

WORKING PAPER

Trafficking and the Conflation with Sex Work: Implications for HIV Control and Prevention

Svati P Shah¹

These papers were written to inform the work of the Global Commission on HIV and the Law, which is convened by UNDP on behalf of UNAIDS. The content, analysis, opinions and recommendations in the papers do not necessarily reflect the views of the Commission, UNDP or UNAIDS. While the Commission's Technical Advisory group provided review and commentary, the authors accept responsibility for any errors and omissions.

Citation: Shah S., (2011), *Trafficking and the Conflation with Sex Work: Implications for HIV Prevention and Control*. Working Paper for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 7-9 July 2011.

Introduction

The currently dominant understanding of prostitution within some governments and within international organisations that provide policy guidance and recommendations to governments is based on the conceptual conflation of 'human trafficking' with 'prostitution' and 'sexual exploitation.' This conflation bears critical thinking, as lawmakers endeavor to use human rights-based models to address human trafficking and prostitution. Unfortunately, conflating and equating prostitution with 'trafficking' and 'sexual exploitation' has ultimately served to undermine efforts to address both trafficking and sexual commerce, while inadvertently contributing to the harm that people working in sexual commerce face from local law enforcement and from potentially violent clients and intermediaries. Furthermore, this set of confluations is undermining efforts to control HIV among sex workers. The first section of this paper reviews the history of the conflation of these terms in international law. The subsequent sections discuss the impacts of merging prostitution, 'trafficking' and 'sexual exploitation' for HIV control efforts among sex workers.²

Methodology

This paper is a synthesis of extant scholarly and policy literature on prostitution, human trafficking, and HIV/AIDS. All directly referenced works are listed here, as footnotes to the relevant section. While this paper uses some statistics to present its argument, the bulk of the paper is a qualitative review of the history, rhetoric, and effects of contemporary anti-trafficking policies. The paper has been designed to use the literature and data it references to analyse the origins and effects of the contemporary anti-trafficking framework.

History

The conflation of 'prostitution' with 'trafficking' and 'sexual exploitation' has a long and geographically diverse history. However, this has not always been the way in which prostitution has been understood. Legislative attention to prostitution extends back hundreds of years, as evidenced by records from the Middle Ages in Europe and Asia that mark the ways in which prostitution was considered to be a governable, and taxable, commercial activity. The conflation

¹ Svati Shah is Assistant Professor, Women, Gender, Sexuality Studies, University of Massachusetts, Amherst.

² Shah, S (2007), *Distinguishing Poverty and Trafficking: Lessons from Field Research in Mumbai*, *Georgetown Journal on Poverty Law and Policy*, 9(1):441-454, Georgetown University Law Center: Washington, DC.

of prostitution with notions of 'trafficking' and 'sexual exploitation' (which is meant to denote an ideological difference from 'labour exploitation') is a relatively recent historical phenomenon, beginning in earnest with the industrial revolution in Europe. Fears surrounding prostitution were part of broader anxieties surrounding the changes in the ways in which society organised sexuality itself, changes that accompanied both industrialisation and urbanisation. Discourses on prostitution and 'white slavery' in the late nineteenth and early twentieth centuries in the United States (US) and the United Kingdom comprise one of the first historical examples of the kinds of connotations that are present in contemporary perspectives on sexual commerce.

During the era of 'white slavery,' social crusaders, inspired by the abolition of the chattel slave trade, attempted to make a distinction between 'innocent' women who were seen to be selling sexual services against their will, and 'willful,' 'fallen' women who were not being compelled into prostitution by a third party. These activists did not openly call for the abolition of prostitution altogether, although this was their intent. Rather, they argued that there are two separate classes of sex workers ('innocent' and 'fallen'/'guilty'), and built legislation that criminalised women who sell sexual services 'willfully.' Ultimately, the idea that there are separate moral classes of sex workers did not describe the daily context of sex workers' lives, where women (and men, and transgender people) sold sexual services due to economic necessity, and not due to any moral failing. However, creating separate moral classes of sex workers served to sustain the idea that all prostitution is morally fraught, and should be abolished. One infamous legislative outcome of this moment was the passage of the *White Slave Traffic Act* in the US, also known as the *Mann Act* (1910). The *Mann Act* became infamous because it was used to prosecute people in consensual relationships of which the state disapproved, e.g. the arrest and conviction of African-American boxer Jack Johnson, who was arrested for transporting his white girlfriend across a state line in the US in 1912. Prevailing racist attitudes in the US at the time prohibited 'interracial' relationships, and rationalised this use of the *Mann Act*. In the end, the law protected no one. Scholars of this period agree that what was protected – intentionally or inadvertently – was the social status quo. These ideas were also imbedded in the *1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, one of the first international agreements to be ratified by the United Nations (UN). Countries that ratified this agreement passed legislation that governed prostitution under its rubric, legislation that made a distinction between 'good' and 'fallen' women in many countries around the world, e.g. in India's *Suppression of Immoral Traffic in Women and Girls Act*, which later became the *Immoral Traffic (Prevention) Act*.

In the 1980s, a branch of liberal feminism in some Western countries began the call for their governments to ban pornography by censoring print and film media. The 'pornography wars' or 'sex wars,' as they are sometimes called, pitted different feminist factions against one another, but did not result in 'pornography' being outlawed in any country. The 'porn wars' had numerous effects on feminism, to be sure, but they also provided the foundation for the contemporary move to conflate prostitution with trafficking, because they used many of the same rhetorical strategies that earlier anti-prostitution crusaders had used. These strategies included dismissing the perspectives of women working in pornography who did not feel themselves to be exploited, abused, or the victims of violence, while promoting the idea that all women in pornography were exceptionally exploited because pornography was not legitimate work, and only constituted exploitation. Other shared rhetorical strategies included the dominance of perspectives from feminists who had never worked in pornography themselves, and who argued that the existence of pornography ultimately undermined the moral standing and value of middle class women. The rhetoric which produced some feminists as able to 'save' women who were of a lower economic or social status, whether in their own country or abroad, recurs in contemporary anti-prostitution discourse as well.

The infrastructure, analysis, and networks that developed among feminists seeking to censor pornography during the 1980s and early 1990s became the structural foundation for the branch of Western liberal feminism which eventually defined 'trafficking,' meaning prostitution, as the gravest danger facing women and girls today, and that laws and policies must be crafted to protect women and girls from this danger. They argued that a legislative response to this understanding of 'trafficking' must be based on the following three principles:

1. all prostitution is done by women and girls.
2. prostitution is primarily experienced as violence by women and girls.
3. therefore, all prostitution constitutes human trafficking and sexual exploitation.

The synergy between anti-pornography/anti-prostitution feminism and non-feminist lawmakers who shared the belief that prostitution is wrong was powerful, and has led to the promotion of the idea that prostitution is equivalent to trafficking worldwide.

Borders

According to the logic which links the idea of 'effective' anti-trafficking initiatives with limiting access to legal cross border migration, a readily available solution to 'trafficking' is to increase border controls further, especially for young people seeking paid work. There is no data supporting the theory that tighter border controls serve to prevent women from engaging in sex work, either by their consent or against their will, although this is the ostensible rationale for heightened restrictions on cross-border migration for women in some countries. A classic example of the effects of this kind of strategy being operationalised in South Asia is that of Nepali women now being barred from crossing the Nepali border unless accompanied by a male relative.³ Another example is US government officials' combination of anti-trafficking initiatives with 'border management' programmes for countries where the US has a special interest in heightening security.⁴ New travel restrictions on women meant to enhance their safety do not address the economic contexts for their migrations, and potentially lead to the need of female migrants needing assistance from third parties for crossing these borders illegally, thus increasing the possibility for these women being exploited in this process.

The Palermo Protocol

It is from this context of governmental and institutionalised feminist concerns that the contemporary anti-trafficking framework has been crafted. The three rhetorical pegs on which the conflation of prostitution with trafficking and sexual exploitation are based are not borne out by perspectives from sex workers' rights organisations and trade unions, nor are they unilaterally supported by research on sexual commerce. A strong body of research on prostitution⁵ shows the following:

1. all prostitution is not only done by women and girls; men and transgender people also sell sexual services, though they are targeted differently by law enforcement.
2. the selling of sexual services is fundamentally conducted as an income generating activity, and not primarily as violence, although the criminalisation of sexual commerce is seen to enhance the violence that sex workers may face.
3. prostitution and human trafficking are not the same phenomenon, and that it is incorrect to assume that everyone who sells sexual services is exploited.⁶

While calling for the abolition of prostitution per se would not have amounted to a viable international campaign, calling for the abolition of prostitution *as* trafficking has been extremely successful in mobilising governmental interest, an international non-governmental organisation (NGO) network, and significant resources to this cause. This mobilisation has not been without its critics, many of which have come from the sex workers' rights movement. A focal point of the debate has been the definition of trafficking in the *Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organised Crime*, also known as the 'Palermo Protocol', which was drafted in 2000. The Protocol, ratified by 117 countries, provides the foundational definition for how governments understand and act upon 'human trafficking':

"The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;*
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and*
- (c) To promote cooperation among States Parties in order to meet those objectives."*

The Protocol goes on to define 'trafficking in persons' as follows:

"For the purposes of this Protocol:

3 Joshi, S (2001), 'Cheli-Beti': Discourses of Trafficking and Constructions of Gender, Citizenship, and Nation in Modern Nepal, South Asia, Vol. 24 Special Issue, pp. 157-175.

