *International Law, Right to Privacy and Marital Rape in India*, OXFORD HUM. RTS. HUB (Feb. 25, 2018), <https://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india/> (last visited Dec. 28, 2020).

<sup>90</sup> Dharm Veer Singh Krishnawa, *Redefining the Rape Laws in India: A Constructive and Comparative Approach*, [http://www.legalserviceindia.com/articles/rape\\_1.htm](http://www.legalserviceindia.com/articles/rape_1.htm) (last visited Dec. 28, 2020).

<sup>91</sup> PEN. CODE, 1860, § 375 (India). According to the Indian Penal Code:

[P]enetration is sufficient to constitute the sexual intercourse necessary for rape. A man is considered to “commit rape under the following circumstances:

1. Sexual intercourse against the victim’s will,
2. Without the victim’s consent,
3. With her consent, when her consent has been obtained by putting her or any person that she may be interested in fear of death or hurt,
4. With her consent, when the man knows that he is not her husband,
5. With her consent, when at the time of giving such consent she was intoxicated, or is suffering from unsoundness of mind and does not understand the nature and consequences of that to which she gives consent,
6. With or without her consent when she is under sixteen years of age.

*Id.*

<sup>92</sup> PEN. CODE, 1860, § 354 (India).

<sup>93</sup> EVIDENCE ACT, 1872, § 155(4) (India).

<sup>94</sup> Dharm Veer Singh Krishnawa, *Redefining the Rape Laws in India: A Constructive and Comparative Approach*, [http://www.legalserviceindia.com/articles/rape\\_1.htm](http://www.legalserviceindia.com/articles/rape_1.htm) (last visited Dec. 28, 2020).

legislation and implement effective structures and processes to protect women in order to realize not only their Constitutional equality with men before the law, but also their equal access to redress.

India must also facilitate programs and mechanisms that coalesce each structural mechanism with which both women under threat of sexual violence and victim-survivors of sexual violence have to interface as they seek assistance and legal recourse when they have been raped. Such structural mechanisms include the police, the judiciary, and medical care facilities, but also forensic facilities, child welfare committees, national and state commissions for women, civil society organizations and legal aid services.<sup>95</sup>

The apathy of law enforcement agencies toward women's safety is experienced by all women. Breaking the cycle of impunity will have to involve a targeted reformation of police conduct and its management of victim-survivors and their cases. Institutional change is fundamental because law enforcement is one of the first institutional structures victim-survivors interface with and it is usually the gateway to pursuing legal justice. Sexual violence against women perpetuated by police, as well as police resistance, apathy, or refusal to investigate in the process of receiving rape charges is a threat to the state's ability to prosecute perpetrators in violation of due diligence obligation. India has sections<sup>96</sup> within the penal code specifically addressing the crime of rape committed by law enforcement; however, for sex workers this redressal is barely accessible. Administrative offences and public order laws often give the authorities a wide range of discretion in how they are implemented, which often acts as a cover for unlawful police practices such as violence and extortion. In effect, criminalization and the application of administrative penalties often produce the same results for sex workers, including abuse, extortion, exposure to violence, and the denial of civil liberties and due process protections.<sup>97</sup>

## VI. Courts Stigmatize Sex Work

The Court's role in perpetuating stigma is evidenced in *Budhadev Karmaskar vs State of West Bengal*, through the Court's approach to addressing issues that sex workers endure.<sup>98</sup> In *Budhadev Karmaskar*, the Court upheld a criminal conviction for the brutal murder of a sex worker. The case was turned into a public interest litigation *suo motu* to address problems that plague sex workers.<sup>99</sup> While the Court in *Karmaskar* attempted to remedy the abuses against sex workers, the Court's language denies sex workers' identity as workers. It emphasized that "sex workers obviously cannot lead a life of dignity as long as they remain sex workers," explicitly denying sex workers'

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<sup>95</sup> HUM. RTS. WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA 75 (2017).

<sup>96</sup> PEN. CODE, 1860, § 376(2)(a) (India) ("Whoever,—(a) being a police officer commits rape—(i) within the limits of the police station to which he is appointed; or (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or (iii) on a woman in his custody or in the custody of a police officer subordinate to him").

<sup>97</sup> INT'L WOMEN'S RTS. ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 23 (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<sup>98</sup> *Budhadev Karmaskar v. State of West Bengal*, (Feb. 14, 2011) 135 S.C.R. 1 (India).

<sup>99</sup> *Id.*

autonomy and respectability because of the very nature of their labour.<sup>100</sup> In denying dignity to sex work, the Court categorically rejects sex workers' identities as labourers, further stigmatizing them. An implicit distinction is drawn between sex work and more socially and culturally accepted forms of labour. Dehumanization and "othering" of sex workers causes and contributes to the societal norms and institutional discrimination that permits violence against them with impunity at the hands of both state and private actors.

In a concurring opinion, Justice Mishra exemplified the Court's attitude towards sex workers by clarifying that the Court is not "encouraging the sex workers to continue with their profession of flesh trade."<sup>101</sup> Rather, the Court, "is merely making an effort to advocate the cause of offering an alternative source of employment to those sex workers who are keen for rehabilitation."<sup>102</sup> The Court confines itself to rehabilitation rather than acceptance of sex workers' participation in the commercial sex industry. In doing so, the Court paradoxically undercuts its professed agenda. While the Court's aim is to alleviate the harsh realities that sex workers face by providing them with vocational training in order to "obliterate" their sex worker identity, the Court advocates a viewpoint that furthers the negative stigmatization of sex work.

Also, courts commonly judge rape victims based on a disillusioned patriarchal construct of how victims of sexual violence should act. In *Raja vs. State of Karnataka*, the Court undermined the possibility that a sex worker could be a rape victim because she did not act the way they believed she should. "Her conduct during the alleged ordeal is also unlike a victim of forcible rape . . . . From the nature of the exchanges between her and the accused persons as narrated by her, the same are not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct. Her post incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and devastated state, she stayed back . . . ."<sup>103</sup>

When courts adopt this understanding of sex work, the courts enforce social majoritarian morality rather than constitutional norms. According to the testimonies of the women interviewed, society deems sex workers to be "immoral and deplorable."<sup>104</sup> Sex workers are classified as a class of "untouchables."<sup>105</sup> Effectively, stigmatization leads to feelings of shame as some of the women interviewed felt fearful at the thought of their children ever finding out about their professions.<sup>106</sup> Furthermore, some women refuse to go to doctors because they are afraid of their physicians finding out their professions and discriminating against them.<sup>107</sup> Significantly, the stigma deters those sex workers who would like to leave the profession from doing so out of concern that future employers will not treat them with respect if it is discovered that they once were sex workers.<sup>108</sup> Law enforcement's use of public nuisance laws and the ITPA to arrest sex workers further demonstrates

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<sup>100</sup> *Id.* at 5.

