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SEX WORK IN GERMANY – PUBLIC POLICY
ANALYSIS FROM A HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

Germany de facto legalized sex work in 2002, which was followed by the introduction of extensive industry-specific regulations on the commercial sex trade in 2017. It is well-established in scientific literature that the legal status of sex work impacts sex workers' human rights, as well as their legal, economic and social standing. The thesis explores the implications of the legalization of sex work in Germany on the human rights of persons selling sexual services. To test the hypothesis that the German legislation on commercial sex fails its aim to protect, and is a cause of violations of sex workers' human rights, I conducted a literature review combined with the analysis of relevant laws based on reports from civil society organizations. The results demonstrate that the German public policy on sex work violates and weakens a number of sex workers' human rights, criminalizes those whom it argues to protect, and constitutes a major step backwards in destigmatizing sex work in Germany.

Key words: sex work, prostitution, human rights, public policy analysis, Prostitutionsgesetz, Prostituiertenschutzgesetz

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INTRODUCTION

Sex workers constitute a demographics that are routinely denied their human rights all around the world. Despite the universal applicability of human rights on all human beings, sex workers continue to remain rights-deprived and discriminated against in every country and throughout history. What distinguishes sexual labour from other types of work is not its supposedly inherent violent or degrading nature, but its deeply embedded position in morality politics, and the ensuing discrimination and social stigmatisation of sex workers. The “whore” stigma ensures that sex workers are not sufficiently respected in society and in interpersonal relationships, which in turn promotes the perpetuation of violence and exploitation against them. The particularity of the social stigmatisation of sex workers is that it is degrading and exclusionary on the one hand, and on the other hand, it establishes them in a position of victimhood. Sex workers are often denied their capacity to act and make their own decisions, and others frequently take the word to speak up for them, supposedly to “save” and “rescue” them. The denial of sex workers’ agency and their designation as powerless victims conceals the many forms of violence and labour exploitation that people selling sexual services are subjected to, and thus constitutes another oppressive and violent power relationship towards them.

The question of how to govern prostitution often surfaces, and the legal responses of different states can differ greatly from a few cases of decriminalisation to varying degrees of criminalisation in most countries. States have historically tried to curb prostitution for several reasons, such as maintaining public order, preserving morals, protecting women from sexual exploitation, or containing sexually transmitted diseases.¹ Ignoring the diversity of the experiences and socio-economic circumstances of sex workers, prostitution is time and again being regulated exclusively in regards to the above listed reasons, which leads to inadmissible simplifications in legislation making that bring forth policy solutions producing violations of sex workers’ human rights. Since the 1970s, sex workers’ rights advocates have been increasingly framing their demands in human rights terms in order to strengthen sex workers’ standing as rights-bearer actors on the international level. A pivotal element of their appeal is the continuous advocacy for the full decriminalization of sex work as the only

¹ Outshoorn, “The Political Debates on Prostitution and Trafficking of Women.”

policy model capable to protect the well-being of, and to reduce violence and exploitation against sex workers.² Despite their advocacy and the attention to and institutionalization of sex workers' rights by international human bodies, sex work remains repressively regulated and criminalized in most countries throughout the world, which is a main cause of human rights violations against sex workers.³

In 2002, Germany reformed its legislation on prostitution: sex work was de facto legalized, and the new law, the Prostitution Act (*Prostitutionsgesetz*) aimed to emancipate sex workers in legal, social and economic terms. This liberalization of prostitution policy was the welcome result of persistent demands raised by sex workers' rights organizations to legally normalize the status of sex work, which was previously deemed as an immoral activity, and thus unrecognized as work by the law. However, the evaluation of the impact of the law by both sex workers' rights organizations and the government concluded that the Act remained limited in scope as well as in practice. This resulted in the drafting and enactment of the Prostitute Protection Act (*Prostituierenschutzgesetz*), in effect since 2017. The new law introduced, in the name of protection, compulsory registration of sex workers and a licensing system for prostitution businesses. Such measures are, however, widely criticized by sex workers' rights advocates, as they constitute a repressive and stigmatising control approach to prostitution, and instead of improving their working and living conditions, they end up infringing on the rights of people engaging in selling sex, by perpetuating stigma and pushing many workers who cannot or will not fulfil the requirements into illegality.⁴

My personal motivation in the subject choice is due to my employment as a Hungarian language interpreter at Frauentreff Olga, a social organization and contact center in Berlin providing low-threshold services to mainly street-based, migrant sex worker women. By having daily contact with sex workers at our contact café and doing outreach work in the neighbourhood, I have noted several recurring challenges our clients inform us about, such as extensive police controls and profiling, discriminatory treatment from healthcare- and social services, extreme accommodation prices, isolated working conditions, violence at the hands of clients and intimate partners, and insufficient protection by the

² NSWP, "COYOTE Founded in California."

³ NSWP, "Global Mapping of Sex Work Laws."

⁴ Herter and Fem, "Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act."

police in cases of reporting. Furthermore, most of the women we work with chose not to register as sex workers. Thus, I developed an interest in exploring how the daily struggles of my clients are linked to the level of prostitution policy, and why their human rights do not seem to be protected to the extent that of other citizens, workers and women in Germany.

Therefore, in this thesis, I will seek the answer to the following research question: What are the implications of the legalization of sex work in Germany on the human rights of sex workers? I will explore the argument that the legalization of sex work in Germany fails its aim to protect, and is a cause of violations of sex workers' human rights.

The thesis begins by presenting the human rights framing of sex workers' rights and their institutionalization by international human rights bodies. It then describes the ways in which different legislative approaches governing sex work impact sex workers' human rights. Subsequently, it explores the implications of the German legalized sex work policy on the human rights of sex workers.

To answer my research question, I have chosen the method of conducting a literature review combined with the analysis of the laws based on reports from civil society organizations. I start with a systematic review of the literature on the framing of sex workers rights as human rights by sex workers' rights organizations. I will proceed with presenting the institutionalization of sex workers' rights in the international human rights arena by reviewing official documents from United Nations treaty bodies and Special Procedures, regional bodies like the Inter-American Commission on Human Rights, the World Health Organization, the Joint United Nations Programme on HIV/AIDS (UNAIDS), and leading non-profit organizations Amnesty International and Human Rights Watch. I will continue with a literature review regarding the implications of different legal approaches governing prostitution on the human rights of sex workers. I will then proceed with analysing the German law on prostitution from the perspective of the human rights of people selling sexual services. For this part, I will review the drafting process as well as written recordings of the public hearing of, and press releases by expert organisations, including associations and counselling centres; the text of the two relevant pieces of legislation, the Prostitution Act of 2002 and the Prostitute Protection Act of 2017; and evaluations of the effect of the laws by sex workers' rights organizations and the government.

My thesis will not analyse the phenomenon of child prostitution and human trafficking for sexual exploitation, which are separate issues from sex work. The involvement

of children (persons below 18) in the sale of sex is a violation of human rights. Sex work is defined as a consensual act between adults that does not involve coercion. Sex work is not to be conflated with sexual exploitation and human trafficking, which are prohibited under international and national laws as they constitute violations of human rights. States have a responsibility under international law to address and prevent human trafficking and sexual exploitation. However, these efforts should not, but often do end up being instrumentalised to justify criminal prosecution, legal oppression or other coercive measures against adults voluntarily engaging in sex work. Researchers and experts that work on trafficking claim that there is no evidence which proves sex work in itself being a cause of human trafficking.⁵

⁵ UNAIDS, “The Legal Status of Sex Work Key Human Rights and Public Health Considerations.”

CHAPTER I SEX WORKERS' RIGHTS ARE HUMAN RIGHTS

In the last twenty years, an international consensus has emerged: sex worker's rights are human rights. International human rights bodies, such as several agencies of the United Nations (UN)⁶, intergovernmental organizations like the World Health Organization (WHO) and the World Bank, and prestigious non-profit human rights organizations define sex workers as:

*"[f]emale, male and transgender adults and young people (over 18 years of age) who receive money or goods in exchange for sexual services, either regularly or occasionally."*⁷

The definition has long been in the making and is a direct response to the activism of the global sex worker's rights movement, which has started to frame its claims as a human rights issue in order to transform sex workers into right bearers on the international level.

The international human rights system, which was born in 1948 with the adoption of the Universal Declaration of Human Rights (UDHR), is underpinned by three main principles: 1) all human beings are born with inherent rights, regardless of their social status; 2) these rights are recognized in a series of binding international treaties, customary international law, and guiding principles, and states must respect, protect, and fulfil these rights; and 3) monitoring and enforcement occur through diverse mechanisms, including the UN system and agencies, regional human rights bodies, and civil society organizations.⁸ Sex workers, who constitute one of the most marginalized and stigmatized communities worldwide, have long argued that legal protections embedded in international human rights conventions and treaties apply to them, including the rights to association, movement, work, health and privacy, freedom from discrimination and violence, and access to justice.⁹

In this chapter, I will present the framing of sex workers' rights as human rights by the sex workers' rights movement. First, I will look into the history of sex worker organizing and the development of the framing of their struggle in a rights language. Then, I will

⁶ Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Program (UNDP), United Nations Population Fund (UNFPA)

⁷ World Health Organization et al, "Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions.", 12.

⁸ United Nations Human Rights Office of the High Commissioner, "What Are Human Rights."

⁹ NSWP, "Consensus Statement on Sex Work, Human Rights, and the Law."

present the sex workers' rights movement's human rights framing and I will explore their arguments that support this framing in depth. Rejecting the term 'prostitution' and instead coining the term 'sex work', rights activists have redefined commercial sex as a form of employment and income generating activity, and not a psychological characteristic of a class of women. This labour perspective stresses that people who engage in sex work are working people, which gives way to include them in the debate of women's, worker's and human rights. I will then present the other four main terrains of sex workers' struggles of resistance: rejection of whorephobia (the dehumanization, fear and hatred of sex workers) by emphasizing sex workers' humanity; rejection of the need for rescue by asserting sex workers' agency; rejection of carceral feminism, as the carceral state is not serving their protection, but is a site of rights abuses against them; and demanding full decriminalization of sex work, by proving that any form of partial or full criminalization of sex work is against the liberation and empowerment of sex workers.

1.1 History of sex worker organizing and the emergence of a human rights framing

1.1.1 Early sex worker activism

The concept of sex work emerged through the prostitutes' rights movement in the United States and Western Europe in the 1970s¹⁰, but the birth of the movement can be traced back a decade further, to early instances of queer resistance in the United States.¹¹

The 1960s was a decade of thriving movements for social change such as women's liberation, demands for civil rights for people of colour, and a cultural revolution challenging norms about gender and sexuality, including queer liberation. It is in this atmosphere that transgender women engaging in sex work were on the front lines of uprisings against police harassment, profiling, sexual assault and rampant abuse that the queer community was facing. Two pivotal instances of resistance were the 1966 Compton's Cafeteria Strike in San Francisco and the 1969 Stonewall Inn Riots in New York City¹². Both establishments have

¹⁰ Kempadoo and Doezema, "Global sex workers: rights, resistance, and redefinition.", 4.

¹¹ Grant, "Playing the whore: the work of sex work.", 116.

¹² Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 95.

been frequented by queer people and among them many trans women doing sex work, who in both cases, having had enough of unrelenting harassment from the police, resisted arrest during a police raid and protested by smashing windows and defacing police cars.¹³ Sylvia Rivera and Marsha P. Johnson, two trans women of colour doing sex work and famous participants of the Stonewall Riots, founded Street Transvestite Action Revolutionaries (STAR), an organization that provided shelter for queer youth and transgender people, among them sex workers¹⁴. They spoke out forcefully against the criminalization of queer youth and trans women for engaging in survival sex work, which is often their only option to support themselves financially in the face of rampant discrimination against them¹⁵. This is just one of the examples of sex workers' role in the 1960s' queer liberation movement, which laid groundwork for the prostitutes' rights movement emerging in Europe and the United States in the following decade.

COYOTE (Call Off Your Old Tired Ethics), the first political organization dedicated to sex workers' rights, was founded in 1973 in the United States by former sex worker Margo St. James. The political work of the organization centred around state and police violence against sex workers, while their field work included providing medical, legal and financial assistance to sex workers, as well as educating the public about prostitution through public speeches and seminars. COYOTE demanded (and continues to demand) full decriminalization of sex work.¹⁶ June 1975 marked another important event in early sex worker organizing: striking French sex workers occupied the Saint-Nizier church in Lyon, in a protest against fines, police harassment and a law in the making that were to arrest those offering sexual services for money. Their actions were then followed by sex workers in several cities around France.¹⁷ The occupation in Lyon lasted for 8 days and captured international media attention.¹⁸ The protest is considered to be the start of the sex workers' rights movement in Europe.¹⁹ Both COYOTE founder Margo St. James and striking French sex workers have been quoted to refer to their political claims as "demands for human rights" and "human rights

¹³ NSWP, "Riot at Compton's Cafeteria"

¹⁴ NSWP, "Street Transvestite Action Revolutionaries Found STAR House"

¹⁵ Grant, "Playing the whore: the work of sex work.", 116.

¹⁶ NSWP. "COYOTE Founded in California"

¹⁷ NSWP, "Occupation of St-Nizier church"

¹⁸ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 97.

¹⁹ NSWP, "History of the NSWP and the Sex Worker Rights Movement"

concerns”, but other than using the human rights language, the sex workers’ rights movement in the 1970s did not instrumentalize the international human rights regime yet.²⁰

1.1.2 Globalizing movement, global language of rights

The 1980s saw a big increase of newly formed sex worker organizations around the world, both in the Global North and in the Global South.²¹ As the movement started to internationalize, sex workers’ rights advocates began to link their discourse of resistance to the international system of human rights and state accountability. By raising their claims within the human rights framework, they would call on the international community not to ignore abuses against sex workers any longer. A newly globalizing movement needed a global language of rights.²²

The International Committee for Prostitutes’ Rights (ICPR) was founded in 1985 by representatives of sex workers’ rights organizations from Europe, Canada and the United States. In the same year, they held the First World Whores Congress in Amsterdam, where they participated in plenaries about human rights, health and migration²³. The outcome of the Congress was the World Charter of Prostitutes Rights, in which the sex workers’ rights movement formally applied a human rights frame to its project of liberation for the first time.²⁴ The Charter demands the following:

“Guarantee prostitutes all human rights and civil liberties, including the freedom of speech, travel, immigration, work, marriage and motherhood and the right to unemployment insurance, health insurance and housing.”²⁵

This human rights-based approach has been further developed in the following year, during the Second World Whores Congress, held at the European Parliament in Brussels. The Congress resulted in a Statement on Prostitution and Human Rights, which was the first instance of the sex workers’ rights movement formally appealing to an international human rights treaty – in this case, the European Convention on Human Rights – as a basis of their

²⁰ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 92.

²¹ Kempadoo and Doezema, “Global sex workers: rights, resistance, and redefinition.”, 19-20.

²² Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 97.

²³ Hollibaugh, “Creating a Global Sisterhood [Review of A Vindication of the Rights of Whores, by G. Pheterson]”, 9.

²⁴ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 98.

²⁵ International Committee for Prostitutes Rights, “World Charter for Prostitutes’ Rights”

claims.²⁶ Their argument for the inclusion of sex workers in the international human rights system is clear and powerful:

“The International Committee for Prostitutes’ Rights (ICPR) demands that prostitutes, ex-prostitutes and all women regardless of their work, color, class, sexuality, history of abuse or marital status be granted the same human rights as every other citizen. At present, prostitutes are officially and/or unofficially denied rights both by states within the Council of Europe and by States outside of it. No state in the world is held accountable by any international body for those infractions. To the contrary, denial of human rights to prostitutes is publicly justified as a protection of women, public order, health, morality and the reputation of dominant persons or nations. Those arguments deny prostitutes the status of ordinary persons and blame them for disorder and/or disease and for male exploitation of and violence against women. Criminalization or state regulation of prostitution does not protect anyone, least of all prostitutes. Prostitutes are systematically robbed of liberty, security, fair administration of justice, respect for private and family life, freedom of expression and freedom of association. In addition, they suffer from inhuman and degrading treatment and punishment and from discrimination in employment and housing. Prostitutes are effectively excluded from the Human Rights Convention.”²⁷

The above statement points out that prostitution is not an issue of morality or public order, but of a marginalized community that are being denied their human rights. Further, it describes prostitutes as ordinary persons, not stigmatized others. It emphasizes that the state is responsible for human rights violations against sex workers, not sex work in and of itself. And it proposes that remedy for such violations should not be sought in criminalizing sex work, instead in the international human rights system with its extensive monitoring and enforcement mechanisms.

But it was not just the globalizing movement that gave rise to a human rights framing of sex worker’s concerns: so did the globalization of the HIV/AIDS crisis in the 1980s. A

²⁶ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 98.

²⁷ International Committee for Prostitutes’ Rights (ICRSE), “Statement on Prostitution and Human Rights”

human rights approach to HIV/AIDS and sex work recognizes that as long as human rights violations that render sex workers particularly vulnerable to HIV – such as healthcare discrimination, sexual abuse from criminal clients and police officers, condom confiscations, lack of access to justice – are not addressed, HIV/AIDS in sex worker communities will remain a devastating issue. The movement’s main focus at the time shifted from civil rights claims to harm reduction, with condom distribution projects and HIV/AIDS education in sex worker communities. Such programs diversified the movement, which, by embracing the human rights principle that every person should have access to healthcare, started reaching out more to transgender and male sex workers. Sex worker organizations at the time noted that condom distributions were just an access point to sex workers, who then quickly would relate their stories of stigma, abuse from police and healthcare professionals, and lack of facilities. This in turn would feed a human rights approach of such projects, and eventually widen their scope of activities to media advocacy and lobbying for rights-based legal reforms.²⁸

The history of sex workers’ rights groups in the industrialized North has been well documented, but there is little written on sex worker organizing in Third World countries.²⁹ While international activist gatherings in the 1980s were dominated by sex workers from the Global North, sex workers in the Global South have just as well been taking actions, demonstrating against injustices, demanding civil, political and social rights on a local level.³⁰ Their representation in the international arena began in the 1990s, at the international AIDS conferences: under-funded sex worker organizations from the Third World took the chance to seek out donor funding for travels for this public health matter, an issue that is supposedly less controversial than sex workers’ rights. The AIDS conferences thus revitalized and truly globalized the international movement. In the year 1990, at the Second International Conference for NGOs Working on AIDS in Paris, the Global Network for Sex Work Projects (NSWP) (at the time under the name of the Network of Sex Work-Related HIV/AIDS Projects)³¹ was officially founded, which since became the leading international umbrella organization for sex workers’ rights organizations in both the Global North and the

²⁸ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 101.

²⁹ for exceptions, see: Kempadoo and Doezema, “Global sex workers: rights, resistance, and redefinition.”

³⁰ Kempadoo and Doezema, “Global sex workers: rights, resistance, and redefinition.”, 22.

³¹ NSWP, “NSWP formally established as a network”

Global South.³² NSWP played and continues to play a pivotal role in advocating for the human rights of both male and female, transgender and cisgender sex workers. Thanks to their advocacy, the vocabulary of discussing sex work related matters in the international HIV/AIDS conferences has changed, and instead of using the terms “prostitution”/ “prostitutes”, they encouraged the usage of the terms “sex work”/ “sex workers”, to reframe sex workers into rights bearing labourers rather than deviant others.³³

In the 1990s and the early 2000s, several influential sex workers’ rights organizations formed in the Global South, and a commitment to a human rights framing of sex workers’ needs and struggle is one of the core principles that links these diverse groups together. Regional organizations such as the Asia Pacific Network of Sex Workers (APNSW), the Red de Mujeres Trabajadores Sexuales de Latinoamérica y el Caribe (RedTraSex) which brings together sex workers from Latin America and the Caribbean, and the African Sex Workers Alliance (ASWA) all embrace the idea that human rights are universal and must be applied to sex workers.³⁴ With the engagement of these organizations, the global movement began to more fully reflect the diversity of sex trades, and it became one of the most intersectional social movements in the world by representing sex workers’ interests of different genders, races, nationalities, sexual orientations, gender identities and other statuses.

While the diversifying global movement embraced the human rights-based approach in their advocacy, in 2005, sex workers from 30 European countries together issued the Declaration on the Rights of Sex Workers in Europe, a document that outlined the rights to which sex workers are entitled under international law based on treaties that have been ratified by European countries.³⁵ In the Declaration, sex worker advocates in an official capacity stated what they hoped from appealing to the human rights regime in their claims: the empowerment of sex workers through the authoritative weight of the international justice system; clearly set benchmarks to organize for and measure progress; and an emancipatory future in which sex work policies are based in the enhancement of sex workers’ rights.³⁶

³² NSWP, “History of the NSWP and the Sex Worker Rights Movement”

³³ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 101.

³⁴ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 102.

³⁵ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 103.

³⁶ ICRSE, „The Declaration on the Rights of Sex Workers in Europe.”

In 2013, a worldwide consultation among 160 sex worker-led organizations took place under the umbrella of the NSWP, representing diverse sex workers from sixty countries across the globe. The outcome of their negotiation is the Consensus Statement, a document that is based on the core values of NSWP: the acceptance of sex work as work, the opposition to all kinds of criminalisation and legal oppression of sex work, and the support of the self-determination and self-organizing of sex workers.³⁷ The Consensus Statement outlines eight core human rights that apply to sex workers of all genders, class, race, ethnicity, health status, age, nationality, citizenship, language, education levels, disabilities and other status. These fundamental rights are:

1. Right to associate and organize
2. Right to be protected by the law
3. Right to be free from violence
4. Right to be free from discrimination
5. Right to privacy and freedom from arbitrary interference
6. Right to health
7. Right to move and migrate
8. Right to work and free choice of employment

The right to associate and organize will guarantee that sex workers are allowed to get together and organize providing their community with life-saving services, and advocate on their behalf. The right to be protected by the law will ensure that when sex workers are victims of violent crimes, they will no longer lack access to justice, and they will enjoy equal protection under the law to other rights-bearers. The right to be free from violence will guarantee that sex workers are protected from abuse they experience regularly from the police, criminals who pose as clients, and healthcare officials. The right to be free from discrimination will protect sex workers from the pervasive discrimination they must face in housing, employment, healthcare, the criminal justice system, and almost every facet of their lives. Sex workers' right to privacy and freedom from arbitrary interference will guarantee the prevention of: being victimized by police who routinely and arbitrarily detain them; being forced by healthcare workers to undergo mandatory testing and reveal confidential test results; being forced by governments to register in databases; and other

³⁷ NSWP, "Consensus Statement on Sex Work, Human Rights, and the Law."

privacy breaches and violations. The right to health will tackle the legal oppression that endangers sex workers' health by driving them into illegality and away from the services, tools and health education that could ensure their physical wellbeing. The right to move and migrate will promote and protect the rights of migrant sex workers, an especially vulnerable subgroup of the sex work community, due to restrictive immigration laws that are combined with sex work criminalization. Lastly, the right to work and free choice of employment will tackle the lack of labour protections that force sex workers into abusive working conditions, and deprive them of power over their own labour.³⁸

1.2 The sex workers' rights movement's human rights framing

1.2.1 Redefining prostitution as sex work, a form of labour

"People sell sex to get money. This simple fact is often missed, forgotten, or overlooked. To many it seems inconceivable that people could do something considered so strange and terrible for the same mundane, relatable reasons that govern everybody else's everyday lives."³⁹

The term 'sex work' was coined by activist and sex worker Carol Leigh in 1978. It refers to people trading their own sexual labour in exchange for a resource (which is often money, but can be shelter, alcohol or drugs as well).⁴⁰

'Sex worker' is a term that suggests we stop viewing prostitution as an identity – a psychological or social characteristic of people who sell sex – and instead start thinking about it as an income-generating activity, a form of labour.⁴¹ This definition emphasizes the social location of those working in the sex industry as working people. Not to be conflated with mere political correctness, this new terminology moved global understandings of sex work toward a labour framework which can provide solutions to many of the problems faced by sex workers.⁴² The term also signifies that the struggles of people selling sex are inseparably linked to the fights for the recognition of women's work, for basic human rights

³⁸ NSWP, "Consensus Statement on Sex Work, Human Rights, and the Law.", 1.