4 Chapkis, W (2005), *Soft Glove, Punishing Fist: The Trafficking Victims Protection Act, Regulating Sex ed Bernstein, E and Schaffner L, Routledge Press; Shah, S (2008), South Asian Border Crossings, Migration and Sex Work, Sexuality Research and Social Policy, 5(4): 19-30.*

5 This body of research is too vast to cite in full. Some examples include: Bernstein, E (2007), *Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex*, Chicago: University of Chicago Press; Nencel, L (2001), *Ethnography and Prostitution in Peru*, London: Pluto Press; Delacoste, F and Alexander, P (1998), *Sex Work: Writings By Women in the Sex Industry*, San Francisco: Cleis Press; Revathi, A and Geetha, V (2010), *Truth About Me: A Hijra Life Story*, New Delhi: Penguin Books.

6 <http://www.villagevoice.com/2011-03-23/news/women-s-funding-network-sex-trafficking-study-is-junk-science/>

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;" (emphasis added)

According to this definition, 'trafficking' requires: 1) recruitment, 2) force/power/deceit, and 3) exploitation. If all of these criteria are present in an individual case, then the consent of the 'trafficked' person is irrelevant. The wording "exploitation of the prostitution of others or *other* forms of sexual exploitation" is the place where the concepts of prostitution and sexual exploitation are fused together. In this definition, there is no prostitution that is not definable as 'sexual exploitation,' although the research and advocacy on sexual commerce paints a much different, and more complex, picture.

Veterans of the debates and discussions that led to this version of the definition of trafficking in the Protocol explain that the anti-prostitution feminist lobby, which had made alliances with some governments, including the US, had taken great pains to argue that all prostitution is equivalent to sexual exploitation and violence against women, regardless of consent, and that it therefore constituted 'trafficking.' Another group of feminist activists argued that trafficking and prostitution were not equivalent, and that conflating them completely would amount to the UN advocating to abolish prostitution altogether. This would not be acceptable, they argued, because (a) many people rely on prostitution for their livelihoods, and (b) two consenting adults engaging in sexual commerce should not be criminalised for doing so. The resulting definition reflects many of the agenda items of the anti-prostitution lobby (e.g., rendering consent irrelevant, placing extraordinary emphasis on defining prostitution as 'trafficking' and 'sexual exploitation,' conflating prostitution with women and girls, etc.) The inclusion of language that acknowledges that prostitution may not be the only form that human trafficking takes is the result of the efforts of opponents to the abolitionist position.

Criminalisation

Unfortunately, the conflation of 'prostitution' and 'trafficking' under the legal rubric of 'exploitation' in the dominant discourse on sexual commerce has served to obscure the distinctions between the various lived experiences of poverty and economic migration. Factors like poverty and migration are swept into the framing of 'trafficking' instead. This set of confluences has, therefore, served to frame sexual commerce itself as something that can only be addressed through more and more punitive laws and policing. In other words, conflating prostitution and trafficking has resulted in further criminalising prostitution, and in making the institutionalisation of other approaches to sex work more difficult to pursue. Prostitution has been further criminalised in the era of 'trafficking' than in at any other time in history. This has occurred in two ways. First, when governments seek to pass domestic anti-trafficking laws that are in alignment with the Palermo Protocol, they have done so by defining more forms of sexual exchange as trafficking/prostitution than were previously criminalised. India's government considered this kind of legislative change in 2005, although sex workers' advocacy groups and their allies in the HIV/AIDS sector contested the proposed revisions to the current anti-prostitution law. Second, some governments have responded to reports like the US State Department's Trafficking in Persons (TIP) Report by conducting violent crackdowns against sex workers, as has been the case in South Korea and in Cambodia.

The problem with the criminalisation of sexual commerce is also twofold. First, the data on the effects of criminalisation are uneven, or lacking. Therefore, the rationale that criminalisation of sexual commerce curbs prostitution is based on an ideology that abhors prostitution, rather than on data that supports or disputes criminalisation as policy. Second, the criminalisation of sexual commerce renders sex workers more vulnerable to violent clients, and to police. Sex workers who are criminalised have always been vulnerable to police because they themselves have no real legal recourse if they are victims of a crime (e.g., reporting a crime to the police as a sex worker can result in being raped by a police officer, or a client, where prostitution is criminalised).⁷ Rather than preventing prostitution or trafficking, criminalising sex workers actually serves to make sex workers more invisible by driving them further underground. This increases their vulnerability to police, and to poor working conditions (which should include the right to use condoms, and to

⁷ Canadian HIV/AIDS Legal Network (2004), *Sex Workers and Law Reform in South Africa*, HIV/AIDS Policy and Law Review, 2004; Report on Global Meeting of Sex Workers' Organisations, World Social Forum, 2009.

refuse clients.) These effects of criminalisation directly and negatively impact the ability to monitor, prevent, and treat HIV infection among sex workers (a set of issues which are discussed in the section below on HIV).

In the face of criminalisation, the significance of macro and microeconomic contexts for sexual commerce, or the significance of data, ultimately fade in favour of stereotypes. These include the idea of the essentially helpless victim of prostitution/ trafficking, and of the immoral, profiteering pimps/ traffickers who can only be stopped by bolstering states' policies that essentially restrict the movement of migrant workers, both within and across national borders. Without addressing the contexts of livelihood and migration, the conditions that make sexual commerce a viable livelihood strategy for poor people around the world continue to exist. From the perspectives of unskilled economic migrants, the anti-trafficking framework – and the criminalisation of sexual commerce that it requires – is yet another way in which the state renders economic survival even more difficult to maintain for people living below the poverty line in any given country.

Data

In addition to the problems of criminalisation, several other problems have arisen as the result of the conflation of prostitution and trafficking (and the conflation of 'trafficking' and 'sexual exploitation'). These include the lack of specificity in defining the issues at hand, which has contributed to a persistent problem of gathering accurate data on the scale and scope of human trafficking worldwide. The ongoing debate on trafficking and prostitution is increasingly driven by different approaches to collecting, critiquing, and analysing data on these phenomena. What counts as trafficking? At what point does smuggling become trafficking? And, what role does consent play in both smuggling and trafficking? In addition to the inherent problems of data collection in quantifying the magnitude of trafficking worldwide, the discourse on sex trafficking has become extremely polarised and politicised with respect to governmental laws and policies regarding cross-border migration. Thus, it has become even more difficult to discern actual information about who is trafficked, where, and how. This is compounded by the fact that there is disagreement and confusion among lawmakers and among law enforcement about what constitutes human trafficking, and whether all prostitution does or does not fit the definition. The result has been data that are, at best, aggregated estimates of trafficking, with vast margins of error. These estimates are thought to be too high, overall, by researchers who have reviewed the methodology by which the estimates are calculated. According to researchers for the International Organisation for Migration who have reviewed existing data on trafficking, many of the numbers on trafficking, especially those said to describe 'global' trends, are little more than 'guesstimates.' In addition, there are problems with defining variables consistently across studies, with some studies easily conflating sex work with trafficking and 'sexual exploitation,' while others take great pains to disaggregate these terms.⁸

HIV Prevention

Despite the numerous problems embedded within the anti-trafficking framework, the framework is hugely influential, especially in its detrimental effects in preventing HIV infection among people who sell sexual services. Conceptually, the anti-trafficking framework undermines HIV prevention because it renders a vast population – sex workers who were not trafficked – as criminalised by virtue of their existence. The anti-trafficking framework has reduced the options of people selling sexual services to either being 'rescued' from their livelihood, or to going 'underground,' that is, to becoming even less traceable by official entities, including governmental agencies, such as ministries of health, and non-governmental organisations that provide health and HIV-prevention services. The impact of the anti-trafficking framework on sex workers is, first and foremost, achieved through the criminalisation of people who sell sexual services. The impact of these on HIV-prevention is not reducible to one law or a set of laws. Rather, the impact of the anti-trafficking framework both encompasses and exceeds individual laws.