<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Id.*

<sup>103</sup> *Raja and Ors. v. State of Karnataka*, (Oct. 4, 2016), Criminal Appeal No. 1767 S.C.C. (2011) (India).

<sup>104</sup> *Id.*

<sup>105</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

the denouncement of sex work as a livelihood.<sup>109</sup> Sadhana's Director, Geeta asserted that society views sex workers as objects to dominate and oppress, while also using them as an outlet for sexual frustrations.<sup>110</sup> The stigma is both an expression of patriarchal culture and a factor facilitating its perpetuation; such stigma raises legal barriers to achieving justice for sex workers through judicial application and interpretation of the law as well as through police enforcement.

Every transaction is based upon the exchange of a service for an agreed-upon price. Thus, if a sex worker is not paid enough or at all based on the agreement, or if the client demands service of a different nature than what the sex worker agreed to, consent is nullified. Where the act has not occurred, a sex worker—like any other women—must be able to say “no” to whatever she has not agreed to and withhold consent to move forward. When the act is complete and the client breaches the contract by not paying the agreed upon price, a sex worker must have a path of redress. The common safeguard against fraud is to have clients pay beforehand. However, per the *Raja* case and the testimonies of sex workers, clients sometimes try to extract service without payment.<sup>111</sup> More distressing is when clients demand services of a different nature from what sex workers agree to perform. Such was the predicament Shyla<sup>112</sup> found herself in when she and another sex worker agreed to meet with clients. Once there, they noticed that the clients mixed something into their drinks and that there were seven unexpected men standing outside the room.<sup>113</sup> Thankfully both women were able to escape. Not only was it dangerous, but in such an instance where clients intend to initiate a sexual encounter that exceeds what the sex workers have agreed to, it is within their right to withdraw consent. The non-recognition of sex work as an act of labour allows clients to continue holding power over women and increases risks to sex workers' well-being and safety.

The law is obligated to equally protect everyone from rape- including sex workers. To deem that sex workers are less impacted by rape than other women because they provide sex as a service is discriminatory. For sex workers—when working—sex is transactional; the nature of each appointment is discussed, negotiated and agreed upon. In this way, the act of sex is planned and consensual. Rape is the antithesis of sex work because voluntary sex work is about a woman's agency to use her body and to control how she does so, in order to make a living. Rape, on the other hand is about the domination over her, an act against her will and disregarding her consent, to intimidate, humiliate and oppress with violence. Rape is a violent crime from which sex workers need protection as does any other individual.

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<sup>109</sup> *Id.*

<sup>110</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (Name changed to protect confidentiality.)

<sup>113</sup> *Id.*

## Sex Workers' Vulnerability to Violence

### I. Criminalization and Stigmatization of Sex Workers

India's domestic law regarding sex work is framed by the ITPA.<sup>114</sup> The ITPA's purpose is to prevent the traffic of women and children in prostitution in India.<sup>115</sup> Enacted in 1956 (amended in 1986), the law uses the term "prostitution," defined as "the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind . . ." <sup>116</sup> The ITPA does not criminalize the act of sex for remuneration, but does criminalize all attendant activities, including solicitation, "aiding, abetting, or compelling" prostitution and living off the earnings of prostitution.<sup>117</sup> All offenses are criminal, placing not only sex workers but also their dependents in jeopardy of arrest and prosecution. The ITPA imposes additional punishment of up to three months imprisonment when prostitution activities are carried out "within a distance of two hundred meters of any place of public religious worship, educational institution, hotel, hospital, nursing home" or such other public place as allocated by the Commissioner of Police or a Magistrate.<sup>118</sup> The majority of sex worker arrests are for the offense of solicitation.<sup>119</sup>

The effect of the ITPA's criminalization of both the solicitation of sex work and the existence of sex workers near "respectable" public institutions makes clear the intent of Indian law to ensure that, while sex work may exist, sex workers may not be seen.<sup>120</sup> The facts of the *Sahyog Mahila Mandal* case before the Supreme Court of India demonstrates the circumstances of most sex workers who are constantly harassed by the State to live at the fringes of society.<sup>121</sup> The *Sahyog Mahila Mandal* case considers the treatment of sex workers who resided in Chakla Bazaar, an area in Surat that was initially on the outskirts of the city.<sup>122</sup> Women engaged in sex work were given homes in this area and lived there for more than 400 years.<sup>123</sup> However, the city of Surat expanded over the years until it merged with Chakla Bazaar.<sup>124</sup> Schools, temples and mosques were built, and it became known as a "red light area."<sup>125</sup> The petitions alleged police-perpetrated atrocities against the women sex workers in this area such as arresting them without due process rights and causing forcible evictions from their homes.<sup>126</sup> The petitioners also sought to challenge the

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<sup>114</sup> The Immoral Traffic (Prevention) Act, (1956) (India).

<sup>115</sup> SADHANA MAHILA SANGHA, FROM STIGMA TO JUSTICE: PUBLIC HEARING ON POLICE VIOLENCE AGAINST WOMEN AND TRANSGENDER SEX WORKERS 31 (Mar. 5, 2019).

<sup>116</sup> The Immoral Traffic (Prevention) Act, (1956) § 2(f) (India) ("Definitions. - In this Act, unless the context otherwise requires, 'prostitution' means the sexual exploitation or abuse of persons for commercial purposes, and the expression 'prostitute' shall be construed accordingly.").

<sup>117</sup> *Id.* at § (2-A)4(b).

<sup>118</sup> *Id.* at § (2-A)7(b).

<sup>119</sup> INT'L WOMEN'S RTS. ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 22 (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<sup>120</sup> SADHANA MAHILA SANGHA, FROM STIGMA TO JUSTICE: PUBLIC HEARING ON POLICE VIOLENCE AGAINST WOMEN AND TRANSGENDER SEX WORKERS 31 (Mar. 5, 2019).

