



**Submission of Tlaleng Mofokeng,
Special Rapporteur on the right of everyone to the enjoyment of
the highest attainable standard of physical and mental health
to the report of the Special Rapporteur on violence against
women and girls to the Human Rights Council on prostitution
and violence against women and girls.**

31 January 2024

Introduction

In my daily work, I am a medical doctor and in the fulfilment of my mandate as Special Rapporteur, I adopt an anti-racist and anti-coloniality framework to analyse the power dynamics in global health. When talking about human rights, we are reminded that all people are entitled to have their human rights protected, however we do not often stop to think about who we consider human. Black people, women, queer people, people with disabilities, and impoverished people almost always get left behind in human rights discourse that promotes equality and respect of their right to autonomy. Sex workers exist at each of these intersections and for many, sex work is a primary lifeline that sustains them and their families. Despite this, sex workers remain the most abused and endangered people in society, constantly under siege from the general public and governments who project moralistic concerns aimed at controlling sexuality. Controlling sexuality and, in particular, women's sexuality has its origins in patriarchy. Patriarchal oppression is not specific to any country or region: it is universal.

Impact of sex work criminalization, punitive legal frameworks and public policies, discrimination and violence, and treatment by United Nations Human Rights Mechanisms and UN agencies

Several UN mechanisms, including Special Procedures and Treaty Bodies, have expressed concerns about the impact of criminalization and punitive legal frameworks and public policies on sex work.

The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has indicated that “basic rights afforded to other workers are [also] denied to sex workers because of criminalization, as illegal work does not afford the protections that legal work requires, such as occupational health and safety standards” (A/HRC/14/20, para. 27).

Criminalization leads to poorer health outcomes for sex workers, because of the latter's fear of legal consequences, harassment and judgement, as well as because of the stigmatization affecting them (A/HRC/14/20, paras. 36 and 39). Sex workers are affected by stigma and marginalization, and they are “at significant risk of experiencing violence in the course of their work, often as a result of criminalization” where access to health services is impeded and occupational risks increase (A/HRC/14/20, para. 27)

In that report, I highlight that structural violence, when suffered at the hands of law enforcement, among others, “creates similar barriers to the right to the highest attainable standard of health”, adding that police brutality and impunity contribute to the fact that victims of sexual or gender-based violence do not report these crimes, which perpetuates this type of violence, and arises in particular where sex work is criminalized. Also, “criminalization enables abuse and exploitation” and “sex workers are exposed to conditions that include exposure to sexually transmitted infections but also to violence, extortion and intimidation by clients and policy” (A/HRC/50/28, para. 71).

The Working Group on discrimination against women and girls has stressed that the discriminatory use of criminal law, punitive sanctions and legal restrictions to regulate

women's control over their own bodies was a severe and unjustified form of State control. This can include punitive provisions in criminal, civil and administrative laws and regulations including governing sex work. The enforcement of such provisions generates stigma and discrimination and violates women's human rights. It infringes women's dignity and bodily integrity by restricting their autonomy to make decisions about their own lives and health (A/HRC/32/44 15, para 76).

The Working Group has further emphasized that criminal laws and other punitive regulations had imposed custodial sentences on women involved in sex work in a manner that has been shown to harm rather than protect them. The Working Group considered that the criminalization of women involved in sex work placed them in a situation of injustice, vulnerability and stigma and is contrary to international human rights law (A/HRC/32/44, para 84). It also stressed that States should also ensure that law enforcement officials serve a protective function, as opposed to engaging in or perpetuating violence against women sex workers. (A/HRC/32/44, para 85).

The Working Group has also observed that women involved in sex work were likely to face deprivation of liberty because of laws and social attitudes that seek to control women's morality and sexuality. The Working Group has noted that female sex workers were disproportionately affected and targeted by law enforcement agents, not only where sex work is criminalized, but also in countries where sex work itself is not a criminal offence: women who engage in it may be prosecuted and incarcerated for other offences, including loitering, vagrancy and public indecency, and for migration-related infractions. In this context, the Working Group has recommended banning laws and practices policing, targeting, punishing or confining women in relation to (inter alia) sex work (A/HRC/41/33, paras 36 and 80).

It has concluded that violations of the rights of sex workers had long been committed with impunity and that these violations were gendered, as laws penalizing sex workers (most of whom are women) were based on patriarchal moral standards about women's sexuality and that laws targeting sex work were enforced disproportionately against women and facilitated systemic violence against them, including sexual violence by police and other actors (Amicus Brief on Nigeria, 2020)¹.