³⁹ Smith and Mac, "Revolted prostitutes: the fight for sex workers' rights.", 46.

⁴⁰ Smith and Mac, "Revolted prostitutes: the fight for sex workers' rights.", 1.

⁴¹ Kempadoo and Doezema, "Global sex workers: rights, resistance, and redefinition.", 3.

⁴² NSWP, "History of the NSWP and the Sex Worker Rights Movement."

and for adequate working conditions. The conceptualization of people engaging in sexual labour as 'sex workers' brings forth that women's common interests can be connected to the broader feminist struggles against gender exploitation and the devaluation of "women's" work under capitalism. Carol Leigh, inventor of the term, recalls that indeed she created the term out of the feminist priority to end divisions between women.⁴³

In one of the first theoretical elaborations on the subject, Than-Dam Truong proposes that sexual labour be considered as a form of labour that humankind performs to sustain itself, since it's vital to the fulfilment of basic human needs (procreation and bodily pleasure).⁴⁴ In this regard, it is similar to mental and manual labours, which all involve specific body parts and a particular set of skills. Wendy Chapkis further concludes that sex work falls under the sociological category of "emotional labour", jobs and acts for which feeling and care are needed, commodified and commercialized, and in this sense it's akin to psychotherapy, service work, bodywork e.g. massage, or child care.⁴⁵ Much in the same way as a therapist is able to separate their work from their private life, sex workers can also preserve a sense of self and integrity in the face of emotionally demanding work, as long as they work in security and under adequate working conditions.

But the use of the term 'sex work' is still unevenly and politically distributed. Outside of sex workers' own political networks, it's only in the domain of public health that sex workers are widely referred to as such, but only due to their own advocacy during the AIDS era when they pushed back against notions that sex workers would be "vectors of disease", and hence responsible for the illness.⁴⁶ The advocacy and participation of NSWP in the global response to HIV/AIDS was mainly accountable for the terms 'sex worker' and 'sex work' replacing 'prostitute' and 'prostitution'.⁴⁷

⁴³ Kempadoo and Doezema, "Global sex workers: rights, resistance, and redefinition.", 3.

⁴⁴ Trương, "Sex, money, and morality: prostitution and tourism in Southeast Asia."

⁴⁵ Chapkis, "Live sex acts: women performing erotic labor."

⁴⁶ Grant, "Playing the whore: the work of sex work.", 20-21.

⁴⁷ NSWP, "History of the NSWP and the Sex Worker Rights Movement."

1.2.2 Rejection of whorephobia

Sex workers are generally regarded as women who defy sexual and behavioural norms, who are pitied, despised, condemned and excluded from mainstream society, and hence occupy an anomalous, marginal societal position similar to that of a low caste or ethnic minority group. Throughout history, people engaging in sex work have been dehumanized as deviants in cultures around the world.⁴⁸ This social exclusion denies sex workers protection from abuse that is available to others as citizens, workers and women, thus renders them vulnerable for exploitation.

A driving force behind sex worker dehumanization is whorephobia, defined as “the social fear and hatred of sex workers”.⁴⁹ It stigmatizes people in the sex industry, and renders them as unworthy of concern. A precursor to whorephobia is “whore stigma”, which means the “social and legal branding of women who are suspected of being or acting like prostitutes”.⁵⁰ Erving Goffmann defines stigma as “an attribute that is deeply discrediting”⁵¹, and which reduces its bearer from a complete and accepted person to a tainted and discounted one.⁵² Branded with stigma, people may suffer social death – nonexistence in the eyes of society – if not physical death, as often the case with sex workers, who suffer higher rates of murder than the general population.⁵³

According to Gail Pheterson, the scholar who first coined the term in the 1980s, ‘whore stigma’ not only targets sex workers, it also seeks to regulate all women who defy the socially defined boundaries of womanhood with their autonomy.⁵⁴ Stigmatization reinforces conventional norms and promotes dominant interests by legitimizing established power hierarchies⁵⁵: female sexual acts that serve women’s economic and sexual interests pose a threat to masculinist hegemony, therefore the creation and sustainment of categories of “good” and “bad” women (madonna/prostitute, virgin/whore) are

⁴⁸ Vanwesenbeeck, “Another decade of social scientific work on sex work: a review of research 1990-2000.”

⁴⁹ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 105.

⁵⁰ Pheterson, “A Vindication of the rights of whores.”, 30.

⁵¹ Weitzer, “Resistance to Sex Work Stigma.”, 717.

⁵² Benoit et al., “Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers”, 459.

⁵³ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 105.

⁵⁴ Pheterson, “A Vindication of the rights of whores.”, 30.

⁵⁵ Weitzer, “Resistance to Sex Work Stigma.”, 717.

indispensable for the upholding of a patriarchal society.⁵⁶ The image of the whore divides and disciplines women. In order to avoid being stained with the whore stigma, non-sex working women are pressured to conform to monogamy, domesticity and virginity, and distance themselves from sex workers, which further perpetuates the whore stigma and has grave consequences for sex workers' safety. As author Melissa Gira Grant puts it: "[S]o long as there are women who are called whores, there will be women who are trained to believe it is next to death to be one or to be mistaken for one. And so long as that is, men will feel they can leave whores for dead with impunity."⁵⁷ The whore stigma turns sex workers into invisible, disposable targets of violence, through the illusion that it is sex work itself, and not targeted violence, that murders and rapes sex workers. The stigma intensifies or lessens in relation to how a sex worker is perceived racially and economically. When sex workers are being discriminated against, a pervasive cultural belief permits, validates and supports that discrimination.⁵⁸

An analysis of gender relations as regards to the whore stigma must not neglect heteronormativity. Among the social subjects who are often criminalised or pathologised because of their sexuality are not only cis women, but also queer cis men and trans persons. It is not surprising that cis women, gay or bisexual cis men and trans people make up the majority of sex workers: sex work is more likely to be done by those who are oppressed because of their sexuality and at the same time reduced to it.⁵⁹

State actors such as the justice system, the police and healthcare workers have institutionalized the whore stigma, which is one of the main obstacles of the realization of sex workers' rights⁶⁰. In an environment where devaluation and violence are acceptable acts against those who are stigmatized, sex workers must face ineffective, inappropriate and outright harmful polices that negatively impact their working conditions and well-being. The justice system and its service providers routinely discriminate against sex workers by treating them unworthy of protection.⁶¹ The rights of people selling sex are often violated by the

⁵⁶ Kempadoo and Doezema, "Global sex workers: rights, resistance, and redefinition.", 5.

⁵⁷ Grant, "Playing the whore: the work of sex work.", 127.

⁵⁸ Sumaq, "A Disgrace Reserved for Prostitutes: Complicity & the Beloved Community.", 13.

⁵⁹ Maciotti, „Liberal zu sein reicht nicht aus. Eine progressive Prostitutionspolitik muss das «Hurenstigma» ebenso bekämpfen wie die Kriminalisierung von Sexarbeit.“

⁶⁰ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 106.

⁶¹ Benoit et al., "Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers.", 461.

police through invasive searches, public humiliation, verbal harassment and unwarranted arrests. It is hardly surprising then, that sex workers report hesitancy or refusal to seek protective services after being victimized. Studies about sex workers seeking health care services report that the fear of judgment from health providers plays a major role in their unmet health care needs. Sex workers who disclose their occupation frequently encounter discrimination, including abusive and insensitive language used toward them, being treated disrespectfully, being humiliated, being denied of care, and having their confidentiality breached.⁶² At the heart of this discrimination is the pervasive stigma against sex workers.

Anti-prostitution activists, who aim to abolish sex work by stating that women engaging in sex work are characterized by a collective female victimhood, only further strengthen the whore stigma⁶³ (more about this in chapter 1.3.3).

Fighting the social stigma of the whore is therefore a necessary precondition for any social justice struggle involving sex workers. Some parts of the sex workers' rights movement recovered, reclaimed and valorise the name and identity of "whore", a traditionally derogatory name, to fight the whore stigma and whorephobia. The *Putafeminismo* (Spanish for 'whorefeminism') movement in Brazil, for example, is an alliance of sex workers, academics and feminists, who understand 'whore' ('puta') as a political term and concept to be utilized to create bridges between sex workers and other working-class movements fighting for labour rights under neoliberalism.⁶⁴

Destigmatization can only occur with the inclusion of sex workers, the "experts" (as they have lived experience of the stigma), in the development of progressive laws, policies and practices.⁶⁵ Sex workers' rights activists argue that the disappearance of the whore stigma would occur through decriminalizing sex work, and normalizing and recognizing the selling of sex as labour.⁶⁶ Weitzer puts forth several preconditions to the destigmatization of sex work: the use of neutral language and the erasure of derogatory names from the public

⁶² Benoit et al., "Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers.", 463.

⁶³ Agustin, "The Sex Worker Stigma: How the Law Perpetuates Our Hatred (and Fear) of Prostitutes."

⁶⁴ Blanchette and da Silva, "Classy Whores: Intersections of Class, Gender, and Sex Work in the Ideologies of the Putafeminista Movement in Brazil", 551.

⁶⁵ Benoit et al., "Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers.", 468.

⁶⁶ Agustin, "The Sex Worker Stigma: How the Law Perpetuates Our Hatred (and Fear) of Prostitutes."

discourse⁶⁷; a more balanced, less sensationalist and caricatured portrayal of sex work in mass media; industry mobilization (of owners and managers) for advocacy and resource allocation along shared interests with sex workers; bottom-up sex worker activism; the repeal of discriminatory laws on sex work; and full decriminalization.⁶⁸ Due to the stigma's potency in all cultures around the world, one would expect that if all of the above preconditions were suddenly fulfilled, similarly to the continuous diminishing of the stigma of homosexuality, the whore stigma would decline unevenly and slowly, but steadily.

The human rights-framing of sex workers' rights is a rejection of the dehumanizing charges of whorephobia and the whore stigma. In their fight against a society that gives way to abuses against sex workers by dehumanizing them, advocates of sex workers' rights insist that the "whore" is a rights-bearer human being.⁶⁹ Human rights are universal – this was the radical new concept of the modern human rights movement, as states the Universal Declaration of Human Rights from 1948.⁷⁰ While whorephobia mandates that the "whore" deserves stigma and disdain, but not rights, the directive of a human rights frame is that sex workers deserve universally applied rights, like all people, only by virtue of their humanity.

1.2.3 Rejection of rescue

Sex workers have long been the focus of a politics of rescue which negates the agency and choices of people working in the sex trade.

Rescue politics regarding sex work have a long history that goes back to the late-nineteenth, early-twentieth century, when the concept of the so-called 'white slavery' appeared in, and took hold of, the public discourse in the US, the UK and most of Europe. It signified an unfounded and racist panic about foreign-born men and men of colour drugging, abducting and forcing innocent, white women into prostitution, who therefore needed to be saved.⁷¹ Jo Doezema adjudges the notion of the "white slave trade" to the social purity

⁶⁷ In addition, Weitzer notes that „*discredited groups sometimes expropriate pejorative terms: they may call themselves "whores" or "johns" for purposes of shock value and to reclaim and invert negative identifiers. [...] those who participate in sexual commerce should be free to call themselves whatever they want.*” (Weitzer, “Resistance to Sex Work Stigma.”, 722.)

⁶⁸ Weitzer, “Resistance to Sex Work Stigma.”, 721-725

⁶⁹ Mgbako, “The Mainstreaming of Sex Workers' Rights as Human Rights.”, 106.

⁷⁰ United Nations, „Universal Declaration of Human Rights (UDHR)”

⁷¹ Mgbako, “The Mainstreaming of Sex Workers' Rights as Human Rights.”, 107

movement, a network of powerful religious lobby-groups that sought to reinforce Christian norms of sexuality and marriage through demands for increased moral legislation. The social purity movement, with significant help from sensationalist journalists, had major success in disseminating these tales of ostensible threat and deflowered innocence. Meanwhile, research indicates that most of the “victims” of the “slave trade” were actually sex workers who decided to migrate, like many workers throughout history, in hope of finding a better life.⁷²

But it was not only Christian fundamentalists who thought that sex workers were victims in need of rescue. Half a century later, in the 1960s and 1970s, radical feminists claimed that sex work was the epitome of male domination and patriarchal control over female sexuality, and believed that sex workers needed to be enlightened about their “oppression” and rescued from their “false consciousness” – only then are they welcome to join the feminist revolution. Despite their claim to be concerned with the liberation of sex workers, their arguments made it clear that they were ready to sacrifice the well-being of sex workers for their greater goal of the prohibition of prostitution. A striking example of priorities of sex work abolitionists was the time when leading anti-prostitution scholar Kathleen Barry argued at the peak of the HIV/AIDS crisis, that HIV prevention in sex work communities should not include the distribution of condoms, a crucial strategy to prevent catching the disease, and instead should focus on “getting women out of prostitution”.⁷³ Gail Pheterson noted that the early sex workers’ rights movement was rightly challenging attempts for the moral rescue of sex workers, whether the attempts came from doctors, politicians, religious crusaders or feminists, because these rescue agendas never included and legitimized sex workers themselves as spokespersons and self-determining agents.⁷⁴

Although sex work-abolitionist Christian groups and radical feminists hold opposing views on other social issues, such as abortion or same-sex marriage, they agree on their opposition to prostitution, and continue to join forces in their efforts as contemporary anti-prostitution lobbyists, also called as neo-abolitionists.⁷⁵ Feminist groups with the sole focus of targeting the sex industry seem to ignore the differing values of right-wing religious

⁷² Kempadoo and Doezema, “Global sex workers: rights, resistance, and redefinition.”, 35-36.

⁷³ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 107.

⁷⁴ Pheterson, “A Vindication of the rights of whores.”

⁷⁵ Weitzer, “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade.”, 450.

groups, and are eager to work with them. Authors who have critically assessed the two groups argue that both groups have “archaic and violated visions of femininity and sexuality”, a sexual ideology that is “pro-marriage” and “pro-family”, and that they share an antipathy towards non-procreative sex; hence, what they do is moralistic sexual politics.⁷⁶

Neo-abolitionists claim that sex work is inherently oppressive and exploitative.⁷⁷ They view it as the utmost expression of gender-based violence, because, from their perspective, it completely commodifies women’s bodies for the benefit and pleasure of men. They claim that this commodification turns sex workers into sexual objects that can be displayed, sold and bought, and for this reason, they define ‘prostitution’ as the ultimate form of sexual exploitation.⁷⁸ In this paradigm, sex work is conflated with other, widely condemned practices, such as rape and sexual slavery, to which no woman could meaningfully consent, only be forced into, hence they need to be rescued.⁷⁹ “Rehabilitation programs” targeting sex workers constitute a common form of rescue politics, which are designed to “save” sex workers by training them into alternative professions, into “respectable” gendered work. Sex workers in these programs must quit sex work and take up alternative jobs, even though the alternatives are often economically not viable and sometimes even further impoverish them in the transition process.⁸⁰ Such rehabilitation institutions are further designed to isolate sex workers from the rest of society: they may be called shelters, but more often than not, the doors are locked, phones are monitored – this is not charity, it is control.⁸¹

Sex workers’ rights activists refute the neo-abolitionist myth that all sex workers are coerced into the industry, or that the industry is inherently and exceptionally exploitative. They point out that the neo-abolitionist perspective constructs all sex workers as powerless victims who are unable to decide about their own work and lives, thereby refuses to acknowledge their agency. In reality, sex workers constitute a heterogenic group of individuals of all genders, who decide to enter the sex industry for many different reasons. Their aspirations, socio-economic circumstances, and ways in- and out of sex work are highly

⁷⁶ Bernstein, “Carceral politics as gender justice? The “traffic in women” and neoliberal circuits of crime, sex, and rights.”, 233.

⁷⁷ Weitzer, “The Mythology of Prostitution: Advocacy Research and Public Policy.”, 15.

⁷⁸ ICRSE, „Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry.“

⁷⁹ Weitzer, “The Mythology of Prostitution: Advocacy Research and Public Policy.”, 452.

⁸⁰ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 107-108.

⁸¹ Grant, “Playing the whore: the work of sex work”, 11.

diverse. To some, sex work can allow more flexible working hours, greater control over their working conditions, financial advantage compared to other jobs. For others, it may be the most acceptable or rewarding of very few options which are available to them to financially sustain themselves.⁸² Sex workers, just like any other people who live in capitalist societies, must navigate as best as they can sometimes very unfavourable legal, social and economic environments, and must earn an income to provide to their families and themselves by using the opportunities and resources that are available to them. Under capitalist conditions, most people spend their time with an activity which in the absence of the need to earn a living wage, they would most likely do differently, or not do at all. The possibility of freeing oneself from this constraint and going one's own way is not available to all people equally, as it's strongly dependent on social background, gender, sexuality, migration history and other factors.⁸³

The neo-abolitionist perspective victimises sex workers, misrepresents the diverse realities of their lives, and fails to recognize them as workers. It refuses to acknowledge that sex work is primarily an economic activity involving the sale of sexual services, and like workers in other service industry jobs, sex workers either sell their labour power to bosses and managers, or exchange their services with clients directly for money or other goods. Sex workers state that by refusing to regard their labour as work, and instead deeming it as 'sexual exploitation', neo-abolitionists are involved in concealing the many forms of labour exploitation people engaging in sex work can be subjected to. The sex industry, just like other labour markets in capitalist societies, is abundant with exploitative and unjust practices. Different working arrangements allow sex workers different levels of control and autonomy over their earnings and working conditions – some can be fair or even empowering, while others unfair and disempowering. Either way, it is crucial to understand that sex workers can only be protected from exploitative working conditions if their work is recognised and conceptualized as work, and if they are granted labour rights that empower them as workers.⁸⁴

⁸² ICRSE, „Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry.“, 5.

⁸³ Macioti, „Liberal zu sein reicht nicht aus. Eine progressive Prostitutionspolitik muss das «Hurenstigma» ebenso bekämpfen wie die Kriminalisierung von Sexarbeit.“

⁸⁴ ICRSE, „Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry.“, 6.

The sex workers' rights movement's human rights framing is a refusal of "rescue" and "rehabilitation" politics that deny the agency of sex workers. "Rights, not rescue" is a phrase often heard by sex workers' rights activists, and when they organize in hundreds of groups all around the world, they assert themselves as agents capable of speaking up for their working conditions and interests. Human rights activism is based on the notion that the voices of directly affected people and communities must be centred if we want to effectively address the rights abuses they face, as they are the most equipped to identify sources of, and solutions to their own marginalization.⁸⁵ A human rights-based approach demands that in order to center their voices, we must believe that sex workers have agency over their own lives and are capable of making their own choices, even under harsh economic and social conditions that may limit their opportunities. Rescue politics deny this, and hence its advocates think that as benevolent saviours, they must speak on sex workers' behalf. In the face of the decades-old, globalized, culturally diverse and organized sex worker-led movement for human rights, it is clear that their reasoning is false.

1.2.4. Rejection of carceral feminism

The term 'carceral feminism' has been coined by Elizabeth Bernstein in 2007, and it refers to a feminist approach that relies on the law-and-order system of the carceral state to realize feminist goals and bring about gender justice.⁸⁶ Sex work abolitionists practice carceral feminism, insofar they call for strengthened police power to solve the "problem" of sex work. They advocate for stronger police presence and control to fight human trafficking for sexual exploitation, but also for the criminalization of the clients of sex workers. This sex work policy is also called the 'Nordic model', and sex workers claim that it is to be viewed as a "backdoor" criminalisation of sex work and sex workers themselves, which puts them in unsafe and precarious working and living conditions.⁸⁷

Police violence against sex workers is a persistent global reality. In many countries around the world, police are sex workers' worst enemies: assault and harassment, naming

⁸⁵ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 108.

⁸⁶ Bernstein, "Carceral politics as gender justice? The "traffic in women" and neoliberal circuits of crime, sex, and rights."

⁸⁷ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 109.

and shaming, being outed to third parties, denial of protection, arbitrary arrest and detention, extortion and blackmail, inhumane detention conditions, unlawful profiling, confiscation of property, bribery and exploitation, expulsion and deportation, and denial of access to justice are gross human rights violations that sex workers routinely experience at the hands of the police.⁸⁸ Those who lobby for heightened police control permit police violence against sex workers in order to fight “the system” of prostitution.⁸⁹ They claim to fight the “violent institution of prostitution”, yet accept that violence as a tool to keep people away from it – in other words, sex work marks the line where it is favourable to some who claim to be feminists, that rights end and violence against women becomes justice.

The sex workers’ rights movement was born out of resistance to police violence and oppression. The 1960s’ queer liberation movement with sex workers on the front lines, the founding of COYOTE in 1973, and the 1975 French sex workers’ strike were all ignited out of demands for freedom from carceral interventions.⁹⁰ Juno Mac and Molly Smith, citing black feminists who have long been critical of the kind of feminism that entrenches carceral power, argue that “for sex workers and other marginalised and criminalised groups, the police are not a symbol of protection but a real manifestation of punishment and control”.⁹¹ The carceral state therefore cannot be the pathway to sex workers’ liberation.