An example of this kind of overarching effect occurred in India, where some organisations working with sex workers used peer educators to spread information about HIV prevention, and to distribute condoms. Several sex workers' organisations in India – all of which are members of India's National Network of Sex Workers – have mobilised successful campaigns around HIV and trafficking through peer-education and outreach efforts. The simple idea that no one can reach sex workers like other sex workers can led to successful programmes in the Indian states of Maharashtra, West Bengal, and Andhra Pradesh. Unfortunately, as documented by Human Rights Watch in 2003⁹, sex workers who served as peer outreach workers were arrested and beaten for carrying condoms for distribution with them. Police who arrested outreach workers claimed that these peer educators demonstrated their intent to break the law by their possession of condoms. The use of 'condoms as evidence' of prostitution by police has increased worldwide since the rise of the dominant anti-trafficking framework.

⁸ International Migration, Vol. 43 (1/2) 2005.

⁹ <http://www.who.int/gender/documents/sexworkers.pdf>

The harassment of peer educators is an example of the impact of convergence of anti-trafficking laws that target prostitution, and the rise in the use of peer-education strategies for curtailing the transmission of HIV. The possession of condoms by peer educators conducting outreach among men who have sex with men (MSM) is used by police to cite the intent to break the local anti-sodomy law in countries that criminalise homosexuality by criminalising consensual sodomy between adults. A recent report on male sex work in Southern Africa shows that, in addition to posing problems in prevention efforts, the criminalised and 'underground' status of male sex workers renders them extremely vulnerable to harassment and exclusion from services when they attempt to access support and care for HIV-related health concerns. Speaking about accessing services in Kenya, one study respondent said,

"[At the] government hospital, the nurses just [stand] in front of everyone and shout out loud to the people waiting for assistance: 'If you have HIV, go to room nine, TB room 12, STD [sexually transmitted disease] room 8...'"¹⁰

Poverty and 'Exploitation'

Discourses on human trafficking that have focused on prostitution and 'sexual exploitation' have had a vexed relationship with the question of poverty. This relationship bears noting here because the primary contemporary meaning of the term 'exploitation' comes from Karl Marx and Friedrich Engels' work on class, a point that will be elaborated below. If 'exploitation' references the denial of access to the full value of one's own labour, then a discussion of poverty in relation to this term is required here, since 'sexual exploitation' is used so frequently in conjunction with prostitution within the dominant discourse on human trafficking. Within this discourse, it is sometimes difficult to assess exactly what 'sexual exploitation' refers to. The phrase is generally used in two ways. It is used to denote intermediaries between the person selling sexual services and the client of those services, e.g. landlords, pimps, brothel keepers, smugglers, or any one else who profits from the selling of sexual services but does not sell these services themselves. This use of 'sexual exploitation' refers to the lack of access that people selling sexual services – primarily figured as women – have to the full value of each transaction. The criminalisation of sexual commerce increases the likelihood that this form of 'sexual exploitation' will proliferate, as people continue to require intermediaries to provide protection from police and anti-trafficking activists. The phrase 'sexual exploitation' is also, at times, used to denote prostitution itself, where the actual exchange of money and sex is seen to be exploitative. 'Abolitionists' who seek to abolish paid sex have perpetuated this latter usage. While neither of these uses are particularly helpful in explaining power and powerlessness from the perspectives of people who sell sexual services, the phrase 'sexual exploitation' is used prodigiously in the anti-trafficking literature, and often without clarity about which of these two meanings it is meant to deploy.

The language of 'sexual exploitation' obscures the meaning of 'exploitation' as linked with material deprivation – poverty, in other words. While trafficking is clearly related to economic vulnerability and the lack of economic power, discourses on human trafficking have tended to conflate poverty with a generalised lack of agency, such that poverty also becomes inextricable and, in some representations, co-equal with trafficking itself. This conceptual frame is problematic, because it renders poverty less a structure, and more an individual characteristic of individual persons. In its most extreme form, conflating human trafficking with poverty has rendered 'poverty' itself as an agent of trafficking. If poverty essentially 'traffics' human beings into underground economic sectors, including prostitution, then poor people are necessarily rendered as non-agentive beings with respect to the illegal and underground strategies for economic survival they may engage. An example of this perspective on poverty in its relationship to trafficking is to be found in the Swedish government's 2003 report entitled "Poverty and Trafficking in Human Beings: A Strategy for Combating Trafficking in Human Beings Through Swedish International Development Cooperation."¹¹ In the Swedish government's report, poverty and trafficking are linked because "[p]eople become the victims of human traffickers mainly due to inequitable resource allocation and the absence of viable sources of income. Families have no assets and incomes are inadequate. In the countryside, agriculture is less profitable than formerly and land has become increasingly scarce."¹²

This relatively emblematic anti-trafficking perspective is rooted in a legal and policy orientation that emphasises combating 'exploitation,' where exploitation is understood in an extremely individualised way, and the remedy (rescue from prostitution) is incommensurate with the need to generate a livelihood. The discourse that seems to be emerging among various governmental and non-governmental actors concerned with the issue of trafficking is one in which poverty, exploitation, and trafficking are theorised in relation to each other in the relative absence of a discussion about structural concerns regarding poverty, and the ways in which poor people navigate or negotiate livelihood options which may include prostitution. Regarding the problem of evoking 'exploitation' in international human rights instruments, Baerbel Uhl writes,

10 <http://www.plusnews.org/report.aspx?reportid=93018>

11 *Poverty and Trafficking in Human Beings* (2003), Swedish Ministry for Foreign Affairs, available at <http://www.sweden.gov.se/sb/d/574/a/20262>.

12 *Ibid.*

“The Palermo Protocol definition of trafficking for the purpose of exploitation is unclear as the term ‘exploitation’ is not defined in the Protocol or in international law. ‘Exploitation’ was first introduced in international law in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. The term ‘exploitation’ replaced the term ‘immoral purposes’ that was in an earlier convention, namely the ‘International Convention for the Suppression of the White Slave Trade’ of 1910. The origins of the term ‘exploitation’ are variegated and rooted in different contexts throughout the centuries. The contemporary meaning, however, was established by the socio-critical theories of Karl Marx and Friedrich Engels: ‘exploitation’ means the ‘annexation of unpaid labor of workers by the owners of the means of production.’ Hence, it refers to an economic and work-related dimension.”¹³

In other words, when workers are ‘exploited,’ i.e. when they do not receive the full economic benefit of their labour, or if they are abused in the process of trying to earn a living, they have historically formed organisations that represent their interests, like trade unions. Through collective bargaining, they have, in many cases, been able to negotiate a better situation for themselves vis-à-vis their workplace.

The ‘Anti-Prostitution Pledge’

One of the ways that governments around the world are being impelled toward an understanding of prostitution as trafficking has been through the implementation of the US government’s Anti-Prostitution Pledge. The pledge is an addendum to the US President’s Emergency Plan for AIDS Relief (PEPFAR). PEPFAR is the primary means by which the US provides financial support to organisations combating AIDS around the world. All organisations outside of the US receiving money under PEPFAR are required to sign the pledge. Although the pledge has been legally challenged in its application inside the US, and although it was slated for review by the Obama administration in early 2009, it remains in full force for organisations receiving funds under PEPFAR outside of the US. It reads in part,

“(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.”¹⁴

Maurice Middleberg, Vice President of the Global Health Council, has said that the Anti-Prostitution Pledge proves that the anti-trafficking agenda is an anti-prostitution agenda.¹⁵ This is clear from the language in the pledge, e.g., when it states that prostitution itself is dehumanising, and that the link between prostitution and trafficking is direct. It is also clear in the ways in which the pledge has been operationalised.

