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RESEARCH ARTICLE

Criminalisation of Sex Work: A Critical Approach to Criminalisation Theories from a Human Rights Perspective*

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Abstract

Criminalisation is a popular legal approach to sex work. It adopts the view that sex work is harmful and wrong both for sex workers and the community. This argument seemingly coincides with fundamental principles of criminalisation, namely harm and wrong principles. However, I provide a new approach to criminalisation theories which introduces a real restriction on the state's authority to criminalise. In doing so, I first discuss that harm and wrong principles are only *defining* principles which determine the scope of behaviours that can be considered within the criminal law realm. On the other hand, the *restricting* principles, namely those of proportionality and prohibition of discrimination, determine the boundaries of the state's authority to criminalise the *defined* harmful wrongdoings. After I apply the defining principles to sex work, I investigate whether the restricting principles give countervailing reasons against criminalisation. The conclusion is that, unless it is proven to be contrary in a specific jurisdiction, sex work should not be criminalised because prima facie reasons cannot turn into all-things-considered reasons to justify criminalisation of sex work.

Keywords

Sex work, Criminalisation theory, Human rights, Prohibition of discrimination, Proportionality

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Introduction

Sex work (SW) has been suggested to be one of "the oldest professions" in the world.[1] However, the fact that it has existed for centuries does not imply that there has been a common understanding of how SW can be defined. Indeed, there are two opposite conceptualisations of SW. The most prevalent is that SW is a degrading and unacceptable activity, while the other and the less popular is that it is a common occupation which is socially understandable.[2]

The negative view of SW accepts that it is inherently oppressive and violent because it makes sex workers the victims of sexual exploitation.[3] According to this view, "abuse, coercion, and control" within the patriarchal sex industry constitute complete victimhood of sex workers.[4] The sexual exploitation of sex workers is even understood as "the worst form of slavery" which should never be seen as tolerable.[5] On the other hand, the other view argues that SW carries with it the free choice of workers to exercise sexual autonomy, and it should be seen as an ordinary occupation.[6] This approach admits that sexual labour can be exploited just "like other forms of work", and it mostly focuses on the human rights of sex workers as a solution to the harm that sex workers are generally exposed to.[7] Alongside these two opposite approaches to SW, some research studies argue that sex workers do not constitute a homogeneous group, and both "gendered victimisation" and "gendered survival strategy of sex workers as free agents" apply to the nature of SW.[8] The complexity of the issue in developing a common understanding is revealed by these fundamental approaches alone, notwithstanding the diversity of studies on SW that take different positions in explaining the activity.

The divergent conceptions are reflected in the different legal approaches to SW around the world. Despite the fact that each state has its own specific laws and regulations on SW, there are five main different legal approaches: Prohibitionism, abolitionism, neo-abolitionism, legalisation, and decriminalisation.[9] The prohibitionist approach seeks to directly or indirectly punish all forms of SW since it sees SW as an unacceptable degrading activity.[10] In this approach, any involvement in SW is sanctioned by criminal

1 See Lujo Bassermann, *The Oldest Profession: A History of Prostitution* (1st edn, Dorset Press 1994).

2 Teela Sanders, Maggie O'Neill and Jane Pitcher, *Prostitution: Sex Work, Policy and Politics* (SAGE 2009) at 3.

3 Ibid at 6

4 Ibid. 8.

5 Amihud Gilead, 'Philosophical Prostitution' (2010) 6 (1) Journal of Social Sciences 85, 92.

6 Sanders and others (n 2) at 9

7 Jane E. Larson, 'Prostitution, Labor and Human Rights' (2004) 37(3) U.C. Davis Law Review 673, 698., also see Berta E. Hernández-Truyol and Jane E. Larson, 'Sexual Labor and Human Rights' (2006) 37(2) Columbia Human Rights Law Review 391, 391.

8 See Joanna Phoenix, 'Prostitute Identities: Men, Money and Violence' (2000) 40(1) The British Journal of Criminology 37.

9 Laura Barnett and Lyne Casavant, *Prostitution: A Review of Legislation in Selected Countries* (Library of Parliament Background Papers 2014) Library of Parliament <https://publications.gc.ca/collections/collection_2015/bdp-lop/bp/2011-115-1-eng.pdf> 'accessed 25 Aug 2023'.

10 Ibid 2.

procedures, detention, confinement and/or fines.[11] The abolitionist approach does not punish the sale of sex, but prohibits all other SW-related activities such as soliciting, procurement or living off the earnings of SW.[12] The neo-abolitionist approach, which has recently been adopted by the European Parliament as well, makes a distinction between selling and buying sex, and only punishes the clients and procurers of sex workers on the basis of the view that sex workers are victims of exploitation.[13] Prohibitionist, abolitionist, and neo-abolitionist approaches are accepted to be subdivisions of criminalisation of SW since they all intervene in SW directly or indirectly through criminal law.[14] Criminalisation is generally justified by the link between SW and crimes such as human trafficking, and some alcohol and drug-related crimes.[15] Other common given reasons for criminalisation are preventing sexual exploitation of sex workers, and protecting communities from public nuisance caused by kerb crawling, loitering and soliciting.[16] This shows that the criminalisation approach adopts the victimhood view, and accepts that SW is inherently harmful not only for sex workers themselves but also for the community as a whole.[17]

