

Submission on Prevention of Trafficking: The Rights of People in Sex Work and the problem of conflation with Trafficking.

Submitted to the Supreme Court Panel constituted by the Hon'ble Supreme Court vide orders

In the matter of

Budhadev Karmaskar Vs. Government of West Bengal [Cr. App. 135/ 2010]

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The Global Commission on HIV and Law based on 680 global submissions, and depositions on over 700 people recently observed that,

“Sex work and sex trafficking are not the same. The difference is that the former is consensual whereas the latter coercive. Trafficking for the purpose of commercial sexual exploitation involves adults or children providing sexual services against their will, either through force or deception. A denial of agency, trafficking violates their fundamental freedoms. Setting aside the question of whether people would choose sex work if they had better options, a point of view that casts "voluntary prostitution" as an oxymoron erases the dignity and autonomy of the sex worker in myriad ways. It turns self - directed actors into victims in need of rescue.”¹

The approach advocated in this submission is informed by the sex work communities in Maharashtra and Karnataka, supported by *Sampada Gramin Mahila Sanstha* (SANGRAM), a voluntary organisation working at the grassroots level and *Veshya Anyay Mukti Parishad* (VAMP), a registered collective of 5500 sex workers.

The submission also draws on the First Pan-India Survey of Female Sex workers, Rohini Sahni, V Kalyan Shankar, University of Pune, April 2011, commissioned by CASAM [Center for Advocacy on Stigma and Marginalization, SANGRAM].

1. THE PROBLEM OF SEX WORK BEING SEEN AS VIOLENCE AND EXPLOITATION

1.a. Sex work has traditionally been seen as a form of violence and exploitation. Over the last two decades, however, the sex workers' rights movement has consistently argued that while there is violence *within* the sex industry, the exchange of sexual services for money does not in and of itself constitute violence. According to a national survey² conducted among sex workers **adult women choose to enter sex work of their own volition for various reasons**. The survey revealed that 73% of the women surveyed had entered sex work on their own. Significantly, 77% of women already in the labor market changed their occupation and opted for sex work as a source of livelihood. (refer Annexure 1). Women's experiences point to the conclusion that **consensual adult sex work does not constitute violence per se**.

1.b. Sex workers experience disproportionate levels of violence including police abuse, sexual assault, rape, harassment, extortion, abuse from clients and agents, intimate partners, local residents, and public authorities. Sex workers who have been beaten up have reported being turned away at government health centres. *“Police ask for free sex, rape and beat us and demand bribes to drop*

¹ Global Commission on HIV and the law: Risks, rights and health, July 2012, Page 32

² Sahni, R and V Kalyan Shankar, The First Pan-India Survey of Female Sex workers, University of Pune, April 2011,

cases”, *Shabana Khazi sex worker from Nippani*. But because of the positioning of ‘**sex work as sexual exploitation and violence**’, the everyday violence and exploitation that sex workers face is overlooked, ignored or accepted resulting in discrimination by state and non-state actors. The Pan India sex worker survey finds that 37% women had been physically abused by the police. 51% women surveyed stated that they had faced verbal abuse from law enforcement officers. 22% women stated that they had been forced to pay bribes to the police. (*Refer Annexure 1 - violence faced from law enforcement*)

1.c. Violence is an important factor affecting the vulnerability of sex workers to HIV, sexually transmitted infections, abuse and assault by State and non-State actors. Sex workers often find themselves in situations that put them at increased risk of violence. This situation is exacerbated because **sex work is erroneously understood as an illegal activity or is perceived as illicit** by law enforcement, forcing the ‘industry’ underground.

2. CONSEQUENCES OF VIEWING SEX WORK AS VIOLENCE AND EXPLOITATION

2.a. Discrimination against sex workers permeates the criminal-justice machinery across India resulting in a lack of protection under the law.

2.b. Police routinely abuse sex workers, illegally detain and torture them. Their rights when being arrested are routinely violated in blatant violation of the guidelines on arrest and custody laid down by the National Human Rights Commission.

2.c. When sex workers approach the police if they are beaten or abused by private parties, their right to remedies is routinely denied by the police who refuse to lodge First Information Reports or investigate the acts of violence.

2.d. Magistrates routinely remand sex workers to custody to be taken back to their native villages without giving them access to the due process of the law and an opportunity to be heard.

2.e. There have been numerous instances where, despite sex workers residing for many years in a place, possessing requisite legal documents like ration cards, voter I-D and electricity bills; their houses have been razed and they have been thrown out³ and their rights as citizens of India have been violated.

