



**In Defence of Abolition: A Human Rights Law Critique of the
Global Sex Trade**

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Case List

A v United Kingdom (1999) 27 EHRR 611

Aksoy v Turkey (1996) 23 EHRR 533

Aydin v Turkey (1998) 25 EHRR 251

Chahal v UK (1996) 23 EHRR 413

Costello-Roberts v the United Kingdom (1993) 19 EHRR 112

Giuliani and Gaggio v Italy (2012) 54 EHRR 10

Greek Case, Commission Report of 5 November 1969, Yearbook 12

IACtHR, 29 July 1988, Velásquez Rodríguez v. Honduras, Series C No. 4

Ireland v United Kingdom (1979-80) 2 EHRR 25

Julian Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin)

Laskey v United Kingdom (1997) 24 EHRR 39

M.C. v. Bulgaria (2005) 40 EHRR 20

Maslova and Nalbandov v Russia App no 839/02 (ECtHR 24 January 2008)

Mastromatteo v Italy App no 37703/97 (ECtHR 24 October 2002)

O’Keeffe v Ireland App no 35810/09 (Grand Chamber Judgment 28 January 2014)

Osman v. United Kingdom (2000) 29 EHRR 245

Pretty v The United Kingdom (2002) 35 EHRR 1

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R v Brown (1993) UKHL 19

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Valiuliene v Lithuania App no 33234/07 (ECtHR, 26 March 2013)

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Brottsbalken (1962:700) trns: Swedish Criminal Code (1962:700)

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Lov om straff (straffeloven), trns: Penal Code (Penal Code)

Offences Against the Person Act 1861

Prostituiertenschutzgesetz – ProstSchG trns: Prostitute Protection Law – ProstSchG

Prostitution Reform Act 2003

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) 2000

Sexual Offences Act 2003

Straftaten gegen die persönliche Freiheit, Strafgesetzbuch, trns: Offences Against Personal Freedom, German Criminal Code

Svensk författningssamling (1998:408) trns: Swedish Code of Statutes (1998:408)

United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949

United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

United Nations Convention on the Rights of the Child 1990

Utlänningslag 2005:716 trns: Aliens Act 2005:716

Abstract

This review explores the concept of sexual autonomy as it applies to prostitution, and particularly, how best to protect the sexual autonomy of those within the sex trade in the UK. This is examined within the context of positive obligations under the European Convention on Human Rights (1953), specifically the substantive positive obligation under Article 3 (Prohibition of Torture and Inhuman or Degrading Treatment) to have an adequate legislative framework that deters violations of sexual autonomy as established in *M.C. v Bulgaria* (2005).

This issue is explored through an analysis of the ECHR, Article 3, positive obligations, and sexual autonomy. Then, an exploration of the prostitution markets in the UK, Germany, New Zealand, and Sweden, and any consequence of their respective legislative approaches on protecting sexual autonomy is undertaken; and finally, concluding by suggesting that criminalising sex buyers, while decriminalising those who sell sex, is the most effective way of implementing the aforementioned positive obligation.

This review systematically analyses existing research that could provide guidance to practitioners and policymakers working at the intersection of human rights law and sexual violence. There is very limited research considering prostitution legislation under this Article 3 obligation, suggesting that this review could provide a unique analysis of a complex and multi-faceted socio-legal issue. A critical review of legal and non-legal qualitative and quantitative literature, including case law and legislation, is undertaken, utilising primarily socio-legal research, and also elements of doctrinal research. One of central issues is the consistently sporadic and limited nature of *all* research into prostitution, therefore, any findings are treated with caution and acknowledged to be limited in their reliability.

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Introduction

The discourse surrounding prostitution legislation is highly divisive, with historic and contemporary research generally falling into two oppositional camps: those who view prostitution as sexual labour that is not *inherently* harmful, but rather it is the criminalisation of some or all aspects that result in harm;¹ and those who argue that it is a form of systemic sexual abuse that should be abolished, and the individuals involved supported to exit.²

This review seeks to add to the literature in the latter camp. It argues that the legislative framework that regulates prostitution in the UK does not protect the sexual autonomy of prostituted individuals because violations of sexual autonomy (henceforth “autonomy-violations”) are an inherent feature of prostitution, and cannot be separated from otherwise “consensual prostitution”, irrespective of which regulatory framework is applied. It is argued that these violations occur directly as a result of pre-existing sex buyer (SB) attitudes. Evidence supporting this theory will be presented in subsequent chapters. Therefore, the question becomes the best way to *combat* these violations.

¹ For example, see: Christine Milrod and Ronald Weitzer, ‘The Intimacy Prism: Emotion Management among the Clients of Escorts’ (2012) 15 *Men and Masculinities* 447; Valerie Jenness, ‘From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem’ (1990) 37 *Social Problems* 403; and Carol Leigh, ‘Inventing Sex Work’ in Jill Nagel (Ed), *Whores and Other Feminists* (Routledge 2013)

² For example, see Andrea Dworkin, ‘Against the male flood: Censorship, pornography, and equality’ in Drucilla Cornell (ed), *Oxford readings in feminism: Feminism and pornography* (Oxford University Press 2000) ; Julie Bindel, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (Springer 2019). ; Sarah Deer, ‘Relocation revisited: Sex trafficking of native women in the United States’ (2010) 36 *William Mitchell Law Review* 621.

Separately from this, individuals might fall under the “prohibitionist” moniker, and object to prostitution based on a perception of it being “sexually immoral”, which is wholly distinct from the abolitionist position. The prohibitionist demographic is beyond the scope of this review. See Maddy Coy, Cherry Smiley and Meagan Tyler, ‘Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers, and the Myth of Neutrality in Prostitution Research’ (2019) 48 *Archives of Sexual Behavior* 1931

This will be examined within the context of positive obligations under the European Convention on Human Rights (1953), specifically, as *M.C. v Bulgaria (2005)* demonstrated,³ the substantive positive obligation under Article 3 (Prohibition of Torture and Inhuman or Degrading Treatment)⁴ to have an adequate legislative framework that deters autonomy-violations, which itself is a specific example of what Stoyanova terms the broader ‘(positive) obligation to criminalise’ and the ‘obligation to adopt effective regulatory frameworks’ to prevent harm.⁵

It is posited that tackling demand (sex buying) through SB criminalisation, while decriminalising prostituted individuals, is the most effective approach for two intrinsically linked reasons. Firstly, where demand is not actively tackled, it will be demonstrated that this results in an increase in the number of individuals selling sex (supply), referred to as ‘market size’, and that this *supply* consistently comprises of individuals who cannot consent.⁶

Secondly, sex buying itself, irrespective of legislation, will be demonstrated to be linked to autonomy-violations and an increased likelihood of wider IDT.⁷ In this sense, sex buying should *prima facie* be deterred as an act which both encourages and also normalises autonomy-violations.

The key feature is that prostitution legislation on the one hand, and ‘*criminalis[ation] of harmful conduct*’ more generally, should not be viewed as distinct, and in fact share a

³ *M.C. v Bulgaria (2005)* 40 EHRR 20

⁴ Article 3 Convention for the Protection of Human Rights and Fundamental Freedoms 1953: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. (European Convention on Human Rights 1953) (ECHR)

⁵ Vladislava Stoyanova, ‘Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women’ in Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (eds), *International Law and Violence Against Women Europe and the Istanbul Convention* (Routledge 2020)

⁶ This element is expanded upon in Chapter 4, see Seo-Young Cho, Axel Dreher and Eric Neumayer, ‘Does Legalized Prostitution Increase Human Trafficking?’ (2013) 41 *World Development* 67.

⁷ The evidence demonstrating this will be returned to in Chapter 2 regarding SB attitudes.

symbiotic relationship whereby to protect sexual autonomy more broadly, prostitution requires a distinct '*effective regulatory framework*' to prevent harm, which it is argued here, must conform to the '*obligation to criminalise*' beyond simply criminalising autonomy-violations generally:⁸ by criminalising sex buying itself.

This argument builds on the rationale underpinning *M.C.*⁹ it is not that the jurisdictions examined in this review – the UK, Germany, New Zealand, and Sweden – have insufficient legislative frameworks to adequately deter violations of sexual autonomy *per se* – such as legislation criminalising rape – but that there is a *de jure/de facto* divide between what the legislation prohibiting autonomy-violations imposes, and what actually happens in prostitution due to a legal lacuna where sex buying is not *also* prohibited.

This argument, and possible solutions, will be formulated as follows in their respective chapters: Firstly, an analysis of the ECHR, Article 3, positive obligations, and sexual autonomy will be presented and contextualised. Then, through an analysis of legal and non-legal literature, the review will seek to explore how the concept of sexual autonomy might apply to prostitution; to explore the prostitution markets in the aforementioned jurisdictions,¹⁰ and any consequence of their respective legislative approaches on protecting sexual autonomy; and finally, concluding as to which of the three different legislative approaches examined could best implement the aforesaid positive obligation.

This review systematically analyses existing research that could provide guidance to practitioners and policy-makers working at the intersection of human rights law and sexual

⁸ Stoyanova (n5)

⁹ *M.C.* will be explored in greater detail in Chapter 1; the rationale referred to here alludes to the overview of the case given at n3.

¹⁰ See previous paragraph. As to the different legislative approaches, these will be split into three categories, examined and defined in subsequent chapters. Firstly, an overview of the law in the United Kingdom as it stands will be provided for grounding context; then an analysis of legalisation within Germany; decriminalisation in New Zealand; and finally, the Nordic Model in Sweden.

violence.¹¹ A critical review of legal and non-legal qualitative and quantitative literature, including case law and legislation, will be undertaken, utilising primarily socio-legal research, and also elements of doctrinal research. Utilising Grix's methodology definition, it is posited that this combination of research methods will paint the most comprehensive picture in terms of the law as it stands, how the law impacts the relevant demographics, and how this might subsequently be changed.¹² Further, there is very limited research considering prostitution legislation under this Article 3 obligation, suggesting that this review could provide a unique analysis of a complex and multi-faceted socio-legal issue.

¹¹ Systematic review here is taken to mean: '*...a comprehensive search to locate all relevant published and unpublished work on a subject; a systematic integration of search results; and a critique of the extent, nature, and quality of evidence in relation to a particular research question*' see Andy P. Siddaway, Alex M. Wood and Larry V. Hedges, 'How to Do a Systematic Review: A Best Practice Guide for Conducting and Reporting Narrative Reviews, Meta-Analyses, and Meta-Syntheses' (2019) 70(1) *Annual Review of Psychology* 747

Also to note, this review does not seek to establish a potential framework for bringing a case against the UK under the Human Rights Act 1998 or the European Convention on Human Rights 1953. In other words, it does not examine the steps an individual would have to take to bring a case to the European Court of Human Rights, rather, it seeks to apply the principles of human rights law to the context of prostitution more generally.

¹² See Jonathan Grix, *The Foundations of Research* (Palgrave Macmillan 2004): '*The term refers to the choice of research strategy taken by a particular scholar – as opposed to alternative research strategies*' p32

Sex Work or Prostitution?

The debate regarding terminology when referring to the sex trade is one that divides feminist and legal discourse, with some arguing that *‘prostitution’* is stigmatising,¹³ while others¹⁴ argue that *‘sex work’* simply sanitises systematic sexual exploitation.¹⁵ This review falls into the latter camp, and argues that prostitution is overwhelmingly a form of sexual exploitation, a position reflected in various International Conventions¹⁶ (but is by no means universally accepted¹⁷).

This is, ultimately, the abolitionist position. Abolitionism seeks to provide prostituted individuals with financial and social support so that they need not rely on prostitution to survive, while simultaneously advancing the argument that prostitution is rooted in sex-class inequality, and needs to be reduced as much as is possible by deterring those who wish to purchase sex.¹⁸

¹³ Kate Lister, ‘Sex Workers or Prostitutes? Why Words Matter’ *inews.co.uk* (5 October 2017) < <https://inews.co.uk/opinion/columnists/sex-workers-prostitutes-words-matter-95447>> accessed 21 June 2021

¹⁴ For example, see Bindel (n2) pp 63-86

¹⁵ On this point, it is important to note that prostitution is overwhelmingly comprised of women, who are purchased by men. There is extensive literature on why this might be the case, however, the *why* is beyond the scope of this review. Gender-neutral terminology will be used throughout this review as regards the prostituted individuals, as in almost all circumstances the law would apply equally to men as it does to women, as well as transgender prostituted individuals. However, this should not be read as meaning there is not pattern in this regard. Estimates place figures at 85-90% of those who sell sex as being female, while those who purchase sex are said to be almost exclusively men. See Graham Scambler, ‘Sex Work Stigma: Opportunist Migrants in London’ (2007) 41(6) *Sociology* 1079-1096

¹⁶ For example, see the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949) which states in its preamble that *‘Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person’* and the United Nations 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which asks states to *‘take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women’*.

¹⁷ For example, see International Women’s Rights Action Watch Asia Pacific, ‘Framework on Rights of Sex Workers & CEDAW’ (*nswp.org*, 2017) < <https://www.nswp.org/sites/nswp.org/files/framework-on-rights-of-sex-workers-cedaw-1.pdf>> accessed 21 June 2021

¹⁸ See n2 generally

Abolitionism argues that prostituted individuals overwhelmingly lack any alternative means of survival, and for most, it is not a choice.¹⁹ To protect the human rights and dignity of those within prostitution, individuals should be assisted to exit and specifically *not* criminalised or marginalised further. Those who oppose abolitionism, however, argue that it is an overly paternalistic perspective, and prostitution is no more inherently harmful than other types of “work”, but poor legal regulation is what leaves prostituted individuals with little protection from violent SBs.²⁰

However, while any discussion of prostitution is inextricably linked to this feminist discourse, a normative analysis of whether prostitution can *ever be* a “good” or “bad” phenomenon will not take place; rather the issue will be analysed solely as it occurs *now* through the lens of the positive obligation to deter autonomy-violations.

Therefore, in line with the hypothesis of this review, the term prostitution will be used, which is also used in all the examined legislation. It will be used interchangeably with *sex trade* where appropriate. Sex work will be used when quoting secondary sources directly.

What is Prostitution?

Prostitution can be defined as the ‘*exchange of sexual services for money*’ when read with the statutory definition of ‘*prostitute*’ found in section 54(2) of the Sexual Offences Act 2003 (SOA 2003).²¹

¹⁹ *ibid*

²⁰ See n1 generally

²¹ Sexual Offences Act 2003, s54(2): A prostitute is somebody who ‘*provides sexual services to another person in return for payment*’.

Crown Prosecution Service guidance defines sexual services as:

*'...acts of penetrative intercourse (as set out in s.4(4) SOA 2003) and masturbation. It does not include activities such as 'stripping', 'lap dancing' etc.'*²²

This further highlights the usefulness of the term prostitution. The scope of what constitutes 'sex work' is not always clear, whereas the above definition sets much narrower parameters.²³

While issues discussed here – such as sexual violence - may also be applicable to the broader commercial sex industry,²⁴ they are beyond the review's scope.

Prostitution is also overwhelmingly demand-driven.²⁵ While there are often other factors that may *compel* vulnerable or desperate individuals into prostitution, such as poverty or addiction,²⁶ without an SB willing to pay, it would be impossible for somebody to sell sex (or be sold by a trafficker or pimp) irrespective of whether they "choose" to do so.²⁷

²² Crown Prosecution Service, 'Prostitution and Exploitation of Prostitution' (CPS, 04 January 2019) <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution#_Toc534624527> accessed 21 June 2021

²³ For example, see Andrew Poitras, 'What constitutes sex work?' (*Hopes&Fears*) <<http://www.hopesandfears.com/hopes/now/question/216863-what-constitutes-sex-work>> accessed 21 June 2021

²⁴ Such as 'stripping' or 'lap dancing' see n22

²⁵ For example, see Bridget Anderson and Julia O'Connell-Davidson, 'Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study' (2003)15 International Organisation for Migration; Andrea Di Nicola and others, *Prostitution and Human Trafficking Focus on Clients*, (Springer, New York, NY 2009) ; Michael Shively and others, 'A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report' (2012) The National Institute of Justice, U.S. Department of Justice

²⁶ For example, see 'OHCHR | Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881>> accessed 21 June 2021; and Kuba Shand-Baptiste, 'The Rise of "Survival Sex" Is a Crushing Reminder of the Results of Britain's Austerity-Fuelled Poverty' (*The Independent*, 22 May 2019) <<https://www.independent.co.uk/voices/austerity-sex-survival-universal-credit-poverty-prostitution-un-report-a8925256.html>> accessed 21 June 2021.

²⁷ Anderson and O'Connell-Davidson (n25)

What is Sexual Autonomy?