Advocates of sex workers’ rights reject carceral feminism, and maintain that criminalization and the carceral state are not protectors from, but causes of, the human rights abuses sex workers endure. The movement puts its human rights mandate on an anti-carceral basis, by rejecting every form of sex work criminalization and related legal repressions, as a precondition to the realization of sex workers’ human rights. Even when clients of sex workers and other third parties are targeted by the police, it is sex workers who bear the burden of carceral abuse. Sex workers’ rights activists call for an anti-carceral and rights-based approach instead: the full decriminalization of sex work, including an opposition to the criminalization of sex workers, clients, third parties, families and friends.⁹²

⁸⁸ Vanwesenbeeck, “Sex work criminalization is barking up the wrong tree.”

⁸⁹ Grant, “Playing the whore: the work of sex work.”, 6.

⁹⁰ Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 110.

⁹¹ Smith and Mac, “Revolted prostitutes: the fight for sex workers’ rights.”, 91.

⁹² Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 110.

1.2.5 Full decriminalization of sex work

The global sex workers' rights movement has a long history of advocating against laws that violate the human rights of sex workers. Sex workers' rights organizations oppose criminalisation and all forms of legal oppression of sex work, including that of sex workers, clients, third parties, families and friends.⁹³ They argue that decriminalisation is a key element to tackle exploitation within the sex industry, as well as to ensure safer working conditions, protection of workers' rights, access to health services, and decreased vulnerability to stigma, discrimination, violence and HIV. Ever since 1973, COYOTE has been relentlessly advocating for the full decriminalisation of sex work.⁹⁴ The Consensus Statement of NSWP from 2013, which has been issued on behalf of 160 sex worker-led organizations from around the world, opposes criminalisation and all other legal oppression of sex work.⁹⁵ As the most current example, in March 2021, 8 influential European sex workers' rights- and human rights organizations⁹⁶ issued a joint statement, and are calling for the decriminalisation of sex work in Malta. The statement clearly articulates the demand for decriminalisation to prevent human rights violations against sex workers:

“Globally sex workers and their organisations are demanding decriminalisation, the right to self-determination and self-organisation. [...] Our work tells us that without exception, policies that criminalise sex workers, migrants and their work or organisations supporting them, lead to more, not less, violence and exploitation. These types of repressive environments consistently undermine access to services, decent work and justice, and lead to increased human rights violations. [...] The evidence is clear: only decriminalisation of sex work will protect the well-being and dignity of sex workers.”⁹⁷

⁹³ NSWP, “Consensus Statement on Sex Work, Human Rights, and the Law.”, 1.

⁹⁴ NSWP, “COYOTE Founded in California.”

⁹⁵ NSWP. “Consensus Statement on Sex Work, Human Rights, and the Law.”

⁹⁶ ICRSE; ILGA Europe; Transgender Europe; the International Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Youth & Student Organisation; the Platform for International Cooperation on Undocumented Migrants; La Strada International; European NGO platform against human trafficking; European AIDS Treatment Group

⁹⁷ NSWP, “9 European Organisations Call for Decriminalisation of Sex Work in Malta.”

1.3 Conclusion

In this chapter, I have presented the emergence and framing of sex workers' rights as human rights by the diverse and globalized sex workers' rights movement. In the first part of the chapter, I looked at the history of sex worker organizing and their appeal to the international system of human rights. Sex workers all around the world have been standing up for their rights and against sex work criminalization locally since the 1970s, and by the 1990s, they already constituted a truly international and intersectional movement, representing sex workers' interests of different races, nationalities, genders and sexual orientations. The globalizing movement, counting on the authoritative weight of the international human rights system and state accountability, soon began to frame their discourse of resistance in human rights terms. As a culmination of this process, in 2013, NSWP presented the Consensus Statement on Sex Work, Human Rights and the Law, which was the outcome of the negotiations of 160 sex worker-led organizations around the world, and which underlined their three shared core values: that sex work is work; that legal oppression and criminalization of sex work must be eliminated; and that self-determination and organization of sex workers must be supported. The document outlined eight core human rights that apply to all sex workers but are still routinely denied to them: the right to associate and organize; the right to be protected by the law; the right to be free from violence; the right to be free from discrimination; the right to privacy and freedom from arbitrary interference; the right to health; the right to move and migrate; and the right to work and free choice of employment.

In the second part of the chapter, I explored in depth the arguments of sex workers that support the movement's human rights framing. Redefining prostitution as sex work, a form of income-generating activity, locates sex workers as working people instead of "deviant others", and provides them with a labour framework which can serve solutions to many issues they face. Rejection of whorephobia, another key element of sex workers' struggle of resistance, mandates that sex workers must not be dehumanized and thus excluded from protections from abuse available to other citizens, and that fighting the social stigma of the "whore" and destigmatizing sex work is indispensable for realizing sex workers' human rights. Sex workers further renounce politics of rescue by sex work abolitionists, who conflate sex work with rape and sexual slavery; claim that sex work is inherently and

exceptionally exploitative; and argue that sex workers are victims of coercion and thus need to be rescued. This perspective not only conceals labour exploitation in the sex industry, it also denies sex workers' agency to speak up for themselves, which should be key in any effective tackling of marginalization and human rights abuses against them. Sex workers reject the carceral feminism of sex work abolitionists, which appeals to a strengthened police control to solve the "problem of prostitution" and bring about gender justice. Sex workers' rights advocates claim that criminalization and the police are not protectors from, but causes of human rights abuses against sex workers, and that an anti-carceral approach is an indispensable precondition to the realization of sex workers' human rights. Finally, the sex workers' rights movement demands full decriminalization of sex work as a key element to end exploitation; to bring about safe working conditions, labour rights and access to health services; and to decrease discrimination, stigma and vulnerability to violence.

CHAPTER II INTERNATIONAL HUMAN RIGHTS BODIES STAND UP FOR THE HUMAN RIGHTS OF SEX WORKERS

Chapter II will elaborate on the institutionalization of the human rights framing of sex workers' rights by different important international human rights bodies. As sex workers' rights organizations have long been documenting abuses against sex workers around the world, human rights bodies have responded to their efforts by embracing the framing of sex workers' rights as human rights. The participation of sex workers' rights organizations in international forums has been indispensable in the process: their human rights advocacy includes outreach to UN special rapporteurs, consultative work with UN agencies and human rights non-profit organizations, submissions to UN treaty bodies, regional forums, and country reviews during the Universal Periodic Review (UPR). It is on account of their efforts that over the past several decades, a consensus in the international human rights arena emerged: human rights legal protections apply to sex workers just as much as to any person, by virtue of their humanity.

In the first part of the chapter, I will present international human rights treaties that address sex work and the rights of sex workers. In the second part, I will demonstrate that international human rights bodies identify and condemn violations against sex workers' human rights in three main terrains: violence against sex workers, violations of sex workers' right to health, and abusive "anti-trafficking" policies and laws. In the third part of the chapter, I will introduce the stance of international human rights bodies on the consequences of the legal status of sex work on sex workers' human rights.

2.1 The rights of sex workers in international human rights treaties

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the United Nations in 1979, was one of the first legal instruments in the international human rights arena that explicitly mentioned sex work. The treaty defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

*of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*⁹⁸

It is in Article 6 of the CEDAW that sex work is specifically addressed, in an attempt to ensure equal opportunities in, and equal access to political and public life. The article requests state parties to “take all appropriate measures ... to suppress all forms of traffic in women and exploitation of prostitution of women.”⁹⁹ Even though the wording of the article could be argued to encompass an abolitionist attitude towards sex work, the history of the drafting suggests otherwise: while Morocco pushed for an amendment to include the phrase “suppression of prostitution” in addition to “suppression of the exploitation of prostitution”, the suggestion has been rejected and not included in the final version, signifying that the CEDAW does not consider prostitution inherently coercive and in need to be abolished.¹⁰⁰ This represents that the CEDAW recognizes the human rights of sex workers. In General Recommendation No. 19 from 1992, the CEDAW Committee further noted that “[p]rostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”¹⁰¹ In 1994, the United Nations adopted the Declaration on the Elimination of Violence Against Women (DEVAW), which marked a welcome distinction between voluntary and forced sex work. The DEVAW lists “forced prostitution” as a form of violence against women¹⁰², which indicates that the difference between forced prostitution and voluntary sex work is recognized by the Declaration, even though there is a lack of further elaboration on the distinction in the document.

Beside the CEDAW and the DEVAW, there is no other international human rights instrument that explicitly addresses sex work and sex workers’ human rights, however, there are treaties encompassing human rights that are routinely denied to sex workers. The right to be free from arbitrary arrest, detention, discrimination and violence; the right to free association; and the right to work convey a legal basis for the protection of sex workers’

⁹⁸ United Nations, “Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)”, Art.1.

⁹⁹ United Nations, “CEDAW”, Art.6.

¹⁰⁰ Marshall, “Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work.”, 52.

¹⁰¹ United Nations, “CEDAW, General Recommendation No. 19”

¹⁰² United Nations, “Declaration on the Elimination of Violence against Women (DEVAW)”, G.A. Res. 48/104

human rights on an international level, as the enjoyment of these rights is systematically deprived of sex workers around the world.¹⁰³

The United Nations Universal Declaration of Human Rights (UDHR), which was adopted in 1948 and serves as the foundation of international human rights law, broadly addresses the human rights commitments of UN state parties. The Declaration protects the right to life, liberty and personal security, as well as economic, social and cultural rights. Article 22 of the UDHR asserts that the realization of one's "economic, social and cultural rights are indispensable for his dignity and the free development of his personality".¹⁰⁴

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, addresses numerous rights often denied to sex workers. As discussed in the previous chapter, sex workers are often subjected to harassment, profiling and sexual assault by law enforcement officials, especially in places where sex work or aspects of it are criminalized. Article 7 of the ICCPR preserves the right to be free from cruel, inhumane or degrading treatment or punishment. Article 9(1) provides the right to be free from arbitrary arrest or detention. Article 10 requires humane treatment in detention, and article 14 demands equal access to justice, including access to legal counsel.¹⁰⁵ Together, these articles address the most common violation of rights sex workers endure at the hands of the police and law enforcement.

Another United Nations treaty that encompasses the human rights of sex workers is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been adopted in 1966 together with the ICCPR. The ICESCR includes rights that are generally denied to sex workers in places where sex work is illegal or where it is not considered a legitimate form of work. Article 6 preserves the right to work and requires state parties to implement "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual". Article 11 provides for the right to an adequate living, including access to adequate housing. When sex work is illegal or illegitimate, sex workers face obstacles accessing basic necessities that are part of the fundamental human rights. Article

¹⁰³ Marshall, "Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work.", 53.

¹⁰⁴ United Nations, "Universal Declaration of Human Rights (UDHR)"

¹⁰⁵ United Nations, "International Covenant on Civil and Political Rights (ICCPR)"

12 protects the right to the highest attainable standard of physical and mental health, which is also often denied to sex workers, as they don't have access to health services or experience discrimination at the hands of medical practitioners.¹⁰⁶

2.2 International human rights bodies condemn violations of sex workers' human rights

2.2.1 Violence against sex workers

Sex workers experience rampant violence in various forms, which have been characterized as a series of human rights violations not only by sex workers' rights organizations, but by international human rights bodies as well. In international forums, particular attention has been paid to the violence sex workers endure at the hands of police officers and healthcare practitioners, to sex workers' lack of access to justice, to the forced administrative detention of sex workers, and to the intersectional violence that migrant and transgender sex workers experience.

International human rights bodies have condemned pervasive police abuse of sex workers on numerous occasions. In 2010, during the Universal Periodic Review, the United States received an official recommendation from Uruguay to address violence against sex workers.¹⁰⁷ The recommendation was preceded by a report presented to the UPR by national sex workers' rights organizations, which documented physical and sexual assault of sex workers at the hands of police officers.¹⁰⁸ Likewise, in 2016, when the adherence of Ghana's government to the ICCPR has been reviewed, the Human Rights Committee expressed worries about rampant police abuse of sex workers.¹⁰⁹ In 2016 and 2017, the CEDAW Committee called on the governments of Nigeria and Kyrgyzstan to protect sex workers from police violence.¹¹⁰ In 2017, the CEDAW Committee reviewed Kenya's compliance with the Convention, and criticized the Kenyan government for not ensuring sex

¹⁰⁶ United Nations, "International Covenant on Economic, Social and Cultural Rights (ICESCR)"

¹⁰⁷ United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review United States of America.", 92.

¹⁰⁸ Best Practices Policy Project et al., "Report on the United States of America."

¹⁰⁹ United Nations Human Rights Committee, "Concluding observations on the initial reports of Ghana."

¹¹⁰ CEDAW, "Concluding observations on the fourth periodic report of Kyrgyzstan.", 6.

workers' access to justice in the cases when they fall victims to violent crimes, and instead leaving authorities unpunished for further violating sex workers in the reporting process.¹¹¹ Also in 2017, the Committee against Torture called on the Namibian government to "take all effective legislative, administrative, judicial and other measures to prevent persons selling sexual services from being subjected to torture and ill-treatment."¹¹²

The abuse that sex workers suffer at the hands of medical practitioners can reach the level of degrading treatment, infringing on the human rights of sex workers and breaching the UN Convention against Torture (CAT). This has been expressed by the CAT Committee and the Special Rapporteur on Torture on several occasions. In 2010, Austrian sex workers submitted a report to the CAT Committee about forced vaginal exams and mandatory STD blood tests that have been conducted in front of male police officers.¹¹³ In response to the report, the CAT Committee affirmed that the forced medical testing of sex workers in Austria and its humiliating circumstances amount to degrading treatment.¹¹⁴ In the same year, the CEDAW Committee argued that the forced medical tests of sex working women in Tunisia infringe on sex workers' rights to movement and privacy.¹¹⁵ The CAT Committee further condemned sex workers' lack of access to justice after enduring degrading treatment from medical practitioners.¹¹⁶ This observation has been echoed by the Special Rapporteur on Torture as well.¹¹⁷

Administrative detention and "forced rehabilitation" are another form of violence sex workers suffer, highlighted by the CAT Committee. During the country review of China in 2015, the Committee voiced concerns over administrative detention without due process of suspected sex workers¹¹⁸, a violation of rights amounting to a serious breach of the

¹¹¹ CEDAW, "Concluding observations on the eighth periodic report of Kenya."

¹¹² United Nations Committee Against Torture, "Concluding observations on the second periodic report of Namibia.", 5.

¹¹³ Sex-worker Forum of Vienna, Austria, "Submission to the United Nations Committee Against Torture.", 5-6.

¹¹⁴ United Nations Committee Against Torture, "Concluding observations on the fourth and fifth periodic reports of Austria.", 8.

¹¹⁵ CEDAW, "Concluding observations of the Committee on the Elimination of Discrimination against Women Tunisia.", 8.

¹¹⁶ United Nations Committee Against Torture, "Concluding observations on the second periodic report of Namibia.", 9.

¹¹⁷ Mendez, "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.", 18.

¹¹⁸ United Nations Committee Against Torture, "Concluding observations on the fifth periodic report of China.", 12.

Convention against Torture. The Rwandan government has been condemned by the Committee in 2017 for forced administrative detention of people suspected to engage in sex work, arguing that detention for the purpose of “rehabilitation” only exposes detainees to further abuse.¹¹⁹ The Special Rapporteur on Violence against Women highlighted that sex workers in India must face forced detention and rehabilitation, and violence at the hands of police, clients, their communities and families.¹²⁰

Violence against transgender and migrant sex workers have also been highlighted by international human rights bodies, although to a lesser extent than in the case of previously mentioned forms of violence sex workers endure. In 2011, the UN Special Rapporteur on Violence against Women reported that undocumented female migrant sex workers are particularly vulnerable to sexual abuse.¹²¹ In 2012, the European Court of Human Rights ruled a violation of the prohibitions on torture and discrimination in the European Convention on Human Rights, when Spain failed to protect an undocumented migrant sex worker from repeated harassment and abuse.¹²² Since 2012, the Inter-American Commission on Human Rights showed great interest in the struggles of transgender sex workers, and issued several country reports between 2012 and 2017, in which they document rights violations against this highly marginalized demographic in Honduras, Guatemala, Jamaica, Colombia and Mexico.¹²³ In 2015, they have also published a comprehensive report, documenting the severe and endemic violence transgender sex workers face in the form of arbitrary detention, police and community violence, and murder.¹²⁴

¹¹⁹ United Nations Committee Against Torture, “Concluding observations on the second periodic report of Rwanda.”, 7-8.

¹²⁰ Manjoo, “Report of the Special Rapporteur on violence against women, its causes and consequences.”, 20.

¹²¹ Manjoo, “Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences.”, 46.

¹²² European Court of Human Rights, *B.S. v. Spain*. Oct 24, 2012.

¹²³ Inter-American Commission on Human Rights: “Report on the situation of human rights in Jamaica”; “Truth, Justice and Reparation: Fourth report on human rights situation in Colombia.”; “Situation of human rights in Honduras”; “The human rights situation in Mexico”; Situation of human rights in Guatemala”.

¹²⁴ Inter-American Commission on Human Rights, “Violence against LGBTI persons”

2.2.2 Violations of sex workers' right to health

Violations of sex workers' right to health have received thorough attention from international human rights bodies. The CEDAW Committee's General Recommendation No. 24 from 1999 clearly states that the health needs and rights of women who belong to disadvantaged and vulnerable groups should be given special attention to, including women in prostitution.¹²⁵ The CESCR Committee, which is monitoring implementation of the International Covenant on Economic, Social and Cultural Rights by State Parties, calls on governments to provide access to the full range of sexual and reproductive healthcare services to sex workers, as well as to take measures to fully protect persons working in the sex industry.¹²⁶

Sex workers' vulnerability to HIV/AIDS is heightened when their right to health is repeatedly violated. This has been affirmed by the Special Rapporteur on the Right to Health in 2013, in a report submitted to the UN General Assembly, documenting how migrant sex workers' health is endangered by routinely running into obstacles while trying to access health services, by confiscation of condoms by police officers as evidence of prostitution, forced HIV testing, and general barriers to health services such as fear of arrest, deportation and detention.¹²⁷ In 2017, the African Commission issued a report on human rights and HIV, calling attention to sex workers' lacking access to healthcare services in Africa.¹²⁸ WHO and UNAIDS, the world's most prominent global health-focused international human rights organizations, have long been arguing that the fight against the global HIV/AIDS epidemic is only possible if it goes hand in hand with the fight against human rights violations against sex workers.¹²⁹ Since they constitute one of the most vulnerable populations due to the stigma and endemic rights abuses they face, centring sex workers' struggle for health rights is indispensable in achieving the long-term goal of zero HIV infections worldwide. By regularly

¹²⁵ CEDAW, "General Recommendation No. 24: Article 12 of the Convention", 5.

¹²⁶ Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 22 on the Right to Sexual and Reproductive Health.", 32.

¹²⁷ Grover, "Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.", 58-59.

¹²⁸ African Commission on Human and People's Rights & UNAIDS. 2017. "HIV, the law and human rights in the African human rights system: key challenges and opportunities for rights-based responses.", 24-25.

¹²⁹ See World Health Organisation, "Addressing Violence Against Sex Workers"; UNAIDS, "Guidance Note on HIV and Sex Work" (2012)

consulting with, and citing influential sex workers' rights organizations in their policy papers regarding sex work and HIV/AIDS, UNAIDS and WHO have shown great example in pivoting the voice of sex workers.¹³⁰ Mgbako notes that although human rights bodies should be applauded when they centre sex workers in the global response to HIV, broader acknowledgements to sex workers' right to health including reproductive, occupational and mental health, are still to be explored in depth by institutions in the international human rights arena.¹³¹

Beside the right to health, other economic, social and cultural rights of sex workers have not yet been widely addressed by human rights bodies. A welcome exception is the CEDAW Committee's country review of Hungary in 2013, during which they commented on the labour conditions of sex workers in the country, and issued a recommendation to the State to prevent discrimination against sex workers, as well as to ensure that their right to safe working conditions is guaranteed at national and local levels.¹³²

2.2.3 Abuses related to anti-trafficking laws and policies

Campaigns to "end sex trafficking" conflating migrant sex workers with persons trafficked for sexual exploitation have been condemned by human rights bodies, as they incite human rights abuses against sex workers. The contemporary "rescue industry", a global coalition of carceral feminists, right-wing fundamentalist Christians, and private and non-profit organizations, knowingly conflate sex work with the crime of trafficking, and push for tightened immigration borders and police "raid" and "rescue" operations to "end sex trafficking".¹³³ Elizabeth Bernstein argues that such anti-trafficking campaigns have way more success in criminalizing marginalized people and enforcing border control, than in offering concrete solutions and benefits to victims of trafficking.¹³⁴ Janie Chuang criticizes the "rescue industry" for transforming the anti-trafficking movement into an anti-prostitution campaign, by ideologically hijacking the human trafficking discourse as a means

¹³⁰ World Health Organisation et al., "Fact sheets: HIV/AIDS.", 14.

¹³¹ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 116.

¹³² CEDAW, "Concluding observations on the combined seventh and eighth period reports of Hungary.", 6.

¹³³ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 118.

¹³⁴ Bernstein, "The Sexual Politics of the New Abolitionism.", 141.

to abolish sex work, and hindering the development of appropriate and nuanced law and policy that would protect the human rights of sex workers and victims of trafficking alike.¹³⁵

The harmful discourse and policies advanced by the contemporary rescue industry are a threat to sex workers' rights, which has been increasingly highlighted by international human rights bodies. The Special Rapporteur on Violence against Women stated in 2000, that strategies and solutions proposed to combat human trafficking must be assessed from the perspective of how it promotes and provides protection for women's human rights. In the same report, she also highlighted that anti-trafficking immigration policies heighten migrant women's vulnerability to traffickers by further restricting legal border crossings. In pointing out that women's rights advocates have long been condemning violent and coercive "rehabilitation" and "rescue" of sex workers, she elevated the voice of women's rights advocates in the international human rights fora.¹³⁶

In 2010, Human Rights Watch issued a report on Cambodia's anti-trafficking policy and the widespread abuses against sex workers associated with it. The report characterized the law as inciting and enabling police violence and harassment of sex workers during crackdowns on brothels and street workers.¹³⁷ The Special Rapporteur on the Right to Health also expressed concerns on the situation in Cambodia, claiming that the law, despite its expressed aim to target trafficking, conflates sex work with trafficking, and thus fully criminalizes sex work. The Special Rapporteur drew attention to abuses against Cambodian sex workers related to the enactment of the trafficking law, including arbitrary detentions, extortions of sex workers from brothels, and sexual assault.¹³⁸

In 2014, the CEDAW Committee condemned India for the "persecution of women in prostitution as a result of measures taken to address trafficking, such as raid and rescue operations."¹³⁹ Prior to the Committee's country review, Indian sex workers' rights organizations submitted a report on the abuses arising from the conflation of migration, trafficking and sex work, arguing that when trafficking is confused with the voluntary

¹³⁵ Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy.", 1655.