2.f. Systematic violence against and police harassment of women, men and transgender persons in sex work have been documented by human rights organizations in many settings.⁴ The risk of human rights violations for sex workers is deepened by criminal prohibitions of sex work or of some key elements thereof. Criminal prohibitions not only facilitate social stigma and marginalisation of sex workers but make it virtually impossible for them to enjoy the protection of the law when they face

³ Baina, June 2004, Goa

⁴ See, e.g., Human Rights Watch, *Epidemic of abuse: Police harassment of HIV/AIDS outreach workers in India*, New York, 2002; Human Rights Watch, *Lessons not learned: Human rights abuses and HIV/AIDS in the Russian Federation*, New York, 2004; Human Rights Watch, *Rhetoric and risk: Human rights abuses impeding Ukraine’s fight against HIV/AIDS*, New York, 2006, all available at www.hrw.org; and Pivot Legal Society, *Voices of dignity: A call to end the harms caused by Canada’s sex trade laws*, Vancouver, Canada, 2004, available at www.pivotlegal.org.

violence or abuse. On the contrary, these provisions in the law open the door to harassment and extortion of sex workers by the police.⁵

2.g. According to research conducted by the Commission on AIDS in Asia and the Pacific, a direct link has been found between low levels of condom usage amongst sex workers who are arrested and prosecuted. Criminalizing sex work clearly undermines efforts to prevent new infections, and hinders the provision of treatment and care to those infected. Government and non-government organizations need to act upon the elimination of HIV *in conjunction with* the elimination of violence against sex workers for HIV/AIDS prevention in the region to be effective.

3 THE PROBLEM OF SEX WORK BEING SEEN AS TRAFFICKING

3.a. According to the Global Commission on HIV and the Law, **some governments deploy anti-trafficking laws so broadly that they conflate voluntary sex work with the exploitative, coerced trafficking of people (primarily women and girls) for the purposes of sex.**⁶ Municipalities may interdict sex work under the authority of vaguely worded statutes relating to “public decency”, “morality” and even rape⁷; “nuisance” laws prohibiting loitering and vagrancy; or zoning or health regulations.⁸ These statutes give police wide latitude to arrest and detain sex workers. Even if they are detained only briefly, their working lives are vexed by harassment and fear.

3.b In India the principal legislation dealing with sex work/prostitution is the Immoral Traffic Prevention Act, (ITPA) the erstwhile Suppression of Immoral Traffic Act, 1956 (SITA)⁹. The origins as well as the title of the legislation itself reflect the stigmatization and the conception of sex work as being synonymous with trafficking. The legislation was enacted in pursuance of the ratification by the Government of India of the International Convention for the Suppression of Traffic in Persons and of the exploitation of the prostitution of others¹⁰.

3.c. In ITPA, the law with regard to sex work is called prevention of “immoral traffic” further deepening the incorrect association of prostitution with trafficking, In a departure from criminal jurisprudence, indicative of stigmatization of sex workers, The ITPA has paradoxical offences like detaining a person “with or without his consent” in premises where sex work is carried on or taking a person, “with or without his consent” for the purpose of prostitution.

3.d. The recent Criminal law amendment ordinance 2013 also conflates prostitution and trafficking. In Section 370 IPC, which deals with the offence of Trafficking of Persons, the term

⁵ See *Epidemic of abuse*, *ibid.*, and G Misra, A Mahal and R Shah. “Protecting the rights of sex workers: The Indian experience.” *Health and Human Rights* 2000; 5(1): 88-115.

⁶Shah, S., 2011. *Trafficking and the Conflation with Sex Work: Implications for HIV Prevention and Control* Working Paper. The Global Commission on HIV and the Law. 2011 and Burris, Overs and Weait, 2010, *supra*.

⁷For instance, see the submission by Matsinhe and Odete, Mozambique, 2011. Africa Regional Dialogue, Aug 3-4, 2011 for a discussion of the Mozambique law against ‘vices against nature’ used to penalize sex work.