Sexual autonomy exists in tandem with the concept of consent; consenting to a sexual act(s) is the exercising of sexual autonomy. Conversely, if an individual does not or cannot consent to a sex act, this would violate their sexual autonomy. The legal definition of 'consent' in each jurisdiction will be examined in their respective chapters.

Consent within prostitution is an enormously contentious issue, with some arguing that exchanging sex for money precludes the concept of consent, as the requirement for payment is a coercive factor in and of itself;²⁸ and with others arguing that the relationship is entered into entirely autonomously, and consent is only vitiated when non-agreed interactions occur.²⁹ These positions typically align with the division between prostitution as sexual exploitation versus labour (respectively) as described previously.³⁰

However, this review will focus on three examples of clear violations of consent and highlight their prevalence within prostitution to demonstrate that prostitution invariably entails at least one type of autonomy-violation for those involved. Firstly, trafficking into prostitution. The definition of trafficking will be taken from the Palermo Protocol 2000,³¹ which all examined jurisdictions have ratified, and precludes any concept of consent.³² Further, the domestic legal

²⁸ Lara Gerassi, 'A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work' (2015) 42 *Journal of sociology and social welfare* 79.

²⁹ *ibid*

³⁰ See Introduction

³¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) 2000, Article 3(a): *"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'*

³² *ibid* Article 3(b): *'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used'*

regulation of trafficking will be analysed and reviewed. The position of this review is not that prostitution and trafficking are necessarily the same thing, but that they are often fundamentally linked.

Secondly, so-called “child prostitution”;³³ and thirdly, acts of IDT that may take place within prostitution, which are not necessarily acts of sexual violence *per se*, yet would still represent an autonomy-violation as the individual did not – or could not – consent to them. This concept of ‘conditional consent’ is already understood in English law where an agreement to intercourse does not mean an agreement to everything that then subsequently occurs.³⁴ Further, the statutory recognition of *R v Brown* precludes consent to harm exceeding Actual Bodily Harm (ABH),³⁵ which was subsequently upheld in *Laskey*.³⁶ This will be returned to in due course.

³³ The problematic nature of the term “child prostitute” will be considered in Chapter 5

³⁴ See *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) and *R (on the application of F) v The DPP* [2013] EWHC 945 (Admin).

³⁵ *R v Brown* [1993] UKHL 19

³⁶ *Laskey v United Kingdom* (1997) 24 EHRR 39

Chapter 1: The European Convention on Human Rights, Article 3, and Sexual

Autonomy

1.1 Convention Rights

The European Convention on Human Rights (ECHR) imposes binding legal obligations on signatory States. Article 1 obliges each State to ‘*secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*’.³⁷ The UK ratified the ECHR in 1951, signalling their accession to its binding obligations.³⁸ Certain rights are qualified, meaning the State can interfere with them in certain circumstances.³⁹ Others, such as Article 3, are absolute, meaning they cannot be interfered with and are entirely non-derogable.⁴⁰ There are no circumstances in which a State can permit torture or IDT, or facilitate it.⁴¹

1.2 Article 3 – General Obligation

Under Article 3, both torture and IDT are equally, and entirely, prohibited, irrespective of where the dividing line between torture and IDT is found to lie.⁴² For example, in the *Greek* case, severe beatings, mock executions, and electro-shock treatment carried out by the military junta constituted both ill-treatment and torture;⁴³ while in *Costello-Roberts*, the corporal punishment of a child in the form of three strokes with a birch rod was found to be ‘*degrading punishment*’ but not torture,⁴⁴ but both were equally prohibited. While, as Reidy

³⁷ European Convention on Human Rights 1953, Article 1

³⁸ Council of Europe, ‘Chart of signatures and ratifications of Treaty 005’ (*Council of Europe*) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 21 June 2021

³⁹ Council of Europe, ‘Some Definitions’ (Council of Europe) <<https://www.coe.int/en/web/echr-toolkit/definitions>> accessed 21 June 2021

⁴⁰ *Aksoy v Turkey* (1996) 23 EHRR 533 para 62

⁴¹ For example, by deporting a terrorist suspect to a region where they may subsequently face torture or IDT. See *Chahal v UK* (1996) 23 EHRR 413

⁴² n40 Aksoy

⁴³ *Greek Case*, Commission Report of 5 November 1969, Yearbook 12.

⁴⁴ *Costello-Roberts v the United Kingdom* (1993) 19 EHRR 112

suggests, inhuman may differ from degrading, and treatment from punishment and so forth,⁴⁵ for the purposes of this review a simple “minimum threshold” of what may fall within the scope of Article 3 is all that is necessary to establish, as regardless of whether the mistreatment constitutes torture or “just” IDT, it is equally prohibited.

A definition relevant to prostitution will be presented shortly. The challenge moving forward will be to place the *system* of prostitution firmly within these parameters to demonstrate that it *inherently* propagates and facilitates at the very least IDT, and quite possibly in more extreme cases, torture.⁴⁶

1.3 Article 3 – Positive Obligations

Article 3 imposes positive and negative obligations on States, with the latter best defined as an obligation *not* to interfere with a Convention right.⁴⁷ Applying this to Article 3, this simply means the State must *refrain* from committing torture or IDT.

A positive obligation differs in the sense that the State must actively take steps to protect the Convention right(s) in question.⁴⁸ Harris describes this as ‘*one whereby a state must take action to secure human rights*’⁴⁹ and Mowbray defines it as ‘*requiring...states ... to take action*’.⁵⁰ In short, the State undertakes *action* (as opposed to the negative obligation of *inaction*) to protect a right.

⁴⁵ Aisling Reidy, ‘The prohibition of torture Aisling Reidy A guide to the implementation of Article 3 of the European Convention on Human Rights’ (2003) 6 Human Rights Handbook 11

⁴⁶ The rationale for this conceptualisation as ‘*the system of prostitution*’ will be examined in Chapter 2.

⁴⁷ n39

⁴⁸ *ibid*

⁴⁹ Davis Harris and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 18

⁵⁰ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing 2004) 2

Positive obligations are not absolute, however, and it is somewhat unclear as to when they might arise, in part reflected in the fact that they are not stated explicitly within the text.⁵¹

One potential solution is propounded by Dröge,⁵² who references *Velásquez Rodríguez*, where it was held that a positive obligation arises:

*'...not because of the act itself, but because of the lack of due diligence to prevent the violation...'*⁵³

This due diligence principle is complex,⁵⁴ and also not absolute. Here, due diligence follows Bourke-Martignoni's analysis, meaning *'a duty to act with due diligence to protect individuals against human rights violations'*,⁵⁵ and what Sarkin terms *'an oversight tool'*.⁵⁶

⁵¹ n39

⁵² Cordula Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Berlin, Springer-Verlag, 2003)

⁵³ IACtHR, 29 July 1988, *Velásquez Rodríguez v. Honduras*, Series C No. 4, para 172 ; Full quote: *'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'*.

⁵⁴ For example, Stoyanova argues that the due diligence principle and positive obligations are not as intrinsically linked as others maintain. See Stoyanova (n5).

⁵⁵ Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and its Role in the Protection of Women against Violence' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill, 2008) 47, 52

⁵⁶ Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Level of Violence against Women around the World' (2018) 40(1) Human Rights Quarterly 1, 16.

But, in *Osman*, for a State to have failed to exercise due diligence, and thus be in breach of its positive obligation ‘to protect an individual whose life is at risk from the criminal acts of another individual’,⁵⁷ it was established that there needs to be what Lavrysen terms a ‘knowledge condition’,⁵⁸ where the State is aware of the victim and the risk.⁵⁹

This may set human rights as it applies to prostitution on unsteady footing, due to the potential for administrative unworkability when it comes to identifying any potential victims or risks. However, in the *Mastromatteo* case,⁶⁰ which concerned a murder committed by convicts on prison-leave, it was held that the victim-identifiability element in *Osman* was not necessarily required when discussing issues of general protection to society.⁶¹ Stoyanova posits that ‘[w]hat is required is that the State is aware or should have been aware of the existence of a general problem.’⁶² This is supported by Judge Pinto De Albuquerque’s Separate Opinion in *Valiuliene* where he stated:

*‘If a State knows ... that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group...the State can be found responsible...’*⁶³

It will be demonstrated that the context of prostitution would certainly engage the positive obligation under Article 3 to protect an individual’s sexual autonomy, because the prevalence

⁵⁷ *Osman v. United Kingdom* (2000) 29 EHRR 245 para 115

⁵⁸ Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 131

⁵⁹ This ‘knowledge condition’ is effectively the crystallisation of the ‘*Osman Test*’, see Franz Christian Ebert and Romina I. Sijniensky, ‘Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman Test* to a Coherent Doctrine on Risk Prevention’ (2015) 15(2) *Human Rights Law Review* 343

⁶⁰ *Mastromatteo v. Italy* App no 37703/97 (ECtHR 24 October 2002) para 69

⁶¹ *ibid*

⁶² Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law* (Cambridge University Press 2017)

⁶³ *Valiuliene v Lithuania* App no 33234/07 (ECtHR, 26 March 2013)

of autonomy-violations should present the UK with the requisite '*empirical social experience*'⁶⁴ indicative of a '*general problem*'⁶⁵ to satisfy the '*knowledge condition*'⁶⁶ underpinning the due diligence principle. In short, if a positive obligation to do *something* can be established, and the State does not exercise due diligence in fulfilling this obligation, it may be found to be in breach of the obligation.

There is a further distinction to understand: substantive versus procedural positive obligations. Again, this is a complicated issue which the European Court of Human Rights (ECtHR) has not always consistently addressed, but a definition can be formulated as follows. As Lavrysen explores, in *Giuliani and Gaggio*⁶⁷ the Court examined the substantive aspect of an alleged Article 2 (Right to Life) ECHR violation as whether the State had:

'...legislative, administrative and regulatory measures to reduce as far as possible the adverse consequences of the use of force'.⁶⁸

Akandji-Kombe further explains that substantive obligations are:

*'...those which require the basic measures needed for full enjoyment of the rights guaranteed, for example laying down proper rules...prohibiting ill-treatment...'*⁶⁹

Therefore, and with reference to Stoyanova's conceptualisation,⁷⁰ substantive obligations can be surmised as entailing the necessity of a legislative framework that actively protects the

⁶⁴ Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012)

⁶⁵ Stoyanova (n5)

⁶⁶ Lavrysen (n58)

⁶⁷ *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10

⁶⁸ n66

⁶⁹ Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights' (2007) 5 Human Rights Handbooks

⁷⁰ n65

right(s) in question. Case law will be presented shortly to highlight how this applies to sexual autonomy.

Briefly on the issue of the procedural aspect, which in *O’Keeffe* the Court held entails the obligation ‘to conduct an effective official investigation into alleged ill treatment inflicted by private individuals’;⁷¹ although a case could be made that if ill-treatment *has* occurred due to a failure in the legislative framework, and no effective investigation into this has occurred, this might constitute an Article 3 breach, this is beyond the scope of this review. It is recognised that procedural and substantive obligations are often difficult to disentangle, but moving forward the key issue is whether the UK has an effective legislative framework in place to protect sexual autonomy, thus fulfilling the substantive element of the positive obligation under Article 3 to deter autonomy-violations.

1.4 Article 3 – Sexual Autonomy

This substantive obligation to protect sexual autonomy was central in *M.C. v Bulgaria*.⁷² The Applicant (MC) alleged that A and P raped her, which both defendants denied. Through the course of the investigation it was found that there was little evidence to establish the use of ‘force and threats’.⁷³ Further, lack of consent to sexual activity required evidence of ‘active resistance’ on the part of the victim – which was missing in the case of M.C. leaving her unable to seek justice, and which restricted the scope of prosecutions for rape generally.⁷⁴

MC subsequently lodged a complaint with the Court arguing that Bulgarian law did not have an effective deterrent in place against rape and sexual abuse. The Court considered that

⁷¹ *O’Keeffe v Ireland* App no 35810/09 (Grand Chamber Judgment 28 January 2014) paras 162 and 172

⁷² n3

⁷³ *ibid* para 61: ‘... no resistance on the Applicant’s part or attempts to seek help from others had been established’.

⁷⁴ *ibid* para 109

Bulgarian law was out of step with developing universal trends on the conception of consent: while the use of physical force by the perpetrator and active resistance by the victim historically may have been required, resistance to force was no longer considered to be the guiding factor in a number of jurisdictions.⁷⁵

Consequently, the Court held that Bulgaria's domestic legislation should be amended in order to provide citizens with adequate protection of their sexual autonomy through the application of effective deterrence.⁷⁶ It was held that Bulgaria was in breach of its substantive positive obligations under Articles 3 and 8 to protect sexual autonomy as a result of not having adequate legislation.⁷⁷

The important point in *M.C.* is the conception of the violation of sexual autonomy as a particularly grave crime. The Court recognised this, describing the necessity for '*effective deterrence against grave acts such as rape, where fundamental values ...are at stake, requires efficient criminal-law provisions,*'⁷⁸ and above all else, the fundamental necessity of not '*jeopardising the effective protection of the individual's sexual autonomy*'.⁷⁹

It is posited, therefore, that if a State does not have effective deterrence against violations of sexual autonomy under its substantive positive obligation as was the case in *M.C.*, then the obligation to amend such legislation may arise. This will be applied to the context of prostitution to argue that it – it being prostitution - systemically facilitates violations of sexual autonomy, and thus requires an '*effective regulatory framework*' to prevent harm.⁸⁰ Before that, however, a second consideration must be dealt with.

⁷⁵ *ibid* para 163

⁷⁶ *ibid* para 150

⁷⁷ *ibid* para 187

⁷⁸ *ibid* para 150

⁷⁹ *ibid* para 166

⁸⁰ Stoyanova (n5)

1.5 Non-State Actors

While the obligation of State-actors not to engage in IDT is well established,⁸¹ applying this obligation to prostitution is perhaps more complex as it predominantly comprises of interactions between non-State actors. To step outside the context of prostitution, *Z & Others* provides clarity as to how far the obligation to prevent torture and IDT extends beyond State-actors.⁸²

*'Article 3, requires States to take measures...to ensure that individuals ... are not subjected to IDT, including such ill-treatment administered by private individuals ...'*⁸³

Z & Others clearly establishes the State's obligation to have safeguards in place to prevent private individuals from enacting IDT on others, as well as a procedural obligation to investigate such claims. *Z* references the ruling in *A v United Kingdom*⁸⁴ which clarifies the issue further.⁸⁵

A concerned the physical abuse of a child by his stepfather. When the father was charged with assault occasioning ABH under section 47 of the Offences Against the Person Act

⁸¹ Human Rights Act 1998, s6(1)

⁸² *Z and Others v The United Kingdom* (2001) 34 EHRR 97 para 73

⁸³ To contextualise fully, the full quote is as follows: *The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see A. v. the United Kingdom, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see, mutatis mutandis, Osman v. the United Kingdom, judgment of 28 October 1998, Reports 1998-VIII, pp. 3159-60, § 116).*

⁸⁴ *A v United Kingdom* (1999) 27 EHRR 611

⁸⁵ n82 para 73

1861,⁸⁶ the stepfather submitted that it should be considered '*reasonable chastisement*', which at the time could act as a defence to a s47 charge.⁸⁷

Following the stepfather's acquittal, A brought a case against the UK to the ECtHR. The Court found that the '*reasonable chastisement*' defence did not afford the child adequate protection from IDT in the form of physical beatings.⁸⁸ Consequently, the UK Government removed the availability of this defence for charges of ABH, Grievous Bodily Harm, and child cruelty.⁸⁹

Following this argument, it is proposed that if actions by non-State actors within the setting of prostitution fall within the description of IDT, and the State does not have legislation that adequately protects from such actions, then responsibility might arise to amend it.

1.6 Defining Inhuman and Degrading Treatment

While consideration has been given to how Article 3 functions, it is also necessary to explain the parameters of IDT in order to identify its existence within prostitution. *Ireland v United Kingdom*⁹⁰ – a leading early Article 3 case – held that '*ill-treatment must attain a minimum level of severity...to fall within the scope of Article 3*'.⁹¹

If it can be shown that mistreatment of those within prostitution at the hands of SBs exceeds the '*minimum level of severity*', then it is posited that this could fall within the scope of Article 3. For the purposes of this review, two specific types of IDT will be used as reference points. Firstly, *sexual* violence; and secondly, broader general physical violence.