¹³⁶ Coomaraswamy, "Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences", 80-83.

¹³⁷ Human Rights Watch, "Arbitrary Detention and Other Abuses against Sex Workers in Cambodia.", 28.

¹³⁸ Grover, "Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.", 32.

¹³⁹ CEDAW, "Concluding observations on the combined fourth and fifth periodic reports of India.", 8.

migration of women, patriarchal control over women's mobility is enacted by the state in bringing forth measures thwarting female migration.¹⁴⁰

In 2016, Amnesty International issued a report on violations of sex workers' rights resulting from anti-trafficking laws criminalizing sex work in Buenos Aires. The report drew attention to the targeting and punishment of sex workers who insisted that they were not victims of trafficking. The application of the anti-trafficking law resulted in repeated violent police raids of sex work establishments, involving intimidation, theft of personal property, coercive questioning, arrests and arbitrary detentions.¹⁴¹

2.3 International human rights bodies concerned with the human rights implications of the legal status of sex work

2.3.1 Criminalization

Criminalization of sex work is a legal framework which makes the sale, purchase, and/or other sex work-related activities (e.g. solicitation, brothel keeping, living off the income gained from sex work) illegal.¹⁴² Numerous international human rights bodies have stated that criminalization of sex work and human rights abuses against sex workers are directly related. As already mentioned in Chapter 3.1, one of the first instances of a global human rights body marking a connection between rights abuses against sex workers and the criminalized status of sex work happened in 1992, when the CEDAW Committee issued a recommendation saying that sex workers are especially vulnerable to violence due to their unlawful status tends to marginalizing them.¹⁴³ The Committee drew attention to this link in the 2010 review of the human rights records of Fiji as well, expressing their concern that the criminal status of sex work in the country results in sex workers routinely falling victim to violence, and in particular, being highly vulnerable to torture and harassment by the

¹⁴⁰ Pai et al., "Status of sex workers in India.", 6-7.

¹⁴¹ Amnesty International, "The human cost of criminalizing sex work in the city of Buenos Aires, Argentina.", 27-30.

¹⁴² Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 120.

¹⁴³ CEDAW, "General Recommendation No. 19: Violence against women", 3.

police.¹⁴⁴ The CESCR Committee, while reviewing Russia's human rights records in 2017, concluded that it is concerning how due to the criminalization of sex work, sex workers must face difficulties in accessing healthcare services.¹⁴⁵ In the same year, it has been identified by the Special Rapporteur on the Right to Health that criminalization of sex work is the main cause of violations of sex workers' right to health.¹⁴⁶ The direct link between the criminalization of sex work and human rights violations against sex workers has also been highlighted by the WHO, UNAIDS, Human Rights Watch and Amnesty International.¹⁴⁷

Under the partial criminalization model, the sale of sex is decriminalized, while the purchase and facilitation of sex work are criminalized. Several international human rights bodies condemn the legal framework of partial criminalization due to its incompatibility with sex workers' rights, because despite the ostensible decriminalization of the selling of sexual services, the implementation of the model in practice results in rights abuses against sex workers. UNAIDS has been clear at denouncing the legal framework of partial decriminalization: "In Sweden and Norway, the buying of sex is criminalized, an approach based on the idea that the client merits punishment, but the sex worker is a 'victim.' There is very little evidence to suggest that any criminal laws related to sex work stop demand for sex or reduce the number of sex workers. Rather, all of them create an environment of fear and marginalization for sex workers."¹⁴⁸

In its research report on sex workers' human rights in Norway, issued in 2016, Amnesty International firmly criticized the country's legal framework towards sex work, arguing that the rights of sex workers in Norway are violated directly due to or compounded by partial criminalization.¹⁴⁹ The report documents human rights abuses against sex workers such as surveillance and harassment by the police, evictions due to police threatening landlords who rent out property to sex workers, difficulties in acquiring safe locations to work in, and

¹⁴⁴ CEDAW, "Concluding Observations on the Committee on the Elimination of Discrimination against Women." 6.

¹⁴⁵ Committee on Economic, Social and Cultural Rights, "Concluding observations on the sixth periodic report of the Russian Federation."

¹⁴⁶ Puras, "Twenty-fourth Report on the Enjoyment of the Right to Health.", 12-14.

¹⁴⁷ See World Health Organisation, "Violence against sex workers and HIV prevention"; UNAIDS, "Guidance Note on HIV and sex work" (2009); Human Rights Watch, "World Report 2014"; Amnesty International, "Policy on State Obligations to Respect, Protect and Fulfill the Human Rights of Sex Workers"

¹⁴⁸ UNAIDS, "Guidance Note on HIV and Sex Work" (2012), 4.

¹⁴⁹ Amnesty International, "The human cost of 'crushing' the market.", 7-8.

fear of working together with other sex workers as that might result in being prosecuted for “promoting prostitution”.¹⁵⁰ Human Rights Watch is also critical of partial criminalization, and supports full decriminalization instead:

“Human Rights Watch supports full decriminalization rather than the Nordic model because research shows that full decriminalization is a more effective approach to protecting sex workers’ rights. Sex workers themselves also usually want full decriminalization. The Nordic model appeals to some politicians as a compromise that allows them to condemn buyers of sex but not people they see as having been forced to sell sex. But the Nordic model actually has a devastating impact on people who sell sex to earn a living.”¹⁵¹

The CEDAW Committee, on the other hand, has been inconsistent in differentiating between partial criminalization and full decriminalization, and has not yet fully addressed the human rights implications of partial criminalization.¹⁵² While in its country review of Fiji in 2010, the Committee called on the state party to decriminalize sex work¹⁵³, in its review of Canada in 2016, the Committee requested that the state party only decriminalizes women engaging in sex work.¹⁵⁴ And even though the Committee briefly commented on the potential risks to the health and safety of sex workers that partial criminalization in Canada entails¹⁵⁵, it did not fully engage with the human rights implications of the legislative model.

2.3.2 Decriminalization

Under decriminalization, the sale, the purchase as well as the facilitation of sexual services are fully decriminalized. The facilitation of sexual services remains subject to laws on exploitation, coercion, assault, bullying and rape that apply in other contexts, and laws that ban human trafficking and the selling and purchasing of sex by minors also remain in

¹⁵⁰ Amnesty International, “The human cost of ‘crushing’ the market.”, 46-64.

¹⁵¹ Human Rights Watch, “Why Sex Work Should Be Decriminalized”, note 193.

¹⁵² Mgbako, “The Mainstreaming of Sex Workers’ Rights as Human Rights.”, 128.

¹⁵³ CEDAW, “Concluding Observations on the Combined Second, Third, and Fourth Periodic Reports of Fiji.”, 6.

¹⁵⁴ CEDAW, “Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada.”, 12.

¹⁵⁵ CEDAW, “Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada.”, 11.

effect.¹⁵⁶ The Special Rapporteur on Violence Against Women stated in 2010 that decriminalization of sex work combined with a human rights approach is the legal framework best suited to realize both the human rights and the labour rights of sex workers.¹⁵⁷ In the same year, the Special Rapporteur on the Right to Health voiced that in order to address the violations of sex workers' right to health, decriminalization is necessary.¹⁵⁸ In 2012, WHO has called on states to work toward the decriminalization of sex work, to improve sex workers' access to health services, and to stop the unjust and disproportionate targeting of sex workers with non-criminal laws and regulations.¹⁵⁹ In the same year, UNAIDS similarly championed the full decriminalization of sex work, including the elimination of criminal laws and penalties for the sale and purchase of sex, facilitation of sex workers, brothel keeping, and other sex work-related activities.¹⁶⁰ In 2013, the Special Rapporteur on Extreme Poverty highlighted in a report that sex workers in Namibia face stigma, violence and discrimination due to sex work being criminalized, and called the state party for the full decriminalization of sex work.¹⁶¹

Human Rights Watch, while initially not taking a stance on sex work per se and instead focusing on the human rights implications of criminalization on victims of forced prostitution, later evolved its position on sex work that culminated in the adoption of a decriminalization policy in 2014. In the years leading up to this statement, the organization expressly opposed the United States' policy conditioning HIV/AIDS funding to non-profit organizations on adopting an anti-prostitution policy,¹⁶² and issued a report that documented the connection between criminalization of sex work and sex workers' poor health.¹⁶³ The regional divisions of Human Rights Watch reported police violence against sex workers on numerous occasions: these reports condemned Honduras,¹⁶⁴ Cambodia¹⁶⁵ and

¹⁵⁶ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 121-122.

¹⁵⁷ Coomaraswamy, "Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences.", 21.

¹⁵⁸ Puras, "Twenty-fourth Report on the Enjoyment of the Right to Health.", 2.

¹⁵⁹ World Health Organisation et al., "Fact sheets: HIV/AIDS.", 17.

¹⁶⁰ UNAIDS. "Guidance Note on HIV and Sex Work." (2012), note 148.

¹⁶¹ Carmona, "Report of the Special Rapporteur on Extreme Poverty and Human Rights.", 22.

¹⁶² Human Rights Watch, "U.S.: Restrictive Policies Undermine Anti-AIDS Efforts."

¹⁶³ Human Rights Watch, "Unprotected: Sex, Condoms and the Human Right to Health."

¹⁶⁴ Human Rights Watch, "Human Rights Abuses against Transgender People in Honduras."

¹⁶⁵ Human Rights Watch, "Arbitrary Detention and Other Abuses against Sex Workers in Cambodia."

the United States¹⁶⁶ for extensive abuse, arbitrary detentions, and physical and sexual violence against sex workers. Drawing on the experience of these documentations of violations of sex workers' human rights, the organization officially called for the full decriminalization of adult sex work in 2014.¹⁶⁷ This was supported by further reports on human rights abuses against sex workers in Tanzania,¹⁶⁸ China¹⁶⁹ and New Orleans,¹⁷⁰ all of which argued that decriminalization is needed to effectively address human rights abuses against sex workers. Human Rights Watch reaffirmed its stance on supporting the full decriminalization of sex work in 2019.¹⁷¹

In 2016, Amnesty International adopted an official policy calling for "the decriminalization of all aspects of adult consensual sex work due to the foreseeable barriers that criminalization creates to the realization of the human rights of sex workers," arguing that "laws [criminalizing sex work] force sex workers to operate covertly in ways that compromise their safety, prohibit actions that sex workers take to maximize their safety, and serve to deny sex workers support or protection from government officials. They therefore undermine a range of sex workers' human rights, including their rights to security of person, housing and health."¹⁷²

Prior to the adoption of the policy, Amnesty International issued several documents about government abuses against sex workers, such as a 2012 statement condemning Greece for forced HIV testing and arrest of sex workers;¹⁷³ a 2014 report on sex workers being murdered in Honduras;¹⁷⁴ a response in the same year to evictions and police abuse against sex workers in Brazil;¹⁷⁵ as well as a report about police abuse against sex workers in Nigeria amounting to the level of torture.¹⁷⁶ This period has later been described by the

¹⁶⁶ Human Rights Watch, "Condoms as Evidence of Prostitution in Four US Cities."

¹⁶⁷ Human Rights Watch, "World Report 2014.", 47.

¹⁶⁸ Human Rights Watch, "Discrimination against Sex Workers, Sexual and Gender Minorities, and People Who Use Drugs in Tanzania."

¹⁶⁹ Human Rights Watch, "Abuses against Sex Workers in China."

¹⁷⁰ Human Rights Watch, "State Response to Sex Workers, Drug Users and HIV in New Orleans."

¹⁷¹ Human Rights Watch, "Why Sex Work Should Be Decriminalized."

¹⁷² Amnesty International, "Policy on state obligations to respect, protect and fulfil the human rights of sex workers.", 2.

¹⁷³ Amnesty International, "Public statement: Greece must stop the criminalization and stigmatization of alleged sex workers found to be HIV positive."

¹⁷⁴ Amnesty International, "Urgent action: Sex workers targeted and killed in Honduras."

¹⁷⁵ Amnesty International, "Urgent action: Sex Workers Evicted and Abused by Police."

¹⁷⁶ Amnesty International, "Welcome to hell fire": Torture and other ill-treatment in Nigeria.", 32-35.

organization as a years-long research and global consultation to find out how to protect sex workers against human rights violations in the most efficient way.¹⁷⁷ Indeed, the organization consulted numerous and diverse stakeholders to review its draft policy document in favour of decriminalization, such as sex workers' rights organizations, sex work abolitionist activists and HIV/AIDS agencies, among others.¹⁷⁸ UNAIDS publicly supported the policy draft as in line with their own approach and policy on sex work.¹⁷⁹ The global sex workers' rights movement supported the draft on the decriminalization policy with full steam, in the form of letters of support from ICRSE, Sweden's Rose Alliance, the APNSW, the United States' Sex Workers Outreach Project (SWOP), India's SANGRAM, South Africa's Sisonke and SWEAT, the Sex Worker's Rights Advocacy Network from Central and Eastern Europe and Central Asia (SWAN), and the Canadian Alliance for Sex Work Law Reform.¹⁸⁰ The final policy has been adopted by Amnesty International in 2016. With its measured and profound analysis of human rights, the policy legitimizes the lived experiences and decades-long campaigning of the sex workers' rights movement as an indispensable source of evidence to legislation and policy change.

2.4 Conclusion

In this chapter, I demonstrated that the human rights framing of the sex workers' rights movement and their efforts to persistently document and report human rights abuses against sex workers has been recognized, embraced and institutionalized by international human rights bodies. As a result of the relentless human rights advocacy of the sex workers' rights movement in forms of outreach to UN special rapporteurs, consultative work with UN agencies and human rights non-profit organizations, submissions to UN treaty bodies, regional forums, and country reviews during the UPR, a consensus about human rights legal protections applying to sex workers just as much as to any person became apparent in the international human rights arena.

¹⁷⁷ Amnesty International, "Sex workers at risk: A research summary on human rights abuses against sex workers."

¹⁷⁸ NSWP, "Measuring the Impacts of Amnesty International's Resolution on Protecting the Human Rights of Sex Workers Including Full Decriminalisation of Sex Work: a Global Perspective.", 3.

¹⁷⁹ Sidibé, "Letter to Mr. Salil Shetty, Amnesty International."

¹⁸⁰ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 125.

CEDAW and DEVAW, the only two international human rights instruments explicitly mentioning prostitution, respectively condemn the “exploitation of prostitution of women” and “forced prostitution”, which suggest that the documents do not deem prostitution inherently coercive and in need to be abolished. UDHR, the foundational document of international human rights law, asserts that the joint realization of economic, social and cultural rights is of vital importance to every person’s dignity and development. ICCPR addresses the most common violations of rights sex workers experience at the hands of police and law enforcement, such as cruel, inhumane or degrading treatment, arbitrary arrest and detention, and lack of access to justice. ICESCR preserves rights that are deprived from sex workers in places where sex work or aspects of it are criminalized, such as the right to work, the right to basic necessities e.g. adequate housing, and the right to the highest attainable standard of physical and mental health.

These international human rights instruments conveyed the legal basis on which international human rights bodies have condemned violations of sex workers’ human rights. Rampant violence and abuse against sex workers on the account of police, medical practitioners and forced “rehabilitation” programs, and particular vulnerability of migrant and transgender sex workers, as well as the intersectional violence they face, have been widely condemned in international human rights forums. Violations of sex workers’ right to health have also received careful attention from international human rights bodies, who affirmed that sex workers constitute one of the most vulnerable populations to HIV/AIDS due to the stigma and pervasive human rights abuses they face. Campaigns to “end sex trafficking” which willingly conflate migrant sex workers with victims of human trafficking for sexual exploitation as a means to abolish sex work have also been condemned on the international level. Human rights bodies criticized this discourse and the anti-trafficking immigration policies advanced by it for criminalizing sex work, enabling police abuse against sex workers, controlling women’s mobility and heightening migrant sex workers’ vulnerability to traffickers.

International human rights bodies have shown concern with the human rights implications of the legal status of sex work. They have highlighted that criminalization of sex work and its related activities are a direct cause of human rights abuses against sex workers. The legal model of partial criminalization has also been criticized from a human rights perspective, since according to international human rights bodies, the implementation of the

model results in rights abuses against sex workers. They state that any criminal law related to sex work create an environment of marginalization of sex workers. The legal model of full decriminalization, on the other hand, has been deemed to best suit the realization of human rights and labour rights of sex workers on the international level. Human rights bodies further called on states to stop the unjust and disproportionate targeting of sex workers with non-criminal laws and regulations.

Chapter III HUMAN RIGHTS AND THE LEGAL STATUS OF SEX WORK

Since the beginning of the 19th century, authorities made efforts to control and regulate the social phenomenon of prostitution. This control desire usually took form of prohibiting sex work as well as its commercial exploitation, or imposing rigorous conditions on the operation and location of sex businesses. The main challenge of prostitution policy is its moral nature: it is an “archetypical example of morality politics”.¹⁸¹ Therefore, how it should be governed is subject to heated and rabid debates. Another challenge of prostitution policy making is the near complete lack of reliable data about the sector. Reliable numbers are difficult to obtain, due to the general need for anonymity and thus difficult access to the milieu for the outside eye; the high mobility of sex workers; and even discrepancies in the definition of key categories such as “trafficking” or “forced prostitution”.¹⁸² In this data-free environment, lack of evidence opens up space for policy makers to project their ideology about the subject. The third challenge is policy implementation, since it depends on practices of local officials, who may operate in relative autonomy from national legal frameworks and institutions, which can result in local policies seriously deviating from national policy.¹⁸³

Regarding the impact of prostitution policy, in terms of influencing the prevalence of sex work in a country, policy proves to be ineffective: it does not decrease the prostitution market, let alone makes it disappear completely.¹⁸⁴ Prostitution policy does, however, make an impact on the social and legal position of sex workers. Measures to regulate prostitution influence sex workers’ workplace conditions, labour relations, access to health and social services, income and taxes, housing, citizenship and human rights. For this reason, in this chapter, I will present the human rights implications of different public policies governing sex work.

¹⁸¹ Wagenaar, "Why Prostitution Policy (Usually) Fails and What to Do about It?", 2.

¹⁸² Wagenaar, "Why Prostitution Policy (Usually) Fails and What to Do about It?"

¹⁸³ Doezema, "Sex slaves and discourse masters: the construction of trafficking.", 9.

¹⁸⁴ Wagenaar, "Why Prostitution Policy (Usually) Fails and What to Do about It?", 10.

3.1 Classifications of sex work policies

In reviewing classifications of legal regimes governing sex work in scientific literature, one can quickly recognize that there is no consensus among researchers how legal approaches toward sex work best be categorised, nor is there a common understanding on what a particular category means or on what basis is it used.¹⁸⁵ Several different concepts can be identified in how researchers categorise, analyse and compare sex work policies. Östergren concludes that it is likely symptomatic of sex work policy research being a young field that there are different competing classification systems.

Among the most common terms regarding sex work policy are ‘criminalisation’, ‘legalisation’, ‘regulation’ and ‘decriminalisation’, and more general approaches such as ‘prohibitionism’, and ‘abolitionism’ or ‘neo-abolitionism’. ‘Abolitionism’ and ‘prohibitionism’ are used as contrasting categories in the literature, where ‘abolitionism’ means the abolishing of the facilitation and purchase of sexual services through criminalizing those acts, but not criminalizing the selling; while under ‘prohibitionism’, all aspects of sex work, including the selling, are illegal.¹⁸⁶ ‘Neo-abolitionism’, a further qualification of ‘abolitionism’, describes policies targeting the ‘demand’ for sexual services, by criminalizing the purchase, as well as introducing social initiatives that aim to persuade and help sex workers leave the sector.¹⁸⁷ Skilbrei and Holmström argue that such categories oversimplify sex work policies and hence depict them as more static and coherent than they really are; Matthews states that these categories can be useful as long as they are treated as ‘ideal types’ that will entail overlaps and contradictions in practice. Hence, when attempting to assess a prostitution policy by applying these categories to it, the policy will never be a ‘perfect fit’.¹⁸⁸

While different classification schemes exist, a significant number of scholars operate with a three-fold typology, with the categories ‘criminalisation’ (sometimes divided into ‘criminalisation of sex worker’ and ‘criminalisation of client’/ ‘partial criminalisation’),

¹⁸⁵ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”

¹⁸⁶ Outshoorn, “Introduction: Prostitution, Women’s Movements and Democratic Politics.”

¹⁸⁷ Jakobsson and Kotsadam, “The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation.”

¹⁸⁸ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”

'legalisation' (or 'regulation') and 'decriminalisation'.¹⁸⁹ This classification system is in line with sex workers' rights organizations' typologies in their analysis of the effects sex work policies have on their rights and welfare.¹⁹⁰ Therefore, following in the footsteps of numerous scholars and sex workers' rights advocates, I will use the most commonly applied typology, and analyse three types of legal approaches toward governing sex work from a human rights perspective: criminalisation, which also includes partial criminalisation; legalisation; and decriminalisation.

3.1.1 Criminalisation

Criminalisation of sex work is defined as a legislative framework where laws are in place to make sex work and/or activities associated with sex work a crime. These are enforced by law enforcement agencies such as the police, and result in punishment, prosecution, arrest and imprisonment of sex workers.¹⁹¹

The underlying understanding of commercial sex in a criminalisation regime is that sex work is a negative social phenomenon that should be eliminated. This position is explained with religious and socio-medical notions such as sex belongs to the frame of a conjugal relationship, or that selling sex is an "antisocial act" and responsible for spreading diseases. Another, feminist-oriented justification to the goal of eliminating the sex trade is that commercial sex exists due to structural gender inequality and has inherent harm to women.¹⁹² According to this perspective, selling and purchasing sex, even between consenting adults, is in itself a violation of the human rights of women. Both the religious/socio-medical and the feminist-oriented understanding of commercial sex view sex work itself as a threat – to marriage, the family, the health and moral fabric of society, the possibility to reach gender equality.¹⁹³

Under criminalization, the articulated priority is the protection of the whole society from sex work, and not the wellbeing of sex workers. Indeed, criminalisation has a disastrous

¹⁸⁹ See e.g. Bernstein, "Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex."

¹⁹⁰ NSWP, "Consensus Statement on Sex Work, Human Rights, and the Law."

¹⁹¹ NSWP, "Sex work and the law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms."

¹⁹² See e.g. Farley et al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder.", 37.

