



**Joint Submission to the Special Rapporteur on Violence Against Women its Causes and
Consequence
December 2020**

1. This submission is made by the Sexual Rights Initiative¹(SRI), Global Network of Sex Work Projects² (NSWP), and the International Women’s Rights Action Watch Asia Pacific (IWRAP Asia Pacific)³. The Sexual Rights Initiative is a coalition of national and regional organizations based in Canada, Poland, India, Egypt, Argentina and South Africa, that work together to advance human rights related to sexuality at the United Nations. NSWP is a global network of sex worker-led organisations and networks, with 310 members in 95 countries that exists to uphold the voice of sex workers globally and connect regional networks advocating for the rights of female, male, and transgender sex workers. IWRAP Asia Pacific is an international, Global South women’s rights and feminist organisation committed to the full realisation of women’s human rights through the pursuit of equality.
2. This joint submission in response to the questionnaire by the Special Rapporteur provides context to the analysis on laws on violence against women. As a critical aspect to understanding laws on rape and other forms of sexual violence, this submission locates penal laws within the larger structural paradigm that dictates and influences the enactment and implementation of these laws and policies. It provides critical analysis of the harms of carceral approaches or approaches that rely on punishment and incarceration, when addressing gender-based violence. It argues that the report of the Special Rapporteur is an opportunity to lay down clear frameworks on consent and to counter paternalistic and essentialist discourses. These discourses rely on a binary understanding of gender, pose gender as anchored in physiology, view gender as binary and deny women and girls agency and bodily autonomy. Ultimately, they obstruct the struggle to eliminate gender-based violence as opposed to supporting it.

Harms of adopting a carceral approach to address gender – based violence

3. “So, what can we do — what must we do — so that this time the radical change called for by protestors is delivered? So that resources are redistributed away from the hyper-securitization policies and practices that have seen millions flow to surveillance, policing and

¹ <http://www.sexualrightsinitiative.com/>

² <http://www.nswp.org/>

³ <https://www.iwraw-ap.org/>



prisons and away from public programmes for health, education, employment.”⁴ This statement by the Special Rapporteur on extra judicial, summary or arbitrary executions about the widespread protests in response to racial injustice, police brutality and the murder of George Floyd, highlights the problems with a highly carceral and securitised state. This sentiment about the fundamental issues with a carceral state is not new, Black feminist activists, sex worker activists, migrant activists have been highlighting the problems with excessive criminalisation for years.

4. Gender-based violence (GBV) is most often considered from an individualistic perspective—either that of the person who has been subjected to violence or the person perpetrating violence. The criminal justice response to GBV has its roots in this paradigm, that often ignores the ways in which systems and structures perpetuate, contribute to and are complicit in gender-based violence and the resulting inadequacy of responses anchored in this approach. The widespread prevalence of this individualistic perspective has often resulted in feminist and social justice movements moving away from addressing the material conditions and structural oppressions and towards creating more categories of crimes, higher punishment and increased incarceration of marginalised groups based on race and class locations. Previous Special Rapporteurs have addressed this individualistic approach and recommended that States undertake “systemic due diligence” in responding to GBV and this includes transformative change.⁵ Yet, this transformational change recommendation is restricted in its approach towards law enforcement systems and more encompassing in addressing the societal structures outside of criminal law and its processes.
5. The drive to utilize criminal law, increase criminal legislations and increase punishment is neither new nor obscure.⁶ It is rooted in the assertion of power and control and a renewed commitment to the neoliberal notion of the ‘safe’ and ‘clean’ family conceptualized in contrast to an environment of fear and paranoia. This commitment to law and order is coupled with a commitment to “family values.” The result is that the private family is the institution that should be supported and furthered, and people are governed through crime and/or law and order.⁷ This combination of protecting the private family and using criminal

⁴ Agnes Callamard; <https://www.ejiltalk.org/learning-from-us-streets-a-moment-of-reckoning/>

⁵ A/HRC/23/49, Report of the Special Rapporteur on violence against women, its causes and consequences, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/136/39/PDF/G1313639.pdf?OpenElement>

⁶ Karen Engle, Anti-Impunity and the Turn to Criminal Law in Human Rights, 100 Cornell L. Rev. 1069 (2015) Available at: <http://scholarship.law.cornell.edu/clr/vol100/iss5/2>

⁷ Bernstein, Elizabeth. "Carceral Politics as Gender Justice? The "traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights." *Theory and Society* 41, no. 3 (2012): 233-59. Accessed November 29, 2020. <http://www.jstor.org/stable/4147571>, pg 259



law to control deviations from the norm is a necessary condition for the neoliberal state apparatus. As has been established repeatedly that the “neoliberal economic strategies redirect public monies away from the provision of goods and services, they in fact require an enhanced penal apparatus to contain newly disenfranchised populations.”⁸