⁸⁶ Offences Against the Person Act 1861, s47

⁸⁷ n84 para 10

⁸⁸ *ibid* 'Findings'

⁸⁹ This was removed with the introduction of the Children Act 2004, s58

⁹⁰ *Ireland v United Kingdom* (1979-80) 2 EHRR 25

⁹¹ *ibid* para 163

1.6.1 Sexual Violence

The leading case on sexual violence as IDT is *Aydin v Turkey*, which clarifies how fundamental the protection of sexual autonomy is.⁹² The Applicant was a 17-year-old girl who was detained by Turkish officials, and alongside extensive cruel and degrading physical abuse,⁹³ she was also raped by State officials while in custody. This treatment was condemned in the most absolute terms as a clear violation of Article 3.⁹⁴

While *Aydin* concerned rape at the hands of State officials, it is posited that the State-actor status of the perpetrator is an aggravating factor, *not* a comment as to the trauma caused by rape as a general crime. By this it is meant that the Court recognised rape to be something that in and of itself ‘*leaves deep psychological scars on the victim*’⁹⁵ and the fact that it is committed by State or non-State actors does not negate this, but merely constitutes a case-specific aggravating factor. This is supported by the fact that other cases, including *M.C.* and *Maslova and Nalbandov*, have expressly spoken as to its ‘*especially grave and abhorrent...and cruel*’ nature.⁹⁶

To summarise: *M.C.* set out the need for measures that prevent violations of sexual autonomy as it is understood within Article 3; and *Aydin* clarifies that the ECtHR views rape as a violation of Article 3. That is to say, rape clearly exceeds the threshold of IDT – and possibly

⁹² *Aydin v Turkey* (1998) 25 EHRR 251

⁹³ Including ‘*being beaten, being placed in a tyre and hosed with pressurised water, combined with the humiliation of being stripped naked*’ see *ibid* paras 78 and 80

⁹⁴ *ibid* para 78 ‘*Such an offence struck at the heart of the victim’s physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering... Furthermore, rape leaves deep psychological scars on the victim, which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.*’

⁹⁵ *ibid* para 83

⁹⁶ See *Maslova and Nalbandov v Russia* App no 839/02 (ECtHR 24 January 2008) paras 107 and 108

even torture⁹⁷ – and consequently, legislation must exist on a domestic level that adequately deters rape from happening, while also appropriately punishing perpetrators. The next task will be to transpose this to prostitution, with an analysis of the impact of different legislative approaches to the issue.

1.6.2 Physical Violence

While sexual violence in the form of rape will be shown to be commonplace within prostitution, it is also important to recognise that other prevalent SB actions would likely exceed the threshold to be considered IDT. It is posited here that if an individual experiences non-consensual physical violence within the context of prostitution that simultaneously would ‘*attain a minimum level of severity*’,⁹⁸ but is not necessarily rape, this should nevertheless also be considered an autonomy-violation. This is a developing area of law,⁹⁹ but as the *Hogben* case demonstrated, paying for intercourse does not mean consent cannot be vitiated.¹⁰⁰ Although *Hogben* concerned the removal of a condom, it is posited that this is simply a specific example of what might vitiate consent, and physical violence should also be included under that rationale.

As mentioned, in *A* the Court found that ABH fell within the scope of Article 3, so it can be assumed that this provides a minimum threshold of sorts for the actions themselves; in

⁹⁷ Clare McGlynn, ‘Rape as ‘Torture’? Catharine MacKinnon and Questions of Feminist Strategy’ (2008) 16 *Feminist Legal Studies* 71

⁹⁸ n90 para 163 for full quote: ‘*The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim... The Court considers that treatment of this kind reaches the level of severity prohibited by Article 3*’.

⁹⁹ Gavin A. Doig and Natalie Wortley, ‘Divisional Court: Conditional Consent? An Emerging Concept in the Law of Rape’ (2013) 77 (4) *Journal of Criminal Law*

¹⁰⁰ *R v Hogben* (2019 unreported), see Nicholas Dent, ‘“Stealth” conviction brings conditional consent out in the open’ (*Lexology* May 2019) < <https://www.lexology.com/library/detail.aspx?g=630e5037-43d5-4cc3-9b6c-a92457f7feb9#:~:text=A%20%E2%80%9Cconditional%20consent%E2%80%9D%20case%20involves,have%20been%20broken%2C%20or%20withdrawn.>> accessed 21 June 2021

Ireland the Court defined “degrading” as treatment that could arouse ‘*feelings of fear, anguish and inferiority...*’;¹⁰¹ and in *Pretty*, the Court defined it as something that ‘*break(s) an individual's moral and physical resistance*’.¹⁰²

Moving forward, this review seeks to demonstrate that those within prostitution overwhelmingly suffer some form of autonomy-violation in the form of IDT, whether this is rape as in *Aydin*, or other types of IDT based upon these definitions *as a result* of SB attitudes, *irrespective* of which legislative approach is taken. Therefore, the substantive obligation necessitates combating these violations as effectively as possible.

¹⁰¹ N Ireland para 167

¹⁰² *Pretty v The United Kingdom* (2002) 35 EHRR 1 para 52

Chapter 2: The Global Nature of Prostitution

It is necessary to establish that prostitution begets IDT in a manner that differentiates itself from “individual” acts of IDT. Without recognising prostitution as a context in which sexual and physical violence occurs in a distinct way, any exercise in applying specific laws to counter that violence becomes redundant.

After all, the law within England and Wales – and the wider UK – already criminalises rape and physical violence to a degree that is compatible with Convention rights.¹⁰³ So why does prostitution specifically require special consideration, particularly as regards the somewhat restricted nature of positive obligations under the due diligence principle?

First and foremost, it is undeniable that prostitution both within the UK and across the globe is recognised as a distinct social phenomenon, demonstrated by the very fact that there are laws and regulatory frameworks in place that govern exchanges of money for sexual intercourse at all.¹⁰⁴

Further, the recognition of the economic enormity of prostitution also evidences this distinct status. While figures regarding the true size of the prostitution “market” are at best unclear due to the hidden nature of prostitution itself, estimates place global revenue at \$186 billion per year comprised of more than 40 million prostituted individuals,¹⁰⁵ and the Office for

¹⁰³ Sexual Offences Act 2003, s1 (as amended by s142 Criminal Justice and Public Order Act 1994); and Offences Against the Person Act 1861

¹⁰⁴ Such as mandatory health and safety checks in Germany, or the criminalisation of brothel keeping in the UK.

¹⁰⁵ Erika Schulze and others, ‘Sexual exploitation and prostitution and its impact on gender equality’ (*European Parliament* 2014) <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET\(2014\)493040_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf)> accessed 21 June 2021

National Statistics in 2014 estimated that prostitution adds over £5 billion to the UK economy.¹⁰⁶

If it is accepted that prostitution exists as a distinct system, the next step is to then examine whether or not it yields any common or even universal experiences for those within it; specifically in relation to the prevalence of autonomy-violations that would represent a ‘*general problem*’¹⁰⁷ and thus require a specific legislative approach to deal with it in light of the Article 3 positive obligation. To examine that, attention must be turned to the wider global sex trade.

2.1 Global Sexual Violence and Abuse

It is advantageous to examine wider global research that has been undertaken on experiences of individuals within prostitution as, on a pragmatic level, it presents a deeper understanding of a hidden industry. Further, an examination of global trends and experiences will allow for a more reliable inference of how prostitution may function in jurisdictions where there is less research. Prostitution legislation varies by jurisdiction, but it is posited here, and evidenced below, that certain trends are consistent throughout prostitution *wherever* and *however* it occurs.

In the United States (US), the research examining sexual and physical violence within prostitution spans several decades. While this may raise questions as regards the relevance of

¹⁰⁶ Joshua Abramsky and Steve Drew, ‘Changes to National Accounts: Inclusion of Illegal Drugs and Prostitution in the UK National Accounts’, Office for National Statistics (*Office for National Statistics*, May 2014)

<<https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/articles/nationalaccountsarticles/revisiostogrossdomesticproductinbluebook2016>> accessed 21 June 2021. NB: This figure has come under criticism due to the alleged methodological shortcomings of the study, but even if it is assumed that the £5 billion figure is an over-estimation by as much as 50%, this still leaves the total economic activity of prostitution at more than double that of the fishing industry, for example.

¹⁰⁷ Stoyanova (n5)

research more than 30 years old, it is posited that the age of the research is beneficial. If certain experiences – in this case, sexual and physical violence – can be tracked throughout several decades, then that arguably speaks to its prevalence and consistent nature within prostitution.

For example, in 1982 Silbert and Pines found that 70% of women in prostitution in San Francisco had been raped by SBs;¹⁰⁸ in 1993, Hunter found that prostituted women in Oregon were raped on average once per week by SBs;¹⁰⁹ and in 1994, Parriott found that 85% of women in prostitution in Minneapolis had been raped during the course of being prostituted.¹¹⁰

In 2008 Farley et al interviewed 130 prostituted women in San Francisco, 82% of whom had been physically assaulted while in prostitution; 73% had been raped; and 59% had been raped more than five times while in prostitution.¹¹¹

In Colombia, of 96 women who were interviewed as to whether they had a) been physically assaulted in prostitution, b) been raped in prostitution, and c) been raped more than five times in prostitution the figures were 70%, 47%, and 64% respectively;¹¹² in Mexico, of 123 women the figures were 59%, 46%, and 44%;¹¹³ in South Africa, of 68 women the figures were 66%, 56%, and 58%;¹¹⁴ in Thailand, of 166 women the figures were 56%, 38%, and

¹⁰⁸ Mimi H Silbert and Ayala M Pines, 'Victimization of Street Prostitutes' (1982) 7 *Victimology* 122.

¹⁰⁹ Susan K. Hunter, 'Prostitution is Cruelty and Abuse to Women and Children', (1993) 1(1) *Michigan Journal of Gender and Law* 91

¹¹⁰ Ruth Parriott, 'Health Experiences of Women Used in Prostitution: Survey Findings and Recommendations' (1994) Centre for Urban and Regional Affairs, available at <https://conservancy.umn.edu/bitstream/handle/11299/205150/S9406.pdf?sequence=1&isAllowed=y> accessed 21 June 2021

¹¹¹ Melissa Farley and others, 'Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder' (2004) 2 *Journal of Trauma Practice* 38

¹¹² *Ibid* p43

¹¹³ *ibid*

¹¹⁴ *ibid*

56%;¹¹⁵ in Turkey, of 50 women the figures were 80%, 50%, and 36%;¹¹⁶ and in Zambia, of 117 women interviewed the figures were 82%, 79%, and 52%.¹¹⁷

A 2002 study across five countries¹¹⁸ undertaken by Raymond and others found that:

*'Rates and frequency of violence and control are extremely high, with physical harm (almost 80 percent), sexual assault (over 60 percent)... leading the indicators.'*¹¹⁹

Further:

*'...acts...included being beaten, bit, burned... choked, crushed, dragged, hit with objects... punched, scratched... smacked, strangled... thrown out of a car, twisted, and hair pulled...being...urinated on, pinched in the breasts, sodomized, objects inserted in anus and vagina, bestiality... weapons used against women... being strangled with a bandana, burned... bound with extension cords, assaulted with...knives and guns, hit with shoes and a liquor bottle.'*¹²⁰

Clearly, physical and sexual violence is endemic within prostitution, globally speaking. In each of the referenced studies, reported treatment far exceeds the minimum threshold of IDT established in Chapter 1. Indeed, the fact that many of the women involved reported being repeatedly raped within prostitution would place this on par with the treatment established in *Aydin*, and further, the *'deliberate inhuman treatment causing very serious and cruel suffering'* established in *Ireland* as being necessary to constitute torture seems to be

¹¹⁵ *ibid*

¹¹⁶ *ibid*

¹¹⁷ *ibid*

¹¹⁸ Indonesia, the Philippines, Thailand, Venezuela, and the United States

¹¹⁹ Janice G Raymond and others, 'A Comparative Study of Women Trafficked in the Migration Process' (2002) available at < https://reliefweb.int/sites/reliefweb.int/files/resources/7092F5115C910FD8C1256F56003B65FD-Gender_Migration_CATW_2002.pdf > 61 accessed 21 June 2021.

¹²⁰ *Ibid* 64

analogous; after all, what is treatment such as being ‘*thrown out of a car...strangled...bound with extension cords...*’ if not ‘*deliberate*’ which causes ‘*cruel suffering*’?

Further, because prostitution is often comprised of individuals who have other vulnerabilities such as poverty or addiction, this obliterates any notions of “choice”.¹²¹ To engage in prostitution *willingly* is predicated on being able *not* to engage in it when preferred. However, this is rarely an option. For example, Raymond found that:

*‘...respondents said that they also suffered physical punishment when they made mistakes or tried to run away...they had to service men...even when they were ill or did not feel well...Their movement was highly controlled, and most were not allowed to leave the premises and were tightly guarded.’*¹²²

In the legalised brothels of Nevada (US), Farley described conditions reminiscent of an actual prison:

*“[There was] a grated iron door in one brothel. The women’s food was shoved through the door’s steel bars...One pimp starved a woman he considered too fat.”*¹²³

Chong Kim, a prostitution survivor who worked with Farley, stated that legal brothel owners ‘*are worse than any pimp. They abuse and imprison women and are fully protected by the state.*’¹²⁴

¹²¹ For example, see Jacquelyn Monroe, ‘Women in Street Prostitution: The Result of Poverty and the Brunt of Inequity’ (2005) 9 *Journal of Poverty*; and Mimi Silbert, Ayala M. Pines, and Teri Lynch, ‘Substance Abuse and Prostitution’ (1982) 14 *Journal of Psychoactive Drugs* 193 respectively

¹²² Raymond (n119)

¹²³ Julie Bindel, “‘It’s like You Sign a Contract to Be Raped’” *The Guardian* (7 September 2007)

<<https://www.theguardian.com/world/2007/sep/07/usa.gender>> accessed 21 June 2021.

¹²⁴ *ibid*

In the Netherlands, violence and coercion to keep women trapped in prostitution is commonplace, with an estimated 50% to 90% of women in licensed prostitution ‘*working involuntarily*’.¹²⁵ In the *SNEEP* case,¹²⁶ six defendants were found guilty of trafficking more than 100 women into State-regulated prostitution via a sprawling and organised network of accomplices, with the judgment detailing the levels of violence faced, including ‘*rape and coercion into breast enlargement or abortion*’ used to control the women.¹²⁷

Not only are these conditions that in any other circumstance would constitute clear and obvious IDT endemic within prostitution *wherever* it occurs across the globe, but that in many cases, the women are forcibly prevented from exiting. To phrase it bluntly, there is little that resembles anything close to sexual autonomy.

It is also fundamental to understand *why* these things happen. Is it *because of* any given legislative approach that IDT results, or for a different reason? As mentioned, prostitution is understood to be *demand*-driven – and this is where the crux of the issue becomes apparent. It is posited here that the systemic nature of behaviour constituting IDT is not consequence of the legislation,¹²⁸ but simply a symptom of a deeper issue: the attitudes of SBs themselves.

2.2 Sex Buyer Attitudes

Research demonstrates that compared to non-sex buyers (NSBs), SBs lack – or have drastically reduced capacity for – empathy for those in prostitution, which itself is strongly

¹²⁵ CAP International, ‘Assessment of ten years of Swedish and Dutch policies on prostitution’ (*CAP International*, August 2012) <<http://www.cap-international.org/wp-content/uploads/2017/10/Brief-prostitution-Sweden-and-Netherlands-EN-1.pdf>> accessed on 21 June 2021

¹²⁶ The *SNEEP* Case LJN: BD6972, Almelo District Court, 08/963001-07 Print judgement

¹²⁷ *ibid*: ‘*A characteristic feature of the organisation was its ruthless and violent conduct. The case file is bursting with violence and intimidations. The five defendants have no respect at all for the physical and mental integrity and right of self-determination of these women.*’

¹²⁸ See Introduction n1

linked to sexual aggression.¹²⁹ But as importantly, the lack of empathy affords SBs an opportunity to act on pre-existing desires to violate sexual autonomy and enact violence.¹³⁰

As regards links between sexual violence and sex buying: between 2010 and 2013 four UN agencies undertook a multi-country study to understand the driving factors behind male violence against women.¹³¹ While the study covers many factors, one key finding was that rape perpetration was strongly linked with '*transactional sex*' (prostitution).¹³²

This is supported by Farley's research which found that 15% of SBs were more likely to rape a woman if they thought they could get away with it compared to NSBs (2%).¹³³ SBs reported a higher level of sexually aggressive behaviour, as well as being more likely than NSBs (37% vs 21%) to believe that once sex has been paid for, the woman is obligated to do whatever the SB wants;¹³⁴ in 2005, Monto and McRee found the SBs were more likely to have committed rape;¹³⁵ and in 2014, Heilman et al found that in a study of five countries, in each one SBs were more likely to perpetrate sexual violence.¹³⁶

What this seeks to demonstrate is that it is not the *legislation* that is the *cause* of violations of sexual autonomy, as argued by some,¹³⁷ but that SBs are more predisposed to committing

¹²⁹ David Lisak and Carol Ivan, 'Deficits in Intimacy and Empathy in Sexually Aggressive Men': (2016) *Journal of Interpersonal Violence*; also R. Karl Hanson, 'Empathy deficits of sexual offenders: A conceptual model' (2003) 9 *Journal of Sexual Aggression* 13-23.