<sup>121</sup> *Sahyog Mahila Mandal And Anr. Vs State Of Gujarat And Ors.*(2004) - 2 GLR 1764 at 3. Section 2.1.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.* at 1.

provisions of the ITPA<sup>127</sup> on the grounds that it violated rights guaranteed under Articles 14, 19 and 21 of the Indian Constitution.<sup>128</sup> The Court held that the unfettered police power was not arbitrary, and the warrantless searches they conducted were not discriminatory or pointless because their mission to move sex workers out of the city of Surat necessitated these measures.<sup>129</sup> They were able to uphold the arbitrary actions of law enforcement through the implementation of the ITPA.

The ITPA also makes an “owner, lessor or landlord of any premises” with the knowledge that any part thereof may be used for prostitution, a willful party of the prostitution, thereby criminalizing anyone who may wish to provide housing to sex workers.<sup>130</sup> This criminalization of landlords places sex workers in an incredibly vulnerable position for securing or maintaining housing security, which protects women sex workers from gender-based violence. The Indian Supreme Court applied the same reasoning in *Shankar v. State of Tamil Nadu*, where it held that “if in a particular locality the vice of prostitution is endemic, degrading those who live by prostitution and demoralising others who come into contact with them, the Legislature may have to impose severe restrictions on the right of a prostitute to move about and to live in a house of her own choice.”<sup>131</sup> In both cases, the Indian judiciary is definitive in its treatment of sex workers, not only in refusing to protect women from police brutality, but also in upholding without question a law that criminalizes all aspects of daily life and liberty of sex workers. Aside from enabling extreme

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<sup>127</sup> Immoral Traffic (Prevention) Act, (1956), §§ 7(1)(b), 14 & 15 (India). The Sections read:

Section 7(1)(b) - Prostitution in or in the vicinity of public place .—(1) Any person who carries on prostitution and the person with whom such prostitution is carried on, in any premises: (b) which are within a distance of two hundred meters of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or Magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months . . . .

Section 14 - Offences to be cognizable .—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of that Code: Provided that, notwithstanding anything contained in that Code, (i) arrest without warrant may be made only by the special police officer or under his direction or guidance, or subject to his prior approval; (ii) when the special police officer requires any officer subordinate to him to arrest without warrant otherwise than in his presence any person for an offence under this Act, he shall give that subordinate officer an order in writing, specifying the person to be arrested and the offence for which the arrest is being made; and the latter officer before arresting the person shall inform him of the substance of the order and, on being required by such person, show him the order; (iii) any police officer not below the rank of sub-inspector specially authorised by the special police officer may, if he has reason to believe that on account of delay involved in obtaining the order of the special police officer, any valuable evidence relating to any offence under this Act is likely to be destroyed or concealed, or the person who has committed or is suspected to have committed the offence is likely to escape, or if the name and address of such a person is unknown or there is reason to suspect that a false name or address has been given, arrest the person concerned without such order, but in such a case he shall report, as soon as may be, to the special police officer the arrest and the circumstances in which the arrest was made . . . .

Section 15 - Search without warrant .—(1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer or the trafficking police officer as the case may be, has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.

*Id.*

<sup>128</sup> INDIA CONST. arts. 14 (Equality before law), 19 (Protection of certain rights regarding freedom of speech, etc.) & 21 (Protection of life and personal liberty).

<sup>129</sup> *Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors.*, (2004), 2 G.L.R. 1764, at 24 (India).

<sup>130</sup> Immoral Traffic (Prevention) Act, (1956), §§ (1-A)2(a)-(c) (India).

<sup>131</sup> *Shankar v. State of Tamil Nadu*, (1994), 4 S.C.C. 478 (India).

impunity for law enforcement, the law also results in women being forced into *ad hoc* confinement-type rehabilitation programs and their families, including sometimes children, being arrested as traffickers.<sup>132</sup>

## II. Rights to Equality and Freedom of Discrimination

Without equal protection of the laws, sex workers have no safeguards against crimes committed against them. CEDAW's General Recommendation No. 19 states that "[p]rostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence."<sup>133</sup> The reality for sex workers is that they do not have equal protection as a result of two determining circumstances: first, that sex workers' marginalized status makes them more susceptible to abuse and then that this marginalization negatively affects their ability to seek legal protection for abuses when they occur.<sup>134</sup>

In *Prostitution and Consent* scholar Barbara Sullivan outlines a general study covering whether sex workers are afforded equal protection of the law when they are sexual assault victims. She observed that, before the courts, sex workers lack credibility, which makes it difficult for the prosecution to prove sexual assault beyond a reasonable doubt.<sup>135</sup> Per Sullivan's study, the men were permitted to present evidence to prove that the victim-witness was a sex worker, and the medical expert was permitted to testify that she was "accustomed to sexual intercourse."<sup>136</sup> This evidence was allowed to determine her credibility, proving the Court's discrimination against sex workers and thus their lack of objectivity. As Sullivan observes, this unfair procedure shows that "[c]learly, a prostitute—or a woman who [is] simply promiscuous— [is] a particularly untrustworthy woman who [is] not worthy of the law's protection."<sup>137</sup>

In the previously mentioned case of *Raja vs. State of Karnataka*, despite the gang rape that the prosecutrix endured, as evidenced by her scars, the Supreme Court held that the victim's narrative or experience did not seem credible because she was a sex worker.<sup>138</sup> The victim's sexual history and chosen area of work led the Court to determine that she lied about the rape because she was scorned for nonpayment.<sup>139</sup> Sex workers experience violence at the hands of some clients and intimate partners and the court's stereotyping and treatment, prevents women from negotiating

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<sup>132</sup> *Id.*

<sup>133</sup> GLOBAL NETWORK OF SEX WORK PROJECT, THE SMART SEX WORKER'S GUIDE TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 16 (2019), available at [https://www.nswp.org/sites/nswp.org/files/smart\\_guide\\_to\\_cedaw\\_-\\_nswp\\_2018\\_0.pdf](https://www.nswp.org/sites/nswp.org/files/smart_guide_to_cedaw_-_nswp_2018_0.pdf).

<sup>134</sup> INT'L WOMEN'S RTS. ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 37 (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<sup>135</sup> Barbara Sullivan, *Rape, Prostitution and Consent*, 40(2) AUSTRALIAN & NEW ZEALAND J. OF CRIM. 128 (2007).