In 2005, the Maharashtra State legislature, which governs the State of Maharashtra in Western India, banned women dancing fully clothed for tips in beer bars, a practice which had been legal in Maharashtra for more than ten years, and recalled a much older form of entertainment, known as a *mujra*. Criminalising dancing in beer bars impacted Mumbai, primarily, and put roughly 75,000 migrant women out of work immediately.¹⁶ Some media outlets in India began to report that bar dancers who had been criminalised in Mumbai had traveled far from the city to continue working, including travelling to Dubai¹⁷ and the US state of Georgia.¹⁸

Ethnographic research led by a Mumbai-based feminist organisation, Forum Against Oppression of Women, showed that, while most bar dancers were not doing sex work, the ones who did enjoyed a broad range of negotiating power with their clients.¹⁹ The US State Department’s TIP Report for 2006, however, seemed to assess the ban on bar dancing as a step toward eliminating prostitution and trafficking. Although the TIP Report’s “Tier 2 Watch List” ranking for India that year did not change, the ban was acknowledged in India’s entry in the 2006 Report:

“The March 2005 order by the Home Minister of Maharashtra state to close down “dance bars”—many of which served as prostitution and trafficking outlets—may check a new trend of traffickers favoring this more sophisticated and concealed format for selling victims trafficked for the purpose of sexual exploitation over more blatant brothel-based trafficking.”²⁰

13 Uhl, B (2011), *Terminology Matters: What do we mean when we say ‘exploitation’?*, available at <http://rightswork.org/2011/02/terminology-matters-what-do-we-mean-when-we-refer-to-exploitation%E2%80%99/>

14 <http://www.aidsmatters.org/archives/113-PEPFAR-Rules-and-Restrictions.html>

15 Middleberg, M (2006), *The Anti-Prostitution Policy in the US HIV/AIDS Program*, Health and Human Rights, Vol. 9, No. 1, pp. 3-15.

16 Agnes, F (2005), *Hypocritical Morality*, *Manushi*, 149, available at <http://www.indiatogether.org/manushi/issue149/bardance.htm>. The ban was successfully challenged by the Bar Girls Union, though it now languishes on appeal with the Indian Supreme Court. Until the case is heard, the ban remains in effect. Six years on, this means that the women cannot turn to the bars for employment.

17 <http://daily.bhaskar.com/article/MAH-MUM-bar-girls-banned-in-mumbai-trafficked-to-dubai-2475386.html?PRV>

18 <http://www.cablegatesearch.net/cable.php?id=09MUMBAI305>

19 SNDT Women’s University & Forum Against Oppression of Women (2005), *After the ban: Women working in dance bars*, Mumbai, India.

20 US Department of State (2005), *Trafficking in Persons Report*, available at <http://www.state.gov/documents/organisation/47255.pdf>

The various equivalencies presented in this entry – that dance bars were trafficking ‘outlets’ (an unsubstantiated claim), and that brothel-based sex work constitutes trafficking – shows two things: first, that the anti-trafficking agenda is an anti-prostitution agenda, as Middleberg claims and second, that in order for this agenda to proceed uninhibited, trafficking and prostitution must be conflated.

The Anti-Prostitution Pledge’s effects on HIV prevention have been documented by a number of NGOs, including the Center for Health and Gender Equity, based in Washington DC and a party to the lawsuit against the pledge, and the Sex Workers’ Project, based in New York City. According to both organisations, the pledge makes HIV prevention work more difficult or, in some cases, impossible among sex workers, primarily because the pledge renders organisations working with sex workers who are not categorised as ‘trafficked’ as ineligible for funds that would be used to promote HIV prevention and care among these people.²¹

Several examples support this point. In Southern Maharashtra in 2005, SANGRAM, an organisation that works with sex workers and helps to facilitate a sex workers’ collective, refused to sign the pledge, and was forced to significantly curtail its HIV prevention programmes as a result. SANGRAM also became the target of an anti-prostitution organisation, the International Justice Mission (IJM), based in the US and funded by American Christian fundamentalist groups. The IJM attempted to stage a ‘rescue’ of women in the brothels with whom SANGRAM worked, despite knowing that the women there did not consider themselves in need of rescue by anyone. This incident, involving some 200 local police, led to major disruptions in the daily lives of the women in the red light district, as well as interrupting SANGRAM’s programmes in the area.

In Bangladesh, an organisation working with sex workers – Durjo Nari Shangho – lost money when the international NGO that had been funding them signed the pledge. Durjo had been running drop-in centres for sex workers in Dhaka, a critical service for a city in which sex work does not take place in brothels, and where solicitation is primarily street based. Durjo’s drop-in centres provided a safe place for women to rest, to use a restroom, and to meet one another, as well as providing a central location for conducting health promotion programming. Women who would otherwise have been difficult to find were suddenly accessible, could be effectively targeted with information on condom use, and they could be given condoms regularly. These services ceased following the pledge, and have not been reinstated.

In addition to these examples, there are numerous indirect impacts of the pledge. For HIV prevention efforts, the primary impact of the pledge is in reducing resources for HIV prevention among sex workers, who run a high risk for becoming HIV-infected. The pledge, and other laws and policies that conflate trafficking and prostitution, together build a case for the further criminalisation of sexual commerce. The impact of criminalisation is to drive sex workers and their clients ‘underground,’ meaning that they become much, much more difficult to identify, making them that much more difficult to provide with health-related services and information. Organisations that do not sign the pledge are also impacted by it, in the loss of funding for critical services, and in lost relationships with other local NGOs that quickly become unwilling to work with an organisation that has refused to sign the pledge.

Other Impacts of Anti-Trafficking/Anti-Prostitution Laws and Policies Around the World

Several country examples detailing the enforcement of anti-trafficking/anti-prostitution laws and policies have been cited above. In this section, several other examples illustrate the impact of these laws and policies in relation to people in sex work, their health needs, and HIV treatment and prevention. Regarding scholarship that has critiqued the role of the criminalisation of certain populations in combating HIV, a consensus is emerging among scholars that, while criminalisation may be an effective way of controlling the visibility of some groups of people, it is not an effective way of monitoring and controlling HIV. In this vein, Aziza Ahmed, Assistant Professor of Law at Northeastern University, writes,

“Many countries have established criminal penalties for individuals living with HIV/AIDS for engaging in behaviors that risk transmission of HIV infection. Designed to reflect public morality or discourage socially undesirable behaviors, these laws are often enforced selectively against vulnerable populations or those who seek testing, treatment or services. . . Although neutral on their face, these laws may become guises for discrimination through selective enforcement against MSM, prostitutes and victims of sexual exploitation.”²²

Two points from this passage bear emphasising. First Ahmed refers not only to female sex workers, but also to MSM. Ahmed references work on the criminalisation of sex workers under different laws, including archaic anti-sodomy and new anti-homosexuality laws around the world. One of the detriments of the discourse that conflates trafficking and prostitution is that this conflation relies upon the idea that only women sell sexual services. This gives rise to the rationale that laws that criminalise sex work actually protect women and girls (and women *as* girls). If we include the fact that men and transgender women also sell sexual services, then criminalisation is necessarily cast in a different

21 <http://www.genderhealth.org/files/uploads/change/publications/aplobrief.pdf>; and <http://www.sexworkersproject.org>

22 Gable, et al (2009), *A global assessment of the role of law in the HIV/AIDS pandemic*, Public Health, 123: pp. 260–264.

light. In this light, sex workers are criminalised through a set of laws, rather than a single law, which criminalises their existence, without criminalising the act of exchanging sex and money. Criminalisation ultimately renders anyone selling sexual services more vulnerable to HIV. The following sections include examples of the impacts of criminalisation, and conflation of sexual commerce and trafficking on efforts to prevent and treat HIV. This is a selected list designed to illustrate global trends.

Individual country / regional cases

The Caribbean

On vulnerability to the police:

“Female sex workers face grave physical and sexual violence at the hands of clients, pimps and the police. In principle laws exist to protect all persons from violence and violation and this includes sex workers. It is however evident that sex workers do not feel safe to complain to the police about violence they experience. On the contrary, their vulnerability to arrest for a range of offences by the police exposes them to grave abuses by the police.”²³

On data and monitoring of trafficking:

“While the more recent anti-trafficking laws concern all forced migration and labor situations, the primary concern of the US State Department for coercion for and within sex industries means that new trafficking acts duplicate the focus that already exists in laws against procuring and detention of persons against their will in the sex trade.”²⁴

Submission made by Anton Rocke, SASOD, Guyana, for the Caribbean Dialogue of the Global Commission on HIV and the Law:

“Sex workers in Guyana, and other parts of the world, face disproportionate levels of violence which is often unreported. The assault, battery, rape and even murder of sex workers, which is all too common in the industry, goes unnoticed because of the existing legal framework around the profession which prevents sex workers from reporting violence. The stigma and discrimination perpetuated by sex work related offences has made violence against sex workers acceptable.”

Confidential submission for the Caribbean Dialogue of the Global Commission on HIV and the Law:

“I have been working in HIV and AIDS prevention and advocacy with MARP for 8 years in Trinidad and Tobago. I have seen that laws that criminalise sex work and irregular migrants prevent access to HIV prevention, treatment, testing, health and social services. Restrictive laws also prevents organisations from receiving support from government funding as well as corporate donors as clients are seen as criminal and unworthy. In our society HIV is polarised where you are an innocent victim or someone who has gotten what they deserved due to immoral and risky behavior.”