¹³⁰ Melissa Farley and others, 'Attitudes and Social Characteristics of Men Who Buy Sex in Scotland' (2011) 3(4) *Psychological Trauma Theory Research Practice and Policy* 369

¹³¹ Emma Fulu and others, 'Why Do Some Men Use Violence Against Women And How Can We Prevent It? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific' (2013) Bangkok: UNDP, UNFPA, UN Women and UNV

¹³² *ibid* p10

¹³³ Melissa Farley and others, 'Comparing Sex Buyers With Men Who Do Not Buy Sex: New Data on Prostitution and Trafficking' (2017) 32 *Journal of Interpersonal Violence* 3601.

¹³⁴ *ibid*

¹³⁵ Martin A Monto and Nick McRee, 'A Comparison of the Male Customers of Female Street Prostitutes With National Samples of Men' (2005) 49 *International Journal of Offender Therapy and Comparative Criminology* 505.

¹³⁶ Brian Heilman, Luciana Herbert, and Nastasia Paul-Gera, 'The Making Of Sexual Violence: How Does a Boy Grow Up to Commit Rape?' (2014) *International Center for Research on Women (ICRW)*

¹³⁷ See Introduction n1

violations of sexual autonomy, and being able to purchase sex reinforces these attitudes (and often presents an opportunity to act on them).¹³⁸ The differing legislative approaches therefore can only combat or facilitate these pre-existing attitudes, as opposed to causing them *per se*.

It is important to acknowledge that those who view prostitution as sexual labour often argue that this dehumanisation occurs as a result of prostitution's lack of recognition as "work".¹³⁹ By decriminalising those within prostitution, and treating it *as* work, any pre-existing harmful SB attitudes would be normatively shifted as SBs begin to view those who they pay for sex as akin to any other "worker", and thus worthy of the respect inherent within that.¹⁴⁰ This will be expanded upon in Chapter 5, but if prostitution *is* reconceptualised as work, is there any evidence that this changes anything?

Moving forward, if it is accepted that prostitution regularly entails violations of sexual autonomy to present a '*general problem*'¹⁴¹ against a '*specific segment of the population*'¹⁴² as a result of market expansion and SB attitudes, and this is also the case within the UK, then it is posited that the positive obligation under Article 3 is consequently triggered in line with *M.C.* and a legislative change must occur in the form of a unique legal approach beyond that of simply criminalising rape and physical assault.

¹³⁸ Farley (n133)

¹³⁹ For example, see Lynzi Armstrong, 'Stigma, Decriminalisation, and Violence against Street-Based Sex Workers: Changing the Narrative' (2018) 22(7-8) *Sexualities*; Meredith Ralston, 'Sex Workers Need Decriminalization, Not Stigma' *The Globe Post* (23 April 2019) <<https://theglobepost.com/2019/04/23/decriminalizing-sex-work/>> accessed 21 June 2021; Open Society Foundation, 'Ten Reasons to Decriminalize Sex Work' (*Open Society Foundation*, April 2015) <<https://www.opensocietyfoundations.org/publications/ten-reasons-decriminalize-sex-work>> accessed 21 June 2021; Ine Vanwesenbeeck, 'Sex Work Criminalization Is Barking Up the Wrong Tree' (2017) 46 *Archives of Sexual Behavior* 1631;

¹⁴⁰ *ibid*

¹⁴¹ Stoyanova (n5)

¹⁴² n63

Chapter 3: The United Kingdom

3.1 Background

Prostitution is a devolved issue, so while it would be accurate to say any law reform may only apply to England and Wales, there is no reason it could not also be applied the UK as a whole.¹⁴³ It operates as partially-criminalised, and partially decriminalised, and prostitution as defined in the Sexual Offences Act (SOA) 2003 is legal in and of itself.¹⁴⁴ However, aspects such as soliciting, brothel keeping, and street prostitution are illegal.¹⁴⁵ This messy approach to regulation has created what the Fawcett Society described as a ‘*worst of both worlds*’ situation, placing those within prostitution at great risk.¹⁴⁶

The UK has legislative measures in place to theoretically combat autonomy-violations and trafficking in the form of the Modern Slavery Act 2015, the Palermo Protocol 2000, and section 53A SOA 2003 makes ‘*paying for sexual services of a prostitute subjected to force*’ a strict liability offence.¹⁴⁷ Parallel to this, the concept of consent is defined in section 74 SOA 2003.¹⁴⁸

The question for the UK is: do these criminal law measures adequately protect sexual autonomy, per *M.C.*, or does the current legal status of prostitution undermine them, resulting in a failure to prevent autonomy-violations?

¹⁴³ Home Affairs Committee, *Prostitution*, (HC 2016-17, 26-III) para 12

¹⁴⁴ Sexual Offences Act 2003, s54(2): A prostitute is somebody who ‘*provides sexual services to another person in return for payment*’.

¹⁴⁵ *ibid*

¹⁴⁶ n143

¹⁴⁷ Sexual Offences Act 2003, s53A

¹⁴⁸ *ibid* s74: ‘*For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.*’

3.2 Market Size and Trafficking

In 2016-17, figures estimated the number of prostituted individuals in the UK at approximately 72,000,¹⁴⁹ an increase from approximately 50,000 in 2014,¹⁵⁰ and Ward et al found that the number of SBs had doubled during the decade 1990-2000.¹⁵¹ Why is this?

Although there are many factors as to why somebody might be compelled into prostitution, and thus contribute to a market expansion, the influx of women from outside the UK in recent years cannot be ignored. In July 2020, the Centre for Social Justice found that all types of modern slavery – including sexual exploitation – were increasing.¹⁵²

Of particular relevance here, the report found that the most common type of exploitation was sexual exploitation (33%).¹⁵³ During the Covid-19 pandemic there was a 280% increase in the advertising of sexual services online in the West Midlands,¹⁵⁴ with the women being of predominantly Eastern European origin, and a representative from *Women's Aid* stated that there had also been an increase in on-street prostitution in Birmingham.¹⁵⁵

A 2018 APPG report stated that '*...modern slavery and human trafficking are far more prevalent than previously thought*', and that there were '*growing reports of organised crime groups sexually exploiting women around the UK in so-called 'pop-up' brothels*'.¹⁵⁶

¹⁴⁹ n143

¹⁵⁰ Ibid para 16

¹⁵¹ H Ward and others, 'Who Pays for Sex? An Analysis of the Increasing Prevalence of Female Commercial Sex Contacts among Men in Britain' (2005) 81 *Sexually Transmitted Infections* 467.

¹⁵² Centre for Social Justice and Justice & Care, 'It Still Happens Here: Fighting UK Slavery In The 2020s'(July 2020)< <https://www.justiceandcare.org/wp-content/uploads/2020/07/Justice-and-Care-Centre-for-Social-Justice-It-Still-Happens-Here.pdf>> accessed 21 June 2021

¹⁵³ ibid p23

¹⁵⁴ ibid p65

¹⁵⁵ ibid p64

¹⁵⁶ All-Party Parliamentary Group, *Behind Closed Doors Organised sexual exploitation in England and Wales An inquiry by the All-Party Parliamentary Group on Prostitution and the Global Sex Trade* (APPG 2018) p2

While prosecution and investigation figures were provided to the inquiry, they concluded that they '*represent a small fraction of the true scale of organised sexual exploitation.*'¹⁵⁷

The prostitution market is almost certainly increasing, and although research in this area is limited, a 2010 report suggested that *at least* 10,000 women involved in off-street prostitution were victims of trafficking or non-UK nationals who were highly vulnerable.¹⁵⁸ When contextualised within Article 3(b) Palermo Protocol 2000,¹⁵⁹ as well as the section 74 SOA 2003 definition of consent, it is posited that there are individuals numbering into possibly tens of thousands who, due to the imposition of force and coercion, lack sexual autonomy.

To illuminate, if it is imagined that the conservative figure of 10,000 individuals are prostituted through force or coercion to one client per week,¹⁶⁰ this would result in a staggering 520,000 section 53A offences per year. This becomes even more striking when placed within the context of prosecution figures, which number at a meagre seven *since 2014*.¹⁶¹

The prostitution market in the UK is increasing every year, and as will be explored, it is argued that this is a result of demand not being tackled effectively; a large number of these individuals are trafficked, forced, or coerced; and thus, they lack the ability to consent per domestic and international legislation. It is argued, therefore, that the UK is falling short of the substantive positive obligation established in *M.C.* to adequately protect the sexual autonomy of those within prostitution.

¹⁵⁷ Ibid p5

¹⁵⁸ Keith Jackson, Jon Jeffery and George Adamson, 'Setting The Record: The trafficking of migrant women in the England and Wales off-street prostitution sector' (Project Acumen ACPO Migration And Associated Matters 2010) <<https://nordicmodelnow.files.wordpress.com/2017/12/setting-the-record-project-acumen-aug-2010.pdf> > accessed 21 June 2021

¹⁵⁹ n32

¹⁶⁰ To note, the average number of clients per week is actually closer to 25, see n143

¹⁶¹ Crown Prosecution Service, 'Violence Against Women and Girls Report 2018–19' (CPS 2018-19) <<https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf> > accessed 21 June 2021

3.3 Physical Violence

A consistent obstacle is the difficulty in gleaning accurate figures pertaining to anything prostitution-related. However, a 2018 study by Connelly provides a comprehensive data set of violence-related experiences from which initial analysis can be drawn.¹⁶²

Here, a secondary quantitative data analysis of 2,056 crime reports submitted to *National Ugly Mugs* (NUM) took place,¹⁶³ seeking to understand ‘i) *How do the different sex markets in the UK affect what crimes are reported to NUM? (and) ii) What effect do the different sex markets in the UK have on sex workers’ willingness to report victimization to the police?*’¹⁶⁴ While the scope of this research is broader than the central focus of this review, some important data is provided.

Firstly, the sample size of 2,056 reports is relatively large compared to the data analysed previously, and so it provides a strong foundation for analysing experiences within the UK. Secondly, it also offers an insight into the *type* of crime experienced by victims, which *is* central to this review.

The research showed that on average, 46% of *all* prostituted individuals reported experiencing some form of violence;¹⁶⁵ 17.8% reported rape and/or attempted rape,¹⁶⁶ established in *Aydin* as at the very least IDT; and 7.2% reported being sexually assaulted.¹⁶⁷ While the specific type

¹⁶² Laura Connelly, Daiga Kamerāde and Teela Sanders, ‘Violent and Nonviolent Crimes Against Sex Workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom’ (2018) *Journal of Interpersonal Violence*.

¹⁶³ National Ugly Mugs are a non-profit organisation ‘*which provides greater access to justice and protection for sex workers who are often targeted by dangerous individuals but are frequently reluctant to report these incidents to the police.* see ‘About’ <<https://uglymugs.org/um/about/>> accessed 21 June 2021

¹⁶⁴ Connelly (n162)

¹⁶⁵ *ibid* p9

¹⁶⁶ *ibid* p11

¹⁶⁷ *ibid*

of violence that 46% of individuals had been subjected to is not clarified, from the research presented previously it can be inferred that this is extremely likely to exceed the IDT threshold established in A. The very fact this is referred to as '*violence*' in the study would suggest that it is non-consensual, and thus an autonomy-violation. Connelly describes it as '*almost axiomatic*' that researchers lament the '*enduring levels of violence*'¹⁶⁸ and further studies support this point. Campbell and Stoops found that 80% of those in prostitution in Liverpool had been subjected to physical violence;¹⁶⁹ and a multi-city study of 240 prostituted individuals undertaken by Barnard found that 63% had been subjected to SB violence over their lifetime, 47% reported being '*slapped, kicked, or punched*', and 28% reported '*attempted rape*'.¹⁷⁰ It seems apparent that physical and sexual violence is commonplace within prostitution in the UK, *irrespective* of whether the victim has been trafficked or not. Specifically, violence that exceeds ABH established in A as IDT, and often sexual violence reaching the threshold in *Aydin*.

If it is accepted that those within prostitution in the UK are '*subject to repeated violence*'¹⁷¹ enough to present a '*general problem*',¹⁷² then following the rationale in *M.C.*, it should be incumbent upon the State to ensure that they don't '*risk...jeopardising the effective protection of the individual's sexual autonomy*',¹⁷³ namely, the rape of and broader physical violence against those within prostitution. To do so would be a failure akin to that found in *M.C.*, as it is occurring against a specific '*segment of its population*', namely, those in prostitution.¹⁷⁴

¹⁶⁸ Connelly (n162)

¹⁶⁹ Rosie Campbell and Shelly Stoops, 'Taking sex workers seriously: Treating violence as hate crime in Liverpool' (2010) Research for Sex Work 12

¹⁷⁰ Marina Barnard and others, 'Violence by clients towards female prostitutes in different work settings: questionnaire survey' (2001) 322 British Medical Journal 524

¹⁷¹ n63

¹⁷² Stoyanova (n5)

¹⁷³ n3 para 166

¹⁷⁴ n63

Despite this violence, willingness to make official reports to authorities is very low. In 2019, the English Collective of Prostitutes described the treatment of those reporting crimes as *'going backwards'* due to the fact that they *'face a character assassination in court, and that you get put on trial rather than the rapist'*,¹⁷⁵ and there have been calls from activists and campaigners to *'change the way they (see) sex workers'* to counteract perceived victimisation by authorities.¹⁷⁶

Connelly found that only 20% of all prostituted individuals on average would be willing to report crimes to the police non-anonymously.¹⁷⁷ Further, Campbell discovered that reasons for reluctance in reporting crimes (including violence and rape) included:

*'...a lack of trust in the police; poor previous experience with law enforcement... fear of arrest for soliciting...'*¹⁷⁸

In light of this, it is therefore interesting that the CPS themselves recognise the issue of those in prostitution being reluctant to report crime, and highlight the need for individuals not to be prejudicially treated as prima facie suspects, with CPS guidance stating:

*'...those who sell sex should not be treated as offenders but as people who may be or become victims of crime.'*¹⁷⁹

¹⁷⁵ 'Sex Workers Denied Justice over Rapes, Says UK Prostitutes' Collective' *Reuters* (5 November 2019) <<https://www.reuters.com/article/us-britain-women-rape-trfn-idUSKBN1XF1QE>> accessed 21 June 2021

¹⁷⁶ Jenny Rees, 'Sex Workers "Not Reporting Attacks"' *BBC News* (28 February 2018) <<https://www.bbc.com/news/uk-wales-south-west-wales-43227579>> accessed 21 June 2021.

¹⁷⁷ Connelly (n162)

¹⁷⁸ Rosie Campbell, 'Working on the Streets: An Evaluation of the Linx Project' (Liverpool Hope University College/NACRO 2002)

¹⁷⁹ 'Prostitution and Exploitation of Prostitution | The Crown Prosecution Service' <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution#_Toc534624527> accessed 21 June 2021

The discrepancy between prosecution guidelines, and the reluctance of those involved in prostitution to report the extreme levels of violence faced due to the perception they may be treated as suspects, further evidences the failure of the UK to provide an adequate framework that ensures the '*penalisation and effective prosecution of any non-consensual sexual act*'.¹⁸⁰

Although the specific reason for the inadequacy of legislation that punishes rape in *M.C.* differs to that detailed here – in essence it can be summarised as “conception of consent” in *M.C.* versus “treatment by authorities” in the UK – it is posited that the same rationale still applies. The Bulgarian Government fell short of their positive obligation in *M.C.*, just as the UK Government are falling short of theirs by creating an environment in which prostituted individuals feel unable to report their own sexual assaults and rapes. If this is accepted, the question then becomes: which new legislative approach can resolve this?