<sup>136</sup> *Raja and Ors. v. State of Karnataka*, (2017), Criminal Appeal No. 1767 SCC (2011) ¶ 20 (India).

<sup>137</sup> Barbara Sullivan, *Rape, Prostitution and Consent*, 40(2) AUSTRALIAN & NEW ZEALAND J. OF CRIM. 130 (2007).

<sup>138</sup> *Raja and Ors. v. State of Karnataka*, (Oct. 4, 2016), Criminal Appeal No. 1767 S.C.C. (2011), ¶ 20 (India).

<sup>139</sup> *Id.*

safer sex, but more critically becomes an obstruction to access to justice<sup>140</sup> when faced with harm or abuse.

Indian courts reject the term “sex worker” as they see it as a phrase that gives dignity only to pimps, procurers, and others who profit off of sexual exploitation.<sup>141</sup> While the Court rightly points out that the term “sex worker” is problematic in some respects, the Court’s critique misses the mark. As Sadhana’s Director observes, the term is problematic because it is gendered within public imagination.<sup>142</sup> Furthermore, the term also inherently stigmatizes sex workers and essentializes their identities because “it has implications that are singular: once [somebody] identifies as a sex worker, people do not see you as anything other than that.”<sup>143</sup> Rather than addressing these concerns, the Court fosters social stigma against sex workers through its conflation of voluntary sex work and sexual exploitation.<sup>144</sup> The Court frames sex work as inherently “degrading” and a practice which “undermines womanhood itself,” proclaiming that under the Indian Constitution, “it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women.”<sup>145</sup> Although this is seemingly in accordance with India’s obligations under CEDAW, the Court’s equation of voluntary sex work and sexual exploitation leads to further stigmatization of sex workers and exacerbates their vulnerability to sexual violence, including rape.

### III. Police Harassment and Violence

Criminalization of sex work and sex workers’ identities condones gender-based violence and adversely affects the mental health of sex workers and furthers the cultural and societal stigma directed towards sex workers. Additionally, criminalization facilitates state harassment of sex workers by enabling and sometimes even encouraging law enforcement to brutalize women either out of sex work or away from spaces where they engage in sex work.<sup>146</sup> State actors, including elected officials and police officers, directly and indirectly engage in acts of gender-based violence against sex workers in creating and enforcing legislation or norms that uphold cultural prejudices against them. Police officers in particular engage in systematic abuse of sex workers through

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<sup>140</sup> U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 33 on Women’s Access to Justice*, ¶ 8, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015):

Discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms, and gender-based violence, which particularly affect women, have an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition, discrimination against women is compounded by intersecting factors that affect some women to a different degree or in different ways than men and other women. Grounds for intersectional or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, and being lesbian, bisexual, transgender women or intersex persons. These intersecting factors make it more difficult for women from those groups to gain access to justice.

*Id.*

<sup>141</sup> *Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors.*, (2004), 2 G.L.R. 1764, at 18 (India).

<sup>142</sup> Michael T. Tien, *Human Trafficking: The Missing Male Victim*, 18 PUB. INT. L. REP. 207, 208 (2013) (arguing that while a disproportionate number of human trafficking victims are women, there is little discussion regarding male victims because of gendered understandings of sexual exploitation); Santosh Shinde et al., *Male Sex Workers: Are We Ignoring a Risk Group in Mumbai, India?*, 75 INDIAN J. OF DERM., VENER., & LEPR. 41 (2009) (spotlighting male sex workers as a vulnerable group to sexually transmitted diseases, including HIV).

<sup>143</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>144</sup> *Id.*

<sup>145</sup> *Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors.*, (2004), 2 G.L.R. 1764, at 19 (India).

<sup>146</sup> U.N. DEVELOPMENT FUND (UNDP), REPORT, SEX WORK AND THE LAW IN ASIA AND THE PACIFIC 1 (2012).

assaults, detentions and abuse, including harassment and criminalization of clients and the family members of sex workers.<sup>147</sup>

As a part of this submission, members of Sadhana who engage in sex work shared incidents where police officers verbally harass and detain them for existing as a sex worker in a public space.<sup>148</sup> Subsequently, women recounted that the police regularly verbally and physically abuse them in various brutal ways including<sup>149</sup> inserting chili powder into their vaginas and using electric shocks to harm them.<sup>150</sup>

Police also rape sex workers with impunity. One woman detailed an experience where an officer threatened her with filing a false report as a pretext to lure her into his car and drive her to a secluded graveyard where the officer robbed her, raped her and left her stranded.<sup>151</sup> Similarly, a group called *Obavva Pade (OP)* exemplifies the extent of state-sponsored harassment of sex workers. *Obavva Pade* is a police-authorized unit of women (without any police training) recruited exclusively for the purpose of moral policing.<sup>152</sup> Their primary function is to apprehend sex workers in public, abuse and humiliate them, and forcefully drag them to police stations.<sup>153</sup> Sex workers are chased to the streets, threatened with jail, questioned on their profession, harassed in public and verbally and physically chastised.<sup>154</sup> Sex workers interviewed for this submission often noted that *OP*'s harassment and brutality exceeded that of the police because they were formed for the sole purpose of harassing sex workers.<sup>155</sup> In addition to physical injuries and fines, the tangible effects of state-sponsored gender-based violence toward sex workers by police and police-appointed units includes long-term trauma, anxiety and other mental health issues, including suicidal ideation.<sup>156</sup>

India's domestic legislation contributes significantly to the violence, including rape and other gender-based violence, that sex workers endure because of the way police conduct enforcement despite the fact that private acts of commercial sex are not criminalized under the ITPA.<sup>157</sup> In a survey addressing police violence toward sex workers in India,<sup>158</sup> 50% experienced abusive

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<sup>147</sup> *Id.* at 2.

<sup>148</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Eve teasers beware, Obavva Pade on prowl in Bengaluru*, DECCAN CHRONICLE (May 25, 2018), <https://www.deccanchronicle.com/nation/current-affairs/250518/eve-teasers-beware-obavva-pade-on-prowl-in-bengaluru.html> (last visited Dec. 28, 2020).