¹⁹³ Östergren, "From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.", 9-10.

effect on the health and human rights of sex workers. Persecution of sex workers under criminalised sex work regimes can lead to deportation, imprisonment, loss of custody rights of their children, eviction from housing, and criminal records. Criminal records carry stigma and may drastically limit one's future employment and other opportunities, e.g. eligibility for state benefits and ability to migrate.¹⁹⁴

Trying to avoid arrest pushes sex workers in more isolated areas, and limits their time and methods to do safety screenings of clients. This isolation leaves sex workers vulnerable to violence and extortion. Further, the stigma perpetuated by criminalisation creates a climate of impunity for those who commit violence against sex workers. Impunity of perpetrators, be it real or perceived, puts sex workers at higher risk of rape and assault. Sex workers routinely suffer violence and sexual assault at the hands of police officers too, which violence often remains unreported due to sex workers' fear of further abuse and arrest.

In the criminalisation regime, sex workers don't have access to the same labour rights as other citizens who are selling personal services legally. Since sex work is not considered a legitimate way of earning an income, sex workers cannot join or form unions. Illegal income from sex work cannot be subject to taxation laws, therefore sex workers cannot use their income to pay into and benefit from social security and health insurance. Social and medical assistance for sex workers in a criminalised regime is furthermore generally conditional upon expressing a wish to leave the sex industry; they cannot expect access to such services if they are vocal about intending to remain active sex workers. Due to the illegal nature of sex work, participants of the sector need to remain anonymous. This makes it difficult or even impossible for them to cooperate in matters such as developing safety measures, codes of conduct and ethical standards for running sex work businesses. It is also very risky for sex workers to organise politically due to needing to avoid the attention of the authorities. To register as a formal interest group or organisation is not possible.¹⁹⁵

Sex workers' right to health is put at risk in a criminalisation regime. Criminalisation and punitive laws targeting sex workers are the main factors compromising sex workers' health.¹⁹⁶ Stigmatised and forced into the 'underground', sex workers are driven away from health care services, as well as deprived of their bargaining power to engage in safer sex

¹⁹⁴ NSW, "Sex work and the law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms."

¹⁹⁵ Östergren, "From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.", 9-10.

¹⁹⁶ UNAIDS, "The Legal Status of Sex Work: Key Human Rights and Public Health Considerations."

with clients, since visible condoms and open negotiation puts them at risk of arrest. Threat of punishment hinders sex workers from accessing health care services. Stigma and discrimination by healthcare providers also deter sex workers from healthcare providers. Harm prevention measures, such as distributing condoms to sellers and buyers, are repressed in places where sex work is criminalised, since it can be perceived as encouraging sex work and/or inciting crime.¹⁹⁷ Criminalisation and legal oppression drastically heighten sex workers' vulnerability to HIV and other STIs.¹⁹⁸

The differing treatment of sex work from other types of labour is a grave example of governments tending to exercise control over self-determination, sexuality and bodily autonomy. Laws prohibiting sex work interfere with private sexual behaviours and exert control over LGBTI people and women, who constitute a majority of sex workers worldwide. Similarly to state control over reproductive rights, criminal laws forbidding sex work disregard the right to bodily autonomy, and attempt to legislate a harmful morality instead.¹⁹⁹

Sex workers' human rights cannot be realized until criminal laws prevent sex workers' access to justice, health and social services; heighten their vulnerability to discrimination, violence and arbitrary arrests; and threaten their right to a safe working environment.²⁰⁰

3.1.1.1 Partial criminalisation

Sex work-abolitionists champion the partial criminalisation model, which they define as a legal framework targeting the "demand" for commercial sex by criminalizing the purchase of sexual services, while decriminalizing the sellers.²⁰¹ Mgbako argues that despite the framing that suggests that sex workers are decriminalized under this model, it is practically a carceral paradigm that retains stigma on sex workers and leads to human rights violations against them. The main goal of the partial criminalisation model is the abolition of sex work, and not the increased safety and security of people engaging in selling sex. Partial

¹⁹⁷ Östergren, "From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.", 13-14.

¹⁹⁸ UNAIDS, "The Legal Status of Sex Work: Key Human Rights and Public Health Considerations."

¹⁹⁹ Open Society Foundations, "10 reasons to decriminalize sex work."

²⁰⁰ International Committee on the Rights of Sex Workers in Europe, "Declaration of the Rights of Sex Workers in Europe."

²⁰¹ See e.g. EQUALITY NOW

criminalization brings heightened police presence and surveillance into sex workers' work and lives.²⁰²

As long as clients, managers, third parties and sex work-related activities remain criminalized, it will be sex workers who must endure the harmful effects of partial criminalization, even if sex workers themselves are ostensibly decriminalized. The model diminishes sex workers' bargaining power with their clients. In order to protect clients from the police, sex workers must retreat to hidden locations with clients, where they are more vulnerable to abuse and assault. Negotiations are also rushed by nervous clients in fear that the police will detect them, which reduces sex workers' time to determine if the client is potentially dangerous.²⁰³ Partial criminalisation further renders "promoting prostitution" illegal, which results in decreased safety at work for people selling sex. "Promoting prostitution" can include instances such as sex workers living or working together to increase their own safety, as well as landlords and bodyguards accepting payments from sex workers, who in turn become criminally liable.²⁰⁴

Partial criminalization of sex work also harms sex workers' economic viability. As long as the purchase and facilitation of a service are not legally possible, the transaction and the livelihood of the service provider remain criminalized, even if the selling of the service is seemingly decriminalized. Thus the implementation of this legal framework is an attack on sex workers' poverty reduction strategies. Under this model, sex workers do not have equal access to employment protections and labour rights like other workers and service providers. This is a natural outcome of the fact that partial criminalization does not treat people who sell sex as rights bearing workers.²⁰⁵

It is not debated that partial criminalization is preferable to full criminalization regarding the human rights of sex workers. However, as discussed above, under the partial criminalization model, it is sex workers who continue to suffer rights violations: they are surveilled, harassed, evicted, impoverished, and criminalized for activities they engage in to increase their own safety. Partial criminalization is sometimes named as decriminalization, due to the ostensible decriminalization of the selling. But there is a vast difference between partial criminalization and full decriminalization in terms of human rights. While full

²⁰² Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 126.

²⁰³ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 127.

²⁰⁴ Smith and Mac, "Revoluting prostitutes: the fight for sex workers' rights.", 158-159.

²⁰⁵ Mgbako, "The Mainstreaming of Sex Workers' Rights as Human Rights.", 128.

decriminalization aims to protect the rights of sex workers, partial criminalization seeks to abolish sex work through targeting the “demand”, and subordinates the protection of the human rights of sex workers for this goal. As sex workers’ rights activists Juno Mac and Molly Smith note:

“to decriminalize sex work is to treat as important the immediate, material safety of people who are selling sex ... [D]ecriminalization is a deeply radical demand, far more so than throwing the world’s poorest sex workers to the wolves in an attempt to annihilate the sex industry through increased policing.”²⁰⁶

3.1.2 Legalisation

Legalisation of commercial sex is defined as “legislation that provides mechanisms for government regulation of paid sex transactions after sex work has been decriminalized”.²⁰⁷ The difference between legalisation and decriminalisation is the application of industry-specific regulations in the law (it is also called sometimes ‘regulatory regime’). Examples of regulation include registration of sex workers, licensing of sex work businesses, geographic restrictions such as zoning (allowing sex work to take place only in designated areas e.g. red-light districts, or prohibition near schools and churches), age restrictions, health requirements such as mandatory condom use and periodic HIV and STD tests, and other regulations for clients, managers and workers. In a legalised regime, sex work is regulated by civil law instead of criminal law. Criminal law naturally continues to apply in sex work-related cases that involve crimes, such as assault, rape, extortion or kidnapping.²⁰⁸ Sex workers and managers who cannot or refuse to adhere to the regulations may be subject to criminal sanctions.²⁰⁹ The police are often used to ensure that sex workers and sex work businesses adhere to the regulations in a legalised framework.²¹⁰

²⁰⁶ Smith and Mac, “Revolting prostitutes: the fight for sex workers’ rights.”, 207.

²⁰⁷ Weitzer, “Legalizing Prostitution: From Illicit Vice to Lawful Business.”, 76.

²⁰⁸ Weitzer, “Legalizing Prostitution: From Illicit Vice to Lawful Business.”, 77.

²⁰⁹ Smith and Mac, “Revolting prostitutes: the fight for sex workers’ rights.”, 176.

²¹⁰ NSWP, “Sex work and the law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms.”

Weitzer argues that from the perspective of reducing harms in the sex industry, legalisation is preferable to criminalisation.²¹¹ Indeed, a commonly stated aim across different legalised systems of sex work is harm reduction.²¹² Proponents of legalised systems claim that regulations are in order to protect the society and/or those selling sex from harm. Sex work is controlled and specifically regulated with the justification that its harmful effects on society and/or on sex workers can and should be eliminated.²¹³

Mac and Smith argue that despite the articulated aim for harm reduction, regulation is generally not directed at prioritizing the wellbeing of sex workers, rather at controlling sex workers who, similarly to a criminalized regime, are viewed as “vectors of disease” and “symbols of disorder”.²¹⁴ Östergren also concludes that legalised sex work regimes (which she calls ‘restrictive regimes’) view commercial sex as a negative social phenomenon and thus take measures to limit or restrict it.²¹⁵ Indeed, special regulations such as mandatory health checks and registrations have a discriminatory nature.²¹⁶ Sex work under a legalised regime can remain highly stigmatised.²¹⁷ Stigma generally disempowers sex workers in asserting their rights to clients, managers and the police, even when they work in a legalised setting. It also pushes many sex workers into trying to maintain a low profile, which can make them reluctant to report abuses to the authorities.²¹⁸ The strong presence of police around sex work in regulatory regimes institutionalizes violence against sex workers, both directly (police inflicting sexual or physical violence, or demanding fines to avoid arrest), and indirectly (restricting access to justice and thus cultivating a culture of impunity for perpetrators).²¹⁹ Platt argues that in a legalised system, violence and stigma against sex workers remains legitimised, institutionalised and invisible, since sex workers are routinely ignored or further criminalised when reporting crimes against them, which leads to under-

²¹¹ Weitzer, “Legalizing Prostitution: From Illicit Vice to Lawful Business.”, 77.

²¹² Lever and Dolnick, “Call Girls and Street Prostitutes: Selling Sex and Intimacy.”

²¹³ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”, 14.

²¹⁴ Smith and Mac, “Revoluting prostitutes: the fight for sex workers' rights.”, 176.

²¹⁵ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”, 14.

²¹⁶ Sanders, “Selling sex in the shadow economy.”, 705.

²¹⁷ NSW, “Sex work and the law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms.”

²¹⁸ Weitzer, “Legalizing Prostitution: From Illicit Vice to Lawful Business.”, 100.

²¹⁹ Platt et al., “Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies.”, 35.

reporting and a climate of impunity. This fosters an environment that fails to recognise sex workers as citizens deserving of support and protection.²²⁰

Due to the application of regulations specific to the sex industry, it is inevitable that some practices will be prohibited, while others will be permitted. Since legalisation also includes provisions regarding who is allowed to engage in sex work, those who are ineligible (e.g. legal/ illegal migrants, minors, HIV-positive people) have to operate illicitly outside of the regulated system.²²¹ Usually, it is the most precarious workers who cannot comply with regulations, and thus must work illegally, forming a criminalized and vulnerable “underclass”.²²² Heavy policing in regulatory regimes exacerbates existing marginalisation.²²³ Some of the sex workers and business owners who would be eligible also might prefer to operate outside the legal sector, due to the burdens of registration, licensing, taxation and mandatory health requirements.²²⁴ Non-compliant sex workers and sex work businesses may face increased police surveillance, raids, fines and prosecution. In practice then, legalisation creates a two-tiered system where *some* sex workers in *some* contexts can work legally while many cannot, which can push illegal sex workers into exploitative working conditions and make them highly vulnerable to human rights violations.²²⁵ And those who can work legally will do so under more restrictive conditions than in other service sector occupations, and with only partial access to labour rights and social benefits.²²⁶

3.1.3 Decriminalisation

Decriminalisation of sex work revokes criminal laws that directly ban commercial sex, as well as those prohibiting all activities associated with it, including laws targeting clients and brothel owners. It demands that next to criminal laws, all forms of legal oppression that

²²⁰ Platt et al., “Associations between sex work laws and sex workers’ health: A systematic review and meta-analysis of quantitative and qualitative studies.”, 43.

²²¹ Weitzer, “Legalizing Prostitution: From Illicit Vice to Lawful Business.”, 77.

²²² Smith and Mac, “Revoluting prostitutes: the fight for sex workers’ rights.”, 179.

²²³ Platt et al., “Associations between sex work laws and sex workers’ health: A systematic review and meta-analysis of quantitative and qualitative studies.”, 3.

²²⁴ Weitzer, “Legalizing Prostitution: From Illicit Vice to Lawful Business.”, 101.

²²⁵ NSW, “Sex work and the law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms.”

²²⁶ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”, 15.

mainly impact sex workers also be repealed, including laws against immorality, obscenity, loitering, homelessness, drug use, homosexuality and public nuisance.²²⁷

In contrast to criminalised and legalised regimes which view sex work as a negative social phenomenon, the underlying understanding of commercial sex in a decriminalisation regime is that it is a multifaceted phenomenon, constituting diverse occupational arrangements, worker experiences and power relations.²²⁸ Due to this diversity, it is not possible to reduce sex work to exploitation and violence. While exploitation and violence are certainly present in the sex industry, sex work should be analysed as any sort of work, having aspects of probable coercion and exploitation, as well as choice and agency. This policy position is based on a human rights principle, arguing that rights such as those to a livelihood, health, security and access to justice should apply to all adult and consenting sex workers.²²⁹ The defence of this position has also been argued from a feminist perspective, specifically feminism that is influenced by ‘sex radicalism’, ‘international’, ‘transnational’ and ‘queer’ feminism.²³⁰ Östergren calls decriminalisation the ‘integrative’ type of legal framework governing commercial sex, since instead of aiming to eradicate or limit the sex industry, it tries to integrate it into society with labour laws and other policy tools.²³¹ Decriminalisation of sex work respects gender equality and sexual rights, and asserts that people have the right to freedom from undue state control over sexual expression.²³²

Sex workers’ right to self-determination means that their agency must be acknowledged and respected, and it must be ensured that they get to articulate their own experiences. Sex workers also must have the right to participate in forums where decisions that affect them are made, in order to create the most appropriate solutions ensuring their safety and welfare. This perspective on commercial sex doesn’t deny that people often sell sexual services due to having limited occupational choices, but it argues that marginalization and poverty don’t negate sex workers’ agency in choosing among limited options. This policy position strongly condemns human rights violations in the sex industry, such as abuse,

²²⁷ NSW, “Sex work and the law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms.”

²²⁸ Weitzer, “Sociology of Sex Work.”

²²⁹ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”, 10.

²³⁰ See e.g. Rubin, “Thinking sex. Notes for a Radical Theory of the Politics of Sexuality.”

²³¹ Östergren, “From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies.”, 9.

²³² Open Society Foundations, “10 reasons to decriminalize sex work.”

coercion and exploitation, and states that such rights violations must be combatted with legal instruments.²³³

Decriminalisation helps to guard sex workers against abuse and violence. If we accept as a starting point that sex work is not inherently violent, it becomes clear that it is criminalisation that puts sex workers' safety at risk. Under decriminalisation, sex workers can work in safer areas, with access to security services, and in case of falling victim to violence, they can report to the police without fear of being persecuted themselves. Decriminalisation also offers sex workers the chance to file complaints against police officers who act unlawfully, without having to fear repercussions on their own lives.²³⁴

Decriminalisation is associated with the best access to health services and the highest financial support to health programs designed for sex workers' needs.²³⁵ Decriminalisation of sex work could be the most important tool to reduce HIV infections in sex worker communities.²³⁶ When sex work is decriminalised, condom usage is more prevalent compared to criminalisation regimes, not only because access to condoms is wider and less stigmatized, but mainly because sex workers don't have to fear that carrying condoms will result in confiscations by the police as evidence of engaging in unlawful sex work. If sex work is decriminalised, sex workers are in a better position to negotiate and enforce condom usage with clients, and are more able to access testing and treatment services for HIV and other sexually transmitted diseases.²³⁷

Decriminalisation views sex work as a form of labour and hence allows the creation of adequate health and safety regulations at the workplace, which can be used by sex workers to assert their rights with clients and employers. This labour approach further enables sex workers to organize, which promotes safer working conditions for them. Collectively, sex workers have the chance to address risk factors at their workplaces, and stand firm on insisting upon improved working conditions.²³⁸

²³³ See e.g. World Health Organization, "Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries."

²³⁴ Open Society Foundations, "10 reasons to decriminalize sex work."

²³⁵ Open Society Foundations, "10 reasons to decriminalize sex work."

²³⁶ Shannon et al., "Global epidemiology of HIV among female sex workers: influence of structural determinants.", 55.

²³⁷ Blankenship and Koester, "Criminal law, policing policy and HIV risk in female sex workers and injection drug users."

²³⁸ Open Society Foundations, "10 reasons to decriminalize sex work."

Decriminalisation improves the safety and wellbeing of sex workers by reducing the stigma, harassment and discrimination against them, and by decreasing the violence they face, including police violence. Under decriminalisation, sex workers have access to support services, health services and justice, and their opportunities and economic empowerment are improved by having the same rights and social protections as other workers.²³⁹ Decriminalisation of sex work is therefore indispensable for the protection of the human rights of people in the sex industry.

3.2 Conclusion

In this chapter, I have introduced three types of legal regimes governing sex work: criminalization (including partial criminalization), legalization, and decriminalization. Even though there is no consensus among researchers yet how prostitution policies best be classified, I have chosen to use this three-fold typology that is widely applied in the literature as well.

I specifically analysed the implications of different legal regimes on sex workers' human rights. Criminalization is a legislative framework where laws make sex work and/or associated activities a crime, since it views sex work as a threat to society, therefore it aims to protect it from prostitution. Criminalization disregards sex workers' right to bodily autonomy. This legal framework has a disastrous effect on sex workers, who must face persecution and police harassment; work in isolated conditions, where they are highly vulnerable to abuse; lack labour rights, which makes them target of exploitation; and lack access to healthcare services, which heightens their vulnerability to HIV/ STDs. Partial criminalization is a legal model which targets the "demand" for commercial sex by criminalizing the purchasing, while ostensibly decriminalizing the selling, of sexual services. The main goal is abolishing prostitution altogether, not the protection of sex workers; it is in practice a carceral paradigm where sex workers must bear harmful consequences, such as harassment, surveillance, impoverishment, and unsafe and isolated working conditions.

Legalization of sex work is a legal regime where decriminalization of sex work is followed by the application of industry-specific government regulation on commercial sex

²³⁹ International Committee on the Rights of Sex Workers in Europe, „The Declaration on the Rights of Sex Workers in Europe.“

transactions, such as mandatory registrations, licensing, zoning, health requirements etc. The extensive set of regulations renders those not willing or able to comply into a criminalized and vulnerable “underclass”, leaving them vulnerable to abuse and exploitation, and without access to justice, health and social services. Legalization is another carceral framework that exacerbates existing marginalization, leaving the most precarious workers vulnerable to police harassment, raids and prosecution.

Decriminalization means the repeal of all forms of legal oppression of sex work, which includes the revoking of criminal laws that prohibit commercial sex, as well as laws prohibiting activities associated with it. It argues that sex work should be analysed as any sort of work, and instead of trying to eliminate and control it, it aims to integrate commercial sex into society with labour laws. This policy approach respects sex workers’ right to self-determination; right to be free from undue state control over sexual expression; and right to participate in the making of decisions affecting them. Under decriminalization, sex workers have access to justice, health and social services, safer working conditions and adequate health and safety regulations. This legal framework provides sex workers with economic empowerment, and it improves their safety and wellbeing, by reducing stigma, harassment, discrimination and violence, including police violence, against them. Decriminalisation is a human-rights based approach that most respects sex workers’ human rights and dignity.

CHAPTER IV SEX WORK LAW AND POLICY IN GERMANY

Prior to 2002, when the Prostitution Act (*Prostitutionsgesetz*) came into force, there wasn't any specific legal regulation of sex work in Germany; instead, the legal status of commercial sex was characterized by "permission without recognition".²⁴⁰ Since 1927, prostitution had no longer been illegal. However, it remained socially sanctioned, based on being considered "against good morals" (*sittenwidrig*) and "harmful to the common good" (*gemeinschaftsschädlich*), ever since the Federal Administrative Court equated prostitution with habitual criminal activity in 1965. The standard of "good morals" has been formulated by the Supreme Court in 1901, defined as a "sense of decency by all those of fair and just mind". The income from selling sexual services was subject to taxation, but contracts related to prostitution (e.g. payment agreements, commercial rental contracts, health insurance contracts) were legally void as prostitution was considered contrary to public morals. Refusing payment for received sexual services was not punishable by the law.²⁴¹

From the late 1980s onwards, strong demands for the normalization of the status of sex work have been raised by sex workers' rights organizations throughout Germany. They protested against the hypocrisy of the situation in which sex work was not illegal and sex workers had to pay taxes, but had no labour rights; as well as the absurdity of the position of brothel owners having to fear penalties for "furthering prostitution" if they offered safe and good working conditions to sex workers. Sex workers' rights organizations lobbied for the adoption of an anti-discrimination law for sex workers as early as 1986. A crucial point in their demands was the abolishing of forced health checks for sex workers, which have been in place since the 1953 adoption of the Venereal Disease Act (*Geschlechtskrankheitengesetz*). Forced health checks have been abolished in 2001 with the adoption of the Infection Prevention Act (*Infektionsschutzgesetz*), as government focus in dealing with AIDS/ STDs shifted from surveillance to the promotion of health-conscious individual behaviour and prevention via education.²⁴²

The process to implement new legislation improving the legal and social status of sex workers in Germany took nearly 20 years. The draft bill to the Prostitution Act has been

²⁴⁰ Grohs, "Contested boundaries: The moralization and politicization of prostitution in German cities.", 159.

²⁴¹ Czarnecki et al., "Prostitution in Germany – A Comprehensive Analysis of Complex Challenges.", 9.