⁸Sukthankar, 2011, *supra*. The author cites the example of Italy, where Domestic Security laws that ‘invest mayors with the judicial power to declare anything that might endanger the security and decorum of the cities an emergency’ have been used to fine sex workers. See also Burris, S., Overs, C. and Weait, M., 2010. *Laws and Practices that Effectively Criminalise People Living with HIV and Vulnerable to HIV*. Paper prepared for First Meeting of Global Commission on HIV and the Law, Oct 6-7 2010, New York, USA. See also submissions by Apisuk, 2011. Asia-Pacific Regional Dialogue, Feb 16-17, 2011; Ferdoko, 2011. EECA Regional Dialogue, May 18-19, 2011; Confidential, 2011. Latin America Regional Dialogue, Jun 26-27, 2011; Maseko, 2011; Sisonke, Botswana, 2011. Africa Regional Dialogue, Aug 3-4, 2011.

⁹ It is proposed to change the name of the Act to “Immoral Traffic (Prevention) Act...”, Proposed amendment (a) in Act 44 of 1986 –Gazette of India, August 20, 1986, Pt II, S2, Ext, p 9 (No 38).

¹⁰Laws of South Asia, Rakesh Shukla

"**exploitation**" includes "prostitution" itself. This in essence means that "**prostitution**" will now be interpreted as **exploitation**.

3.e. Section 370 IPC was introduced to criminalize trafficking in persons and by and large uses the language of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000). However, comparing the language under both reveals a highly significant difference in the definition of "exploitation".

3.f. While The **UN Protocol** which India ratified in 2011 defines "exploitation: as: *"Exploitation shall include, at a minimum, the exploitation of the prostitution **of others** or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;..."*;

Under **Section 370 IPC** "exploitation" is defined as: *"The expression "exploitation" shall include, prostitution **or** other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the forced removal of organs."*

3.g. This conflation in Section 370 IPC criminalizes people in sex work since it does not differentiate between "coercive prostitution" and prostitution; nor does it talk about the "**exploitation of prostitution**".

4. CONSEQUENCES OF VIEWING SEX WORK AS TRAFFICKING

4.a. Violent actions of street clean-up operations, police-led brothel closures or so-called rescue operations are carried out en masse by law enforcers. Police raids conducted under the Immoral Trafficking Prevention Act are an exercise of abuse and violence against consenting sex workers rather than arresting individuals involved in trafficking.

4.b. The process of 'rescue' of these sex workers involves beating, dragging by the hair, abuse, looting by the law enforcement personnel conducting the raid. A social welfare measure intended to treat sex workers as victims/survivors, becomes an exercise in uprooting of consenting sex workers, extreme violence and detention. It is rare to find the arrest of traffickers in such raids.

4.c. These arrested or detained sex workers; far from being treated as victim and survivors, are treated as criminals and are placed in detention homes; for indefinite periods; to be reformed. It is important to note here that the **agency of consenting women** is completely ignored thus criminalizing people engaged in sex work and driving them underground. The Pan India survey revealed that 73% women interviewed opted to enter sex work on their own and a sizeable number of them (63%) found work through close friends and acquaintances. (*Refer Annexure 1 - "entry into sex work"*)

4.d. By introducing the language of prostitution itself as exploitation, the Section 370 IPC has endangered sex workers instead of protecting them from sexual exploitation. To compound the problem, the consent of the victim has been treated as immaterial for the purpose of determining the offence of trafficking. In essence this will render any submission of a consenting sex worker [who is treated under S370, as a 'victim' of a person accused of harbouring and receiving] that she was practising sex work of her free will and volition, immaterial and void.

5. THE RIGHTS-BASED APPROACH TO PREVENT TRAFFICKING – VAMP MOHALLA COMMITTEES

5.a. A key feature of the rights-based approach is that it **distinguishes between consenting sex work and trafficking. It defines “women” as being persons above 18 years of age and recognises the agency of consenting adults in sex work. Minors in sex work are viewed as victims of child sexual abuse. Trafficking in the context of adults and children should be clearly separated into two different laws.**

5.b. Until 2000, there were several under-age sex workers in the communities VAMP works with. Today there is a comprehensive system, monitored by the sex workers themselves, to ensure that no trafficked women or underage girls are working within the community. *“We think of her life, her age, her immature body. We know the hardships of sex work so we do not allow any young girls, we escort them home.”*¹¹ Every Mohalla (site) in which VAMP works, has a committee, which acts as a dispute redress mechanism amongst sex workers. The VAMP mohalla committee monitors trafficking and works closely with the police.