<sup>153</sup> SADHANA MAHILA SANGHA, FROM STIGMA TO JUSTICE: PUBLIC HEARING ON POLICE VIOLENCE AGAINST WOMEN AND TRANSGENDER SEX WORKERS 8 (Mar. 5, 2019).

<sup>154</sup> *Id.* at 10.

<sup>155</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>156</sup> SADHANA MAHILA SANGHA, FROM STIGMA TO JUSTICE: PUBLIC HEARING ON POLICE VIOLENCE AGAINST WOMEN AND TRANSGENDER SEX WORKERS 10 (Mar. 5, 2019).

<sup>157</sup> SANGRAM, VIOLATIONS FACED BY SEX WORKERS IN INDIA (Sept. 22, 2016), <https://www.sangram.org/resources/UPR-Submission-Sex-Work-Final-Submission-22-Sep-2016.pdf> (last visited Dec. 28, 2020).

<sup>158</sup> Dallas Swendeman et al., *Whatever I Have, "I Have Made by Coming into this Profession": The Intersection of Resources, Agency, and Achievements in Pathways to Sex Work in Kolkata, India*, ARCH. SEX. BEHAVIOR 44 10.1007/s10508-014-0404-1 (2015).

language, 35% were physically and sexually abused, 37% were threatened, and 20% were forced to give bribes to police officers.<sup>159</sup>

For example, police are “systematic,” according to Sadhana’s director, Geeta, in the way in which they target sex workers.<sup>160</sup> Officers weaponize the ITPA, public nuisance laws and even anti-terrorism laws.<sup>161</sup> Sex workers view law enforcement as “the most repressive state agency” as they are sexually assaulted and physically abused while in custody.<sup>162</sup> Officers use the ITPA to remove sex workers from public spaces, despite the ITPA’s aim to inhibit the traffic in women and girls for the purpose of *exploitation* of prostitution.<sup>163</sup> Section 5 of the ITPA explicitly criminalizes “procurement” for the “purpose of prostitution,” criminalizing traffickers and excluding voluntary sex work from the aim of the legislation.<sup>164</sup> However, policing practices do not reflect the legislation’s intentions; rather, policing reflects stigma against sex workers resulting in targeted, systematic violence, including rape.

The ITPA has become as excuse for police to pursue women assumed to be engaging in sex work and physically bring them into their spaces of power, such as police stations, within police vehicles and other areas of control.<sup>165</sup> Unfettered authority and limited complaint mechanisms to denounce police violence has resulted in sex workers’ distrust of any process that involves law enforcement, including mechanisms established to protect them and file complaints against abuse of power.<sup>166</sup>

Policing practices effectively render public presence of sex workers criminal through their use of public nuisance laws and the ITPA. Police officers rely on nuisance laws specifically to deprive sex workers of the opportunity to appear before a magistrate and to meet individual quota

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<sup>159</sup> *Id.*

<sup>160</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>161</sup> *Id.*

<sup>162</sup> SANGRAM, VIOLATIONS FACED BY SEX WORKERS IN INDIA 3 (Sept. 22, 2016), <https://www.sangram.org/resources/UPR-Submission-Sex-Work-Final-Submission-22-Sep-2016.pdf> (last visited Dec. 28, 2020).

<sup>163</sup> The Immoral Traffic (Prevention) Act, 1956, Preamble (India) (“An Act to provide in pursuance of the International Convention signed at New York on the 9th day of May, 1950 . . .”). U.N General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, resolution 317 (IV) of 2 December 1949 (“Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community, Whereas , with respect to the suppression of the traffic in women and children . . .”). See also SADHANA MAHILA SANGHA, FROM STIGMA TO JUSTICE: PUBLIC HEARING ON POLICE VIOLENCE AGAINST WOMEN AND TRANSGENDER SEX WORKERS 10 (Mar. 5, 2019).

<sup>164</sup> The Immoral Traffic (Prevention) Act, 1956, § 5(1) (India). This Section provides:

[A]ny person who (a) procures or attempts to procure a 25 person, whether with or without his consent, for the purpose of prostitution; or (b) induces a 25 person to go from any place, with the intent that he may for the purpose of prostitution become the inmate of, or frequent, a brothel; or (c) takes or attempts to take a 25 person, or causes a 25 person to be taken, from one place to another with a view to his carrying on, or being brought up to carry on prostitution; or (d) causes or induces a 25 person to carry on prostitution; shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees and if any offence under this sub-section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years.

*Id.*

<sup>165</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>166</sup> *Id.*

mandates.<sup>167</sup> The recent and ongoing COVID-19 pandemic further enables officers to chase sex workers off of the streets.<sup>168</sup> In attempting to force sex workers out of public places, however, police officers exacerbate the potential for sex workers to experience public and private forms of violence because it is safer for sex workers to solicit clients in public without fear of criminal sanctions.

Another significant consequence of police violence is a heightened susceptibility of sex workers to client-perpetrated violence. Sex workers who were interviewed stated that they solicit clients in public places, such as bus stops, for personal safety reasons. Clients more regularly perpetrate violence against sex workers in more private, secluded settings.<sup>169</sup> Additionally, clients take advantage of women providing services by refusing to wear condoms, refusing to pay workers, or forcing the worker into doing something she has not agreed to do.<sup>170</sup> Sex workers express that these clients—almost exclusively men—know that workers fear police violence and, thus, would never go to the police or press charges. Clients are then emboldened to exploit and perpetrate violence against sex workers.<sup>171</sup>

#### **IV. India’s Failure to Address Violence Against Sex Works as Torture**

The Indian Penal Code does not adequately criminalize the offences of rape as potentially constituting torture and other cruel, inhuman, or degrading treatment or punishment when police perpetrate rape. The National Human Rights Commission registered 35,554 cases of custodial deaths/rapes including 31,779 cases in judicial custody and 3,775 cases in police custody by the NHRC during 1994-1995 to 2018-2019.<sup>172</sup> Sadhana’s testimonies and reports describe that police officer’s conducts and procedures in enforcing the ITPA has involved some of the most extreme forms of sexual violence, rape, harassment and arbitrary detention. Police conduct raids in areas where they suspect women are engaged in sex work and take women into police stations where they often are beaten, sexually assaulted, raped and brutalized.<sup>173</sup> Families and dependents are not informed of the whereabouts of the women. Some sex workers are forced into forced rehabilitation and have expressed that they experience rape and other forms of sexual violence in rehabilitation centers.<sup>174</sup>

The Special Rapporteur on Torture, Manfred Nowak, stated that, “It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.”<sup>175</sup> As a further reference, the Inter-American Commission on

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>171</sup> *Id.*

<sup>172</sup> NATIONAL CAMPAIGN AGAINST TORTURE, THE INDISPENSABILITY OF ADDING OFFENCES OF TORTURE IN INDIAN PENAL CODE (Aug. 2020), <http://www.uncat.org/resources/the-indispensability-of-adding-offences-of-torture-in-indian-penal-code/> (last visited Dec. 28, 2020).