¹⁸⁰ n3 para 166

Chapter 4: The German Model - Legalisation

4.1 Background

Legalisation of prostitution in Germany, as implemented in 2002 by the *Prostitutionsgesetz* (Prost-G),¹⁸¹ can be best described as a form of State regulation.¹⁸² Legalisation imposes State-mandated requirements that those within prostitution, and third parties such as brothel owners, have to abide by, such as registering with authorities, and registering for mandatory health checks.¹⁸³

Despite Germany's long history of involvement in prostitution legislation,¹⁸⁴ this review does not advocate the German model – legalisation – as a potential legislative framework for prostitution in the UK, for two reasons. Firstly, legalisation is generally considered to be an unmitigated disaster in Germany with respect to its goals of creating a safer environment for those within prostitution, with critics describing it as producing 'hell on Earth'.¹⁸⁵

¹⁸¹ Bundesministeriums für Familie, Senioren, Frauen und Jugend, 'Bericht der Bundesregierung zu den Auswirkungen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG)' trns: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 'Report of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)' (2007) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf> p6 accessed 21 June 2021

¹⁸² Barbara Kaveman et al, 'The Act Regulating the Legal Situation of Prostitutes – implementation, impact, current developments' <https://prosentret.no/?wpfb_dl=341> accessed 21 June 2021 p3

¹⁸³ Mandatory health checks were introduced in 2017, see *Abschnitt 2 Prostituierte, §3 Anmeldepflicht für Prostituierte* and *§4 Zur Anmeldung erforderliche Angaben und Nachweise (Prostituiertenschutzgesetz – ProstSchG)* trns: Section 2 Prostitutes, §3 Registration for prostitutes and §4 Information and evidence required for registration, Prostitute Protection Law – ProstSchG)

¹⁸⁴ For example, see Margarete von Galen, 'Prostitution and the Law in Germany' (1996) 3 *Cardozo Women's Law Journal* 349; and John R. Gregg, *Sex, the World History: Through Time, Religion and Culture* (Xlibris Corporation 2019) ch 28

¹⁸⁵ 'The German model is producing hell on earth!' (*Trauma and Prostitution*, 02 November 2016) <<https://www.trauma-and-prostitution.eu/en/2016/11/02/the-german-model-is-producing-hell-on-earth/>> accessed 21 June 2021

Secondly, legalisation is not actually desired either by abolitionists *or* those who oppose the abolitionist stance, in that both parties agree legalisation would not be the preferred outcome if legislative reform were to take place, due to its perceived failure.¹⁸⁶

In 2002 the Bundestag passed the Prost-G, which represented the most comprehensive attempt to control prostitution while making it safer.¹⁸⁷ It was implemented as prostitution was considered to be “a given”, but the German Government did not seek to ‘*abolish nor enhance its reputation*’ due to constantly shifting moral perspectives, but to instead improve the conditions in which it took place.¹⁸⁸

The idea was that if a “breach of contract” occurred – such as the client not paying – then there would be legal protections to ensure compensation in some form.¹⁸⁹ Despite attempting to remain morally impartial to the reality of prostitution, the subsequent eighteen years have highlighted the failure of this approach. Firstly, because the prostitution market in Germany has expanded mainly due to an increase in human trafficking;¹⁹⁰ and secondly, SB violence has not abated.¹⁹¹

¹⁸⁶ For example, see Maxwell Tani, ‘Sex worker explains the difference between legalizing and decriminalizing prostitution’ (*Business Insider*, 10 June 2015) < <https://www.businessinsider.com/sex-worker-explains-the-difference-between-legalizing-and-decriminalizing-prostitution-2015-6?r=DE&IR=T#:~:text=Many%20people%20have%20argued%20for,and%20fairer%20for%20sex%20workers,&text=Decriminalization%20eliminates%20all%20laws%20and,transactions%2C%20unless%20other%20laws%20apply> > accessed 21 June 2021; ‘Debate: Decriminalisation of Prostitution’ (*Royal College of Nursing*, 2019) < <https://www.rcn.org.uk/congress/what-happened-at-congress-2019/1-Decriminalisation-of-prostitution> > accessed 21 June 2021

¹⁸⁷ n181

¹⁸⁸ *ibid* p9

¹⁸⁹ *ibid* p9

¹⁹⁰ Cho (n6)

¹⁹¹ For example, see Bundesministeriums für Familie, Senioren, Frauen und Jugend, ‘Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland’ (2004) trns: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Health, Well-Being and Personal Safety of Women in Germany’ (2004) < <https://www.bmfsfj.de/blob/94200/d0576c5a115baf675b5f75e7ab2d56b0/lebenssituation-sicherheit-und-gesundheit-von-frauen-in-deutschland-data.pdf> > accessed 21 September 2020 p26; and ‘Interview with a dominatrix’ (*Abolition 2014*, May 2014) < <http://abolition2014.blogspot.com/2014/05/interview-mit-einer-domina.html> > accessed 21 June 2021

4.2 Market Size

In 2012, Cho undertook an empirical analysis examining the impact of legalisation of prostitution and its links to human trafficking.¹⁹² While it is acknowledged that not all trafficking is for the purposes of prostitution, and not all prostitution is a result of trafficking, as will be demonstrated, human trafficking is one of the fundamental drivers of the expansion of prostitution in Germany, and thus cannot be ignored.

Due to the aforementioned general opposition to legalisation, an extensive analysis of Cho's work will not be undertaken. Instead a brief review of her findings is presented in order to paint a picture of the effect of legalisation on the prostitution market. Cho refers to data gathered by Danailova-Trainor and Belser in 2006,¹⁹³ which estimated that the prostitution market comprised of approximately 150,000 individuals. In a separate 2008 study, the *European Network for the Promotion of Rights and Health Amongst Migrant Sex Workers* (TAMPEP) estimated the figure at 400,000.¹⁹⁴

Current figures for market size are very difficult to discern, despite Germany's regulatory approach.¹⁹⁵ In 2017, official figures placed the number of individuals who had obtained a license to run a '*prostitution business*' at 1,350, and the total number of registered individuals – including brothel owners and prostituted individuals – stands at 40,400 as of 2019.¹⁹⁶

According to Berlin and others, the low figures of registered individuals does not correspond

¹⁹² Cho (n6).

¹⁹³ Gergana Danailova-Trainor and Patrick Belser, 'Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand' (2006) International Labour Organisation

¹⁹⁴ Philippe Adair and Oksana Nezhyvenko, 'Assessing How Large Is the Market for Prostitution in the European Union' (2017) 14 *Éthique et économique/Ethics and economics* 116.

¹⁹⁵ Maria Perrotta Berlin, Ina Ganguli and Giancarlo Spagnolo, 'Human Trafficking, Prostitution Legislation, and Data - Free Network' (*Free Network*, 22 January 2020) <<https://freepolicybriefs.org/2020/01/22/trafficking-prostitution-legislation/>> accessed 21 June 2021.

¹⁹⁶ *ibid*

with reality.¹⁹⁷ Indeed, the low take-up rate of official registration is an issue that has been recognised by the German authorities themselves, who in 2007 found that only 1% of 305 prostituted individuals had a contract of employment.¹⁹⁸ Further, only 7,700 of those who registered are German nationals, with 80% of all other registered individuals being foreign nationals,¹⁹⁹ mainly from Romania, a country which has been referred to as ‘*the sex trafficking factory of Europe*’,²⁰⁰ and is ranked by the European Commission as one of the leading source-countries for victims of trafficking.²⁰¹

Despite this lack of clarity as to specific figures of the number of individuals involved in prostitution, it is posited that the prostitution market has at the very least continued to grow – a likelihood which has also been recognised by German police²⁰² – notwithstanding that the rate at which that may be occurring is unclear. Indeed, this is supported by Cho’s research, which found that the prostitution market in Germany had increased as a result of an influx of human trafficking victims being trafficked directly into prostitution since legalisation was implemented.²⁰³

¹⁹⁷ *ibid*

¹⁹⁸ n181

¹⁹⁹ Destatis, ‘Press release No. 286 from July 30, 2020’ (*Destatis*, July 2020) <https://www.destatis.de/DE/Presse/Pressemitteilungen/2020/07/PD20_286_228.html;jsessionid=E5E2AA88F8021E5B06128A3721713C6B.internet8731> accessed 21 June 2021

²⁰⁰ ‘How Romania Became Europe’s Sex Trafficking Factory’ *InsideOver* (19 March 2020) <<https://www.insideover.com/society/how-romania-became-europes-sex-trafficking-factory.html>> accessed 21 June 2021.

²⁰¹ European Commission, ‘Report From The Commission To The European Parliament And The Council Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims’ <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_com-2018-777-report_en.pdf> accessed 21 June 2021 p2

²⁰² Christian Kirstges, ‘Immer Mehr Prostituierte Aus Osteuropa Kommen Nach Augsburg’ (*Augsburger Allgemeine*) <<https://www.augsburger-allgemeine.de/bayern/Immer-mehr-Prostituierte-aus-Osteuropa-kommen-nach-Augsburg-id30512282.html>> accessed 21 June 2021.

²⁰³ Cho (n6)

Cho analyses this in terms of the '*substitution versus scale effect*'.²⁰⁴ In theory, legalisation would reduce the demand for trafficked individuals as sex-buying could take place whenever an SB desires without any need for them to partake in illegal activity, thus reducing the need to "use" trafficking victims. In short, autonomous individuals would be favoured over trafficked individuals, thus substituting one for the other (the '*substitution effect*'). However, it was found that the demand to buy sex increased at such a rate that the number of legally-registered individuals could not satisfy this, and consequently, individuals of other nationalities are trafficked in in order to meet the scale-up of market demand (the '*scale effect*').²⁰⁵

This raises difficult questions for those who advocate the legalisation of prostitution from a human rights perspective. If the prostitution market (those selling sex) in Germany is expanding due to legalisation and resulting in trafficking to keep up with demand, then before even considering more generalised levels of sexual and physical violence against those in prostitution, this in itself would represent a large-scale failure to protect sexual autonomy.

²⁰⁴ *ibid* p4

²⁰⁵ *ibid* p25

Germany is not ignorant of this fact, and the trafficking of individuals in the country is prohibited by section 232 *Strafgesetzbuch* (the ‘StGB’),²⁰⁶ and section 232a StGB prohibits forced prostitution as a result of trafficking.²⁰⁷ Parallel to this, sexual assault and rape is defined in section 177 StGB.²⁰⁸

Comparing the legislative definition of forced prostitution and rape, it is posited that there is no material difference between ‘*taking advantage of another person’s...helplessness*’ to force them into prostitution,²⁰⁹ and ‘*performing a sexual act...against a person’s will*’.²¹⁰ They are both predicated on violating an individual’s sexual autonomy, with taking advantage of another’s helplessness simply a specific *form* of the violation of their will.

Consequently, it is argued here that prostitution as a result of trafficking is a specific type of sexual autonomy violation, as it has occurred due to the individual’s ‘*helplessness*’ in the first instance, and then any act that occurs following that necessarily must be ‘*against their will*’.

Fundamentally, this is intended to show that prostitution legalisation in Germany undermines their criminal law system that punishes ‘*all forms of rape and sexual abuse*’.²¹¹ Due to the

²⁰⁶ Straftaten gegen die persönliche Freiheit, §232 Menschenhandel, Strafgesetzbuch, trs: Offences Against Personal Freedom, s232 Human Trafficking, German Criminal Code

²⁰⁷ *ibid* s232a:

‘(1) *Whoever, by taking advantage of another person’s personal or financial predicament or helplessness on account of being in a foreign country, causes that person or causes another person under 21 years of age:*

1. *to engage in or continue to engage in prostitution or...*

2. *to perform sexual acts, by way of which they are exploited, on or in the presence of the offender or a third person, or to allow sexual acts to be performed on them by the offender or a third person...’*

²⁰⁸ *ibid* s177:

‘(1) *Whoever, against a person’s discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person...’*

²⁰⁹ n207

²¹⁰ n208

²¹¹ n3 para 185

substitution versus scale effect, the prostitution-demand is such that it can only be met by introducing non-consenting individuals into the market.

4.3 Physical Violence

Legalisation has also resulted in an increase in other IDT, conceptualised as a violation of sexual autonomy in Chapter 1. Data on the experiences of those within prostitution in Germany is scarce; however, a critical review of the Prost-G undertaken by the German Government states that: ²¹²

*'As regards improving prostitutes' working conditions, hardly any measurable, positive impact has been observed in practice... (and)...there are as yet no viable indications that the Prostitution Act has reduced crime'.*²¹³

Individual accounts also shed light on the experiences of those who have experienced the regime of legalisation. As mentioned, critics have described legalisation as producing '*hell on Earth*',²¹⁴ and various accounts support this assertion.

At a conference in Munich to discuss the effects of legalisation, one speaker stated:

*'...another spoke of the case of a 19-year old, heavily pregnant woman who was hired for a gang-bang in a German brothel by six men, four of whom wore horror masks. One woman talked about women she knew who had been used by 60 men a day.'*²¹⁵

²¹² n181

²¹³ *ibid* p79

²¹⁴ n185

²¹⁵ Bindel (n2) p 26

Kraus has described legalisation as meaning:

*'...today, completely legally, you can buy a woman and piss in her face, do group rapes, and force her to swallow semen.'*²¹⁶

And:

*'The health condition of these women is catastrophic. All women have persistent abdominal pains, gastritis, and frequent infections due to the unhealthy state of living conditions. And of course, all kinds of sexually transmissible diseases. The psychological traumatising can just about be tolerated with alcohol and pharmaceutical drugs. (There is) a growing demand for pregnant women in prostitution... (who) have to serve 15 to 40 men a day continuously until they give birth. Very often, they abandon their child and go to work as soon as possible. Sometimes 3 days after birthing the child.'*²¹⁷

In 2004, the German Government also found that 59% of those in prostitution had experienced sexual violence, 87% had experienced physical violence, and 82% had experienced psychological violence in the course of prostitution.²¹⁸

It is clear is that the German model has totally failed to provide adequate protection of individual sexual autonomy. The violence faced by prostituted individuals within this legislative model far exceeds the physical abuse meted out in the case of A, and indeed, is equivalent to the rape and sexual abuse acknowledged as a form of IDT in *M.C.* and *Aydin*.

There is no reason to suspect that the same would not also occur were legalisation to be introduced in the UK, particularly when placed within the global context of legalisation as

²¹⁶ n185

²¹⁷ *ibid*

²¹⁸ n191 p26

seen in The Netherlands and Nevada, which have also had similar results.²¹⁹ So, the search for the answer to the UK's prostitution reform question continues. The following section considers decriminalisation within New Zealand.

²¹⁹ See Chapter 2

Chapter 5: The New Zealand Model - Decriminalisation

5.1 Background

Decriminalisation can be defined as the removal of criminal sanctions against both prostituted individuals, and SBs.²²⁰ It differs from legalisation in that there are usually fewer State regulations, although perhaps somewhat confusingly, decriminalisation still requires abiding by *some*. Indeed, Bindel argues that decriminalisation is in effect legalisation by another name.²²¹

Decriminalisation was introduced into New Zealand (NZ) with the implementation of the Prostitution Reform Act 2003 (PRA).²²² As NZ is not a Council of Europe State, they are not subject to the ECHR's obligations; however, it is posited that the findings of the impact of decriminalisation in NZ could be applied analogously to other jurisdictions (including the UK), and bearing in mind that it is the favoured legislative model of many campaigners globally, an analogous application is an inherent feature of this particular discourse.²²³

²²⁰ The PRA 2003 decriminalised aspects of prostitution including solicitation, brothel keeping, and 'operators' who can:

Determine(s)—

- (i) *when or where an individual sex worker will work; or*
- (ii) *the conditions in which sex workers in the business work; or*
- (iii) *the amount of money, or proportion of an amount of money, that a sex worker receives as payment for prostitution*

²²¹ Bindel (n2)

²²² Prostitution Reform Act 2003

²²³ For example, see Lala B Holston-Zannell, 'Sex Work is Real Work, and it's Time to Treat it That Way' (ACLU, 10 June 2020) < <https://www.aclu.org/news/lgbt-rights/sex-work-is-real-work-and-its-time-to-treat-it-that-way/>> accessed 21 June 2021

While the unpopularity of legalisation has been discussed, decriminalisation differs in that a number of those within prostitution, and also human rights organisations such as Amnesty International²²⁴ and the World Health Organization,²²⁵ advocate this approach as the best way to improve “working” conditions and as the best human rights approach.

In keeping with previous chapters and jurisdictions, the first question that should be asked is on the impact of decriminalisation on market size; and then whether any increase in market size is linked to quantifiable instances of treatment reaching the threshold of IDT, due to the nature of *how* the market has expanded.

5.2 Market Size

As was explored in the previous chapter, it is suggested in this chapter that if the market has expanded due in part to trafficking and other coercive acts, then there is no material difference between those who are trafficked into prostitution – necessarily against their will – and the violation of sexual autonomy that occurred in *M.C.* This argument is confirmed by the provisions on trafficking in the NZ Crimes Act 1961 (CA 1961).²²⁶

Firstly, section 98D CA 1961 does not require coercion at *all* points throughout the trafficking process.²²⁷ Therefore, somebody can be coerced into prostitution without the process necessarily beginning with an act of coercion. However, it is suggested that the *end* result in any case is the same: the individual has been coerced into prostitution against their will.