5.c. When a new entrant wants to work in the VAMP areas, she must provide a birth certificate or other proof of age. Alternatively, she is encouraged to visit the local government hospital where she receives a certificate of age following a physical examination. The onus is on each *gharwali* (brothel owner) to ensure that the women working in her house are over 18 and copies of the birth certificates are maintained by VAMP.¹²

5.d. Minor girls who come to the communities to work are brought before the VAMP committee. The committee members explain why she should not enter sex work and give her information about her rights as a child. It is hoped that by offering these young girls information and counselling it would make them reconsider entering the trade. Counselling is a critical part of this process since some traffickers may exploit her vulnerability. It is not enough to just turn them away.

5.e. The committee then tries to establish who has sent the girl to the community. If they suspect that the girl has been trafficked the issue is referred to the police, who acknowledge that women from the VAMP collective inform them whenever young girls are trafficked into the area.¹³

5.f. Thus it is evident that standards and norms of behaviour can be effectively enforced by a community following an approach centred on empowerment and the actualisation of rights. Though SANGRAM does not work in the big cities, such as Mumbai or Pune, it bears mention that this rights-based approach would be viable in those settings as well. The work of Durbar in Kolkata, another rights-based organisation working with sex workers, which intervenes in suspected cases of trafficking proves that the effectiveness of this model is not limited to a rural or semi-rural locale.¹⁴

¹¹ Interview with sex worker from VAMP, Sangli, India. 5 August 2008.

¹² Interview with sex worker from VAMP, Sangli, India. 5 August 2008.

¹³ M. Gupte et. al., “In the Name of Rescue: A Report of the Fact-Finding Committee *Investigation into the Alleged Molestation/Rape of a Minor Girl by a Decoy Customer in Uttam Nagar, Miraj, Maharashtra*”. May 2007, 3.

¹⁴ N. Gooptu & N. Bandyopadhyay. “*Rights to Stop the Wrong: Cultural Change and Collective Mobilization – the Case of Kolkata Sex Workers*”, Oxford Development Studies, 2007 Vol. 35, No. 3. 265.

6 CONCLUSION AND RECOMMENDATIONS: ADULT CONSENTING SEX WORK SHOULD NOT BE CRIMINALIZED

6.a. Trafficking is a criminal offense and should not be conflated with sex work. Trafficking of Adult Persons and Trafficking of Children should be dealt with under two separate laws to ensure that consenting adults are not infantilised and children are given justice.

6.b. Repeal laws that prohibit consenting adults to buy or sell sex, as well as laws that otherwise prohibit commercial sex, such as laws against "immoral" earnings, "living off the earnings" of prostitution and brothel-keeping. Complementary legal measures must be taken to ensure safe working conditions for sex workers.

6.c. Shut down all compulsory detention or rehabilitation centres for people involved in sex work or for children who have been sexually exploited. Instead, provide sex workers with evidence -based, voluntary, community empowerment services. Provide sexually exploited children with protection in safe and empowering family settings, selected based on the best interests of the child.

6.d. Anti-human-trafficking laws must be used to prohibit sexual exploitation and they must not be used against adults involved in consensual sex work.

6.e. Enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work.

6.f. Ensure that existing civil and administrative offences such as "loitering without purpose", "public nuisance" and "public morality" are not used to penalise sex workers.

6.g. Maintain confidentiality and respect the privacy of sex workers approaching law enforcement and judiciary for redress in cases of sexual assault, exploitation and violence. Ensure specific skills and sensitivity in dealing with women, persons who identify as women and transgender women in sex work.

6.h. Standard Operating Procedures with detailed guidelines on investigating violence and sexual assault should be developed through consultation with experts and women's groups, sex worker community organisations, activists and legal experts working with sex workers. This should include specific guidelines detailing procedures to investigate sexual assault and violence faced by women, persons who identify as women and transgender women in sex work.

6.i. Sensitivity to violence faced by sex workers should be made an integral part of training for police personnel, public prosecutors and the judiciary in partnership with community organisations of sex workers.

6.j. Strengthen efforts of community-based organisations and collectives of sex workers to fight trafficking in their communities. Allocate resources to have a formal engagement with the communities of sex workers and the police force at the district and state level.

Annexure 1. Of the Voices that Matter

Of the Voices that Matter ...

What do women in sex work themselves have to tell us about the realities of their lives?