²⁴² Hydra e.V., "The German Prostitution Law: An Example of the 'Legalisation of Sex Work'."

presented in the German federal parliament, the *Bundestag*, in 2001. The main opposition parties at the time, the Christian Democratic Union (*Christlich-Demokratische Union CDU*) and the Christian Social Union (*Christlich-Soziale Union, CSU*) were against the bill, since they claimed that instead improving the situation of sex workers, the law will only benefit brothel owners and pimps, and weaken the power of police in investigating prostitution-related crimes. But more fundamentally, they argued that prostitution contradicts human dignity of both buyer and seller, hence they opposed the removal of the classification of immorality from prostitution.²⁴³

Refuting these arguments, the coalition government of the German Social Democratic Party (*Sozialdemokratische Partei Deutschlands, SPD*) and the Green Party (*Bündnis 90/Die Grünen*), supported by the Party of Democratic Socialism (*Partei des Demokratischen Sozialismus, PDS*) and the indispensable contribution of numerous civil society organizations, has finally passed the Prostitution Act (*Prostitutionsgesetz*). The new law came into force in 2002.²⁴⁴

The German administrative federalism has a three-level architecture: legislation falls under the responsibility of the federal government, but the federal states have the mandate to specify these laws, and adjustment to local circumstances is assigned to local statutes. This structure gives states and local governments serious elbow room to enact a variety of policies, as they do in the case of prostitution.²⁴⁵

4.1 The Prostitution Act (*Prostitutionsgesetz*, 2002)

The Prostitution Act was an attempt of the federal government of Germany to improve the working and living conditions of sex workers. The new law de facto legalized prostitution, defined it as an autonomous decision, and aimed to emancipate sex workers in legal, social and economic terms.²⁴⁶

²⁴³ Crofts, „Prostitution law reform in Germany the oldest profession: At last to be treated as a profession?“, 154.

²⁴⁴ Crofts, „Prostitution law reform in Germany the oldest profession: At last to be treated as a profession?“, 155.

²⁴⁵ Grohs, „Contested boundaries: The moralization and politicization of prostitution in German cities.“, 159.

²⁴⁶ Grohs, „Contested boundaries: The moralization and politicization of prostitution in German cities.“, 160.

The law removed the designation of prostitution as an immoral act, which previously rendered contracts in commercial sex invalid, and thus eliminated a serious legal disadvantage for sex workers. By legally separating the selling of sexual services from morals, the Prostitution Act provided a legal basis for sex workers to claim payment for services that they provided, and as a special protection that is not granted for persons selling other kinds of services, the enforceability of the contract between provider and client is one-sided.²⁴⁷

The law enabled sex workers to enter into lawful employment contracts subject to social and health insurance contributions. Such employment contracts, similarly to the contract between provider and client, are enforceable only from the side of the sex worker, meaning they may leave the employment without notice. The law provided a framework of restricted authority to prostitution business operators in favour of the right to sexual self-determination of sex workers. In this sense, the law set forth that operators and managers may not prescribe the choice of clients and type of sexual services performed, and they must ensure that every activity performed by the sex worker is of a voluntary nature.²⁴⁸ The inclusion of sex workers into social insurance schemes gives persons selling sex the possibility to receive pension; to know that should they lose their job, they may receive unemployment benefits; and to have access to retraining programs provided by the Employment Office (*Jobcenter*) in case they want to change their occupation.²⁴⁹

The adoption of the Prostitution Act was accompanied by certain changes in laws concerning sex work in the German Criminal Code (*Strafgesetzbuch, StGB*). The elimination of the penalty for “furthering prostitution” made brothels legal businesses, and it was aimed to improve working conditions since offering safety services at work would not carry the risk of penalization for business operators anymore.²⁵⁰ The penalty prohibiting the exploitation of sex workers and the penalty for ‘pimping’ remained, but the latter has been redefined: the law now clarifies that solely arranging sexual relations does not amount to an offence, unless restraining of the personal and economic liberty of a sex worker takes place.²⁵¹

²⁴⁷ Crofts, „Prostitution law reform in Germany the oldest profession: At last to be treated as a profession?“, 156.

²⁴⁸ Czarnecki et al., “Prostitution in Germany – A Comprehensive Analysis of Complex Challenges.”, 9.

²⁴⁹ Crofts, „Prostitution law reform in Germany the oldest profession: At last to be treated as a profession?“, 157.

²⁵⁰ Hydra e.V., “The German Prostitution Law: An Example of the ‘Legalisation of Sex Work’.”

²⁵¹ Crofts, „Prostitution law reform in Germany the oldest profession: At last to be treated as a profession?“, 157.

The Introductory Act to the Criminal Code (*Einführungsgesetz zum Strafgesetzbuch, EGStGB*) allows federal states in Germany to prohibit prostitution in municipalities of up to 50.000 inhabitants, and in municipalities with more than 50.000 inhabitants, they may impose spatial or temporal restrictions on prostitution activities, prohibiting the selling of sexual services at certain times or in certain areas (called prohibition or exclusion zones – *Sperrgebiete*). Despite the lobbying of sex workers' rights organizations, this law has not been amended during the reform process in 2001.²⁵²

Migrant sex workers from the majority of the European Union member states were given the chance to work either as self-employed or work for an employer. However, sex workers from member states that joined the European Union in 2004 were only allowed the possibility to work as self-employed. Migrant persons from outside the European Union could not obtain a visa for working as a sex worker in Germany.²⁵³

The Prostitution Act disregarded drug-related prostitution; the case of minors engaging in prostitution; and the legal and social situation of immigrants selling sexual services without a valid residence permit.²⁵⁴

4.1.1 Evaluation of the Prostitution Act

The Prostitution Act brought Germany a liberalization of federal prostitution law in 2002. The main intention of the new law was the expanding of the rights of sex workers. With the introduction of the Act, prostitution has been legally redefined as an autonomous decision – therefore protected by the law and no longer deemed immoral. Indeed, one could argue that withholding the legal protection from sex workers that was guaranteed to other occupations was immoral. This reform process strengthened sex workers' human rights to be free from discrimination and to work and free choice of employment. The aims of the new legislation were to emancipate sex workers, to eliminate the origins of crime in the sex industry, and to create exit programmes for sex workers who wish to change their occupation.

²⁵² Hydra e.V., "The German Prostitution Law: An Example of the 'Legalisation of Sex Work'."

²⁵³ TAMPEP, "European Overview of HIV and Sex Work", 29.

²⁵⁴ BMFSFJ, "Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)", 9.

The legal enforceability of contracts between sex workers and clients empowers sex workers and provides them with greater legal power. Despite this measure being more symbolic as sex workers generally demand payment in advance, it still strengthens sex workers' agency in negotiating transactions, as well as their right to be protected by the law. The ability to enter secure contracts of employment may provide a degree of protection for sex workers from exploitation by employers. However, this particular part of the law showed only a limited effect in practice. According to The Professional Association of Erotic and Sexual Services (*Berufsverband erotische und sexuelle Dienstleistungen e.V., BesD*), after the implementation of the law, most sex workers were employed by brothels as freelancers, which provided brothel managements the power to make sex workers agree to the "house rules" if they wanted to work in the establishment, including to offer certain services.²⁵⁵ Brothels remained unregulated under the German trade law, which meant a lack of adapting adequate working and pricing standards that could effectively prevent the exploitation of sex workers.²⁵⁶

With the new law, sex workers gained access to social security insurance systems, which empowers their economic and social standing. This change redressed the imbalance of not being allowed access to these protections despite the obligation to pay taxes. This measure therefore strengthens sex workers' right to be free from discrimination. Access to retraining programs by the Employment Office strengthens sex workers' right to self-determination. However, concerns with educating the staff of the Employment Office, who sometimes denied sex workers support due to ignorance of the law, continued to be an issue.²⁵⁷

Sex workers' right to health has been strengthened with the 2001 enactment of the Infection Protection Act, which removed sex workers' obligation to undergo regular STD exams. Since the elimination of this measure, a greater number of sex workers are visiting health departments under difficult circumstances than before.²⁵⁸ This shows that a voluntary basis is needed to effectively prevent sexually transmitted diseases, and to provide assistance to persons coerced into prostitution. This measure, together with the possibility

²⁵⁵ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.”

²⁵⁶ Hydra e.V., “The German Prostitution Law: An Example of the ‘Legalisation of Sex Work’.”

²⁵⁷ Hydra e.V., “The German Prostitution Law: An Example of the ‘Legalisation of Sex Work’.”

²⁵⁸ Czarnecki et al., “Prostitution in Germany – A Comprehensive Analysis of Complex Challenges.”

promoted by the Prostitution Act to enter employment contracts with health insurance access, greatly strengthens sex workers' right to health.

Prior to the enactment of the Prostitution Act, old legislation was aiming to discourage all people to engage and remain engaged in commercial sex, whether they freely chose this type of work or not. In comparison, the Prostitution Act recognizes that persons may freely choose to sell sexual services, which strengthens their right to free choice of employment. With the elimination of the penalty for "furthering prostitution" and the redefining of pimping, brothel operators and persons providing services to sex workers and improving their work environment are no longer criminalized to do so. Brothels generally have gotten more attractive, hygienic and safer.²⁵⁹ This puts an end to a legal paternalism under which services improving the conditions of sex workers were criminalized, due to the belief that these may incentivize sex workers to remain in the industry.²⁶⁰ This measure thus recognizes sex workers' agency and capability to make their own choices.

The three-level architecture of German administrative federalism gives states and local governments the possibility to adapt and enact a variety of policies concerning prostitution, zoning decrees being the most important regulatory instrument. This resulted in numerous local governments displacing street-based sex work to suburban and industrial areas, following trends of gentrifying city centres. Working in isolated, far-away areas heightens the risk of violence and abuse against sex workers. This measure thus weakens sex workers' right to be free from violence.

Policing remained a problem after the enacting of the law as well, as police has the right to enter sites where sex work occurs at any time of the day, without having to demonstrate probable cause.²⁶¹ This makes sex workers vulnerable to abuses by the police, and fuels a climate of distrust towards the police among sex workers, which hinders their access to justice as it might lead to reluctance to file a report in case they fall victim to a crime. This measure infringes on sex workers' right to privacy and freedom from arbitrary interference, and weakens their right to be protected by the law.

²⁵⁹ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.”

²⁶⁰ Crofts, „Prostitution law reform in Germany the oldest profession: At last to be treated as a profession?“, 155.

²⁶¹ Hydra e.V., “The German Prostitution Law: An Example of the ‘Legalisation of Sex Work’.”

Some discussed reforms, such as the removal of the ban on advertising prostitution, amendment to the law regarding prostitution exclusion zones, and the reform of immigration laws, were not enacted. Sex workers' rights organizations argued that it was incorrect and ineffective to remove the label of immorality from commercial sex, while simultaneously leaving it in a grey area where associated activities keep being treated as immoral. The restrictive measures applied to migrant sex workers were aimed to make sex work unattractive and difficult to access for migrants, under the pretence of protection. This is an infringement on the rights to move and migrate, to be free from discrimination, as well as on the right to free choice of employment. This measure is based on the racist and xenophobic belief that the majority of migrant sex workers are powerless victims of poverty and forced prostitution, which view hinders the promotion of an approach centring on migrant sex workers' human- and labour rights. This is especially concerning since sex work is a vital source of income for many migrants all around the world, as proficient language skills are not needed, and no formal education is expected (nor available).²⁶²

BesD e.V. argued that while the new law generally furthered the rights of sex workers, it remained limited in scope and in practice, as well as too weak in impact, and therefore stayed relatively unknown among sex workers in Germany. They highlighted that destigmatisation of sex work, which has not reached a desirable level since the enactment of the law, should enjoy higher priority and be supported by legal measures for the betterment of sex workers' social, legal and economic standing.²⁶³

The official evaluation of the law took place in 2007 by the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (*BMFSFJ*), which stated that the objectives of the law were not achieved to the level expected and that therefore additional steps were deemed necessary. The evaluation showed that actual, measurable improvements to sex workers' social protection and working conditions have not been reached. Employment contracts in the industry have been used very little in the 5 years since the enactment. The evaluation document argued that in contrast to other trade sectors, the particular risks of the employment in prostitution should be addressed by regulation through legal means. The absence of industry-specific regulations also leads to a lack of basis for

²⁶² Hydra e.V., "The German Prostitution Law: An Example of the 'Legalisation of Sex Work'."

²⁶³ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.”

regulatory oversight, which in turn favours lack of transparency and favours criminal structures within the sex industry. The official evaluation has thus concluded that a more broad-based approach to regulating the sex industry was needed, and that existing legal instruments need to be expanded, as well as used more efficiently.²⁶⁴

4.2 The Prostitute Protection Act (*Prostituiererschutzgesetz*, 2017)

The Prostitute Protection Act has been presented in 2015 by the SPD, and debated in 2016. The bill expresses an agreement between the SPD, the CDU and the CSU. The three parties claimed that passing the bill is needed to end human trafficking for sexual exploitation, as well as violence, exploitation and inhumane conditions in prostitution. They stressed that at the time, it was easier to set up a brothel in Germany than any other business, which they found untenable. According to their argument, to introduce the measure of compulsory registration was needed to provide prostitutes with information about their rights; hence they claimed it to be a tool of protection. They also considered registration as a necessary instrument for preventing that people selling sex remain invisible and thus fall prey easier to traffickers, as well as for the controlling of the sector by the authorities. They stressed that people who want to work as prostitutes must respect the rules.²⁶⁵

Those claiming the need for a new law referred to the failure of the Prostitution Act of 2002, which has been displayed in the 2007 Report by the Federal Government's Report on the Effects of the Prostitution Act. The report highlighted that the positive effects on the working conditions in the sex industry are difficult to measure; that self-employment and employment contracts with social security contributions have been used very little; that alternatives to prostitution have not been created; that transparency of the sector hasn't been improved enough; that crimes committed against prostitutes, as well as trafficking and exploitation, are lacking reliable measure indicators or don't seem to be decreasing at all.²⁶⁶

²⁶⁴ Bundesministerium für Familien, Senioren, Frauen und Jugend (BMFSFJ), "Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)."

²⁶⁵ Bundestag, „Stenografischer Bericht - 173. Sitzung - Berlin, Donnerstag, den 2. Juni 2016.“

²⁶⁶ BMFSFJ, "Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)."

PDS and the Green Party opposed the bill, arguing that it is an expression of sheer control, encompassing a paternalistic and stigmatizing attitude that denies self-determination of people in prostitution. The parties opposing the bill were in favour of regulating prostitution in the area of verification of managers and prostitution establishments, in order to design better working conditions for people selling sexual services. However, they stressed that compulsory registration and health counselling are means of mere repression and control. They claimed that ensuring the anonymity of people in prostitution is indispensable for protecting them from stigma, and that the law would promote unprotected and secret labour. According to them, resolving social issues that produce prostitution should enjoy priority over taking actions against, and controlling prostitution. They claim that the strengthening of the self-determination of prostitutes and the protection of the most vulnerable in the industry should be of highest importance.²⁶⁷

The preliminary discussions of the proposed law included a public hearing and recording of press releases by expert organisations, including associations and counselling centres. Expert organisations expressed a general disagreement with the bill. Among these organisations were the National Coordination Group against Trafficking in Human Beings (*KOK e.V.*), which brings together 38 counselling centres for people in prostitution and victims of human trafficking; *Diakonie Deutschland e.V.*, the social welfare organisation of the Protestant church in Germany; the German Women Lawyers Association (*Deutscher Juristinnenbund e.V.*); *BufaS e.V.*, an alliance of 22 German counselling centres catering for sex workers; and the German AIDS Service Organizations (*Deutsche AIDS-Hilfe*). Sex workers and sex worker-led organisations were not involved in the review process.

The expert organizations generally are in favour of the regulation of sex work facilities, but they are critical of the extent of the rigorous set of requirements which, according to their argument, favours monopoly of large establishments at the expense of smaller facilities, where sex workers usually have more self-determination.²⁶⁸

²⁶⁷ Bundestag, “Stenografischer Bericht - 173. Sitzung - Berlin, Donnerstag, den 2. Juni 2016.”

²⁶⁸ *bufaS e.V.*, “Stellungnahme für die öffentliche Anhörung zum Thema „Regulierung des Prostitutionsgewerbes“ am 06. Juni 2016 im Ausschuss für Familie, Senioren, Frauen und Jugend des Deutschen (Stellungnahme)“; *Diakonie Deutschland*, “Stellungnahme der Diakonie Deutschland – Evangelischer Bundesverband zum Entwurf eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen (ProstSchG-RegE) (Stellungnahme)“; *Deutscher Juristinnenbund e.V.*, “Stellungnahme zum Referentenentwurf des

The expert organizations expressed a general disagreement with the extent and set of obligations that the bill imposes on individuals engaging in sex work. According to them, the bill relies on the control of sex workers in an excessive and unilateral way, especially through the compulsory health counselling and obligatory registration. They expressed concern about the fact that the proposed draft bill focuses on the expansive control of prostitution instead of the welfare of people engaging in selling sex²⁶⁹. They highlighted that the bill does not respect personal freedom, sexual self-determination, health and human rights of sex workers²⁷⁰, and instead criminalizes them and exacerbates their marginalization.²⁷¹ The organizations argued that the bill does not consider enough the stigma that keeps weighing on people in prostitution.²⁷² They pointed out that the reliance on regulatory provisions carries the risk of abuse by police and other authorities when it comes to a subject as socially stigmatised as sex work.²⁷³

During the preliminary discussions, expert organizations thoroughly analysed the law and highlighted the likely negative consequences of its application. They stressed that the law will not be able to meet its own objectives: improving the living and working conditions of sex workers, and identifying and helping victims of trafficking and exploitation. Instead, they argued, it goes into the opposite direction from its stated intentions: it controls, stigmatizes and discriminates against people engaging in selling sex. They warned that the law will disproportionately control and push those persons into illegality that it should support and protect.

The government - despite identifying, involving and consulting with relevant stakeholders (with the exception of sex workers themselves), as well as collecting concrete evidence from them relying on their expertise - has showed unwillingness to change their approach in face of criticism by experts, and has not corrected the bill accordingly.

Bundesministeriums für Familie, Senioren, Frauen und Jugend eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen (Stellungnahme)"

²⁶⁹ Bundesweiter Koordinierungskreis gegen Menschenhandel (KOK) e.V., „Stellungnahme des KOK e.V. zu dem Referentenentwurf des Bundesministeriums für Familie, Senioren, Frauen und Jugend. Entwurf eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen vom 29.07.2015. (Stellungnahme)"

²⁷⁰ bufaS e.V., "Stellungnahme"

²⁷¹ Diakonie Deutschland, "Stellungnahme"

²⁷² bufaS e.V., "Stellungnahme"; Diakonie Deutschland, "Stellungnahme"

²⁷³ Deutscher Juristinnenbund e.V., "Stellungnahme "

4.2.2 The law

The Prostitute Protection Act (*Prostituiererschutzgesetz*), titled as the ‘*Law on the Regulation of Prostitution and the Protection of People Employed in Prostitution*’, was adopted in 2016 and came into effect in 2017, supplementing the Prostitution Act of 2002. Similarly to the Prostitution Act, it is a federal law and valid for the whole country, while allowing the federal states to impose their own restrictions on taxation and trade law.²⁷⁴

The law is divided into 8 sections, which consist of 38 paragraphs in total. It includes a series of duties and obligations concerning the detailed regulation of prostitution, as well as a series of rights intended to protect people engaging in selling sexual services. Article 1 lays out general provisions and definitions. It defines a sexual act as an act of a sexual nature that is committed by at least two persons, both present and participating. A prostitute is defined as a person providing sexual services in exchange for money. A prostitution enterprise is a company offering various services to at least one, or more, prostitutes.²⁷⁵

In order to sell sexual services, either self-employed or employed by an enterprise, one must register as a prostitute with the competent authorities. The registration is possible only if all the requirements are fulfilled, such as obtainment of certificate about medical consultation, age of majority, work permit for foreign citizens, absence of pregnancy and absence of exploitation. The registration must be periodically renewed. The registration process includes an interview and informational counselling regarding the law, taxation, social security and consulting services, as well as activation of help in case exploitation is discovered. The registration certificates are valid only in a specified territory, and they always have to be carried by the sex workers during their work.²⁷⁶

Section 3 discusses the requirements and rules for management of commercial sex. Prostitution managers must obtain a license, reviewed periodically, and similarly to the registration as a prostitute, managers must be of adult age, as well as having a clean criminal record during the 5 years prior to the application. The license may be withdrawn if its owner

²⁷⁴ Bundesgesetzblatt, „Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen“

²⁷⁵ Bundesgesetzblatt, „Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen“, section 1.2.

²⁷⁶ Bundesgesetzblatt, „Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen“, section 2.

receives a criminal conviction, or if they don't respect the sexual self-determination of prostitutes, and exploit them.²⁷⁷

The law also specifies the essential requirements for places where prostitution activity is to be carried out, with the aim of protecting prostitutes, customers, as well as the public interest. Brothels have the responsibility to enforce the obligation to use condoms. Pregnant people and people not registered as prostitutes may not be employed. A copy of registration for every person selling sex in the establishment must be kept at the brothel, preventing access to the certificates by third parties.²⁷⁸

The law prevents brothel owners and managers to have a say in the designing of sexual services offered at their enterprise, as that is the responsibility solely of the people directly involved in the service. Agreements between managers and prostitutes must be in writing, and payments between them must be trackable. The law also specifies how to collect and transmit data, and the possibility of addition of supplements to the law with ordinances regarding health protection, compliance with obligatory registration, and minimum requirements for circumstances of prostitution activities. Finally, the law sets out its evaluation from 2022.²⁷⁹

4.2.3 Analysis of individual paragraphs

§ 1 and § 2: General provisions

The law applies to all forms of erotic and sexual services, where clients are present in person and money is being exchanged for the service. This means that beside street-based and brothel-based sex work, tantra services, escorting, erotic massage as well as BDSM are defined as prostitution in the bill. The law does not differentiate between regular or occasional, full time or part time service providers.

²⁷⁷ Bundesgesetzblatt, „Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen“, section 3.12-15.

²⁷⁸ Bundesgesetzblatt. 2016. „Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen“, section 3.16-23.

²⁷⁹ Bundesgesetzblatt. 2016. „Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen“, section 4-7.

Persons who operate a venue where prostitution takes place (e.g. a brothel, tantra- or BDSM studio), organise and carry out prostitution events, or run a prostitution agency (e.g. an escort agency) are considered as “operating a prostitution business”. When two sex workers work together in an apartment, it is also considered as operating a prostitution business according to the law.

§ 3 to § 6: Mandatory registration for sex workers

Anyone who plans to sell sexual services must personally register with the competent authorities before taking up prostitution. The registration must be renewed annually if the person is between 18 and 21 years of age, or once in every two years if the person is above 21 years of age. During the registration process, full name (as on passport or ID card), place and date of birth, nationality, officially registered address and intended work locations will be registered. Two passport photos must be provided as well. Foreign-born persons must have a valid work permit for self-employment in Germany.