²²⁴ Amnesty International, ‘Amnesty International Policy On State Obligations To Respect, Protect And Fulfil The Human Rights Of Sex Workers’ (Amnesty International May 2016)

<<https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF>> accessed 21 June 2021

²²⁵ World Health Organization and others, ‘Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries Recommendations for a public health approach’ (World Health Organisation 2012)

²²⁶ Crimes Act 1961

²²⁷ *ibid* section 98D

Section 98B CA 1961 defines ‘*act of coercion*’, which includes using and threatening force,²²⁸ and section 128A CA 1961 defines what *doesn’t* constitute consent within the context of the crime of rape,²²⁹ which includes fear of the use or threat of force. Therefore, if somebody has been trafficked into prostitution, they have been coerced *at some point* (and certainly at the end point of the trafficking process); coercion here can include the use or threat of force; any perceived consent of the victim is negated as a result of the fear of this use or threat of force; thus, forced prostitution resulting from trafficking would constitute rape per s128(2)(a) CA 1961, which requires a lack of consent. Therefore, any individual who fits this description within prostitution would necessarily lack sexual autonomy.

Under the PRA 2003, there are a number of restrictions on who may “provide a commercial sexual service” in NZ, including prohibitions on visas being granted to those who wish to engage in prostitution;²³⁰ and a prohibition on ‘*contracting for commercial sexual services*’ from anybody under the age of 18.²³¹ What this demonstrates in the first instance is that the

²²⁸ *ibid* section 98B:

‘*an act of coercion against the person includes—*

(a) *abducting the person;*

(b) *using force in respect of the person;*

(c) *harming the person;*

(d) *threatening the person (expressly or by implication) with the use of force in respect of, or the harming of, the person or some other person*’

²²⁹ *ibid* section 128A:

Allowing sexual activity does not amount to consent in some circumstances

(1) *A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.*

(2) *A person does not consent to sexual activity if he or she allows the activity because of—*

(a) *force applied to him or her or some other person; or*

(b) *the threat (express or implied) of the application of force to him or her or some other person; or*

(c) *the fear of the application of force to him or her or some other person.*

²³⁰ Prostitution Reform Act, section 19

²³¹ Prostitution Reform Act, section 20

Government has set clear parameters as to who may engage in prostitution, in an attempt to ‘safeguard the human rights of sex workers’.²³²

Further, NZ differs – at least at first glance – from Germany in that the number of prosecutions for trafficking for all purposes registers in the single digits.²³³ Additionally, as in Germany, under section 16 PRA 2003 the ‘*inducing or compelling of persons to provide commercial sexual services*’ is prohibited.²³⁴ In theory, this would refine the number of individuals who wish to ‘*provide commercial sexual services*’ down into those who are over the age of 18; who are native to the State (in other words, not trafficked in a worst-case scenario, or those who may legitimately want to travel to NZ to engage in prostitution of their own volition if this were permitted); and who have not been compelled to ‘*provide commercial sexual services*’. In short, this leaves a market of consenting adults.

Indeed, section 42 PRA 2003 required the *Prostitution Law Review Committee* (PLRC) to have submitted research analysing the demography of those within prostitution in NZ.²³⁵ This research was presented in 2008, and found that:

‘...the enactment of the PRA has had little impact on the numbers of people working in the sex industry’.²³⁶

²³² *ibid* section 3

²³³ Olivia Carville, ‘Exposed: The dark underbelly of human trafficking in New Zealand’ *New Zealand Herald* (22 September 2016) < https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11711211 > accessed 21 June 2021

²³⁴ Prostitution Reform Act, section 16

²³⁵ Prostitution Reform Act, section 42

²³⁶ Prostitution Law Review Committee, ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (Prostitution Law Review Committee 2008) < <http://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf> > accessed 21 June 2021

On its face, this would appear to be a positive development, at least for individuals who do not see prostitution as inherently harmful. However, this finding is directly contradicted later in the report, which, based on 2006 data, states:

'In Auckland 106 street workers were counted... in Christchurch 100 were recorded' ²³⁷

However, in 2007 it was found that:

'In Auckland, 230 street workers were known to be working...In Christchurch 121 were counted.' ²³⁸

Further evidence gathered by the PLRC states that:

'Streetreach believes there has been an overall increase in the number of street-based sex workers in the Auckland region since decriminalization.' ²³⁹

It is unclear why these increases are not reflected in the earlier part of the report. However, the PLRC's own contradictory findings, as well as Raymond's research highlighting that brothel applications had increased by hundreds in recent years, evidences that the prostitution market has increased since the implementation of decriminalisation.²⁴⁰

This does not *necessarily* mean that these increases are due to circumstances similar to those in Germany; in other words, that individuals are being exploited and coerced into prostitution, thus violating their sexual autonomy. However, it is worth examining nonetheless.

²³⁷ *ibid* p118

²³⁸ *ibid*

²³⁹ *ibid*

²⁴⁰ Janice G Raymond. 'Gatekeeping Decriminalization of Prostitution: The Ubiquitous Influence of the New Zealand Prostitutes' Collective,' (2018) 3(2)(6) *Dignity: A Journal on Sexual Exploitation and Violence*

5.3 Trafficking, Child Rape, and Compelled Sexual Services

As mentioned, NZ initially appears to differ from Germany in that while legalisation in the latter has resulted in an explosion of trafficked individuals directly into the system of prostitution, the PLRC itself considers that *‘there is no link between the sex industry and human trafficking’* in NZ,²⁴¹ and figures gathered in 2007 from the Department of Labour found that there were no prosecutions for trafficking into the sex industry at the time of enquiry.²⁴²

However, there are a number of problems within the PLRC report. As the report itself recognises, the immigration status of *‘street-based workers’* is not included, yet the PLRC described itself as *‘satisfied that there were no internationally trafficked women’*.²⁴³ This raises two issues.

Firstly, since the 2008 report, there have been numerous accounts of victims being internationally trafficked directly into the NZ sex trade. For example, an investigation by the *New Zealand Herald* found that Asian women were being lured to NZ *‘with cash offers to work in the sex industry...being forced to work in slave-like conditions’*.²⁴⁴ Once in the country, the women would have their passports taken by the trafficker, and would then be prostituted for 18 hours per day, with one 19-year-old describing it as a *‘sex horror movie...I have to service about 10 to 20 men a day. I cried every day.’*²⁴⁵

Further, the four United States *Trafficking in Persons* reports (TIPRs) since 2016 found that *‘...women from Asia and South America are at risk of sex trafficking. Some international*

²⁴¹ n236 p167

²⁴² *ibid*

²⁴³ *ibid*

²⁴⁴ Lincoln Tan Tan Lincoln, ‘NZ Sex Industry Lures Asian Women’ *NZ Herald* (11 July 2010)

<https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10658178> accessed 21 June 2021.

²⁴⁵ *ibid*

students and temporary visa holders are vulnerable to ... prostitution, with the 2017 report finding that *'As reported over the past five years, NZ is a destination country for ... women subjected to ... sex trafficking'*.²⁴⁶

Although NZ authorities have been quick to point out that investigations into brothels housing *'migrant sex workers'* found *'no evidence of exploitation'*,²⁴⁷ as Armstrong points out: *'determining whether exploitation has occurred takes time in order to build trust'*, suggesting that it cannot be concluded that migrants suffer no exploitation whatsoever within prostitution.²⁴⁸

Of course, the fact that more evidence of trafficking is available now than in 2008 is not necessarily the PLRC's fault. However, it is clear that since 2008, *international* trafficking on the one hand, and the NZ sex trade on the other, could not be accurately described as having *'no link'*.

The second element of the PLRC report that warrants further investigation is the surreptitious caveat of *'international trafficking'*. Although it is true that NZ was home to zero prosecutions of trafficking prior to 2008 (and indeed, up until 2016),²⁴⁹ this is less impressive when it is placed within the context of a 2015 amendment to section 98D CA 1961.²⁵⁰ This amendment finally recognised that trafficking can occur *domestically* as well as

²⁴⁶ United States Department of State, 'Trafficking in Persons Report 2017' (U.S. Department of State 2017) < <https://www.state.gov/wp-content/uploads/2019/02/271339.pdf>> accessed 21 June 2021 p300

²⁴⁷ 'Migrants working unlawfully in sex industry by choice' (*New Zealand Immigration*, 1 August 2019) < <https://www.immigration.govt.nz/about-us/media-centre/media-releases/migrants-working-unlawfully-in-sex-industry-by-choice>> accessed 21 June 2021

²⁴⁸ Kate Nicol-Williams, 'Immigration sting finds 38 foreigners illegally employed as sex workers across New Zealand' *One News* (31 July 2019) < <https://www.tvnz.co.nz/one-news/new-zealand/immigration-sting-finds-38-foreigners-illegally-employed-sex-workers-across-new-zealand>> accessed 21 June 2021

²⁴⁹ n233

²⁵⁰ Section 98D Crimes Act 1961 replaced, on 7 November 2015, by section 5 of the Crimes Amendment Act 2015 (2015 No 95).

internationally; in other words, it criminalised the trafficking of any individuals who were already in NZ either as residents, or who had initially travelled there of their own volition.

If the argument that there are ‘*no links*’ between trafficking and prostitution in NZ hinge on whether there have been any *prosecutions* for the crime of trafficking as it does in the PLRC report,²⁵¹ but the law fails to recognise *domestic* trafficking as a crime, then this will naturally skew figures both of how many individuals had been trafficked into prostitution (when accounting for domestic trafficking), and consequently how many individuals were being prostituted against their will. Somewhat tautologically, if domestic trafficking is not recognised as a crime under the CA 1961, then of course, there will be no prosecutions for a crime that does exist under that legislation.

Since the amendment of section 98D, the NZ Government initiated eight investigations for trafficking in the 2020 *TIP* reporting period, and obtained five sex-trafficking convictions in the 2019 reporting period.²⁵² What is clear, therefore, is that despite the PLRC’s contention that there were ‘*no links*’ between decriminalisation and sex trafficking, this is no longer the case. While accurate figures are not available in terms of exactly how many individuals have been trafficked into the NZ sex trade, evidence confirms that since the recognition of domestic trafficking as a crime, there have been *some*.²⁵³

5.4 What is “Child Prostitution”?

The central aim of this review is to analyse which legislative model best supports the substantive positive obligation established in *M.C.*: the promotion and protection of sexual

²⁵¹ n236p167

²⁵² United States Department of State, ‘Trafficking in Persons Report 2020’ (U.S. Department of State 2020) < <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> > accessed 21 June 2021 p372

²⁵³ *ibid*

autonomy, and a legislative framework that actively and adequately deters but also prosecutes violations.

One could argue that the relatively low number of trafficking victims forced into prostitution in NZ does not necessarily mean the legislation has facilitated *wholesale* violations of sexual autonomy or that it fails in adequately deterring rape, particularly within the context of thousands of individuals. However, the argument that the decriminalisation model might adequately protect sexual autonomy collapses when considered in the context of so-called “child prostitution”.

It is argued here that “child prostitute” is a misnomer, as children cannot meaningfully consent to sexual contact.²⁵⁴ This is also the agreed position of decriminalisation advocates, although there is a disturbing trend developing where this can no longer be taken for granted amongst some advocates.²⁵⁵ In short, if somebody pays a child (or their third-party exploiter) for sexual access, this is a *prima facie* violation of sexual autonomy, as consent cannot be given.²⁵⁶

Section 132(5) CA 1961 makes it clear that it is no defence that a child under 12 may have “consented” to intercourse;²⁵⁷ and section 134A(1)(a) states that one of the component parts of a defence to sexual contact with somebody under the age of 16 (the age of consent in NZ) is that any alleged-perpetrator must take reasonable steps to ensure the child was over the age

²⁵⁴ For example, see United Nations Convention on the Rights of the Child 1990, Article 34(b) which states that: ‘States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices...’;

²⁵⁵ For example, see Human Rights Watch, ‘Why Sex Work Should be Decriminalized’ (*Human Rights Watch*, 7 August 2019) <<https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>> accessed 21 June 2021; New Republic, ‘Child Sex Workers’ Biggest Threat: The Police’ (*New Republic*, 20 January 2016) <<https://newrepublic.com/article/128028/child-sex-workers-biggest-threat-police>> accessed 21 June 2021

²⁵⁶ This is confirmed in ss132, 134, and 134A Crimes Act 1961, which states that it is not a defence to the charge even if the child in question allegedly consented.

²⁵⁷ Crimes Act 1961, section 132(5)

of 16.²⁵⁸ However, it is argued that as the PRA explicitly prohibits the purchase of sex from anybody under the age of 18, but simultaneously does not require SBs to ask for proof of age, it is extraordinarily unlikely that a) an SB would ever ask for proof of age in the first instance;²⁵⁹ and b) the child would have identification that not only falsifies their age as above 16, but also falsifies it as above 18 in line with PRA requirements.²⁶⁰

Consequently, if any adult *'has a sexual connection with (another person), effected by the penetration of (another person's) genitalia by (the adult's) penis...'* and that other person is under the age of 16 (or 12), this would almost always (notwithstanding a situation in which a defence in line with section 134A(1)(a) as described above is raised) be a violation of sexual autonomy.²⁶¹

Research demonstrates that after the PRA 2003 was enacted, the number of children in prostitution increased: a 2005 PLRC report estimated that 20% of those prostituted on the street were underage, and this had risen to 56% in a further study in 2007;²⁶² a 2007 PLRC report found that 9% of all prostituted individuals had entered the sex trade when they were younger than 16;²⁶³ a 2004 investigation found children as young as 12 being prostituted in Christchurch;²⁶⁴ in 2006, NZ MP Gordon Copeland highlighted that only 16 clients had been

²⁵⁸ *ibid* section 134A(1)(a)

²⁵⁹ Although only anecdotal, comments from SBs themselves suggest that appearing to be young/child-like is preferred, see 'The Invisible Men: Quotes from men who buy women' (*The Invisible Men*) <<https://dieunsichtbarenmaenner.wordpress.com/tag/teen/>> accessed 21 June 2021; also Rae Story, 'Working in a New Zealand brothel was anything but "a job like any other"' (*Feminist Current* 2 May 2016) <<https://www.feministcurrent.com/2016/05/02/working-in-a-new-zealand-brothel-was-anything-but-a-job-like-any-other/>> accessed 21 June 2021

²⁶⁰ Prostitution Reform Act 2003, section 22

²⁶¹ Crimes Act 1961, section 128

²⁶² n236 p102

²⁶³ Gillian Abel, Cheryl Brunton and Lisa Fitzgerald, 'The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers' (Department of Public Health and General Practice, University of Otago, Christchurch 2007) <<https://www.otago.ac.nz/christchurch/otago018607.pdf>> accessed 21 September 2021

²⁶⁴ Anna Claridge, 'Prostitution-reform MP wants inquiry into Chch child sex trade' *Stuff* (24 February 2004) <<https://web.archive.org/web/20040224163607/http://www.stuff.co.nz/stuff/0,2106,2824106a11,00.html>> accessed 21 June 2021

prosecuted for sexual activity with those under 18 between June 2003 – December 2005, despite the fact that the estimated number of men purchasing sexual access to underage girls likely numbered into the thousands;²⁶⁵ and in 2010, Auckland Police carried out *Operation City Door*, where 13 girls under the age of 16 were identified as having been prostituted.²⁶⁶ Further, each of the TIPRs from 2015-2020 found evidence that young children were being trafficked domestically directly into prostitution, suggesting that this has clearly continued despite the criminalisation of domestic trafficking in 2015.²⁶⁷

It is clear, therefore, that the prostitution market in NZ is comprised of both children and victims of trafficking, and indeed, its expansion is in part due to the increase of this demographic within the NZ sex trade. These individuals lack the ability to truly consent to the sexual acts they are compelled to engage in. Despite the rationale behind the introduction of the PRA – to ‘safeguard the human rights’ of those involved in prostitution²⁶⁸ – it is clear that this had very limited success.²⁶⁹ There is no reason to believe that the expansion of the prostitution market in NZ could be differentiated from that of Germany or the Netherlands, where sex buying is also not criminalised and as a result has seen an influx of criminal activity linked to trafficking.²⁷⁰ That is not to say that the criminal law provisions in NZ are

²⁶⁵ Tighe Instone, ‘Shadow Report for the CEDAW Committee on New Zealand from: Coalition Against Trafficking in Women New Zealand.’ 9 p5

²⁶⁶ ECPAT International, ‘Global Monitoring Status of action against commercial sexual exploitation of children: New Zealand’ (ECPAT 2012) 2 https://www.ecpat.org/wp-content/uploads/2016/04/a4a_v2_eap_newzealand.pdf > accessed 21 June 2021

²⁶⁷ n252 p373-4

²⁶⁸ Prostitution Reform Act, section 3

²⁶⁹ Lynzi Armstrong, ‘Decriminalising sex work is the only way to protect women – and New Zealand has proved that it works’ *The Independent* (29 May 2017) < <https://www.independent.co.uk/voices/sex-workers-decriminalisation-prostitution-new-zealand-new-law-works-research-proves-sex-workers-safer-justice-a7761426.html> > accessed 21 June 2021

²⁷⁰ Niklas Jakobsson and Andreas Kotsadam, ‘The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation’ (2013) 35 *European Journal of Law and Economics* 87.

not suitably drafted *per se*, rather, that by decriminalising sex buying, it undermines the ability of the State to actively deter violations of sexual autonomy.