<sup>173</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>174</sup> *Id.*

<sup>175</sup> United Nations Special Rapporteur on Torture report before the Human Rights Council, ¶ 36, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).

Human Rights (IACHR) has interpreted torture in rape cases. For example, in the case of *Raquel Martín de Mejía v. Perú*, the IACHR determined that the three elements of torture were present: “(1) it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; (2) it must be committed with a purpose; and (3) it must be committed by a public official or by a private person acting at the instigation of the former.”<sup>176</sup> Here, the Court found that: rape is intentional and causes victims physical and mental pain and suffering, including humiliation; these rapes were committed with the purpose of punishing and intimidating the victim; and they were committed by a member of the security forces who is a public official.<sup>177</sup>

Similarly, the European Court of Human Rights held that rape amounts to torture in certain circumstances. In one case, a young woman was held in detention by police on suspicion of involvement in a group considered a terrorist organization by State authorities. Whilst in detention, she was stripped of her clothes, beaten, sprayed with cold water from high pressure jets, blindfolded and raped.<sup>178</sup> Here, the European Court held that rape constituted torture.<sup>179</sup>

Given the Indian judiciary’s expansive powers with regard to defining or even creating interpretation that may not otherwise exist, rape must be recognized as a form of torture as an act that violates *jus cogens* and defined as such. The Indian State’s hesitation to properly define torture in domestic law and remain evasive when ratifying international legal instruments that explicitly outlaw acts of torture demonstrates a broad and violative sanction of crimes committed by law enforcement.<sup>180</sup> Further, there is a clear history that these State agents are exceeding their powers by terrorizing and abusing women with impunity on the assumption that they are sex workers and therefore do not deserve neither dignity nor have rights.<sup>181</sup> The treatment, and often blanket immunities for police authorities permit them to target, discriminate and violate the bodies of those members of society the law renders invisible because they may be poor, “immoral” or occupy an identity that is marginalized.<sup>182</sup> Through this impunity, the Indian State sponsors all forms of violence, including rape and other forms of sexual violence that may constitute torture.

As the Director of Sadhana Mahila Sangha, Geeta shared “for sex workers the concept of consent does not exist. Where consent does not exist, there is exploitation, which is why sex workers are

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<sup>176</sup> *Raquel Martí de Mejía v. Perú*, Case No. 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996); see also Inter-Am. Comm’n H.R., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc. 68, 68 (Jan. 20, 2007).

<sup>177</sup> *Raquel Martí de Mejía v. Perú*, Case No. 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996).

<sup>178</sup> *Aydin v. Turkey*, App. No. 23178/94, Case No. 57/1996/676/866 [ECtHR] ¶¶ 83-88 (1997).

<sup>179</sup> *Id.*

<sup>180</sup> Even as recent as June 2020 father and son — P Jeyaraj, 58, and his son Fenix, 38 —who ran mobile accessory shop in Tamil Nadu were arrested by some policemen allegedly for keeping the shop open past permitted hours. The duo was taken to the police station where they were brutally assaulted, sodomized and raped. They were pronounced dead in jail succumbing to wounds from physical and sexual trauma. Markandey Katju, *Custodial deaths of Jeyaraj and Fenix: Accused Tuticorin cops should be arrested immediately: law allows it*, FIRSTPOST (June 28, 2020), <https://www.firstpost.com/india/custodial-deaths-of-jeyaraj-and-fenix-legal-recourse-available-to-arrest-accused-tuticorin-cops-8534931.html> (last visited Dec. 28, 2020).

<sup>181</sup> NATIONAL CAMPAIGN AGAINST TORTURE, THE INDISPENSABILITY OF ADDING OFFENCES OF TORTURE IN INDIAN PENAL CODE (Aug. 2020), <http://www.uncat.org/resources/the-indispensability-of-adding-offences-of-torture-in-indian-penal-code/> (last visited Dec. 28, 2020).

<sup>182</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

vulnerable to the crime of rape.”<sup>183</sup> Rape is rife when society takes away a women’s ability to say “no.” But this is symptomatic of society’s lack of respect for women, as Geeta poignantly phrased it:

The existence of sex is a product of the society that is repulsed by it. We are a symptom of the needs of society. We are an indication of how women are treated. In my perspective all women are treated this way. Other hegemonies exist [for example], class [and] caste, which exacerbates the vulnerabilities of women, but [the] identity of women itself is one that is seen as worthy of exploitation. . . . Society needs to understand sex work is a byproduct of the society, [and that the] status and treatment of sex workers is a reflection of every woman’s reality.<sup>184</sup>

## **Sex Workers’ Rights in International Law**

### **I. Labour Protections Prevent and Protect Sex Workers from Gender-Based Violence**

Sex workers have advocated tirelessly to have their identities as workers recognized. This is one of Sadhana Mahila Sangha’s main objectives. Several of the interviewed sex workers within Sadhana work in other forms of informal labour, but depend on sex work as their main sources of income.<sup>185</sup> Sadhana members repeatedly emphasized that most women enter sex work for financial reasons.<sup>186</sup> This justification should be understood not only as women having no other options to survive, but also as women making the best economic choices to provide for themselves and their dependents, including children, and other direct and extended family members.<sup>187</sup> Importantly, interviewees expressed that their main motives for voluntarily choosing to engage in sex work is to financially support their children and fund their children’s educations.<sup>188</sup> While their sacrifices secure their families’ economic stability and aim to break the cycle of poverty through their children’s educations, sex work provides few protections while working, and no economic security in retirement. Lack of worker protections leave sex workers vulnerable to abuse, including rape, while at work and destines them to lives of destitution.