The First Pan-India Survey of Female Sex Workers sought out women working in sex work across the length and breadth of the country. The survey asked questions that have never been asked before on this kind of scale. It asked about women's livelihoods, in and out of sex work, stigma, violence and sexual abuse, and experiences and expectations of the state.¹⁵

Three thousand women were interviewed, in fourteen states, bringing together the voices and experiences of women from far-flung Dimapur and Guwahati to booming cities like Patna, Lucknow, Bhopal and Ahmedabad and the metropolises of Delhi, Mumbai and Kolkata.¹⁶

Across the nation, the common experiences of women in sex work unite them. What their voices offer is a compelling testimony – one that needs to be heard. In the final analysis, theirs are the Voices that Matter.

A. Economic and Professional Background

60% (1803) of the women surveyed came from rural backgrounds and approximately 34% from urban backgrounds (1026).

The families of over 27% of women were engaged in agriculture, 21.5% in providing services, and around 15.5% were daily wage earners.

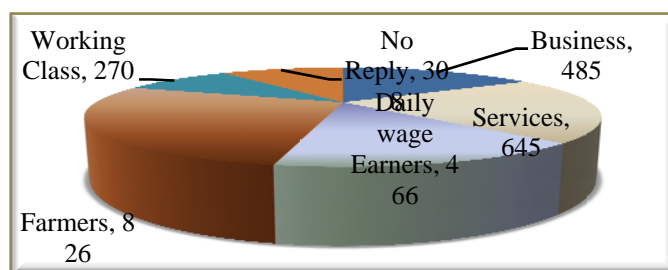


Figure 1. Economic Background

48% women (1447) headed families and 32% women (969) reported sending money back to their homes .

A large segment of the women came from **poor families (64.6%)** with over **50% of them having received no schooling (1507)**. Only 11% had completed formal education to the 12th grade (340).

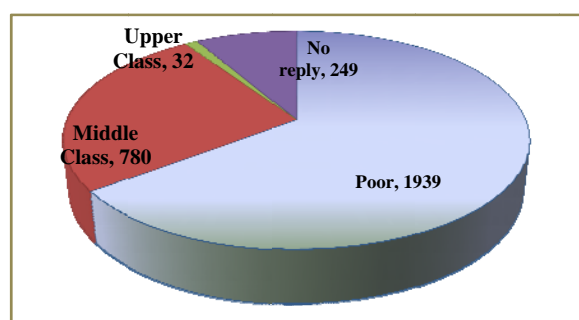


Figure 2. Economic background

Only 32 women (1%) stated that they belonged to economically well off backgrounds, while 26% stated that they were from middle class backgrounds.

¹⁵Andhra Pradesh, Assam, Bihar, Chandigarh, Delhi, Gujarat, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Nagaland, Orissa, Uttar Pradesh, West Bengal

¹⁶From "First pan- India Survey of female Sex workers", RohiniSahni, V Kalyan Shankar, April 2011

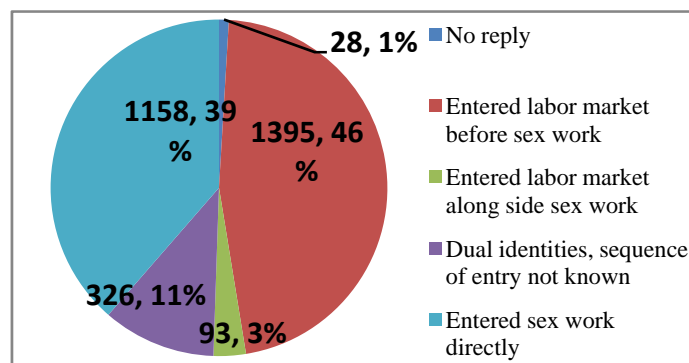
Annexure 1. Of the Voices that Matter

B. Experience of Work before Sex Work¹⁷

39% of the women entered sex work before taking on any other job, while approximately 46% had done other forms of paid work before sex work.

3% women entered both sex work and the market simultaneously.