Submission made by Jane Armstrong, Denise Chevannes-Vogel, Caribbean HIV/AIDS Alliance, for the Caribbean Dialogue of the Global Commission on HIV and the Law:

“In Antigua, as in some other countries in the Organisation of Eastern Caribbean States, there is a large population of migrant sex workers who work in brothels, bars, and on the street. These sex workers often originate from poor communities in other countries in the region, including the Dominican Republic, Jamaica and Guyana. High HIV infection levels have been found among female sex workers in the region: 4% in the Dominican Republic, 9% in Jamaica and 27% in Guyana. (UNAIDS Caribbean factsheet 2010) Discrimination towards sex workers from the host community and poor treatment from authorities including the Police and Immigration, such as arrests and confiscation of passports, stigma and discrimination and coercion for sexual favors, is common. Most are reluctant to report incidences of violence to the authorities due to fear that discovery of their work as sex workers will result in deportation. Sex workers often enter the country on visas as domestic workers or entertainers and the clubs and brothels facilitate their access to work permits. Domestic laws such as the Sexual Offences Act, the newly enacted Trafficking Act, and the Immigration policies in Antigua continue to create barriers to migrant sex workers reporting GBV (gender-based violence).”

Latin America

Submission made by Rosa Amelia Gonzales, Fundacion Llanto, Valor y Esfuerzo – LLAVES, Honduras, for the Latin America Dialogue of the Global Commission on HIV and the Law:

23 Robinson, T (2007), *A Legal Analysis of Sex Work in the Anglophone Caribbean*, UNIFEM, available from <http://www.unifemcar.org>

24 *Ibid.*

“Sex workers are obliged to go to health care centres where they are searched and examined. Anyone who does not carry the Health Certificate (Certificado de Salud Sanitario) is subjected to penalties established in the penal code (Art 30).”

Submission made by Venus Tejada Fernández, Asociación Panameña de Personas TRANS Panama, for the Latin America Dialogue of the Global Commission on HIV and the Law:

“In my country, the mere fact of being a transgender person is synonymous with prostitution, HIV/AIDS, crime, drug addiction, etc. Transgender people engaged in sex work are victims of violence by the police who, in turn, are their pimps. Transphobia and discrimination from the police have come to the point that we cannot traverse public roads even during the day; we are thrown out of restaurants, shops, bars, etc. and publicly exhibited and taken to police headquarters without justification, thus violating Article 21 of the Constitution.”

Submission made by Herbert Hernandez, Guatemala, for the Latin America Dialogue of the Global Commission on HIV and the Law:

“Since 2001 to date, I have been a victim of police assault and aggression three times in the exercise of my work and private life. These assaults and aggressions were motivated by homophobia and the intolerance of the exercise of sex work. Around the years 2001-02, I was making the night rounds of a project I coordinated (Project Rodalinda) through which I visited women, trans and sex workers in the street in Guatemala. At that point in time, the police made continuous rounds (known as raids, which are illegal, but nevertheless were carried out by the police) to rid the streets of people engaging in sex work. One night, by municipal and gubernatorial order, a group of police, practicing this raid procedure, intercepted me in the vehicle in which we were traveling (and in which we were safeguarding three women in fear of the raid) to perform our prevention work. A group of approximately 20 agents grabbed me, saying that I was interfering in their work, tossed me around like a game ball and then put me in the patrol car and arrested me without any justification, without negotiation and without reference to our work, despite our permissions from the Ministry of Departmental Governance. In the face of this abuse of authority, we filed a complaint, but the case went unprocessed and unpunished.”

Confidential Submission for the Latin America Regional Dialogue of the Global Commission on HIV and the Law:

“... these rights that have been recognised, such as the right to privacy and the right to life - that includes not only the right to health and the given right not to be killed, but also the right to choose one's own life project that a person may opt or accept - are perceived as unreasonable and have been unjustifiably constrained by various punitive standards issued by different countries under the pretext of pursuing the common good of society.

In this way, we either find countries that directly prohibit sex work, understanding it as a direct cause of venereal disease, or countries that, in their fight against international human trafficking, dictate regulations that either directly prohibit or seek to punish clients and night club supporters, thus generating an indirect prohibition.”

On the benefits of state-sponsored registration and surveillance of sex workers:

“Sex work is regulated in Tijuana, Mexico, but only half of the city's female sex workers (FSWs) are registered with the municipal health department, which requires regular screening for sexually transmitted infections (STIs) and human immunodeficiency virus (HIV)... Registered FSWs were more likely than unregistered FSWs to have had HIV testing and to engage in less drug use, but did not have significantly lower HIV or STI prevalence after adjusting for confounders.”²⁵

High-Income Countries

Submission made by Dan Allman, Ph.D. and Melissa Hope Ditmore, USA, for the High-Income Countries' Dialogue of the Global Commission on HIV and the Law:

“We present our observations here about funding restrictions in US foreign aid – particularly clauses restricting work that can be done with sex workers in HIV prevention and anti-trafficking efforts – to illustrate how these restrictions on foreign aid promote violations of the rights and compromises the health of sex workers around the world.

PEPFAR is foreign assistance from the US government for HIV and AIDS programming. Currently PEPFAR operates in over 150 countries. PEPFAR has facilitated the provision of ARV treatment to thousands of individuals and expanded services for many, including sex workers, in some places. However, this funding is conditional: recipients of PEPFAR funds are required to sign contracts that include a clause specifying that the recipient is ‘opposed to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children.’ This condition for funding is colloquially known as the “anti-prostitution pledge” or the “anti-prostitution loyalty oath”. This contract language is an adaptation: earlier versions included in the laws creating PEPFAR and its 2008 reauthorization were different, but the effects were not.

25 Sirotnin, et al (2010), *A Comparison of Registered and Unregistered Female Sex Workers in Tijuana, Mexico*, Public Health Reports, Supplement 4, Vol. 125, pp 101-110.

Despite the fact that sex workers face disproportionate risk for HIV, and despite the current US administration's efforts to base policy upon evidence, we argue in our work that the pledge is not grounded in evidence or is grounded on tenuous (or partisan) interpretations of that evidence. What we have found across our research is that by inadvertently promoting stigma against sex workers in health programmes the pledge in all its forms increases sex workers' vulnerability to HIV infection. It does this through undermining the ability of sex workers to access to HIV treatment, care and support."

Submission made by the Best Practices Policy Project, USA for the High-Income Countries' Dialogue of the Global Commission on HIV and the Law:

On the criminalisation of sex workers and HIV prevention efforts:

"The policing of anti-prostitution laws, related policies and by-laws across the United States directly undermines the ability of sex workers to protect themselves from HIV infection and, in a broader sense, alienates these communities from the support needed to defend their health and rights. Sex workers, and people the police assume to be sex workers, are harassed, assaulted, sexually assaulted, extorted, and falsely arrested by police. The law enforcement practice of using condoms as evidence and/or destroying condoms and safe sex materials directly contravenes efforts to halt the spread of HIV in the United States. People of color, transgender people, immigrants, homeless people and youth of color are disproportionately affected by these law enforcement activities."²⁶

Submission made by Brendan Michael Conner, USA, for the High-Income Countries' Dialogue of the Global Commission on HIV and the Law:

"... a minor involved in transactional sex in New York City has, on average, been arrested 2.5 times. Importantly, the arrests are not merely for crimes with "prostitution" in the title, which account for 17.6 percent of charges for minors involved. While the New York Safe Harbor Act has been widely lauded for purportedly decriminalizing minors' involvement, it currently extends only to prostitution and to youth aged 7 to 16, excluding 93 percent estimated to be involved. Therefore, reform must take compound criminalisation into account and extend protection to minors arrested under "proxy" charges such as loitering, false personation, criminal nuisance, etc. Additionally, among this larger category of sex-trading minors, certain groups face disproportionate policing, with 81 percent of young MSM and 63 percent of transgender youth reporting prior arrests. In a study of transgender youth in New York City, participants reported profiling by police and verbal and sexual harassment and violence, including the extortion of sex in exchange for release from custody.

The international legal framework for reform is already in place under the Convention on the Rights of the Child and related treaties. What is needed is a more muscular interpretation of the international mandate, and a change in emphasis from "End Demand" enforcement toward: (1) the full decriminalization of youth involvement, (2) reorientation from court-mandated 'rehabilitation' and secure detention to the rights-based approach of voluntary, client-centered services, especially shelter and living wage alternatives, and (3) implementation of No-Condoms-As-Evidence policies."