Sadhana Mahila Sangha’s 2019 Report, “From Stigma to Justice,”<sup>189</sup> highlights that women voluntarily choose to be sex workers, and particularly that those coming from impoverished areas to cities choose sex work because it affords them a better quality of life than is available to them in rural areas.<sup>190</sup> Even for women who are not from rural areas, interviewees repeatedly shared that women in India enter sex work voluntarily because of economics and lack of resources.<sup>191</sup> As Sadhana’s report notes, the legal system must recognize sex workers as workers because

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>188</sup> *Id.*

<sup>189</sup> SADHANA MAHILA SANGHA, FROM STIGMA TO JUSTICE: PUBLIC HEARING ON POLICE VIOLENCE AGAINST WOMEN AND TRANSGENDER SEX WORKERS 21 (Mar. 5, 2019).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

“[l]ooking at sex work from the lens of labour law, would mean that narratives are taken seriously and that [the] state [would] begin to engage seriously with their duty to improve the situation of women in sex work.”<sup>192</sup>

Denying sex workers labour rights permits institutional discrimination to proceed with impunity, which then limits opportunities for sex workers to negotiate for better living and working conditions. It further impedes their access to healthcare and other social welfare services. Moreover, widespread stigma contributes to denial of a wide range of marriage and family life rights, from taking children away from persons believed to be in prostitution, to housing evictions and exclusion from education.<sup>193</sup> Resolved gender discrimination is pervasive and arguably distinct in its impact on the lives of women who bear the brunt of laws that hold their choices against them.<sup>194</sup>

## II. Right to Health and Support as Survivors of Sexual Violence

The right to health is of particular importance to sex workers, and access to healthcare is critical when a sex worker is a survivor of sexual violence, including rape. Very often people in sex work do not have access to the even most basic form of equality: the ability to call on legal protection from violence and other crimes, including rape, other physical assaults, theft, domestic violence and physical harassment. This disparity in access to legal protection stems from two determining circumstances: sex workers’ marginalized status makes them more susceptible to abuse in the first place, and this marginalization in turn negatively affects their ability to seek legal protection from those abuses.<sup>195</sup>

The World Health Organization (WHO) conducted a study entitled “WHO Multi-Country Study on Women’s Health and Domestic Violence against Women,” considering gender-based violence to be a public health issue. The study culminated in a 2005 Report of results and recommendations.<sup>196</sup> Recommendation 10 urges the development of a comprehensive health sector response to the various impacts of violence against women, noting:

The Study amply shows that most abused women are reluctant to seek help from health providers and tend to do so only if the violence is severe. This suggests that, in addition to more general awareness-raising, the health sector needs to find ways to ensure that: (a) women who have experienced violence are not stigmatized or

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<sup>192</sup> *Id.*

<sup>193</sup> INT’L WOMEN’S RTS. ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 22 (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>; see also AMNESTY INT’L, THE HUMAN COST OF “CRUSHING” THE MARKET: CRIMINALIZATION OF SEX WORK IN NORWAY (2016), <https://www.amnesty.org/download/Documents/EUR3640342016ENGLISH.PDF>.

<sup>194</sup> Bangladesh Society for the Enforcement of Human Rights (BSEHR) and Ors v. Gov’t of Bangladesh and Ors., BGD002, (2001) 53 D.L.R. (Bangl.); Sahyog Mahila Manda and Anr. v. State of Gujarat and Ors., IND023, (2004) 2 G.L.R. 1764 (India).

<sup>195</sup> INT’L WOMEN’S RTS. ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 37 (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<sup>196</sup> WORLD HEALTH ORG. (WHO), WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN (2005) (conducting and reporting on in-depth research on domestic violence against women globally).

blamed when they seek help from health institutions, (b) women will receive appropriate medical attention and other assistance, and (c) confidentiality and their security will be ensured.<sup>197</sup>

The stigma associated with gender-based violence and rape is compounded with the stigma of sex work when sex workers need to access medical care. As the report states, abused women tend to seek help from health care providers only when the violence is severe.<sup>198</sup> Thus, when a sex worker does go to the doctor it is critical that she receives the help that she needs instead of being turned away or shamed for her profession. If she does not feel comfortable, the study notes that she is unlikely to be forthright and disclose the full nature of the violence perpetrated by a personal relationship, client, or stranger.<sup>199</sup> This distrust in turn impedes medical professionals' ability to properly diagnose and treat her. The fear of stigma is so great that some sex workers opt not to disclose their occupation at all because they believe they will receive a lower quality treatment if they do. Others are reluctant to go to doctors at all.<sup>200</sup>

One of the most significant health concerns for sex workers is HIV and AIDS.<sup>201</sup> Stigma and discrimination undermine sex workers' ability to negotiate condom use, as well as other protective measures, which leaves them more vulnerable to contracting the virus among exposure to other STIs.<sup>202</sup> More generally, stigma and discrimination influences sex workers' access to health care services. Some doctors or nurses outright refuse to treat sex workers or deny treatment related to certain conditions.<sup>203</sup> Sex workers are thus deterred from seeking out medical care because of past experiences of judgment, lack of care and dismissal by healthcare professionals.<sup>204</sup> This reluctance to engage with health care providers is also dangerous for women who are victims of gender-based violence; charges or allegations of sexual violence or rape require a high degree of corroboration or evidence which sometimes includes forensic evidence.

In *Raja vs. State of Karnataka*, decided by the Supreme Court of India in 2017, a sex worker accused five men of gang raping her.<sup>205</sup> Medical evidence was presented in the trial court of the opinion that:

... in clear terms that the alleged victim was accustomed to sexual intercourse and that no sign of forcible intercourse was discernible. The medical opinion stated that she was accustomed to sexual intercourse when admittedly she was living

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<sup>197</sup> *Id.* at 95.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> World Health Org. (WHO), *Violence against Sex Workers and HIV Prevention*, INF. BULLETIN SER. NO.3 (2005). *see also* Deb S, *Experience of CSWs with HIV/AIDS: An exploratory study in Kolkata, India*. Presented at the XVI International AIDS Conference, Toronto, Canada: 2006. [Abstract no. CDD1300].

<sup>202</sup> INT'L WOMEN'S RTS. ACTION WATCH ASIA PACIFIC, *FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 47* (2017), available at <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf>.

<sup>203</sup> *Id.* at 48.