5.5 Physical Violence

On the issue of making prostitution safer, even this is debateable. In the 2008 PLRC report, 35% of all prostituted individuals felt that *'they had to accept a client when they didn't want to'*,²⁷¹ with the PLRC finding that *'there are still some sex workers who are being required to provide commercial sexual services against their will'*,²⁷² 9.8% had been physically assaulted by a client in the previous 12 months;²⁷³ 3% had been raped by a client in the past 12 months;²⁷⁴ and that *'the majority (of prostituted individuals) felt that the PRA could do little about the violence that occurred'*.²⁷⁵ Further research found that 10.4% of all prostituted individuals *'don't know how to leave'*, and that 17.6% *'don't know what else to do'*.²⁷⁶ In other words, they were trapped in prostitution, and could do nothing about it.

Despite the best efforts of those who advocate decriminalisation, it is clear that physical and sexual violence is still a fundamental feature, and that there is no indication that this will abate as the market continues to grow. Referring back to the issue raised regarding stigmatisation²⁷⁷ – in NZ prostitution is recognised as *literal* employment in an effort to reduce stigmatisation, yet the violence persists. This suggests it is not its status as employment or otherwise that impacts the violence, but the nature of prostitution itself.

²⁷¹ n236 p45

²⁷² *ibid* p47

²⁷³ *ibid* p56

²⁷⁴ *ibid*

²⁷⁵ *ibid* p14

²⁷⁶ *ibid* p68

²⁷⁷ See n140

As Raymond points out, the PLRC focus on the negligible improvement that the PRA has facilitated in *reporting* instances of these types of violence;²⁷⁸ all indications, even by the PLRC's account, suggest that the rate at which it occurs has not been helped by decriminalisation.²⁷⁹ What is non-consensual violence within prostitution if not a violation of physical and sexual autonomy?

5.6 Conclusion and Possible Implementation

To conclude, it is posited that if decriminalisation were to be implemented in the UK as a response to the issues covered in Chapter 3, this would not conform to the obligations set out in *M.C.* Evidence from NZ suggests that the market would continue to grow, in part due to criminal activity involving minors and victims of trafficking, and the '*general problem*'²⁸⁰ of violence against a '*specific segment of the population*'²⁸¹ would not decline. Indeed, the Holbeck area of Leeds in the UK has trialled a version of decriminalisation which critics have said '*enables paid rape*', has '*expanded the market*', and '*encouraged trafficking of women and girls*'.²⁸²

²⁷⁸ Raymond (n24) p6

²⁷⁹ n236 p56

²⁸⁰ Stoyanova (n5)

²⁸¹ n63

²⁸² See Julie Bindel, 'I worry they are trafficked': is the UK's first 'legal' red light zone working?' *The Guardian* (29 June 2019) < <https://www.theguardian.com/global-development/2019/jun/29/worry-trafficked-uk-first-legal-red-light-zone-leeds-holbeck> > accessed 21 June 2021; 'How Leeds enables paid rape' *UnHerd* (20 July 2020) < <https://unherd.com/2020/07/how-authorities-in-leeds-enable-paid-rape/> > accessed 21 June 2021; Charles Hymas, 'A disaster from day one': Is this the end of Britain's first 'legal' red light district?' *The Telegraph* (24 July 2018) < <https://www.telegraph.co.uk/global-health/women-and-girls/disaster-day-one-end-britains-first-legal-red-light-district/> > accessed 21 June 2021; Charles Hymas and Corinne Redfern, 'Violence, drugs and sexual diseases: How managed zones for prostitution are failing women worldwide' *The Telegraph* (23 July 2018) < <https://www.telegraph.co.uk/global-health/women-and-girls/violence-drugs-sexual-diseases-managed-zones-prostitution-failing/> > accessed 21 June 2021

Even pro-decriminalisation advocates have conceded that ‘*violence remains high*’ and ‘*Amongst sex workers there was not a sense that the Managed Area had improved safety for the street sex workers as fear of crime persisted*’ in Holbeck.²⁸³

In an absolutely *best-case* scenario, in NZ decriminalisation may have encouraged the reporting of criminal activity, but even this is questionable.²⁸⁴ Thus, while the UK may have other laws that adequately deter and prosecute rape and sexual offences in contexts *outside* of prostitution as NZ also does, by introducing decriminalisation it would in effect negate the adequacy of that legislation *within* prostitution, thus constituting a breach of the substantive positive obligation as set out in *M.C.* The third solution that will be considered is Sweden’s approach: the Nordic Model.

²⁸³ Teela Sanders & Vineeta Sehmbi. ‘Evaluation of the Leeds Street Sex Working Managed Area’ (University of Leeds, 2015) <
<https://www.nswp.org/sites/nswp.org/files/Executive%20Summary%20Leeds%2C%20U%20of%20Leeds%20-%20Sept%202015.pdf>> accessed 21 June 2021

²⁸⁴ n236 p57

Chapter 6: Sweden – The Nordic Model

6.1 Background

The Nordic Model (NM) is a legislative approach that is best described as the decriminalisation of prostituted individuals, whilst criminalising SBs.²⁸⁵ There are also associated social aims, which include providing exit services for those who wish – and are able – to leave prostitution, and simultaneously educating the public as to the nature of prostitution more generally.²⁸⁶ Although founded in the Nordic region, it has since been implemented in eight countries as of 2021.²⁸⁷

Advocates of this approach emphasise the necessity of support services – such as social workers, employment support, and housing – that should be coupled with the wider decriminalisation of individuals within prostitution.²⁸⁸ These services are conceptualised as a “stepping stone” of sorts, which provides those who wish to exit with the necessary means not to rely on prostitution for money, which in turn is used to pay for housing, food, and clothing.²⁸⁹

Sweden has been chosen as it was the first country to introduce the model in 1999, so there is a broader body of research on which to draw from to analyse its impact, and how the legislative approach might apply to the UK.

²⁸⁵ For example, see ‘What is the Nordic Model?’ (*Nordic Model Now*) < <https://nordicmodelnow.org/what-is-the-nordic-model/>> accessed 21 June 2021

²⁸⁶ Government Offices of Sweden, ‘Legislation on the purchase of sexual services’ (*Government Offices of Sweden* 08 March 2011) < <https://www.government.se/articles/2011/03/legislation-on-the-purchase-of-sexual-services/>> accessed 21 June 2021

²⁸⁷ Sweden (1999), Norway (2009), Iceland (2009), Canada (2014), Northern Ireland (2015), France (2016), Republic of Ireland (2017), and Israel (2018).

²⁸⁸ n285

²⁸⁹ *ibid*

The law was introduced under *Svensk författningssamling (1998:408) (SFS)*,²⁹⁰ entitled *Lag om förbud mot köp av sexuella tjänster ('LPPSS')*,²⁹¹ but was subsequently repealed and replaced in 2005 by the *Brottsbalken (1962:700) ('SCC')*.²⁹² It is now found in Chapter 6 SCC.²⁹³ The NM has its roots in several decades of radical feminist discourse, which in various ways argues that prostitution is the crystallisation sex-class inequality; that being, male dominance over women.²⁹⁴ This perspective was a key feature of the Swedish Government's rationale when introducing the law as part of the wider 'Kvinnofrid' Bill,²⁹⁵ which '*proposed a large number of measures in different social sectors to combat violence against women*'.²⁹⁶ The Government sought to instil the idea that prostitution was a harmful social phenomenon,²⁹⁷ as well as seeking to reduce prostitution directly in Sweden, to deter the trafficking of individuals into prostitution, and to reduce buyer-demand.²⁹⁸

²⁹⁰ Svensk författningssamling (1998:408) trns: Swedish Code of Statutes 1998:408

²⁹¹ Lag om förbud mot köp av sexuella tjänster trns: Law on the prohibition of the purchase of sexual services

²⁹² Brottsbalken (1962:700) trns: Swedish Criminal Code

²⁹³ Chapter 6, Section 11 Brottsbalken (1962:700) states: '*A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months.*'

²⁹⁴ For example, see Carole Pateman, 'What's wrong with prostitution?' (1999) 27(1) Women's Study Quarterly 53; Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).; Andrea Dworkin, *Intercourse* (Free Press 1987); and more recently see Bindel (n2).; and Gunilla Ekberg, 'The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings' (2004) 10(10) Violence Against Women 1187

²⁹⁵ Literally translated this means 'women's safety'

²⁹⁶ Swedish Institute, 'Selected extracts of the Swedish government report SOU 2010:49: —The Ban against the Purchase of Sexual Services. An evaluation 1999-2008' (Swedish Institute 2010) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_ban_against_the_purchase_of_sexual_services_an_evaluation_1999-2008_1.pdf> accessed 21 June 2021

²⁹⁷ See Ekberg (n294).

²⁹⁸ See n296: '*It was expected that criminalisation would have a deterrent effect on prospective purchasers of sex and serve to reduce the interest of various groups or individuals abroad in establishing more extensive organised prostitution activities in Sweden, which would have an inhibitory effect on the prevalence of prostitution here*' p4

The *LPPSS* has remained ‘central...to prevent and combat prostitution and trafficking in human beings for sexual purposes’ in Sweden, as demonstrated as recently as June 2020 when the Government discussed its impact in their 10th Periodic Report on CEDAW.²⁹⁹

The key literature that will be analysed moving forward is the Swedish Government’s ‘2010 Report’,³⁰⁰ and the follow up ‘2014 Report.’³⁰¹

6.2 Market Size and Trafficking

Sweden is not exempt from the issues that have been discussed as regards NZ and Germany, in that prostitution contains a hidden population so any figures should be treated with caution. However, the general consensus is that the NM’s introduction has actively reduced the prostitution market size: prior to the introduction of the *LPPSS* in 1999, there were an estimated 650 women involved in on-street prostitution.³⁰² Fifteen years later, the *2014 Report* found that this number had more than halved, with the figure now estimated at 200-250.³⁰³ The *2014 Report* found that this figure has remained relatively consistent since 2010.³⁰⁴ Simultaneously, it was discovered that the demand side of the equation had almost

²⁹⁹Government Offices of Sweden, ‘Tenth Periodic Report by the Government of Sweden on the measures in accordance with the Convention on the Elimination of All Forms of Discrimination against Women’ (*Government Offices of Sweden* 2020) <

<https://www.government.se/49e953/contentassets/ebc1aadfe16d44a296e424a1ca2d204e/tenth-periodic-report-by-the-government-of-sweden-on-cedaw.pdf>> accessed 21 June 2021

³⁰⁰ Government Offices of Sweden, ‘Förbud mot köp av sexuell tjänst. En utvärdering 1999–2008’ (*Government Offices of Sweden* 2010) trns: The Ban against the Purchase of Sexual Services. An Evaluation 1999–2008 < <https://www.government.se/4a4908/contentassets/8f0c2ccaa84e455f8bd2b7e9c557ff3e/english-translation-of-chapter-4-and-5-in-sou-2010-49.pdf> > accessed 21 June 2021

³⁰¹ Andrit Mujaj and Amanda Netscher, ‘Prostitution in Sweden 2014: The extent and development of prostitution in Sweden’ (*Lansstyrelsen* 2015) < <https://www.lansstyrelsen.se/download/18.35db062616a5352a22a1d7a5/1559733783690/Rapport%202015-18%20prostitution%20in%20Sweden%202014.pdf>> accessed 21 June 2021

³⁰² *ibid* p7

³⁰³ *ibid*

³⁰⁴ *ibid* p17

halved: in 1996, 13.6% of surveyed men said they had bought sex, but in 2008 this number had reduced to 8%.³⁰⁵

Key to understanding why this happened lies in the comparative study undertaken by the Government. As Chapter 5 of the 2010 Report highlights, a comparative study between Nordic countries as to the impact of different legislation on the market of prostitution is useful due to the countries' similar '*social structure, culture, and economy*',³⁰⁶ with the expectation that similar (or different) legislation would yield similar (or different) results. In short, this hypothesis bore out. The *2014 Report* highlights that at the time of introducing the *LPPSS*, the '*extent of street prostitution was much the same in Norway and Denmark as in Sweden*'.³⁰⁷ However, following the *LPPSS*'s implementation street prostitution in Sweden fell sharply.³⁰⁸ This was followed by a sharp reduction in street prostitution in Norway in 2009, when the country introduced similar legislation that also prohibited the purchase – but decriminalised the sale – of sex.³⁰⁹

The number of individuals in prostitution in Denmark, on the other hand, where prostitution was partially decriminalised in 1999,³¹⁰ was found in 2008 to be an estimated three times

³⁰⁵ n300 p32

³⁰⁶ *ibid* p35

³⁰⁷ n301 p17

³⁰⁸ *ibid*

³⁰⁹ Annen del. De straffbare handlingene, Kappitel 26, §§309 and 316 Lov om straff (straffeloven), trns: Second part. The criminal acts, Chapter 26, ss309 and 316 Penal Code (Penal Code)

³¹⁰ Transcrime, 'National Legislation On Prostitution and the Trafficking in Women and Children' (European Parliament September 2005) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2005/360488/IPOL-JOIN_ET%282005%29360488_EN.pdf> accessed 21 June 2021 p18. It should be noted here that the legislative approach in Denmark speaks to the ambiguity between decriminalisation and legalisation. Like New Zealand, there are no criminal sanctions against those who sell sex, but this does not extend to brothels, nor to individuals who profit off prostitution as a third party. However, it is not prohibited to work indoors in a private setting. As the cited source makes clear: '*The Danish legislative pattern is similar to regulationism model because prostitutes have to register for tax purposes with the local tax and customs authorities, but they are not obliged to undergo to health checks.*' In this sense, it shares similarities with both Germany and New Zealand, but the dividing line as to which it conforms to more is not entirely clear.

greater than that of Sweden.³¹¹ The *2010 Report* concluded that: *'In light of the...similarities that exist among these...countries, it is reasonable to assume that the reduction in street prostitution in Sweden is a direct result of criminalization'*.³¹² Indeed, this is further supported by a study in the Bergen Municipality of Norway, which found an immediate reduction of street prostitution following the implementation of their SB law.³¹³

Further differentiating itself from NZ and Germany, it is generally considered that Sweden has also seen a reduction in trafficking into prostitution. In the 2010 Report, the National Criminal Police stated that *'it is clear that the ban on the purchase of sexual services acts as a barrier to human traffickers and procurers considering establishing themselves in Sweden'*.³¹⁴ While specific figures as to the exact prevalence of trafficking in Sweden remain difficult to discern,³¹⁵ comparative evidence used analogously (see Jakobsson and Kotsadam)³¹⁶ and the known prevalence of trafficking in surrounding Nordic countries such as Denmark, suggest that it is more likely than not that buyer-criminalisation via the *LPPSS* has been one of the direct causes of this reduction.

This is further supported by reports from National and International police, including Europol, who through the course of investigation discovered that *'Traffickers are choosing other destination countries where their business is ... not hampered by similar laws'*.³¹⁷ Some

³¹¹ n300 p7

³¹² *ibid*

³¹³ Bergen, 'Kriminalisering Av Sexkjøp En Foreløpig Kartleggingsrapport Om: Kortsiktige Effekter For Kvinnene, Markedet Og Lokalsamfunnet I Bergen' trns: Criminalization Of Sex Purchases A Preliminary Survey Report On: Short-Term Effects For Women, The Market And The Local Community In Bergen (Bergen 2009)

<<https://www.tjenestekatalog.no/vis/23391322/Kortsiktige%20effekter%20av%20sexkj%C2%BFpsloven.pdf> > accessed 21 June 2021

³¹⁴ n300 p37

³¹⁵ Charlotta Holmström and May-Len Skilbrei, 'The Swedish Sex Purchase Act: Where Does it Stand?' (2017) 4 *Oslo Law Review* 82.

³¹⁶ Jakobsson and Kotsadam (n270).

³¹⁷ Ekberg (n294).

estimates placed the figure at 400-600 women trafficked into prostitution in Sweden annually, compared with 10,000 – 15,000 women trafficked into prostitution in neighbouring Finland which has only half the population of Sweden (and had not criminalised sex buying at the time).³¹⁸

It is unfortunate that there is a dearth of reliable quantitative data on this issue, but in any case, it is posited that the existing evidence demonstrates that the market of street prostitution has reduced significantly, and that trafficking of individuals into prostitution has at the very least reduced when compared to surrounding Nordic countries with different legislative approaches. However, as was the case with NZ’s definition of trafficking up until 2014, there is more to this issue.

6.3 The Nordic Model – A Hill to Die On?

The NM is an enormously contentious issue amongst different campaign groups, self-described sex workers, and international organisations, with some condemning its place in opposition to decriminalisation as an *‘ideological war’*.³¹⁹ Indeed, some question the success of the NM in its own right.³²⁰ In part, the limited successes of the NM are acknowledged in the work of the Swedish Government.