Figure 3. Sequence of entry into sex work



Sequence of entry into sex work with respect to other markets

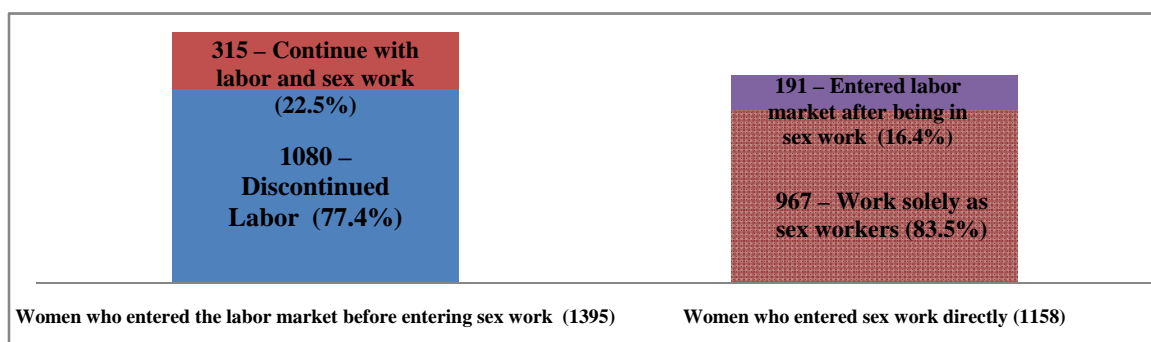


Figure 4. Sequence of entry into sex work

In both cases, a substantial proportion of women remained in sex work despite having other livelihood options: 77% of the women who undertook those other jobs before they began to do sex work had stopped doing those jobs, and only 22% of them continued to pursue these other livelihood options.

In the case of women who came directly into sex work, 83% chose to remain in sex work as an exclusive work option and 16% have started additional livelihood.

The question we asked is WHY - Why did women leave jobs in the labour market and move into sex work?

Out of the 1080 women who discontinued other forms of paid work after entering sex work, approximately 41% gave economic reasons including insufficient income. Around 22% stated that working conditions and sexual harassment contributed to their decision to give up those other jobs.

Following is summary of the reasons:

- Working conditions (hard physical work and low pay, hard work from morning to evening, long working hours for low pay as in case of *beedi/agarbatti* rolling, had to travel long distances as in case of wood-cutting or water-fetching, poor income plus not good for health, less rate for crafts combined with eyes and body strain in making them),
- Personal or family based reasons (poor income combined with parents not sending to work after puberty, father/husband taking away their money)

¹⁷ibid. page 19

Annexure 1. Of the Voices that Matter

c. Migration (shifted to dancing in UP and Bihar for more money, migrated along with parents/husband in search of better livelihoods)

d. Harassment (poor income coupled with physical/sexual abuse, was asked to have sex to keep my job)

C. Entry into Sex Work

Significantly, 73% women (2185) opted to come into sex work on their own and in the case of nearly 63% of those women, they were referred to sex work by friends and acquaintances.

Those who reported having been coerced stated they had been introduced to sex work by force (8%); were cheated (10%); or had been sold (6%).

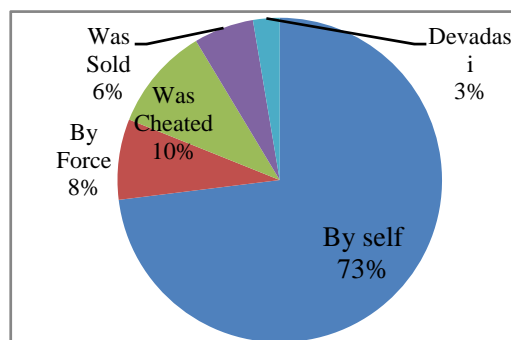


Figure 5. Entry into sex work

D. Violence faced from law enforcement

Violence is a constant factor in the lives of women especially by the police.

Over 51% (1531) of the women interviewed stated that they had been exposed to abusive language. 37% (1118) of the women interviewed have been physically abused by the Police.

A similar percentage of women have experienced verbal threats. 681(23%) women reported that the Police had demanded bribes from them.

Despite the violence and abuse , over 41% women (1236) stated that sex work was a supplementary income for the family. 28% women (855) agreed that the earnings from sex work were a source of livelihood.

Conclusions

Most women in sex work have experienced other forms of employment – and left these jobs for reasons that include abuse, exploitation, sexual harassment, risks and hazards to health and well-being. Women enter sex work for a variety of reasons, many of them economic. A substantial number of women choose to remain in sex work despite having other livelihood options.

Sex work is made dangerous and difficult where violence threatens women's safety and well-being, and women are denied the right to security enjoyed by other citizens. Police violence and harassment emerged in the survey as presenting the greatest threat to women's security, with almost half of those reporting difficulties in doing their work naming police violence, threats, extortion and harassment as the principal factor.

For many women in sex work, sex work is work – a livelihood that enables them to provide for their families. What matters to women is that the state recognises them as workers and as citizens, who are entitled to freedom from violence from agents of the state, to access to state services, including social protection, and as persons with fundamental rights on par with other citizens of India.