6. Liberal feminist groups have often called criminal law as the ‘law which protects’, downplaying the fact that the criminal law is also ‘law from which protection is required.’ The rise of neoliberalism, and the shrinking welfare state, have also reinforced women's rights groups' reliance on the punitive aspect of state power, as opposed to other non-punitive policies of economic protection and redistributive justice. Among other consequences is a tendency toward state overreach as part of this emphasis on the state's retributive and punitive power.⁹ However, there are theories that the rise of this feminist approach is very intrinsically linked to the decline of the welfare state, and the rise of the neoliberal state and economic order. This approach made “marriage” the primary institution that needs to be preserved and “the family” as an institution that is under threat and needs to be secure, creating a racialized and classed hierarchy.¹⁰ Law and order, policing, security apparatus came to be the primary vehicle for this state.¹¹ The primacy of law and order affects the meaning and practice of sexual politics within this paradigm, preserving the “private sphere”, giving credence to moral panics on sexuality and gender. As highlighted, “this new paradigm has been disseminated through such disparate means as stepped up laws and controls against sex offenders (including proposals for a pan-European sex offender registry), the insertion of men into private-sphere caring labour via official World Bank development policy, and burgeoning international campaigns against the traffic in women.”¹²
7. It is imperative the Special Rapporteur challenge rather than reinforce these problematic conceptual underpinnings of responses to sexual violence. Less than 4% of women who

⁸ Bernstein, Elizabeth. "Carceral Politics as Gender Justice? The "traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights." *Theory and Society* 41, no. 3 (2012): 233-59. Accessed November 29, 2020. <http://www.jstor.org/stable/4147571pg237-3>

⁹ Alice M. Miller, Sexuality, violence against women, and human rights: Women make demands and ladies get protection. *Health and Human Rights*, 7(2), 17-47 (2004).

¹⁰Bernstein, Elizabeth. "Carceral Politics as Gender Justice? The "traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights." *Theory and Society* 41, no. 3 (2012): 233-59. Accessed November 29, 2020. <http://www.jstor.org/stable/4147571>, pg 251

¹¹ Hadar Aviram, Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends, 68 *Buff. L. Rev.* 199 (2020). Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss1/4>

¹² Carceral politics as gender justice? The "traffic in women" and neoliberal circuits of crime, sex, and rights, pg 251



experience violence report,¹³ the mass movements against sexual violence like #MeToo, #NiUnaMenos #TotalShutDown point to a systems failure when it comes to using a carceral approach to gender-based violence. This over-reliance and lack of critical perspective on the criminal law approach is not restricted to some areas, it has seeped into regional and international human rights systems. Human rights bodies progressively appear to view criminal law as a fundamental “justice mechanism” that safeguards society as a whole by ending impunity and providing general human rights protection.¹⁴ This, despite the fact that justice is too frequently not served by criminal laws, on the contrary law administration machineries are often the repressive, coercive arm of the state. For instance, gender-based violence by the military State is sanctioned and protected in occupied territories like Kashmir.¹⁵ The colonial underpinnings of criminal justice systems ensure that these systems are ways to target and monitor the oppressed and the non-conforming. Consequently, they are often used to criminalize and monitor activities that do not fit in these paradigms, including but not limited to sex work and migration. In some situations, international law itself provides the impetus for criminalization of sex workers, especially migrant sex workers, under the misguided and protectionist framework that conflates sex work and trafficking.¹⁶

Consent-based approach to violence against women and girls

8. Laws defining violence and assault should be underpinned by consent, i.e. violence is defined by the absence of consent. However, while consent is used by everyone, it is denied to women and girls using the dubious principle of “protecting” them. This protection reframes state obligations from respecting, protecting and fulfilling human rights and fundamental freedoms of people to ‘protecting people, who are understood as unable to protect themselves’ This distinction dislocates the bodies of women and girls from autonomous people to victims without agency and in need of protection. This can take the form of imprisoning women as “protective custody”, thus depriving women and girls of their life and liberty. This paternalistic formulation of women and girls essentializes their experiences and denies them their human rights. As a result of the conflation of sex work

¹³ See, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>

¹⁴ Mattia Pinto, Historical Trend of Human Rights Gone Criminal LSE Law, Society and Economy Working Papers 4/2020, www.lse.ac.uk/collections/law/wps/wps.htm and the Social Sciences Research, Network electronic library at:

<https://ssrn.com/abstract=3561635>, the discussions during the urgent debate on current racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protests, illustrates some this point as well

¹⁵ See, <https://countercurrents.org/2019/08/kashmir-caged-fact-finding-report/>, and <https://blogs.lse.ac.uk/gender/2019/09/09/militarisation-kashmir/>