<sup>204</sup> Deb S, *Experience of CSWs with HIV/AIDS: An exploratory study in Kolkata, India*. Presented at the XVI International AIDS Conference, Toronto, Canada: 2006. [Abstract no. CDD1300]. *See also* Paul R et al. *Factors influencing health-care access of female commercial sex workers in India: an in-depth review*, 4(4) INT'L J. COMM. MED. PUB. HEALTH. 886-890 (2017).

<sup>205</sup> *Raja and Ors v. State of Karnataka*, (2017), Criminal Appeal No. 1767 Of 2011, S.C.C. ¶ 20 (India).

separately from her husband. The medical evidence as such in the attendant facts and circumstances in a way fails to give a true notion or impression of the allegation of gang rape.<sup>206</sup>

All of the accused were acquitted by the Supreme Court, which further added: “It was explicated that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined . . . can never be presumed that her statement should always without exception, be taken as gospel truth.”<sup>207</sup> The general mistrust of law enforcement coupled with the habitual refusal of nondiscriminatory medical treatment often results in sex workers not reporting rape or sexual violence or suffering skepticism to outright dismissal of their cases.<sup>208</sup>

## **Recommendations**

Sadhana Mahila Sangha requests that Special Rapporteur Ms. Dubravka Šimonovic include the following detailed recommendations in her thematic report on “States Responsibility to Criminalize And Prosecute Rape as a Grave and Systematic Human Rights Violation and a Manifestation of Gender-Based Violence Against Women, in line with International Human Rights Standards.”

### **States, particularly India, must repeal legislation that criminalizes sex workers.**

- Repeal the Immoral Traffic (Prevention) Act, 1956. The legislation does not address or deter the crime of trafficking. In its current form it criminalizes sex workers and their families and is utilized by law enforcement to harass and abuse women.
- Repeal or amend public nuisance laws that are currently utilized extort sex workers and arbitrarily detain them in police stations.

### **States, including India, must strengthen prosecution and penalization of perpetrators including police officers, who commit acts of violence, abuse, torture, and cruelty against sex workers. Specifically, India must:**

- Create an oversight agency charged with addressing police misconduct to prevent acts of violence and brutality and ensure that all rape allegations are properly handled.
- Ensure effective prosecution of police perpetrators of any forms of gender-based discrimination, including sexual and physical violence, directed at sex workers.
- Enforce protection of the law equally by prosecuting acts of economic violence.
- Dismantle or ban the authorization or creation of moral policing vigilante groups, such as *Obavva Pade*.<sup>209</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at ¶ 24

<sup>208</sup> Analysis developed from interviews of sex workers conducted for the purpose of this submission.

<sup>209</sup> Detailed *supra*, 21 of this submission.

**States, including India must be accountable acts of violence committed against vulnerable groups such as sex workers.** Specifically, states must:

- Engage with and address human rights violations with sex worker advocacy groups and unions to ensure that their concerns are being heard.
- Establish authorities, outside of law enforcement, to create and sustain mechanisms for filing complaints.
- Decriminalize sex work because of sex workers' and prevention of further stigmatization, ghettoization in red light districts and increased surveillance.
- Sensitize police through dialogue and education and explicitly officers' misuse of anti-trafficking laws.
- Facilitate partnerships between sex worker organizations and police departments in order to eradicate trafficking. Sex workers may have specialized knowledge about the patterns and strategies of traffickers and have distinct access to interface with women and girls who may be trafficked and forced into the sex sector.
- Enact policies that protect sex workers rights and dignity.

**States, including India, must recognize sex workers as workers with labour protections, social security, and access to welfare programs.** Specifically, states must:

- Recognize and include sex workers unions, advocacy groups and community-based organizations, technical working groups, committees etc. pertaining to policy or law that will have an impact on the lives of workers.
- Create and sustain welfare support especially health benefit programs and housing for sex workers.
- Dismantle forced rehabilitation program and ensure the resources used for those facilities support non coercive approaches for sex workers who are seeking alternative livelihoods by their own volition.
- Ensure that all documentation required access worker benefits identify women who do not want to identify as sex workers but as informal workers in order to respect their right to privacy and shield them from stigma.

**States, including India, must improve access to justice for vulnerable groups such as sex workers.**

- Sex workers must have access to legal representation and part of context specific legal aid programs provided by the State.
- State and national human rights commissions must have the power to issue orders for compensation and authorize criminal charges against law enforcement officers who commit acts of sexual violence, rape and other crimes.
- All reports of abuse against sex workers must be documented retaining key testimonies.

**States, including India, must enhance access to health services that are confidential, nondiscriminatory, and safe for victims-survivors of sexual violence.**

- Consider implementing medical provider training for receiving and treating sex workers.
- Institute policy for access to free or affordable healthcare for sex workers, particularly senior workers.
- Sustain and improve access to condoms, reproductive health services and STI treatments.

**India should consider amendments to include gender-neutral language for relevant sections addressing rape within the Indian Penal Code, especially in reference to the gender of victims.**

- India should amend Section 375 of the Indian Penal Code to comply with its international legal obligations. Section 375 currently defines rape as a man engaging in nonconsensual sex with a woman.<sup>210</sup> The gendered definition of both perpetrators and victims creates an impunity gap that allows some perpetrators to escape culpability and renders invisible victims who are not cis female. Transgender sex workers, who Courts note frequently suffer from sexual violence and rape at the hands of police, fall through the cracks in the justice system.<sup>211</sup> Given the Court's recognition of transgender identity in case of *National Legal Services Authority v. Union of India*,<sup>212</sup> Section 375 should be amended to remove the gendered qualifications for the rape.

**India must remove legal sanctioning of marital rape within Section 375 of the IPC.**

- India is expressly in violation of its obligations under CEDAW obligations when excluding marital rape.<sup>213</sup>

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<sup>210</sup> PEN. CODE, 1860, § 375 (India).

<sup>211</sup> National Legal Services Authority v. Union of India, ¶ 112, W.P. (Civil) No. 400 (2012) (India).

<sup>212</sup> *Id.*

<sup>213</sup> CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/NOR/CO/8 (Mar. 23, 2012) (“Give high priority to the enactment of comprehensive specific legislation on domestic violence, to put in place comprehensive measures to prevent and address violence against women and girls, including marital rape, to ensure that perpetrators are prosecuted and punished commensurate with the gravity of their crimes, in accordance with the Committee’s general recommendation No. 19.”).