It takes five business days to receive the registration certificate including a photo ID, provided that all necessary documents have been submitted and coercion hasn't been detected during the registration interview. After that, registered persons are eligible to work anywhere in Germany, except if contradictory local regulations at the federal state level are present. If sex workers decide to take up work in a community that is not specified on their registration certificate, they must contact the competent authorities and register their activity beforehand. Sex workers must always carry their photo ID during work. There is the possibility to acquire an alternative photo ID featuring an alias name instead of the real name; however, this version also includes a photograph.

Deutscher Juristinnenbund e.V. argues that the obligatory registration infringes on the rights to sexual and informational self-determination, since it records personal data in relation to a person's sexual life. They further state that the authorities' possibility of denial of registration amounts to an infringement on the freedom of vocational choice, which is protected by §12 of the German Constitution (*Grundgesetz*).²⁸⁰

²⁸⁰ Deutscher Juristinnenbund e.V., “Stellungnahme”

Carrying a registration ID with a photograph – whether under a real- or alias name – effectively reveals the person being a sex worker. In case a registration ID gets lost or stolen, it could be used to blackmail sex workers due to the sensitive data it includes. This encompasses a high level of risk to be outed against one’s will, which can lead to public stigmatization; losing one’s “daytime” job; eviction by landlords; being ostracized by friends, family and partners.²⁸¹ This is a serious infringement on fundamental rights which permanently impairs the individual security of sex workers, especially of those most vulnerable persons in the industry that the law ostensibly aims to protect.

KOK e.V. highlights that migrant persons, once registered as sex workers in Germany, are prone to facing repression back home if sex work is illegal in their country of origin. This is due to the fact that data exchanges between German authorities and authorities in countries of origin might take place, and data thefts might also occur. The registration certificate thus gives potential leverage to third parties, making sex workers highly vulnerable to blackmail.²⁸² Migrant sex workers fear for their families in their home countries to get in trouble with local authorities in case they are revealed to be sex workers.²⁸³

Deutscher Juristinnenbund e.V. states that the central theme of the law is the denial of autonomy and self-determination of people selling sexual services, hidden behind the façade of protecting victims of commercial sexual exploitation and human trafficking.²⁸⁴ BesD e.V. claims that such disproportionate requirements render many self-employed sex workers into illegality, who will choose to evade registration and thus violate trade laws.²⁸⁵ Deutscher Juristinnenbund e.V. argues that this concerns “on the one hand individuals who only occasionally engage in sex work, but above all, it will concern prostitutes that do not want or cannot risk a registration with the authorities because of their specific vulnerability in their social environment, their working conditions or locations, drug addiction, lack of

²⁸¹ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.”

²⁸² KOK e.V., „Stellungnahme”

²⁸³ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.”

²⁸⁴ Deutscher Juristinnenbund e.V., “Stellungnahme”

²⁸⁵ Herter and Fem, „Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act.”, 7.

resident status, negative experiences with government institutions and the like.”²⁸⁶ This vulnerable group also includes trans persons and persons who have experienced racism.²⁸⁷

The Federal Association of Doctors in Public Health Service (*Bundesverband der Ärztinnen und Ärzte des öffentlichen Gesundheitsdienstes, BVÖGD*) and head officials of 22 health departments in Germany stress that many sex workers, especially those in precarious living circumstances and/or with a migrant background, will not be able to comply with the extensive regulations, which pushes them into illegality and exacerbates their vulnerability.²⁸⁸ For many sex workers, it’s simply not possible to provide all the necessary documents. Migrant sex workers without residence or work permits will not be able to register themselves as sex workers; hence it is specially the mandatory registration measure that forces them further into illegality. Deutsche AIDS-Hilfe states that the law will push the most stigmatised and vulnerable groups of sex workers into isolated and riskier areas of work, which drastically heighten the risk of falling victims to violence outside of established and legal venues of sex work. Sex workers who don’t have a registration certificate won’t risk criminalizing themselves by alerting the police when they experience violence, harassment and exploitation, and they will tend to stay out of reach of social and healthcare services, as well as risk prevention measures.²⁸⁹ Experience shows that perpetrators who pose as clients mostly prefer to frequent these isolated and uncontrolled working areas.²⁹⁰

§7 to §9: Mandatory counselling interview

The registration process includes a mandatory counselling interview. The conversation is to be conducted in confidentiality. The aim of the session is to ascertain if sex work is taken up voluntarily, as well as to inform sex workers about their legal rights and

²⁸⁶ Deutscher Juristinnenbund e.V., “Stellungnahme”

²⁸⁷ Herter and Fem, „Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act.”, 8.

²⁸⁸ Bundesverband der Ärztinnen und Ärzte des öffentlichen Gesundheitsdienstes (BVÖGD), „Stellungnahme zum Referentenentwurf des BMFSFJ. Entwurf eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen. (Stellungnahme)“

²⁸⁹ Deutsche AIDS-Hilfe e.V., „Stellungnahme zum Entwurf eines, Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen‘ (Prostituiertenschutzgesetz, ProstSchG) des Bundesministeriums für Familie, Senioren, Frauen und Jugend. (Stellungnahme)“

²⁹⁰ Herter and Fem, „Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act.”, 8.

obligations, social and health services, taxation obligations, and available help services in case of emergency. The authority conducting the registration must provide information in a language that is spoken by the person willing to take up sex work, however, provision of language interpreters and translators is not explicitly expressed in the text of the law. Instead, it leaves up to the local registration authority that they “may follow the usual practice”. Third parties are allowed to be present during the conversation, as long as both the authority and the sex worker approves of it.

If in the counselling interview, “factual evidence” is discovered about the person being coerced into sex work by third parties or by absence of alternatives, the competent authority is mandated to take immediate measures to protect the individual. Such measures may include transfer of information to other authorities and public bodies, such as the police, youth welfare offices, shelters, psychosocial- or counselling services.

Expert organizations point out that the precondition to a successful counselling and disclosure of eventual adversity is a relationship of trust between counsellor and counselled; and trust is based on voluntariness and a pledge that personal data won’t be recorded and shared with third parties. Deutsche AIDS-Hilfe argues that mandatory counselling sessions are not only inadequate to reach the aim of the law, they are also counterproductive, as they replace already existing and effective counselling services.²⁹¹

KOK e.V. highlights that victims of human trafficking for sexual exploitation only reveal their situation after a longer time, if ever, and that one interview is insufficient to identify individuals affected by human trafficking even for trained experts. They further claim that in cases of human trafficking, providing evidence about coercion is often difficult or even impossible for the victims.²⁹² Trafficked persons may have to get registered under the pressure of traffickers without revealing themselves to the public authorities. If they cannot or didn’t get registered, they might avoid seeking help as they fear to get penalized for working unregistered, without paying taxes. They may lack appropriate visa and/ or work permit and fear deportation to their home countries.²⁹³ KOK e.V. argues that according to studies, most trafficked people indeed wanted to leave their home countries in the first place and were taken advantage of by third parties agreeing to help them move to Germany

²⁹¹ Deutsche AIDS-Hilfe e.V., „Stellungnahme“

²⁹² KOK e.V., „Stellungnahme“

²⁹³ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

to find work.²⁹⁴ Therefore, many victims of trafficking seek an improvement to their situation in Germany and simply deporting them will not help or empower them.

One of the articulated aims of the counselling interview is to provide sex workers with knowledge about their rights and duties, however, reports to counselling centres show that non-German speaking sex workers often receive significantly less information during the counselling. This is the outcome of the vague wording and a lack of budgeting in the law regarding provision of language interpreters, who are often present during the session only via video or phone.²⁹⁵ Dona Carmen e.V. draws attention to the fact that there are federal states that require migrant sex workers to pay the costs for language interpretation themselves. Some other states, that do provide free language interpretation to migrant sex workers, use solely video interpreters, with the argument that counselling sessions with in person-interpretation would take too long and cost too much.²⁹⁶ This reveals the glaring hypocrisy of the "protective character" of the law.

Tax authorities are generally notified about every new sex worker registration. If they detect any supposed evidence of coercion, they can transfer data to third parties without the consent of the person in question. The extent of potential data transfers cannot be predicted due to the vague wording of the law, which results in uncertainty regarding data protection.²⁹⁷

§ 10: Mandatory health counselling

People who plan on taking up sex work must attend a mandatory health counselling session, prior to the registration procedure. Promoters of the law originally wanted to implement obligatory regular health tests to sex workers²⁹⁸, but this is illegal in Germany

²⁹⁴ KOK e.V., „Stellungnahme“

²⁹⁵ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

²⁹⁶ Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen.“

²⁹⁷ Herter and Fem, „Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act.“, 10.

²⁹⁸ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

ever since the 2001 enactment of the Infection Protection Act, therefore it has been changed to a mandatory regular health counselling session.

Confirmation about the health counselling has to be presented at the registration, and must be carried during work at all times, just like the registration certificate. Participation at the health counselling is a periodically recurring obligation: sex workers above 21 years of age must attend every year, and sex workers between 18 and 21 years of age must attend every six months. The counselling session aims to provide persons planning to provide sexual services with information about contraception, pregnancy, preventative healthcare, risks of drug and alcohol use; and with a confidential framework to disclose eventual coercion or hardship.

Deutsche AIDS-Hilfe and the German STI-Society for the Promotion of Sexual Health (*Deutsche STI-Gesellschaft zur Förderung der Sexuellen Gesundheit, DSTIG*) argue that this measure ignores and abolishes two long-standing principles in AIDS/ STD prevention: anonymity and voluntariness of health counselling sessions. These principles are also promoted by §19 of the Infection Protection Act (*Infektionsschutzgesetz*). The law excludes one of the most vulnerable groups from anonymous access to health advice. The organizations state that this repressive measure degenerates counselling for sex workers into a formality, and thus seriously jeopardises AIDS/ STD prevention among sex workers.²⁹⁹

BVÖGD highlights that the introduction of voluntary, low-threshold and anonymous health services provides best access to populations that are hard to reach, like sex workers. They argue that the public health sector has explicitly abolished controlling measures based on their experiences working with vulnerable groups of people. They fear that forcing mandatory health counselling on sex workers will deter them from using already well-established and frequently used voluntary counselling and support services. When recording of name takes place in a health counselling environment, it jeopardises the trust of stigmatized individuals seeking medical assistance. This can further lead to unregistered sex workers (especially migrant, trans, adolescent and coerced sex workers) distrusting social services and health departments, and thus losing their often only access to medical care.³⁰⁰

BesD e.V. argues that obligatory appointments with a public authority do not provide the proper setting for the most vulnerable, exploited and potentially strongly traumatized

²⁹⁹ Deutsche AIDS-Hilfe e.V., „Stellungnahme“

³⁰⁰ BVÖGD, „Stellungnahme“

people to open up. Besides, mandatory counselling by office staff who are not sex workers themselves can become humiliating and patronizing – suggesting that sex workers are unable to care for their own health, or incapable of seeking medical help if they have health problems.³⁰¹ Dona Carmen e.V. notes that in fact, the qualification of the staff for the health counselling is usually not even medical and therefore strongly questionable. They highlight that in the city of Marburg, for example, health counselling for sex workers is provided by people who are also responsible for the social psychiatric service for mentally ill people, which not only jeopardises the reliability and professionalism of the provided health advice, it is also deeply stigmatizing.³⁰²

§ 11: Administrative orders to sex workers

Sex workers without a registration certificate or certificate of health counselling can be sanctioned with a fine up to a thousand euros.

Local authorities are mandated to issue orders and take measures that restrict the practice of sex work, in case those serve the protection of clients or children of sex workers, or nearby residents, e.g. from noise disturbance and behavioural disturbances. This provision gives authorities the possibility to tackle any issue that might be related to prostitution with measures they deem appropriate, even with completely prohibiting individuals to engage in sex work or run a prostitution business.

Deutscher Juristinnenbund e.V. argues that such vague and broad definition of possible disturbances infringes on sex workers' constitutional freedom of vocational choice (Article 12 paragraph 1 of the German Constitution). They highlight the risk of third parties claiming they feel disturbed by the mere existence of prostitution, and that prejudices against sex work are thus “written into law and converted into intervention powers that represent a free pass for the suppression of any visible prostitution”, which can particularly affect street-based sex workers.³⁰³

³⁰¹ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.”

³⁰² Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen.”, 10.

³⁰³ Deutscher Juristinnenbund e.V., “Stellungnahme”

§ 12 to § 28: Licensing requirements for prostitution businesses

Persons who want to operate a prostitution business are required to attain a licence by the competent authorities. Due to the definition outlined in the law, as few as two sex workers working together amounts to a prostitution business.

For the application, a business concept has to be submitted, and a variety of requirements must be met. The duration of the validity of the license may be limited. If the respective authority deems that the location or the concept of the business is running against public interest, they can deny the licence. Rejection of licence application can also occur if the applicant doesn't meet the reliability criteria, which is determined and regularly reviewed based on statement by the police and certificate of good conduct. Authorities may also limit the licence regarding business hours, number of employed sex workers and number of rooms where sexual services take place.

Regarding indoor prostitution, e.g. brothels, spaces of suitable size must be guaranteed. The rooms where sexual activities take place must have access to sunlight, but are forbidden to be visible from the outside. An emergency call system must be implemented in every room where prostitution takes place, and the doors must be easily opened from the inside. Separate toilets for customers and the people selling sexual services, as well as meeting and resting areas (including private deposits to store personal belongings) for prostitutes must be provided. The law prohibits that sex workers work and live/ sleep in the same room, although authorities may grant permission in exceptional cases, when the prostitution business takes place in an apartment. Brothels have the responsibility to enforce the obligation to use condoms, to provide lubricants and other hygiene products, and to enable access of healthcare advisors to prostitutes.

Requirements for prostitution events include the compilation of an event concept, encompassing a wide range of documents such as registration certificates of every sex worker participating at the event, and copies of agreements between organisers and sex workers. Only registered sex workers may be employed, and their safety and health must be ensured by the organiser. Daily records, as well as working days and all payments to sex workers must be documented and stored for a minimum of two years.

As mentioned before, sex work venues, events and agencies that employ more than one person, e.g. two sex workers working together in the same place, are classified as

prostitution businesses by the law. Hydra e.V., a meeting and counselling center for sex workers in Berlin, argues that this measure disproportionately favours big businesses at the expense of small and medium size venues, which may not have the resources to comply with the extensive set of licensing requirements, and are thus forced into illegality or out of business.³⁰⁴ Deutscher Juristinnenbund notes that businesses that operate illegally will be more difficult to monitor.³⁰⁵ DSTIG highlights that small and medium-size businesses, whose legal operation the new law renders nearly impossible, are often run and organised by sex workers themselves, which offers them a higher level of self-determination, security and independence, as well as a comfortable and familiar working environment.³⁰⁶

Due to sex work being considered a trade, building laws permit prostitution businesses as entertainment establishments only in commercial and industrial areas. However, BesD e.V. notes that most prostitution businesses are located in residential areas, since apartments have a more fitting infrastructure to this type of work than commercial facilities.³⁰⁷ In densely populated cities, housing is often expensive and difficult to find, therefore working and sleeping in the same room is the only financially feasible accommodation for many sex workers. The prohibition of working and living in the same place puts these sex workers at risk of homelessness.³⁰⁸

Due to the obligation of prostitution business operators to employ only registered sex workers, persons selling sexual services without a registration certificate will barely be able to find a safe working environment, and will resort to working in isolated apartments. While brothels are rather secure places to work – with security staff or another sex worker on the spot to intervene – working alone in a flat lacks this safety. BesD e.V. reveals that since the introduction of the new law, a growing number of sex workers report about increased physical and sexual violence, stalking, and clients who refuse to pay on the basis that unregistered sex workers will not turn to the police and criminalize themselves.³⁰⁹ KOK

³⁰⁴ BuFaS e.V., „Stellungnahme“

³⁰⁵ Deutscher Juristinnenbund e.V., „Stellungnahme“

³⁰⁶ Deutsche STI-Gesellschaft (DSTIG), „Stellungnahme der DSTIG zum Referentenentwurf des Bundesministeriums für Familie, Senioren, Frauen und Jugend eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen. (Stellungnahme)“

³⁰⁷ BesD e.V., „Stellungnahme“

³⁰⁸ Herter and Fem, „Review of Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act.“, 15.

³⁰⁹ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

e.V. predicts that this will result in the most vulnerable sex workers, who cannot or will not register, being pushed to work in isolation, lacking peer-education and exchange with colleagues, and falling out of reach of helping and counselling services.³¹⁰

Dona Carmen e.V. argues that sex work businesses' inability to comply with the requirements of the new law, as well as with zoning laws and building regulations, results in the destruction of many prostitution businesses, and with it, a severe reduction in the number and diversity of places where selling of sexual services is safer and more secure.³¹¹

§ 29 to § 31: Monitoring of prostitution businesses

Designated authorities have a mandate to inspect and examine facilities where selling of sexual services takes place, and they are authorised to conduct identity checks in prostitution venues during business hours. Operators of prostitution businesses have an obligation to provide all necessary information to authorities that conduct monitoring of business operations. Outside of business hours, authorities may also access these facilities, if they deem it's necessary to do so for the sake of public order and security. Facilities that are simultaneously used as working and residential rooms may also be accessed during- and outside of business hours. This is an infringement on the constitutional right of inviolability of the home, which is protected by the German constitution (Article 13 paragraph 1). The law also admits this right violation, but claims that persons affected must tolerate this measure. Authorities are mandated to take the same measure in cases when they assume a prostitution business without license is set up somewhere, including a sex worker using an unlicensed apartment for work.

Dona Carmen e.V. draws attention to the role of the police in implementing the law, which they claim is an indication of the continuing discriminatory special treatment of sex work and the prostitution trade. Despite the fact that prostitution businesses are no longer considered room rentals but trade facilities, their control is not the responsibility of the trade supervisory authority, but in many cases of the police or the police in consultation with other control authorities (customs, public order office, etc.). As discussed before, the police

³¹⁰ KOK e.V., „Herausforderungen des Datenschutzes in der Politik gegen Menschenhandel.“

³¹¹ Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 31.

play a major role in checking the reliability of prostitution business operators. Not only, but the checks to enforce the law are also placed in the hands of the police in almost every federal state. Dona Carmen e.V. concludes that the police remained to be the central intervention force vis-à-vis the commercial sex industry.³¹²

In conclusion, the extensive monitoring power of the authorities, granted by the law, can adversely affect sex workers who work alone in their homes. This amounts to a violation of the constitutional right to the inviolability of one's home. This is all in the absence of evidence proving that raids and identity checks increase the detection rate of crimes related to human trafficking. ICRSE highlights that proceedings in cases of human trafficking are predominantly initiated by third parties and affected individuals themselves, and rarely do they originate from random police raids and checks.³¹³

§ 32 to § 33: Prohibitions and fines

The law introduces an obligation to use condoms for sexual services, including oral sex. Failure to comply with this obligation results in fines for clients, but not for sex workers. Advertisement of sexual services without a condom is prohibited.

Failure to comply with the regulations put forth by the law amounts to an administrative offence, which is to be punished with a fine. Persons selling sexual services without a registration may be fined up to 1000 euros; persons operating an unlicensed prostitution venue – including, again, two sex workers who share a rented apartment for work – may be fined up to 10.000 euros; clients failing to comply with obligatory condom use may be fined up to 50.000 euros.

Deutsche AIDS-Hilfe is very critical regarding the measure of obligatory condom use, arguing that it goes against the principle that preventative work should be based on education and individual responsibility: an approach that has so far shown high success rates in Germany. They further highlight that not only is the condom obligation impossible to

³¹² Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 5.

³¹³ Bundeskriminalamt, „Menschenhandel Bundeslagebild 2015 (korrigierte Fassung).“

police, it also pushes sex workers who offer unprotected sex to clients into illegal and isolated areas, where they are more vulnerable to abuse.³¹⁴

BesD e.V. criticizes the measure of mandatory condom use, stating that the illegality of the act may motivate clients to offer more money for unprotected sex. This in turn can incentivize sex workers who are under financial or exploitative pressure to engage in unsafe practices.³¹⁵

DSTIG notes that the obligatory condom use regulation may give persons selling sex a false illusion of safety from STDs, which is dangerous since it may prevent them from protecting themselves from the many STDs that can be transmitted in spite of using condoms (e.g. gonorrhoea, chlamydia, syphilis or HPV).³¹⁶

§ 34: Personal data

Data recorded during the registration of a sex worker must be deleted no longer than three months following the expiration date of the registration certificate. The registration authority has a mandate to remind other authorities who received the data of their obligation to delete it. The sharing of sex workers' personal data with private parties is prohibited. In case of scientific and statistical purposes, personal data of sex workers may be shared with private parties only anonymised or pseudonymised. Public institutions may use personal data of sex workers solely for the monitoring of prostitution businesses or prostitution activities. The content of the registration is immediately forwarded to the tax authorities.

The law amounts to a violation of the 1995 European Parliament directive on the "protection of individuals with regard to the processing of personal data", which prohibits recording and registering information about the sexual life of a person.³¹⁷ DSTIG argues the law neglects the fact that providing absolute data protection is impossible, in particular since certain articles leave room for transmission of personal data to third parties. This poses a

³¹⁴ Deutsche AIDS-Hilfe e.V., „Stellungnahme“

³¹⁵ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

³¹⁶ DSTIG, „Stellungnahme“

³¹⁷ Herter and Fem, „Review of Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act“, 18.

high risk of outing on sex workers, who as a consequence may be stigmatised and have to face dangerous consequences.³¹⁸ Furthermore, the law does not specify when personal data will be deleted in cases of detection of a human trafficking case during the registration interview.³¹⁹ Authors of the study *“Technology for and against digital sovereignty”* highlight that with recent developments in digital face recognition technologies, alias certificates of sex workers can easily be de-anonymised, which poses a high risk on the affected persons.³²⁰

Tax authorities, that automatically receive the registration information of a sex worker as soon as their registration process is completed, send letters by post to sex workers who have an already existing tax number under another occupational title, asking if their occupational title may be changed to “prostitute”. Such letters constitute another source of risk of being outed as a sex worker against one’s will.³²¹

Since the implementation of the new law, several federal states outsourced their comprehensive control authority over prostitution to private actors, due to cost cutting reasons. Dona Carmen e.V. draws attention to the fact that this is highly irresponsible from a data protection point of view, and it reinforces the fundamental fears of a loophole in data protection which the law as such already triggers.³²²

Fears and uncertainty regarding data security are motivating sex workers to switch from previously working legally, to working illegalized and underground, where they are more prone to fall victim to violence, harassment and abuse.³²³

4.2.4 Further human rights implications of the Prostitution Protection Act

Thanks to the three-level structure of the administrative federalism in Germany, local implementation of the same law, including legal ordinances and regulations at the level of federal states and local statutes, are by no means identical. Federal states set their own

³¹⁸ DSTIG, „Stellungnahme“

³¹⁹ Herter and Fem, „Review of Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act”, 19.