¹⁶ NSWP, 2019, “The Impact of Anti-trafficking legislation and Initiatives on Sex Workers.”



and trafficking, anti-trafficking legislation increases monitoring, surveillance and criminalisation of sex workers.”¹⁷ Policing and control is one form of protectionism, i.e. vulnerable women and girl victims need protection – from themselves and/or from real and perceived dangers. Highly protectionist legislation has justified measures like protective detention that reinforces gender and cultural stereotypes and punishes women.¹⁸ This has been highlighted by the Working Group on Discrimination against Women and Girls in their report to the Human Rights Council.¹⁹

9. Protectionism does not manifest in isolation. Protectionist discourses are used extensively in all countries and are opportunistically used to deny women and girls their autonomy when multiple oppressions are in operation. The Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions highlights, “for the vast majority of women and girls, their human rights journey entails confronting a system of State actions and inactions, feeding and fed by systemic discrimination, resulting in violation of their rights to basic necessities and ultimately in a violation of their right to life.”²⁰ This is experienced when women and girls are denied the right to autonomy and personhood. When the framework to define violence deems only certain individuals as capable of consent, the violence is perpetrated by the systems and structures that deny women and girls their bodily autonomy.

Full realization of the right to bodily autonomy

10. The concept of bodily autonomy is linked to self-determination over not only bodies, but also lives, and is composed of the right of everyone to make fully informed decisions over their own bodies and lives without discrimination. It is a fundamental aspect of the right to life, right to the enjoyment of highest attainable standard of physical and mental health, rights to privacy and the right to be free from all forms of discrimination and violence and freedom from torture and cruel and inhuman treatment. It obligates States to ensure that these rights are respected, protected and fulfilled, so that every person can exercise their right to decide for themselves over their body and life without interference from the State, family, society and other external elements. While people’s individual circumstances may differ, their oppressions share a commonality in restrictions to bodily autonomy grounded

¹⁷ NSWP, 2019, “[The Impact of Anti-trafficking legislation and Initiatives on Sex Workers.](#)”

¹⁸ Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side* in “Wronging Rights?: Philosophical Challenges for Human Rights” (eds. Aakash Singh Rathore & Alex Cistelean), Routledge (2011) page 42.

¹⁹ A/HRC/23/49, Report of the Working Group on the issue of discrimination against women in law and in practice on Women Deprived of Liberty, para 42- 48, <https://undocs.org/A/HRC/41/33>

²⁰A/HRC/35/23, Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions on gender sensitive approach to arbitrary killings, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/23

in patriarchal gender norms and stereotypes that seek to subordinate women, girls' and gender non-conforming persons' decisions about their own bodies to the State, through laws, policies or their implementation. In its 2016 report on the instrumentalization of women's bodies and the negation of women's bodily autonomy, the Working Group on discrimination against women and girls stressed that "the discriminatory use of criminal law, punitive sanctions and legal restrictions to regulate women's control over their own bodies is a severe and unjustified form of State control. This can include punitive provisions in criminal, civil and administrative laws and regulations governing extramarital consensual sex, same-sex consensual adult relations, gender non-conforming expressions, provision of reproductive and sexual education and information, termination of pregnancy and prostitution/sex work. The enforcement of such provisions generates stigma and discrimination and violates women's human rights. It infringes upon women's dignity and bodily integrity by restricting their autonomy to make decisions about their own lives and health."²¹ Criminalisation of sex work impacts sex workers' ability to assert bodily autonomy and access their rights. Criminalisation turns sex workers into a target population and promotes stigma and discrimination, which impacts not only interactions with law enforcement, but also clients, the larger community, and service providers.²²

Conclusions and Recommendations

11. Reiterate human rights-based State obligations. The human rights framework mandates state obligations in three core areas - respect, protect and fulfill the rights of everyone. In the context of gender-based violence, it is necessary for states to respect, protect and fulfill the rights to bodily autonomy of all without discrimination.
12. Elaborate on systemic approaches to prevent and address gender-based violence which do not rely on incarceration, such as re-distributive justice.
13. Reaffirm that states should ensure full and meaningful participation of all affected persons, including sex workers, before drafting and enacting new laws and policies on gender-based violence.

²¹ Report of the Working Group on the issue of discrimination against women in law and in practice. 8 April 2016. [A/HRC/32/44](#), para. 76.

²² NSWP, 2020, Briefing Paper: Sex Workers' Lack of Access to Justice "Sex workers lack of access to justice."



14. Clearly reaffirm that states should decriminalise all aspects of sex work. States, policymakers and advocates must actively pursue the full decriminalisation of sex work, including sex workers, clients and third parties to respect, protect and fulfil the human rights of sex workers.

15. States should hold law enforcement officers accountable for acts of physical, psychological and sexual violence and abuse of power against sex workers and ensure that victims of state violence have an enforceable right to reparation.