Submission made by Astrid Renland, PION - Prostitutes interest organisation in Norway, Norway, for the High-Income Countries' Dialogue of the Global Commission on HIV and the Law:

"Over the last decade there has been a radical change in the political approach to prostitution in Norway. It used to be seen as mainly a social problem which should be met with social services and harm reduction programmes, but with an increasing focus on human trafficking and the implementation of an "end demand model" – the criminalising of the clients of sex workers in January the 1, 2009, focus has now moved to crime control. The purpose of the new regulatory regime is to combat human trafficking which has changed the law enforcement of paragraphs 202 in the penal code – the so called pimp paragraph, and the implementation of the new bill, paragraph 202a, the prohibition of purchase of sexual services. Within this new paradigm sex workers are regarded as victim and the official policy in Norway has been based on harm reduction regarding services directed towards sex workers. Attention is now primarily on third party and the buyers of sexual services while recruitment for prostitution is individualised and reduced to a matter of cynical criminals and the men's demand for buying sex. Which also means that social and societal factors that contribute to that many people choose to sell sexual services are overlooked and underexposed."

Asia-Pacific

On the effects of criminalisation on transgender sex workers:

"Participants referred to numerous reports from across the region of transgender people being charged or threatened with arrest under laws relating to sex work, human trafficking, homosexuality, loitering and vagrancy. The Indian NGO, Sangama, argued that selective enforcement of anti-trafficking laws can make it difficult for transgender people to travel

²⁶ Best Practices Policy Project (2011), *Report Submitted to the Global Commission on HIV and the Law*, available at <http://www.bestpracticespolicy.org/GlobalCommissionRep2011Text.html>

because police sometimes wrongly assume that all transgender people are sex workers. Sangama stated that the sodomy offence of the Indian Penal Code (Section 377) has been used to blackmail and threaten the arrest of transgender people (hijras), and police have resisted actions by Sangama to protest against misuse of police powers.²⁷

On using the possession of condoms as evidence of prostitution:

“Raids by police and religious authorities hinder HIV prevention work targeting transgender sex workers in Malaysia. The PT Foundation stated in its submission:

“(In 2010) we received 22 cases of transgenders who had been arrested by religious authorities and referred to the Legal Aid Centre. Feedback from outreach workers and the clients stated that raids by the authorities happened almost every day at sex work venues... There were also complaints of assault by enforcement officers. There were complaints from transgender sex workers that they were threatened by authorities for having condoms with them. Some of them are reluctant to (ask for) condoms from the outreach workers.”²⁸

On criminal law and HIV in Asia:

“Criminal laws in the areas considered here and their enforcement, while intended to reduce HIV transmission, are inappropriate and counterproductive with respect to health and human rights. Governments should remove punitive laws that impede the HIV response and should ensure meaningful participation of people living with HIV, people who use illicit drugs, sex workers and men who have sex with men in combating stigma and discrimination and developing rights-centered approaches to HIV.”²⁹

“Several participants [of the Global Commission’s Asia-Pacific Dialogue] highlighted the harmful affects of enforcement of human trafficking laws on sex workers. Another issue of concern highlighted by civil society was the detention of sex workers in facilities for ‘rehabilitation’ or ‘re-education through labour’ in countries such as China, Cambodia and Vietnam. The approach of these facilities is to punish sex workers for engaging in behaviour that is regarded as a ‘social evil’, rather than to offer health care or support.”³⁰

“APNSW [the Asian Pacific Network of Sex Workers] presented a video [during the Global Commission’s Asia Regional Dialogue] in which a Cambodian sex worker recounted being detained and raped by six police officers. The video demonstrated that when the sex industry is illegal, sex workers are denied safe places to work and this puts them at greater risk of violence and abuse. The video explained that an anti-trafficking police raid in a brothel in Kuala Lumpur occurred in 2010 and sex workers were detained, regardless of whether they had actually been subject to trafficking. The video showed that police in Thailand conduct searches for condoms as evidence of sex work, and explained that the ‘100% condom use programme’ in Cambodia often involved compulsory HIV testing which violated human rights – sex workers reported that health care workers treated them roughly.”³¹

On the effects of conflating prostitution and trafficking, and passing legislation that bans prostitution as trafficking:

“In March of 2008 the Cambodian government passed the ‘Law on Suppression of Human Trafficking and Sexual Exploitation’. The law was drafted in Cambodia with support from UNICEF and it was introduced into the Parliament by the Deputy Prime Minister. It criminalises soliciting for prostitution and various other types of sexual behaviour for reward, erotically stimulating images, procuring, training, transporting and almost all social and financial transactions connected to sex work, whether they are abusive or consensual, fair or unfair.... The law makes almost all aspects of buying and selling sex illegal, including most forms of association with sex workers. An unprecedented crackdown on both commercial sex venues and street sex workers across the country began immediately and continues a year later. Sex workers and human rights organisations have published evidence of human rights abuses including rape, violence and unlawful detention by police, prison guards and NGOs and deaths in custody. According to the sex workers organisation Women’s Network for Unity, closing the sex industry has displaced women and pushed them into situations in which they and their families are poorer and more vulnerable.”³²

27 Report of the Asia-Pacific Dialogue of the Global Commission on HIV and the Law, 2011: http://www.hivlawcommission.org/index.php?option=com_content&view=article&id=58&Itemid=64&lang=en, p. 6.

28 *Ibid.*

29 Csete J and Dube, S (2010), *An inappropriate tool: criminal law and HIV in Asia*, AIDS, Sep. Supp 3, S80-85.

30 Report of the Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law, 2011: http://www.hivlawcommission.org/index.php?option=com_content&view=article&id=58&Itemid=64&lang=en, p. 7.

31 *Ibid* at p. 9.

32 Overs, C (2009), *Caught Between the Tiger and the Crocodile: The Campaign to Suppress Human Trafficking and Sexual Exploitation in Cambodia*, available at <http://apnswdollhouse.wordpress.com/2009/03/27/caught-between-the-tiger-and-the-crocodile-the-campaign-to-suppress-human-trafficking-and-sexual-exploitation-in-cambodia/>

Submission made by Maria Lourdes S. Marin, Action for Health Initiatives (ACHIEVE), Philippines, for the Asia-Pacific Dialogue of the Global Commission on HIV and the Law:

"The Anti-Vagrancy Law, signed into law in 1935, criminalises prostitutes, who are defined as "women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct". The Anti-Trafficking Law, a more recent law signed in 2003, criminalises both the client and the pimp who, under this law, are known as the "trafficker". In contrast to the Anti-Vagrancy Law, the Anti-Trafficking Law defines trafficked persons as victims and they are therefore, not penalised. Because both laws criminalise sex work, many sex workers are forced to operate underground in order to escape arrests. Further, they become vulnerable to exploitation, abuse, harassment and extortion. The abuses and harassment are also experienced by HIV outreach workers and peer educators who reach out to both establishment-based and street-based sex workers. Trained volunteer street-based peer educators who happen to be sex workers themselves, are vulnerable to arrests especially those who are unable to show identification. Likewise, outreach workers who frequent street-based sex workers to provide HIV education services are suspected as either traffickers or pimps."

Submission made by Chantiwipa Apisuk, Empower Foundation, Thailand, for the Asia-Pacific Dialogue of the Global Commission on HIV and the Law:

"Laws do not protect our rights. Law becomes a tool for corrupt police to get more money. All sex workers in Thailand pay police either directly or via lost income that the employer is obliged to reroute to the police. The more laws applying to us and our work the more money we have to hand over. The National Economic and Social Advisory Council found in a 2003 study that A go-go bar and massage parlor owners in Thailand pay a 3.2 billion baht (US\$80 million) a year in police bribes. It has risen since then. The 2008 Anti-trafficking Law has created a new excuse for corrupt authorities to extort money from sex workers and our employers. Instead of just ordinary criminals, migrant sex workers have become transnational criminals, or evidence of transnational crime. Migrant sex workers tell how the daily bribes doubled and their salary dropped after the law was implemented. If sex work in itself was not a crime, if sex workers were not treated as criminals wherever they come from, even 10% of the informal "tax" the industry currently provides would fund many work place health and safety programmes, including workplace HIV education and prevention."