For example, the 2014 Report found that in the preceding eight years, online adverts for sexual services had increased from 304 to 6,965, and those who oppose the NM point to the

³¹⁸ André Anwar, ‘Criminalizing the Customers: Prostitution Ban Huge Success in Sweden’ *Der Spiegel* (08 November 2011) <<https://www.spiegel.de/international/europe/criminalizing-the-customers-prostitution-ban-huge-success-in-sweden-a-516030.html>> accessed 21 June 2021

³¹⁹ Erin Sanders-McDonagh, ‘Ideological War against the Decriminalisation of Sex Work Risks Sidelineing Much of the Evidence’ (*The Conversation*) <<http://theconversation.com/ideological-war-against-the-decriminalisation-of-sex-work-risks-sidelineing-much-of-the-evidence-92883>> accessed 21 June 2021.

³²⁰ Charlotta Holmström and May-Len Skilbrei, ‘The “Nordic Model” of Prostitution Law Is a Myth’ (*The Conversation* 16 December 2013) <<https://theconversation.com/the-nordic-model-of-prostitution-law-is-a-myth-21351>> accessed 21 June 2021.

fact that the street-prostitution market may have simply been displaced into an online setting.³²¹

Further, Sweden has certainly not prevented trafficking in its entirety, as the *TIPRs* point out.³²² What does this mean for the success in the LPPSS in reducing the market size of prostitution?

While it is accepted that the online market has certainly increased, this should also be treated with caution. Firstly, the figure of 6,965 should not be taken to mean that there has been a direct increase of over 6,500 *individuals* now involved in prostitution, as the 2014 Report notes,³²³ going on to state:

*'...there is nothing indicating that the actual number of individuals engaging in prostitution has increased.'*³²⁴

It is also interesting to note a possible point of contention as to the success of the NM in terms of the wider discourse. Decriminalisation advocates often argue that the NM *'push(es) the industry underground'*, and thus makes prostitution (even more) dangerous.³²⁵ However, it is not entirely clear what this means, or indeed, if this argument makes sense.

³²¹ n300 p8

³²² n252 p468

³²³ n300: *'Authorities who have studied escort ads in the past have noted that one and the same seller of sexual services is often found in several advertisements. This finding is also indicated by the internet surveys, mainly in the form of the same telephone number cropping up during a search of several advertising sites. The overlap between the number of advertisements and escort sites and the duplication of many ads is shown by both surveys.'* P8

³²⁴ *ibid*

³²⁵ Sarah Kingston and Terry Thomas, 'No Model in Practice: A "Nordic Model" to Respond to Prostitution?' (2019) 71 *Crime, Law and Social Change* 423. ; see also 'Why The "Nordic Model" for Sex Workers Does Not Work' (*Wessex Scene*, 21 March 2018) <<https://www.wessexscene.co.uk/politics/2018/03/21/why-the-nordic-model-for-sex-workers-does-not-work/>> accessed 21 June 2021.

Some research indicates that indoor prostitution entails less violence, relatively speaking.³²⁶ Coupled with this, the “underground” location referenced in these arguments cannot mean street prostitution, as that has demonstrably decreased. So, even if the NM has contributed to a shift in prostitution moving online (which here is taken to mean underground, notwithstanding that this is not necessarily the case anyway), is this not what those who advocate for increased safety measures want to see? If the NM has resulted in a shift to indoor settings, statistically speaking this would suggest a decrease in the likelihood of violence.³²⁷

However, it is conceded that at this stage this is conjecture, and unfortunately there is little quantitative data to argue either way. What is likely, however, is that the overall prostitution market in Sweden has reduced.³²⁸ Even accounting for the increase in online presence, other jurisdictions have also seen this type of market growth, while *simultaneously* seeing an increase in street prostitution.³²⁹

One troubling development is the nationality of those who make up the remaining individuals. While trafficking has likely decreased, it has not entirely abated. This in part is reflected in studies that show up to 80% of the prostitution population in Sweden is made up of undocumented migrants.³³⁰ Considering the fact that they often come from countries that are noted for being source-countries for trafficking victims – such as China, Nigeria, and Romania – and there are references throughout various literature to ‘*debts*’ that they are under

³²⁶ See Ronald Weitzer, ‘New Directions in Research on Prostitution’ (2005) 43 *Crime, Law and Social Change* 211.; Ronald Weitzer, ‘Prostitution: Facts and Fictions’ (2007) 6(4) *Contexts* 28

³²⁷ See Chapter 8 generally

³²⁸ See n300 and n301

³²⁹ n301 p17

³³⁰ Niina Vuolajärvi, ‘Governing in the Name of Caring—the Nordic Model of Prostitution and its Punitive Consequences for Migrants Who Sell Sex’ (2018) *Sexuality Research and Social Policy* 16(2) 151

pressure to pay,³³¹ it is inferred here that rather than being the rather euphemistically-phrased “migrant workers”³³² simply looking to make a living from prostitution, many of these individuals are victims of trafficking.

Further to this, NM opponents argue that this engenders feelings of fear on part of those forced into prostitution to alert the authorities to any buyer-wrongdoings, as it may result in deportation.³³³ It is absolutely agreed that punitive immigration policies should not just replace criminal law sanctions against those in prostitution, regardless of which legislative approach is implemented. It is worth noting that NZ, which is often lauded for its allegedly-liberal approach to prostitution policy, also does not allow “migrant workers” to engage in prostitution, so this is not unique to the NM.³³⁴ However, it is recognised that due to the intrinsic link between trafficking and prostitution markets, there needs to be a complementary immigration-based approach that also facilitates the protection of individuals who have entered a country illegally, whether this is due to trafficking or otherwise.

Under the *Utlänningslag 2005:716*,³³⁵ Sweden offers temporary residence permits to individuals who may have been trafficked to allow a criminal investigation, as well as offering social support services including shelter and financial compensation.³³⁶ However, if individuals feel unable to report crimes for fear of subsequent deportation, this is certainly a shortcoming in the awareness-raising aspects of policy-making, if not in the legislation itself.

³³¹For example, see H el ene Le Bail, Calogero Giametta and No emie Rassouw ‘What do sex workers think about the French Prostitution Act?: A Study on the Impact of the Law ‘ (2019) *M edecins du Monde* 96

³³² *ibid* p8

³³³ Vuolaj arvi (n330) p152

³³⁴ Prostitution Reform Act, section 19

³³⁵ *Utl anningslag 2005:716* trns: Aliens Act

³³⁶Gunilla S. Ekberg, ‘Swedish Laws, Policies And Interventions On Prostitution And Trafficking In Human Beings: A Comprehensive Overview’ (2018) Institute for Feminism and Human Rights <

https://www.researchgate.net/publication/321254711_SWEDISH_LAWS_POLICIES_AND_INTERVENTION_S_ON_PROSTITUTION_AND_TRAFFICKING_IN_HUMAN_BEINGS_A_COMPREHENSIVE_OVERVIEW> accessed 21 June 2021

This would need to be a key consideration for any other jurisdiction if they were to introduce the NM.

While the NM is not a silver bullet in terms of stopping trafficking in its entirety, and thus completely eradicating autonomy-violations, it is important to place this in the wider context of the other legislative approaches. In Germany, trafficking has drastically increased, contributing to the enormous 400,000+ market of prostitution,³³⁷ and in NZ, while not comparable to Germany, the prostitution market has increased, which is in part due to trafficking of individuals.³³⁸

6.4 Physical Violence

Although research of how the NM has impacted violence is scant, particularly in Sweden, the 2010 Report '*found no increase (in violence) since the ban went into effect*'.³³⁹ Clearer insight might be provided by a 2012 study undertaken in Oslo after the NM was implemented there,³⁴⁰ which suggested that there had been an increase from 52% to 59% in terms of individuals who had experienced violence in prostitution.³⁴¹

While this is partially true, it does not tell the whole story. The study distinguishes between types of violence experienced, and while instances such as being spat on, hair pulling, and verbal abuse had all increased, acts such as rape, being struck with a fist, and being struck with an open hand had all *reduced* since the introduction of the NM.³⁴² Of course, this is not to disregard the former types of violence as irrelevant or not worthy of consideration, but

³³⁷ Cho (n6)

³³⁸ Chapter 5 generally

³³⁹ n300 p33

³⁴⁰ Ulla Bjørndahl. 'Dangerous Liaisons A report on the violence women in prostitution in Oslo are exposed to' (Municipality of Oslo 2012)

³⁴¹ *ibid* section 5.2

³⁴² *ibid* section 2.2.5

within the specific parameters of IDT as outlined in Chapter One, it appears that the NM has been an effective deterrent against *those* types of violence. It is posited, therefore, that beyond being the best – comparatively speaking – deterrent against sexual violence, the NM also acts as a powerful tool against other violations of sexual autonomy.

It is wholeheartedly agreed here that an increase in any violence is not a positive. However, this arguably speaks to the inherently violent nature of prostitution. The NM can only do so much in this regard – ultimately, the system is driven by buyer-demand, which comprises individuals who wish to enact violence.³⁴³ Of the three jurisdictions examined, the NM is the only approach that demonstrably reduces the market in terms of both supply and demand, thus reducing the likelihood of these acts of violence occurring.

Further, whereas previous literature has demonstrated that those who purchase sex are more likely to have attitudes consistent with supporting rape myths and violence against women,³⁴⁴ the NM has also reportedly facilitated a paradigm shift in terms of the public's attitudes towards prostitution.³⁴⁵ In 1996, prior to the *LSSPP*'s introduction, Lewin found that only 32% of respondents to a statistical survey thought that an SB should be regarded as a criminal.³⁴⁶ However, in 2002, SIFO (National Institute for Consumer Research) found that 76% of respondents thought the purchase of sex should be criminalised,³⁴⁷ and then in 2010 Kuosmanen found that nearly 71% of respondents wanted to retain the SB law.³⁴⁸ While

³⁴³ See '2.2 Sex Buyer Attitudes'

³⁴⁴ *ibid*

³⁴⁵ For example, see Von André Anwar, 'Prostitution Ban Huge Success in Sweden' *Der Spiegel* (08 November 2007) <<https://www.spiegel.de/international/europe/criminalizing-the-customers-prostitution-ban-huge-success-in-sweden-a-516030.html>> accessed 21 June 2021; Jacci Stoye, 'Report on the Scottish Parliamentary Prostitution Fact Finding Trip to Sweden' (*Nordic Model Now*, 28 September 2019) <https://nordicmodelnow.org/2019/09/28/report-on-the-scottish-parliamentary-prostitution-fact-finding-trip-to-sweden/> > accessed 21 June 2021

³⁴⁶ Bo Lewin and others, *Sex i Sverige; Om Sexuallivet i Sverige 1996* (Folkhälsoinstitutet 1998) <<http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-31413>> accessed 21 June 2021.

³⁴⁷ n300 p30

³⁴⁸ Jari Kuosmanen, 'Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden' (2011) 14 *European Journal of Social Work* 247.

these figures should be treated with caution due to methodological differences and limitations, the consensus is that the *LPPSS* has had a notable change to both the market size of prostitution, and to the public's attitude towards SBs.

6.5 Conclusion and Possible Implementation

It is impossible to speak in absolutes when analysing prostitution due to the limited research on all fronts. But in relation to the hypothesis of this review, it is posited that the NM has been the most effective approach in terms of reducing autonomy-violations of those involved in prostitution, while acting as a partially-effective legislative deterrent against future violations (evidenced by the shrinking market and decreasing buyer demand). When thinking back to the criteria established in *M.C.* as regards conforming to the substantive positive Article 3 obligation, it is argued that the NM is the most effective way an ECHR signatory-State could do this.

Not only must the market size be reduced to limit quantifiable instances of behaviour constituting IDT, but it must be accompanied by a normative shift in how people view the acceptability of prostitution and the inherent abuse therein.

It is posited that if sex buying is permitted, as it is in NZ and Germany, then this tacitly endorses attitudes that care little for the sexual autonomy of others, as well as an increase in the likelihood of non-State actors acting on those attitudes – in other words, committing criminal acts of sexual and physical violence in the course of buying sex.³⁴⁹

If this is the case, which the evidence suggests it would be, what does this mean for the UK's approach to prostitution legislation?

³⁴⁹ See '2.2 Sex Buyer Attitudes'

Conclusions and Recommendations

The debate as to the best legislative model to apply to prostitution to protect sexual autonomy continues. This review has sought to achieve the aims set out in the introduction, but it is conceded that these arguments would be by no means universally accepted. As mentioned, one of the key issues that underpins this debate is that of individual autonomy.³⁵⁰

In short, if somebody wishes to engage in prostitution, and an SB wishes to pay, is it overly paternalistic of the State to try to regulate or prohibit that activity, despite any negative consequences that might arise tangentially (such as IDT or autonomy-violations)? As mentioned, the case of *Laskey* – an appeal to the European Commission from *Brown* – considered the question of whether individuals can consent to harm exceeding ABH.³⁵¹ The Court ruled that it was not in the public interest to allow this under Article 8 (Right to Family and Private Life).³⁵²

Examining whether this judgment was indeed too paternalistic is beyond the scope of this review, but suffice to say, the ruling was statutorily implemented in the UK in 2020 when the Domestic Abuse Bill confirmed this position, also building on the trial case of *Brown*.³⁵³

If it is accepted that prostitution *as a system* facilitates autonomy-violations in the form of physical and sexual harm (harm similar to that in *Laskey*), then it is posited that the Article 8 argument as to personal autonomy would not succeed. *Laskey* and *Brown* concerned what type of harm an individual may consent to during sexual intercourse;³⁵⁴ but in many cases

³⁵⁰ For example, see Laura Connelly, ‘Sex workers don’t need anti-prostitution zealots to save them’ *The Independent* (25 February 2016) < <https://www.independent.co.uk/voices/sex-workers-don-t-need-anti-prostitution-zealots-save-them-rescue-industry-now-doing-more-harm-good-a6895516.html> > accessed 21 September 2020

³⁵¹ n36

³⁵² *ibid* para 50

³⁵³ Domestic Abuse HC Bill (2019-21)

³⁵⁴ n36 and n35

prostitution comprises individuals who do *not* consent to similar harm. The Court would effectively have to permit this *system* where although huge numbers of individuals suffer autonomy-violations, the number of those who wish to engage in prostitution in any case and take on that risk on behalf of a third party outweighs the importance of using the deterrence of SB criminalisation.

While a prohibition against sex buying may be an *interference* with an individual's sexual autonomy, it is posited that this is not the same as a *violation* of an individual's sexual autonomy in the way that Article 3 case law has considered. In essence, it is more important to protect the sexual autonomy of any individual than it is to permit the purchase of sex between two consenting adults, as the evidence demonstrates that the context in which this takes place is inseparable from – although not necessarily *the same thing as* – violations of sexual autonomy in the form of IDT. This concept is already reflected in the fact that the UK regulates certain types of sexual conduct already.³⁵⁵

In conclusion, it is suggested that the UK is bearing witness to a rapid increase in the size of prostitution within its borders, and this is increasingly made up of individuals who lack sexual autonomy due to the nature of how they entered prostitution. When analysing prosecution rates under s53A SOA 2003, it is clear that the UK is failing to adequately punish the systematic violations of these individuals' sexual autonomy. Considering that Article 3 imposes binding, non-derogable obligations; and if it is accepted that that the UK are not exercising due diligence to protect a '*specific segment of its population*'³⁵⁶ from the '*general problem*'³⁵⁷ of autonomy-violations within prostitution, thus giving rise to a positive obligation to deter that harm; it is argued that the UK is required to remedy this.

³⁵⁵ *ibid*

³⁵⁶ n63

³⁵⁷ Stoyanova (n5)

To do this, the UK should *at the very least* begin a process of examining how different legislative models would impact those within prostitution. This review is hindered by the sporadic and unreliable nature of *all* research into prostitution, so any findings here should be treated with caution, particularly as it has only examined three jurisdictions.

However, based on the evidence examined, it is posited that the UK should introduce legislation that criminalises SBs (but not prostituted individuals), while also offering financial and social support to allow vulnerable individuals to exit prostitution. Based on an analysis of this type of legislation in Sweden, it is suggested that the UK would see its prostitution market decrease, as well as reducing the number of individuals trafficked into the sex trade, while simultaneously beginning to change attitudes that drive the demand for prostitution in the form of SB attitudes.

Human rights practitioners and lawyers must make the case for abolition of prostitution through SB criminalisation, while assisting those who wish to exit the sex trade with the means to do so. Although it is regularly put on trial in the “court of opinion”,³⁵⁸ by offering a defence, we can encourage the UK to finally take steps to protect the human dignity of all those who fall within its borders.

³⁵⁸ n319