On the other hand, the legalisation approach regulates the conditions for SW.[18] This approach aims to reduce SW-related crimes and maintain public order with control mechanisms such as registration, licensing, and health checks.[19] The underlying view behind this approach is that SW is a social need that needs to be controlled.[20] Lastly, in the decriminalisation approach, SW is neither prohibited nor regulated, as all SW related laws are repealed.[21] Human rights are the main concern of this approach, and the enhancement of health, safety and working conditions of sex workers is given importance .[22]

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11 Amnesty International, 'Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers' (2016) < www.amnesty.org/en/documents/pol30/4062/2016/en/> 'accessed 26 Aug 2023' 4.

12 Barnett and Casavant (n 9) 14.

13 Ibid at 12., European Parliament, *Resolution of 14 September 2023 on the regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women's rights (2022/2139(INI))* <www.europarl.europa.eu/doceo/document/TA-9-2023-0328_EN.pdf> 'accessed 10 Oct 2023' par. 41-42.

14 Frances M. Shaver, 'Prostitution: A Critical Analysis of Three Policy Approaches' (1985) 11(3) Canadian Public Policy 493, 493, also see Amnesty International (n 11) 4.

15 See Scottish Parliament, *Proposed Criminalisation of the Purchase of Sex (Scotland) Bill (2)* (2012) <https://archive2021.parliament.scot/S4_MembersBills/Criminalisation_of_the_Purchase_of_Sex_(2)_Consultation.pdf > 'accessed 26 Aug 2023' 16. Also see Home Office, *Paying the Price: A Consultation Paper on Prostitution* (2004) <http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/16_07_04_paying.pdf> 'accessed 10 Oct 2023' 74.

16 Home Office (n 15) at 54.

17 Ibid. and also see Nina Persak, 'Prostitution, harm and the criminalisation of clients' in Lieven Pauwels and Gert Vermeulen (eds) *Update in de criminologie VI: actuele ontwikkelingen inzake EU-strafrecht, veiligheid & preventie, politie, strafprocedure, prostitutie en mensenhandel, drugsbeleid en penology* (Maklu 2012) at 230.

18 Barnett and Casavant (n 9) at 9.

19 Ibid.

20 Ibid.

21 Barnett and Casavant (n 9) 2.

22 Christine Harcourt and others, 'The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers' (2010) 34(5) Australian and New Zealand Journal of Public Health 482, 485. and Amnesty International (n 11) 11.

The existence of such opposite legal approaches to SW is a significant point to consider. These legal approaches do not differ from each other in terms of applying different strategies to control SW or improve the conditions of sex workers. Instead, as indicated above, legal responses to SW are different from each other with regard to their preferred social understanding of what SW is and what causes it.[23] Therefore, it can be claimed that it is the description and perception of SW which make the legal approaches different from each other and which lead to different strategies. The divergence of perceptions is perhaps comprehensible considering that SW is a social activity that has gender, economic, political and moral dimensions.[24] However, in regard to the question of whether or not SW should be criminalised, reasoning should not be based solely on some predominant and morally and/or politically preferred arguments.[25] State intervention in individuals' lives through criminal law should be justified within some specific principles that determine the limitations on criminalisation.[26] The free will of individuals and "the right not to be punished" should be preserved to the utmost, and any intervention should be restricted to the minimum.[27]

However, determining "the minimum" with restricting principles has never been simple. There are various arguments for determining the fundamental principles for criminalisation, and the principles vary according to the legal systems.[28] This article will address the concepts of harm and wrong, which are the perhaps the most well-known and widely accepted reasons and principles for criminalisation.[29] While the harm principle argues that it is justifiable to criminalise an act only if it causes harm to others[30], the wrong principle claims that only substantial wrongful conduct should be criminalised.[31] The principles of harm and wrong are also justified with the primary purposes of criminal law which are the prevention of harm and censuring those who

23 House of Commons Home Affairs Committee, *Prostitution* (2016) <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/26.pdf> 'accessed 28 Aug 2023' 36.

24 See Jo Phoenix, 'Sex, money and the regulation of women's 'choices': a political economy of prostitution' (2007) 70(1) Criminal Justice Matters 25, 25., and Sanders and others (n 2) at 3.

25 Persak (n 17) at 235.

26 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007) at 77.

27 Husak (n 26) 57., John Stuart Mill and John Gray, G.W. Smith (eds), *J.S.Mill, On Liberty, in focus* (Routledge 1991) at 30.

28 The principles of harm and wrong discussed in this article are the Anglo-Saxon principles. Their European counterparts are legal good (*Rechtsgut* in German) and offensività principles. While this is the case, it is important to note that the choice to examine the principles of harm and wrong is not necessarily exclusive of the other principles. For an article demonstrating how all these principles from different legal systems share common elements and how they can be used together see Lucille Micheletto, 'Towards an Integrated (and Possibly Pan-European?) Prima Facie Legitimacy Test: Merging the Rechtsgut Theory, the Offensivita Principle, and the Harm Principle' (2021) 29 European Journal of Crime, Criminal Law and Criminal Justice 241.