On the effect of destroying the red light district in Goa for the purpose of preventing trafficking:

"Interventions targeting sex-workers are pivotal to HIV prevention in India. Community mobilisation is considered by the National AIDS Control Programme to be an integral component of this strategy. Nevertheless societal factors, and specifically policy and legislation around sex-work, are potential barriers to widespread collectivisation and empowerment of sex-workers. Between November 2003 and December 2005 we conducted participatory observation and rapid ethnographic mapping with several hundred brief informant interviews... This provides a detailed examination of the demolition of Baina, one of India's large red-light areas, in 2004, and one of the first accounts of the effect of dismantling the red-light area on the organisation of sex-work and sex-workers' sexual risk. The results suggest that the concentrated and homogeneous brothel-based sex-work environment rapidly evolved into heterogeneous, clandestine and dispersed modes of operation. The social context of sex-work that emerged from the dust of the demolition was higher risk and less conducive to HIV prevention"³³

On the role of sex workers in controlling HIV incidence in Kolkata:

"High rates of empowerment, HIV-related knowledge, and condom use among sex workers in Sonagachi, India have been attributed to a community-led intervention called the Sonagachi HIV/AIDS Intervention Programme (SHIP). In this research we examined the crucial role of brothels in the success of the intervention. In-depth, semi structured interviews were conducted with 55 participants of SHIP. The results indicate that brothels help sex workers reduce HIV risk by (a) serving as targeted sites for SHIP's HIV intervention efforts, (b) being operated by madams (women managers of brothels) who participate in SHIP's intervention efforts and promote healthy regimes, (c) structuring the economic transactions and sexual performances related to sex work, thus standardising sex-related behaviour, and (d) promoting community empowerment among brothel residents."³⁴

Eastern Europe and Central Asia

On making already vulnerable people even more so by conflating prostitution and trafficking:

"More significantly, there is no protective legislation specifically aimed at protection of rights and interests of groups of people at high risk of HIV/AIDS infection such as MSM, people who use drugs, sex workers and prisoners from discrimination

33 Shahmanesh M, Woyal S, et al. (2009), *HIV prevention while the bulldozers roll: Exploring the effect of the demolition of Goa's red-light area*, Soc Sci Med. 2009; 69:604-12.

34 Ghose, T et al (2011), *The Role of Brothels in Reducing HIV Risk in Sonagachi, India*, Qual Health Res. 21(5):587-600.

and other human rights abuses. In the very few countries where limited elements of this protection exist, there is little evidence of them being used.³⁵

“Even in cases where there are legal grounds for the detention of sex workers, police commit serious violations of due process and routinely abuse sex workers in custody.”³⁶

Submission made by Ninoslav Mladenovic, BIM-FV Skopje, Macedonia, for the Eastern Europe & Central Asia Dialogue of the Global Commission on HIV and the Law (on criminal legislation and execution of sanctions):

“A major conclusion of this analysis is that the national legal framework provides for, de jure and de facto, criminalisation of HIV transmission, which only reduces the level of access to prevention services, increases the fear and stigma and leaves space for selective application and possible misuse of the Criminal Code (CC), particularly with reference to members of vulnerable groups.

Regarding sex workers, this analysis concludes that penalisation of sex work, with particular reference to its categorisation as a criminal act, “social and pathologic phenomenon” or “social evil”, only contributes to the increase of stigma and discrimination against sex workers and of their vulnerability to HIV/AIDS. Also criminal prosecution of sex workers, pursuant to the criminal provision for causing “transmission of infectious diseases” by means of a “sex act or otherwise”, has endangered the success of existing programmes for HIV/AIDS prevention in sex workers. Therefore, it is recommended sex work to be depenalised, and working conditions and health and safety requirements be legally regulated, for the purpose of protecting sex workers and their clients, by supporting a safe sex environment during sex work. In addition to this, it is recommended that Article 205 of the CC to be reformulated in order to prevent its application to persons who are (potential) HIV carriers, as well as to prevent application of this Article, as legal basis for a forced HIV/AIDS and STI testing of such persons.”

Submission made by Stasa Plecas, Jahas, Serbia, for the Eastern Europe & Central Asia Dialogue of the Global Commission on HIV and the Law:

“Criminalising or penalising sex work fuels violence, discrimination and human rights abuses against sex workers. Sex workers in the SWAN region are subjected to torture, cruel and inhuman and degrading treatment, and criminalisation has grave consequences on their right to health. Recently, at a training for law enforcement in Serbia, a police officer summarised the views and attitudes of the police by saying that sex workers do not deserve to be protected, that time on their protection should not be wasted, as they were willingly engaging in risk on top of engaging in illegal activities which, according to him do not grant them the same rights as other citizens.

In Macedonia, Serbia, Ukraine, Kyrgyzstan, Bulgaria, Russia, Lithuania and Slovakia, alarmingly high levels of physical and sexual violence by police were reported. In countries where sex work is penalised or criminalised, law enforcement officials abuse their power by arbitrarily arresting sex workers, illegally detaining them and violating due processes. Police extortion and threats are common practice. For example, in Kyrgyzstan, 100% of those interviewed report that they have experienced police extortion.”

Submission made by Gulnara Kurmanova, Tais Plus NGO, for the Eastern Europe and Central Asia Dialogue of the Global Commission on HIV and the Law:

“Every year, sex work in Kyrgyz Republic becomes the sole source of surviving for about 10000 most poor and uneducated women and their children, as well as for men. Discrimination against people, who sell sex in the Kyrgyz Republic, is expressed through the fact that they do not have the opportunity to realise their fundamental human rights like right to life, physical and moral inviolability; right to freedom of labor, health, sexual and reproductive rights. In case of violations of the rights of women who sell sex, they do not receive adequate legal protection provided by law. Extortion and violence by police has remained the number one concern of women in sex work in Bishkek and other parts of the Republic. In case of violations of the rights of women who sell sex, they do not receive adequate legal protection provided by law. Due to persistent police intervention the (former) street workers have been driven underground. Now here and there only mamochki (female pimps) can be observed who are looking for clients. They have hidden their girls in apartments disguised as family homes. As a woman reports, ‘police beat you up, demand money and will detain you until you pay’. In illegal police raids, police catch and detain sex workers.”

Submission made by Victoria Lintsova, Ukraine, for the Eastern Europe & Central Asia Dialogue of the Global Commission on HIV and the Law:

35 Report of the Eastern Europe & Central Asia Regional Dialogue of the Global Commission on HIV & the Law, 2011, http://www.hivlawcommission.org/index.php?option=com_content&view=article&id=61&Itemid=67&lang=en, p. 46.

36 *Ibid* at p. 87.

"For a period before 2002, I was a sex worker. Policemen regularly extorted money from me, blackmailed me that distribute information among my clients about my HIV-positive status. Because of these threats, in the end I had to leave my town.

Law enforcement officials have repeatedly used my sexual services without my consent and without payment, or just brutally raped me.

Also, police officers took away money from me at the place where I worked. I was searched without any grounds. Because of this I had to hide the condoms because condoms, in the eyes of the police, are the undeniable proof that I was, as they say, 'a prostitute'. Despite the fact that long time has passed, I still remember those events with pain and tears. Almost all sex workers, whom I know told me about similar abuse by the police. We cannot go to court because the risk receiving a punishment for being sex workers. In Ukraine, sex work is an administrative misdemeanor, but with no other group of offenders, the police do not behave this way."

Africa

On attempts to organise sex workers within the context of criminalisation:

"In 2010, an African sexual rights organisation, Akina Mama wa Afrika, attempted to host a meeting on health rights and economic empowerment for sex workers. On the day of the workshop, Uganda's Minister for Ethics and Integrity sent a letter to the hotel where the event was to take place demanding that it be cancelled. The Minister gave 'directives not to host a Prostitutes Conference run by Akina Mama wa Afrika and if they do so, will be abetting illegality in Uganda.' The meeting did not take place."³⁷

Submission made by Daniel Jafeth Lema, Legal Aid Clinic- University of Dar el-Salaam, Tanzania, for the Africa Dialogue of the Global Commission on HIV and the Law:

"The Tanzania HIV law criminalises the willful transmission of HIV. Despite the fact that there has never been a case brought in court on this aspect after the enactment of the law or before, still the law maintains that, whoever willfully transmits HIV to other person intentionally commits an offence. This is not only an impossible offence to prove but is also a backlash against the efforts of combating transmission of HIV. In fear of being seen as potential criminals, people shy away from testing which is the major starting point in combating transmission. Apart from that, the law put in danger the lives of specific groups such as women who, due to the nature of their roles in the community, find themselves forced to test for HIV before others. This provision also targets other vulnerable and already discriminated groups such as commercial sex workers who may be seen, labeled or targeted as HIV transmission conduits. It is evidently clear based on this analysis that this provision serves no good purpose within the law."