³²⁰ Kleinz, „33C3: Wissenschaftler fordern Maßnahmen für Datenschutz.“

³²¹ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

³²² Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 12.

³²³ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

state-specific priorities, and thus have their own particularities. This gives them leeway to enact policies that are not in line with, or even counterproductive to the national legislation.

Prostitution business operators are placed under extreme scrutiny in several federal states. In Nordrhein-Westfalen, for example, data on operators of prostitution businesses are stored in the electronic monitoring system of the police. In Baden-Württemberg, for the exclusion of reliability of prostitution business operators, not only convictions within the last 5 years are decisive: it is sufficient to have "information from police authorities that has not led to sanctions".³²⁴

In five federal states, sex workers must pay a fee for the mandatory registration (between 15-100 Euros).³²⁵ For precarious sex workers, this can make the registration impossible before starting with sex work, which forces them to take up work illegally, with all its implied risks.

In eight federal states, mandatory registration and health counselling of sex workers takes place centrally. Dona Carmen e.V. argues that the reason behind centralising the registration process is to optimize surveillance through the registration of sex workers in software systems that are shared among authorities. They highlight that in some federal states where obligatory registration and health counselling are centralized, contents of the registration interview and health counselling may be exchanged between the two offices, breaching the confidentiality of both conversations. Meanwhile, the same concept of confidentiality has been abused to exclude third parties from the sessions, and thus deprive sex workers of the universally applicable right to be accompanied by legal counsel.³²⁶

Dona Carmen e.V. also draws attention to the fact that within the privatisation of the obligatory counselling of sex workers, the mandate of the Prostitution Protection Act regarding "neutral" counselling is not fulfilled on the local level in certain places. For example, in the town of Gießen, the counselling interview is outsourced to an organisation called Women's rights are human rights (*Frauenrecht ist Menschenrecht, FiM*), which is an

³²⁴ Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 5.

³²⁵ Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 7.

³²⁶ Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 9-10.

organisation of Christian opponents of sex work, that “work towards protecting people - especially women - from venality and degradation”.³²⁷

Maintenance of prostitution exclusion zones fuels the financial exploitation, as well as police harassment of sex workers. Police officers who catch sex workers getting in contact with clients within prostitution exclusion zones hand out fines to sex workers. In order to be able to pay such fines, sex workers most of the time have no choice but to keep working on the streets. This in turn may lead to being caught and fined again, or having to go to prison for an equivalent period of time.³²⁸

4.3 Conclusion

Prior to 2002, sex work in Germany was in a legal grey zone: it wasn't illegal, but it remained unrecognized as work by the law, due to being considered immoral and harmful to the common good. With the adoption of the Prostitution Act in 2002, aiming to empower sex workers, the label of immorality was removed from prostitution, which previously rendered contracts in commercial sex legally void. This liberalization of the sex industry thus provided sex workers greater legal power and access to employment contracts subject to social security schemes and health insurance. Organizing and operating prostitution businesses have also been redefined in a way that aimed to improve working conditions in the sex industry.

The official evaluation of the Prostitution Act in 2007 revealed that the objectives of the law have not been achieved to the awaited degree, thus the government decided that additional steps in legislation were necessary, with a focus on the need to implement industry-specific regulations. Sex workers' rights organizations agreed that the law remained limited in its implementation. The outcome of the drafting process was the Prostitution Protection Act, which has been adopted in 2016, despite extensive criticism from civil society expert organizations. Its main innovations include the mandatory registration of sex workers,

³²⁷ Doña Carmen e.V., „Ein Jahr Prostituiertenschutzgesetz: Die Umsetzung des Gesetzes und seine Folgen“, 14.

³²⁸ BesD e.V., „Written submission on the general discussion on trafficking in women and girls in the context of global migration.“

and an extensive set of rules and requirements for operating prostitution businesses. Sex workers' organizations were absent from the legislative process.

As discussed in Chapter 2.1.2, special regulations on the sex industry have a discriminatory nature. They perpetuate stigma against sex workers, disempower them in asserting their rights, and push those who cannot or will not fulfil the requirements into working illegally. The International Committee on the Rights of Sex Workers in Europe (ICRSE) argue that the destigmatisation of sex work is a particularly important human rights objective which the Prostitution Protection Act does not nearly satisfy. They maintain that despite the law pretending to provide protection for persons working in the commercial sex industry, in reality it grants authorities extensive means of controlling sex workers, and it drastically undermines many of their fundamental rights.³²⁹

In Germany, since the enactment of the Prostitution Protection Act, pregnant persons, migrants without a work permit, persons without documents, and persons who cannot afford registration and interpretation fees, are excluded from the possibility of selling sexual services legally.

The enactment of the law also illegalizes the work of persons who decide against fulfilling the obligatory registration and other requirements. As argued, such a decision can have several legitimate reasons, including fearing being outed as a sex worker for unreliable data security measures applied by the authorities; fearing being outed and blackmailed by criminals posing as clients who may get their hands on sex workers' photo ID; deciding to work in prostitution exclusion zones out of the preference not to work in unsafe isolation and/or far from home; deciding to offer prohibited practices e.g. sex without a condom due to financial pressure; not wanting to be controlled by the police at any time of the day in one's home; deciding to work in an apartment with other sex worker(s) for safety reasons, without being able to fulfil requirements of licensing the venue as a 'prostitution business'; being able to afford only one rental which then must be used both for living and for working purposes; deciding against participating in often patronizing and humiliating mandatory health counselling sessions; fearing being deported if coercion is detected during the registration interview; fearing the stigma of drug addiction; having experienced previous discrimination and mistreatment at the hands of authorities and medical professionals.

³²⁹ Herter and Fem, „Review of Professed Protection, Pointless Provisions– Overview of the German Prostitutes Protection Act.“, 7.

On the other hand, sex workers who decide to go through the mandatory registration process and compliance with the requirements, must endure discriminatory treatment by the authorities; risk of data breach and outing; risk of random police raids of one's home and frequent police controls; decreased self-determination regarding choosing work practices and -environment according one's own needs and preferences.

The Prostitution Protection Act thus exacerbates the marginalization of the most precarious and vulnerable sex workers. Non-compliance with the law and ensuing illegal status pushes sex workers into exploitative working conditions; isolated working areas and lack of peer support, social- and health services; high vulnerability to violence, abuse and harassment at the hands of police and clients; lack of access to justice and protection by the law.

The law and its implications infringe on the rights of all sex workers to sexual and informational self-determination; the right to be free from discrimination; the right to work and free choice of employment; the right to privacy; the right to the highest attainable standard of health; the right to move and migrate; the right to be free from violence; the right to be protected by the law. The effect of the law is not the protection of the rights of sex workers, but tight control and containment of the commercial sex industry.

Sex workers' rights organizations argue that for the betterment of sex workers' legal, economic and social standing in Germany, a critical approach to racism is indispensable. Migrants must be granted the right to stay and equal working rights as natives. Besides a decriminalisation of the commercial sex industry, and with it the abolishment of restricted areas and particularly stigmatising restrictions for sex workers, state-supported, society-wide anti-stigmatization work should be at the centre. Its tasks would be, among other things, to augment the perspectives and voices of (migrant) sex workers in the public and political arena, and to provide competent counselling and support for them by organisations with an intersectional understanding of marginalization. The adoption of an explicitly political approach is needed, which attempts to make the lives of a wide variety of sex workers more visible, liveable and mobile, and to reduce their exploitation. So that those who choose to

engage in this work are not disadvantaged for it, and those who want to change their occupation can do so more easily.³³⁰

³³⁰ Macioti, „Liberal zu sein reicht nicht aus. Eine progressive Prostitutionspolitik muss das «Hurenstigma» ebenso bekämpfen wie die Kriminalisierung von Sexarbeit.“

CONCLUSION

With this thesis, I aimed to answer the following research question: What are the implications of the legalization of sex work in Germany on the human rights of sex workers? I demonstrated that the legalization of sex work in Germany fails its aim to protect, and is a cause of violations of sex workers' human rights. To explore this argument, I have presented the framing of sex workers' rights as human rights by the global sex workers' rights movement and the institutionalization of this framing by international human rights bodies; the implications of the legal status of sex work on the human rights of sex workers; and the impact of sex work legalization on the human rights of sex workers in Germany.

In the first chapter, I showed that despite being one of the most marginalized and stigmatized communities worldwide, and in face of being routinely denied the enjoyment of their human rights, sex workers' rights organizations have been relentlessly advocating that legal protections embedded in international human rights treaties and conventions apply to sex workers just as much as to any other human beings. With its groundwork laid by queer resistance in the 1960s, and from the 1970s onwards, a global and highly intersectional sex workers' rights movement emerged, representing the shared demands of sex workers across different genders, races, sexualities and nationalities: that sex work is work; that legal oppression and criminalization of sex work must be eliminated; and that self-determination and organization of sex workers must be supported. By highlighting that prostitution is not an issue of morality or public order but of a marginalized community being denied their fundamental rights, the global sex workers' rights movement linked their discourse of resistance to the international system of human rights and state accountability, counting on the authoritative weight of the international justice system in hope that it would prevent the ignoring of rights abuses against sex workers by the international community any longer.

The argumentation of the sex workers' rights movement in support of their human rights framing is five-fold. First, they stress that sex work is not a form of deviance, but of labour and income-generating activity, which locates people selling sexual services as working people deserving protection of their labour rights and right to free choice of employment. Second, they reject whorephobia, the social fear and hatred of sex workers, which dehumanizes people in the sex industry, renders them unworthy of concern, and denies them protection from abuse that is available to others. They argue that the precursor

of whorephobia, the whore stigma, is the main reason that sex workers are being routinely discriminated against and deemed unworthy of protection by state actors such as the justice system, the police and healthcare workers, thus it constitutes one of the main obstacles of realizing the rights of sex workers. Therefore, sex workers' rights advocates demand the destigmatization of sex work and insist that the "whore" is a rights-bearer human being. Third, sex workers reject rescue politics of the neo-abolitionist duo of fundamentalist Christians and radical feminists, who claim that sex work is inherently and exceptionally oppressive and exploitative, conflate sex work with rape and sexual slavery, construct all sex workers as powerless victims lacking agency, and therefore aim to "rescue" sex workers through retraining and rehabilitation programs. Sex workers' rights advocates point out that this perspective misrepresents the diverse realities of sex workers' lives and fails to recognize them as workers, thus perpetuates the whore stigma, defies the human rights activism of sex workers by taking away their voices, and hinders the effective addressing of labour exploitation and violence that sex workers must face. Fourth, sex workers reject the carceral feminism of neo-abolitionists, which advocates for stronger police presence and control over sex work to realize their "feminist goal" of abolishing prostitution. Sex workers' rights advocates highlight that police violence against sex workers is a persistent global reality, and the police are not protectors from, but one of the main causes of human rights abuses against sex workers. The sex workers' rights movement thus calls for an anti-carceral and human rights-based approach that eliminates all form of criminalization and legal oppression of sex work. This brings us to the fifth pivotal point of the sex workers' rights movement's human rights framing: full decriminalization of sex work and all related activities, as a key to tackle exploitation within the sex industry, ensure safer working conditions, protect workers' rights, provide access to health services, and to decrease sex workers' vulnerability to discrimination, stigma, violence and HIV.

In the second chapter, I demonstrated that the human rights framing of the sex workers' rights movement and their efforts to persistently document and report human rights abuses against sex workers has been recognized, embraced and institutionalized by international human rights bodies, who asserted that legal protections apply to sex workers just as much as to any other human being.

CEDAW, DEVAW, UDHR, ICCPR and ICESCR are encompassing the human rights of sex workers and convey the legal basis for international human rights bodies to condemn states

for violations of sex workers' human rights. Rampant rights abuses against sex workers, with the spotlight on police and health practitioner as perpetrators, results of campaigns to "end sex trafficking", as well as on violations of sex workers' right to health and the intersectional violence that migrant and transgender sex workers face, have been widely condemned by the international human rights bodies.

Concern with the human rights implications of the legal status of sex work has also been shown in the international human rights arena. Criminalization of sex work and its related activities have been condemned as direct causes of human rights abuses against sex workers. Human rights bodies further called on states to stop the unjust targeting of sex workers with non-criminal laws and regulations. The legal model of full decriminalization has been deemed to best suit the realization of human rights and labour rights of sex workers on the international level.

Following in the shoes of international human rights bodies, in the third chapter, I explored in depth the implications of the legal status of sex work on sex workers' human rights. I argued that being a prime example of morality politics and the lack of reliable data about the sector makes prostitution policy prone to be projected ideology onto by policy makers. Prostitution policy is ineffective in reducing or eliminating commercial sex, but it strongly impacts the social, economic and legal position of sex workers.

In this chapter, I discovered that the legal models of criminalisation and legalisation view commercial sex as a negative social phenomenon to be eliminated or restricted. Both models use the police as the primary body to enforce laws regarding the sex trade. While in the criminalisation model, laws are in place to make sex work and/or activities associated with sex work a crime, in the legalisation model, the application of industry-specific government regulations on commercial sex renders non-compliant sex workers and business operators into illegality, resulting in the emergence of a criminalized "underclass". Sex workers, who are criminalized either for selling sexual services or for not complying with special regulations, are highly vulnerable to police violence and human rights abuses. This is not to say that criminalisation and legalisation have the same degree of impact on the human rights of sex workers, as criminalisation has a disastrous effect on the health and human rights of *all* sex workers, and perpetuates a climate of complete impunity for perpetrators of violence against them. However, even if to differing degrees, both models perpetuate and institutionalize violence and stigma against sex workers; are prone to

preventing sex workers' access to justice, health and social services; heighten their vulnerability to discrimination and violence; and threaten their right to a safe working environment.

Decriminalisation is a legal model revoking all forms of legal oppression of sex work. This approach views commercial sex as a form of income-generating activity and a multifaceted social phenomenon to be integrated into society through labour laws. Decriminalisation of sex work is advocated for by sex workers' rights organizations and international human rights bodies alike, because it asserts that sex workers have agency and the right to self-determination and free choice of employment, as well as freedom of association and freedom from undue state control over sexual expression. It further strengthens their right to a livelihood, health, security and access to justice; to be free from violence and discrimination; and to equal protection by the law.

In the fourth chapter, I aimed to demonstrate the impact of sex work legalization on the human rights of sex workers in Germany. Prior to 2002, sex work was in a legal grey zone, not illegal but immoral, lacking labour rights and protections, as well as legal enforceability of contracts. The de facto legalization of sex work in 2002 removed the label of immorality from commercial sex, and provided sex workers with greater legal power and access to social and health insurance schemes. The criminal penalty for furthering prostitution has been revoked, which was a step towards promoting sex workers' right to safe and healthy working conditions and indeed resulted in brothels becoming safer and more hygienic.

Forced STD checks prior to 2001 constituted a violation on sex workers' right to privacy and freedom from arbitrary interference, and since it reduced sex workers' trust in healthcare providers, it deterred them from reaching out to health departments and thus infringed on their right to the highest attainable standard of health. With the 2001 enactment of the Infection Protection Act and the removal of sex workers' obligation to undergo STD exams, sex workers' right to health has been greatly strengthened, which is also mirrored by the fact that after the elimination of this measure, a greater number of sex workers have been reported to visit health departments voluntarily.

The reform process in 2001-2002 strengthened sex workers' human rights to be free from discrimination, and it was in line with the direction of sex workers' rights organizations and international human rights bodies to recognize that persons may freely choose to sell

sexual services, to designate commercial sex as a form of labour, and to promote sex workers' right to health by revoking forced STD/HIV testing and providing them with health insurance access. The repeal of this measure which treated sex workers as vectors of disease, as well as the repeal of the label of immorality from sex work, constituted a welcome step forward in destigmatizing sex work, and redefining sex workers as labourers instead of deviant others in Germany.

However, several discriminatory measures stayed in place. The possibility of local governments to enact zoning decrees rendered (and continues to render) sex workers into isolated working areas, where they are more vulnerable to violence, harassment and abuse. The police remaining the main controlling authority vis-à-vis the sex trade, as well as the right of the police to enter sites where sex work occurs at any time of the day without probably cause, fuel a climate of distrust towards the police among sex workers, which in turn hinders their access to justice. Sex workers' rights organizations and international human rights bodies affirm that stigma and violence against sex workers are institutionalized by the police, who are perpetrators of human rights violations against sex workers globally. The law does not meet the demand of sex workers' rights advocates for an anti-carceral approach in prostitution regulation.

Migrant persons wanting to sell sexual services were not preserved their right to free choice of employment, as migrant persons from most countries of the world could not obtain a working visa for doing sex work in Germany. International human rights bodies have affirmed that migrant sex workers are particularly vulnerable to sexual violence and abuse, as well as to having general barriers to justice, social and health services, due to fear of arrest, detention and deportation. The law thus tragically failed to strengthen the human rights standing of migrant sex workers.

Sex workers' rights organizations in Germany concluded that although the law generally provided sex workers with legal empowerment, it stayed too limited in scope, and did not do enough for the societal destigmatization of sex work. Meanwhile, government evaluation of the law in 2007 agreed that the scope of the law was insufficient, but concluded that particular risks of the employment in prostitution should be addressed by regulation through legal means, as well as that regulatory oversight and the tackling of criminal structures within the sex industry were needed. This led to the drafting of a new bill in 2015, with the leadership of two political parties that strongly objected to the removal of

immorality from sex work back in 2001, arguing that prostitution harms human dignity. Sex workers' rights organizations were not invited to the drafting table, which is against the human rights principle that the voices of directly affected people and communities must be centred if we want to effectively address the rights abuses they face. This set the stage for the introduction of repressive, neo-abolitionist regulatory measures in the Prostitute Protection Act.

The new law, in effect since 2017, constituted a case of legalisation and extensive regulation of the sex industry in Germany, with the introduction of controlling measures such as compulsory registration and mandatory health counselling of sex workers, and licensing of prostitution businesses. Following the general argumentation of legalised sex work regimes, these measures were introduced with the justification that the harmful effects of sex work on society and on sex workers can and should be eliminated, but in reality, the drafters of the bill prioritized the tight control and containment of the sex industry over the wellbeing of sex workers. The central theme of the law is the denial of autonomy and self-determination of people selling sexual services, hidden behind the façade of protecting victims of commercial sexual exploitation and human trafficking. This is proven by the fact despite the unanimous objection of expert organisations, as well as their thorough analysis of the probable negative consequences of the law on the rights of sex workers, the government refused to adjust the bill accordingly, and kept the highly discriminatory measures that violate sex workers' rights in the final version of the law.

As demonstrated in Chapter 3.1.2, special regulations such as mandatory health checks and registrations of sex workers have a discriminatory nature. Mandatory registration infringes on sex workers' fundamental right to privacy and freedom from arbitrary interference. The possibility of denial of registration ID violates the freedom of vocational choice. The introduction of requirements for obtaining the registration ID renders pregnant persons, migrants without a work permit, persons without documents, and persons who cannot afford registration and interpretation fees, excluded from the possibility of selling sexual services legally. Sex work is the only feasible occupation for many, especially among migrants and persons without documents, therefore this measure pushes such persons engaging in selling sexual services illegally. International human rights bodies highlighted that undocumented migrant sex workers are particularly vulnerable to harassment and sexual abuse. While the Prostitution Act in 2002 "only" prohibited the obtainment of a

working visa for most migrant sex workers, mandatory registration actively pushes the most vulnerable into criminality, and exacerbates their existing marginalisation. On the other hand, migrant persons who are eligible and willing to register as sex workers must face risk of outing in their home country, due to the possibility of data exchanges taking place between German authorities and authorities in countries of origin.

The recording of personal data in relation to a person's sexual life further infringes on the rights to sexual and informational self-determination. Having to carry a registration ID with a photograph during work poses a high level of risk to be blackmailed and/or be outed as a sex worker against one's will, which may permanently impair the individual security of a person.

The introduction of mandatory health counselling is a step back from the victory of revoking forced STD/HIV testing. This measure in law is contrary to the Infection Protection Act which ensures the anonymity and voluntariness of using health care services, which have been explicitly introduced based on the experiences of the health sector working with vulnerable groups of people. This measure thus jeopardises STD/HIV prevention among sex workers, and weakens their right to the highest attainable standard of health. Local provision of the health counselling of sex workers is sometimes also designated to highly stigmatizing public offices, such as the social psychiatric service. Obligatory condom usage indicates that sex workers once again are treated as vectors of disease by the law, which endangers their health.

Extensive licensing requirements of prostitution businesses led to the disappearance of many work places of sex workers, mainly those of small- and mid-sized that did not have the resources to comply with the regulations, and were mostly operated by sex workers themselves, offering them a higher level of self-determination, security and independence. Two sex workers working together in an apartment constitute a prostitution business, subject to extensive licensing requirements that are nearly impossible to fulfil in an apartment. This measure thus reduces sex workers' control and autonomy over their working conditions. Persons selling sexual services without a registration certificate may not be employed by prostitution businesses and thus must resort to working in isolated apartments, where they are highly vulnerable to physical and sexual violence and stalking. Sex workers' rights advocates argue that not having to do anything with an inherently violent

or exploitative nature of sex work, what exposes sex workers to violence and exploitation is lack of security and inadequate working conditions.

The role of the police remained central in the enforcement of the new law. Police having the right to access prostitution businesses at any time of the day, including apartment prostitution, infringes on the constitutional right of inviolability of the home. Maintenance of prostitution exclusion zones fuels the financial exploitation, as well as police harassment of sex workers. As argued before, the strong presence of police around sex work in regulatory regimes institutionalizes violence against sex workers, both directly (police inflicting sexual or physical violence, or demanding fines to avoid arrest), and indirectly (restricting access to justice and thus cultivating a culture of impunity for perpetrators).

Due to the three-level structure of the administrative federalism in Germany, local authorities have serious leeway to enact policies that are not in line with national legislation. It is on account of this federal structure that local governments may decide to give even more extensive power to the police in the regulation of prostitution; introduce registration fees that render registration impossible for the most precarious persons; systematically breach confidentiality of mandatory counselling sessions; or outsource “neutral” counselling to sex work-abolitionist Christian organizations.

The German law thus violates and weakens a long list of sex workers’ human rights through the introduction of a wide range of industry-specific regulations. The enactment of the Prostitute Protection Act not only criminalizes those people whom it ostensibly aims to protect, it also constitutes a major step backwards in destigmatizing sex work in Germany, which remains to be a main obstacle to the full realization of sex workers’ rights.

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