Following her visit to South Africa, the former Special Rapporteur on violence against women and girls, indicated that, at the time of the visit, there was no data available on the number of people being arrested and prosecuted under the relevant provisions of the Sexual Offences Act, but that the law was reportedly applied to women sex workers only. The Special Rapporteur stressed that the criminalization of sex work had driven women sex workers "underground, increased stigma and discrimination, created obstacles to them accessing services and made them very vulnerable to violence, human rights violations and corruption". The Special Rapporteur also indicated that when women sex workers were arrested, they were often denied access to their medication, including HIV/AIDS medication (A/HRC/32/42/Add.2, para. 35) and recommended to the Government of South Africa to review the relevant legislation and regulations in force in order to decriminalize women sex workers and take a comprehensive approach to addressing the question of sex work ((para. E/C.12/ZAF/CO/1, para. 83 (d)).

¹ https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Amicus_Brief_1_Nigeria.pdf

The Committee on Economic, Social and Cultural Rights (CESCR Committee) has expressed concern that sex workers, mainly women, often do not enjoy all economic, social, and cultural rights, particularly the right to health and the right to work, *inter alia*. It has stressed that sex workers are exposed to harassment, arbitrary arrest, and detention, as well as abuse from police related to the criminalization of the sale of sex, which in turn makes it difficult for them to report physical and sexual violence against them. (E/C.12/ZAF/CO/1, para. 32). Due to the harmful effects criminalization of sex work has on sex workers, the Committee further called on states to consider decriminalizing the sale of sex. (E/C.12/ZAF/CO/1, para. 33 (a) (b) and (c)).

Article 4(b) of the United Nations Declaration on the Elimination of Violence against Women stipulates that States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should refrain from engaging in violence against women. In this context, we wish to recall that the Committee on the Elimination of Discrimination against Women (CEDAW) in its General Recommendation No. 19 defines gender-based violence against women as impairing or nullifying the enjoyment by women of human rights and fundamental freedoms, and constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All forms of Discrimination Against Women. In this General Recommendation, CEDAW recognised how law often facilitated marginalisation and violence (including by State agents) and asked states to take punitive, preventative and rehabilitative measures to protect sex workers (para. 24).

In its General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW “regards gender-based violence against women as being rooted in gender-related factors, such as the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour” (para. 19). It also indicates that, “a State party is responsible for acts or omissions of its organs and agents that constitute gender-based violence against women, which include the acts or omissions of officials in its executive, legislative and judicial branches” (para. 22). In this regard, article 2 (d) of the Convention provides that States parties, and their organs and agents, are to refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with that obligation.

In a paper concerning article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, the CEDAW Committee noted positively the decriminalization of sex work in some countries. It recommended the decriminalization in some countries where sex work was considered illegal and the review or enforcement of laws relating to sex work to ensure that sex workers are not criminalized (CEDAW/2003/II/WP.2, paras. 12 and 14).

Also relevant is article 6.1 of ICESCR, which protects the right to freely chosen, gainful work and which states that States should take appropriate steps to safeguard this right. UNAIDS has also recommended that ending the criminalization of sex work should entail the decriminalization of purchase, sale and management of sex work, the extension of labour protections to sex workers, the protection of sex workers against violence, and the adoption of measures to end stigma and discrimination.²

² https://www.unaids.org/sites/default/files/media_asset/05-hiv-human-rights-factsheet-sex-work_en.pdf

I have previously expressed support to the removal of all laws and policies criminalizing or otherwise punishing sex work, among others (A/HRC/50/28, para. 92). My predecessor had also indicated that decriminalization of sex work is necessary, alongside other measures as part of a comprehensive right-to-health approach, which include human rights education, the participation and inclusion of vulnerable groups and efforts to reduce stigma and discrimination (A/HRC/14/20). The Working Group on discrimination against women and girls noted that the criminalization of sex workers exposes them further to violence, places them in a situation of injustice, vulnerability and stigma and was contrary to international human rights standards.

The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health noted that “the decriminalization or legalization of sex work with appropriate regulation forms a necessary part of a right-to-health approach to sex work, and can lead to improved health outcomes for sex workers” and that decriminalization should be undertaken, along with “the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers”. He stressed that “where sex work is legally recognized, the incidence of violence may also be reduced, through the enforcement of laws against abuse and exploitation” (A/HRC/14/20, para. 46).

The former Special Rapporteur called on States to repeal laws and practices criminalizing sex work and to establish appropriate regulatory frameworks to ensure that sex workers can enjoy “the safe working conditions to which they are entitled”. He recommended States implement programmes and educational initiatives to allow sex workers access to appropriate, quality health services (A/HRC/14/20, para. 76 (b)).

Conclusion

Sex work is work and the decriminalisation of sex work is a human rights issue.