Submission made by Dingaani Mithi, Journalists Association Against AIDS, Malawi, for the Africa Dialogue of the Global Commission on HIV and the Law:

"The criminalisation of sex work in the country is built on the perception that it will prevent HIV transmission by deterring sex workers from practicing their trade and hence infecting their clients. The proposed HIV bill proscribes criminal punishment or a fine to anyone who transmits HIV either 'deliberately', recklessly or 'negligently' (articles 44&45). Punishing individuals for reckless or negligent transmission can lead to individuals such as sex workers in particular to being punished who were unaware of their HIV status. In addition applying criminal law to punish HIV transmission could discourage people from getting tested because of lack of knowledge of one's status.

There is no evidence that criminalising HIV transmission will reduce the spread of HIV. Indeed, criminalising the transmission of HIV has not been shown to incapacitate, rehabilitate, or deter offenders considering that most people do not know their status during the first few months they contract HIV, which is the period where it is most likely to be transmitted to others.

Malawi has not outlawed sex work and it is not reflected anywhere, however the police officers working at night pounce on sex workers and when the issue goes to court they are charged with rogue and vagabond. This is a clear violation of rights of sex workers who are being victimised without any legal basis. Another shocking example, is that of some 10 commercial sex workers who were arrested in the border district of Mwanza and were forced to take a compulsory HIV test under the authority of the police."

Submission made by Kyomya Macklean and Eric Harper, ASWA South Africa, South Africa, for the Africa Dialogue of the Global Commission on HIV and the Law:

"Sex workers, 90% of whom are women, live at the legal, social and economic margins of their society and are subject to repeated and systematic human rights violations. Most sex workers enter the industry for economic reasons. They are marginalised, face gender based violence, economic oppression, human rights abuses, structural violence and health

³⁷ <http://www.nswp.org/regional-content/hon-nsaba-buturo-again-bans-sex-workers-workshop-health-rights-and-economic-empower>

challenges. As sex work is a criminalised offence in almost all African countries, sex workers are usually forced underground, where the sex work industry is 'regulated' by criminal threats and links between police officers and brothels, or pimps/managers. Without labour rights as employees, many sex workers are exploited – experiencing bribes for money, provision of sex to avoid arrest, mobility restriction, withholding of wages and prevention of medical assistance, and arbitrary fines. In Cape Town, brothel owners will often retain 40% of their earnings. In Cape Town, 37% of street-based and 20% of brothel-based sex workers often experience violence and, alarmingly, can't report it to the police. In Mombasa, 67% of sex workers undergo violence occasionally – and for 30% it's a common occurrence. Instead of protection, some police sanction and fuel this violence. There's ample evidence of police harassment, arbitrary arrests, forced sex, and rape. Sex workers hardly can access legal services or protection – making them vulnerable. Highly exploitative working conditions are common. Human trafficking also takes place, although not as widely as commonly depicted, and hidden by criminalisation. Sex workers are subjected to far higher levels of violence than the general population. Some go so far as to claim that there is an unacknowledged genocide of sex workers in Africa."

Submission made by Sisonke Botswana, Botswana, for the Africa Dialogue of the Global Commission on HIV and the Law:

"Criminalisation of sex work, stigmatising and discriminating attitudes in the society has rendered sex workers clandestine and unable to form formal groups and organisations. There are currently two organisations in Botswana working with sex workers, Nkaikele Youth Group and Matshelo Community Development. Due to their intent to rehabilitate and their generalised mandate not specific to sex workers, the organisations tend to employ positivist and judgmental views of seeing sex work as immoral and unlawful hence cultivating stigma and discrimination towards sex workers and driving them further into hiding. Consequently, efforts by BONELA (Botswana Network on Ethics Law and HIV and AIDS) to mobilise sex workers are treated with suspicion.

Sex workers who had been arrested say that they are not allowed to say anything. They are not even questioned. The police tell them they are arrested for idling and prostitution as evidenced by their possession of condoms. They are asked to pay P100, and if they pay they are released immediately. If they do not pay, they are forced to do community service for two months. Two ladies cited a story where their case was heard by the local chief. The police officer told the chief that the ladies were sex workers, and they were told to plead guilty of the offence."

Submission made by Kassoumou Ibrahim, Association des Jeunes Juristes du Niger (AJJN), Niger, for the Africa Dialogue of the Global Commission on HIV and the Law:

"Sex workers are sometimes rounded up for soliciting in public by the vice squad of the national police. The Niger Criminal Code punishes trafficking in women specifically in Article 291."

Conclusions

The impacts of the conflation of prostitution and human trafficking are far-reaching, and have a profoundly negative effect on efforts to contain and control the HIV epidemic among those who are among the most vulnerable to seroconversion. The primary way in which the conflation of prostitution and trafficking impact HIV-prevention, in particular, is through the criminalisation of prostitution as an effect of criminalising trafficking. In fact, the criminalisation of 'human trafficking' is the institutionalisation of an anti-prostitution perspective that, while common, has never been institutionalised in the way that it has come to be. This has resulted in prostitution being the most criminalised that it has ever been. As a result, sex workers have been driven 'underground', and are further removed from access to medical services, including HIV prevention services, and sexually transmitted infection prevention and treatment. The overall effect is one in which the social well-being of people selling sexual services is jeopardised, and successful efforts that have been underway since the beginning of the HIV epidemic to control HIV-incidence are being undermined.

In reviewing submissions made to the Global Commission on HIV and the Law for its Regional Dialogues, and in reviewing reports from NGOs, several summary observations become clear. These derive from the effects of the heightened criminalisation of prostitution:

- One of the effects of criminalising prostitution with a focus on women and girls is the heightened penalisation of transgender people under anti-prostitution laws, while women and girls are penalised under both anti-prostitution and anti-trafficking laws. This has resulted in women and girls being subjected to imprisonment, and to extra-judicial detention in remand homes following rescue operations in brothels.
- Heightened criminalisation of sexual commerce has increased the social and legal stigma and discrimination that sex workers face. As a result, sex workers are less likely to access the services they need, and are less likely to seek legal redress after abuse. For example, some sex workers report being denied access to maternity services, including during labour.

- Although the laws against sex work are not often used, the police very often target sex workers as victims for bribery, violence and sexual assault under the threat of arrest. For example, police abuse their powers by forcing sex workers to have sex with them without condoms, threaten sex workers, demand bribes and refuse to make reports on any crimes committed against them.
- Other criminal laws have been enforced in a selective and discriminatory way. Public order, prostitution, trafficking, obscenity and vagrancy offences have been applied against MSM and transgender people and used to extort money and as a basis for harassment and for perpetrating acts of violence (e.g. Bangladesh, Cambodia, China, Fiji, India, Indonesia, Malaysia, Pakistan, Philippines, Singapore).³⁸
- Enhanced criminalisation of trafficking and prostitution-as-trafficking has led to the enhanced vulnerability of sex workers to the state, e.g., through mandatory testing programmes, which have 'testing targets' for sex workers, and often do not have mandates for obtaining consent or maintaining confidentiality. Numerous examples exist of sex workers being forcibly tested while in police custody for solicitation or trafficking.

Recommendations

A comprehensive strategy that addresses the problems inherent within the current framework would include:

- Assessing what local impacts of laws will be on police and policing practices prior to implementation. In some cases, sex workers can "*leverage the combined forces of community empowerment, collective action and network-based governance to regulate...*" police.³⁹
- Considering the possibility of economic migration in laws and policies that govern sex work, while avoiding legislation that frames 'trafficking' as the only way to understand sexual commerce and HIV.
- Including MSM and transgender people in sex work policy; consider all laws that may impact sexual minorities and sexual marginalised or stigmatised groups.
- Tie policy frameworks on sex work with those that assess and intervene in informal sectors more broadly.
- Include economic empowerment more centrally as a platform for easing the legal, social and physical vulnerabilities of selling sexual services.

Ultimately, a critical assessment of the impact of the anti-trafficking framework shows that it is highly problematic in its ability to offer a clear conceptual understanding of sex work, migration, and vulnerability. Disaggregating human trafficking from prostitution and forced labour are fundamental to crafting cogent and effective law and policy on this issue, by allowing lawmakers to conceive of the problem at hand clearly, before interventions are crafted.

38 *Regional Issues Brief: Laws & practices relating to criminalisation of people living with & populations vulnerable to HIV* (2011), Asia-Pacific Regional Dialogue of the Global Commission on HIV & the Law, http://www.hivlawcommission.org/index.php?option=com_content&view=article&id=58&Itemid=64&lang=en

39 Biradavolu MR, et al (2009), *Can sex workers regulate police? Learning from an HIV prevention project for sex workers in southern India*, *Social Science & Medicine*, 68 (2009) 1541–1547.