29 See Mill and others. (n 27) at 23, and see Michael S. Moore, *Placing blame: a general theory of the criminal law* (Oxford University Press 2010) Chapters 16,17.

30 Mill and others. (n 27) at 30.

31 Robin Antony Duff, 'Towards a Modest Legal Moralism' (2014) 8(1) Criminal Law and Philosophy Vol.8(1) 217, 219, and Andrew Ashworth, 'Is the criminal law a lost cause?' (2000) 116 Law Quarterly Review 225, 240.

commit wrongful behaviours.[32] Accordingly, it has been accepted that criminal law should be reserved and limited to those serious harmful wrongs as a last resort when other means fail to respond to an incident that raises social concern.[33]

In this article, I will argue that the harm and wrong principles are only *defining principles* which indicate what kind of behaviour can be criminalised. In this respect, they determine the scope of behaviours that can be discussed within the criminal law realm and give prima facie reasons for criminalisation of those behaviours. Nevertheless, they do not give all-things-considered reasons for criminalisation since they do not examine the limitations of the authority to criminalise. I will discuss that, if criminal law should be the last resort for only the serious wrongdoings that cause harm to others, the limitations of the authority to criminalise should be determined with further principles.[34] Therefore, in addition to these *defining principles,* we need *restricting principles* that determine the boundaries within which the state authority may intervene in the liberty of individuals who conduct those *defined* harmful wrongdoings. I will suggest the human rights principles of non-discrimination and proportionality as the restricting principles. On the issue of criminalisation of SW, I will first examine whether the harm and wrong principles give prima facie reasons for criminalisation. After applying these *defining principles* to SW, I will analyse the *restricting principles* to investigate whether there are strong countervailing reasons against criminalisation of SW. In the last section , I will emphasise the link between the prima facie reasons for the criminalisation of SW and the countervailing reasons against it while prioritising human rights. My main argument is that SW should not be criminalised since the *restricting principles* are so strong that prima facie reasons cannot turn into all-things-considered reasons to justify criminalisation.

Terminology

In this article, the term "sex work" is used to indicate the conduct or occupation of engaging in sexual activity for money or some other "form of remuneration".[35] It refers to *consensual* exchange of sexual services between adults without any threat, fraud, or any means of coercion.[36] As SW involves reciprocal commercial sexual activity, criminalising means the criminalisation of either the selling or buying of sexual activity, or both.[37] This definition relates to SW in the narrow sense and excludes other types of businesses, such as pornography or online sex work, which

32 Ashworth (n 31) at 249.

33 Ibid 225. and Andrew Ashworth 'Conceptions of Overcriminalization' (2008) 5 Ohio State Journal of Criminal Law 407, 417.

34 Ashworth (n 33) 408.

35 Amnesty International (n 11) 3.

36 Ibid 4.

37 Ibid.

are prevalent in the sex industry. In other words, the concept of SW is not used synonymously with the sex industry. Similarly, although there is an often-asserted link between SW and human trafficking, procuration, living on the earnings of SW or any other exploitative activity, this article only focuses on the criminalisation of SW.[38]

The article recognises the different approaches to SW and considers all the arguments and evidence provided by these approaches. However, while seeking an answer to the question of whether SW should be criminalised, an objective analysis of the criminalisation principles will be developed based on the fact that SW is a consensual social activity that raises social concern.[39]

I. Harm, Wrong, and Sex Work: The Defining Principles

In this section, I will discuss the characteristics of the harm and wrong principles and argue that these are not restricting principles for criminalisation. Although I will examine them separately, it should be pointed out that the concepts of harm and wrong often overlap or complement each other.[40] For example, it has been argued that wrongfulness is a broader concept than harm, since there can be both harmful and harmless wrongs.[41] Likewise, the fact that some claim that only harmful wrongs can be criminalised[42], while the others argue that harmless wrongs can also be criminalised, shows that these concepts are considered and applied together.[43]

Nonetheless, although the relationship between harm and wrong is an interesting and significant matter, this will not be an issue to be discussed in this article. Here, wrongfulness and harmfulness will be discussed as commonly held reasons for criminalisation, and both will be accepted as valid principles without prioritising one over the other. Therefore, the usage of these terms interchangeably or together in the article should not cause any ambiguity. What I will essentially argue here is that both wrong and harm principles constitute *defining* principles for criminalisation, and they only give prima facie reasons for criminalisation. In doing so, I will suggest that these principles, while defining the scope of behaviours that are open to discussion of criminalisation, should not be used as a means of enforcement of morals.[44] The discussion regarding criminalisation of SW will be based on the two aspects of these

38 Ibid. and Amnesty International (n 11) at 3.

39 Ashworth (n 33) 417. Also see Roger Matthews and Maggie O'Neill, *Prostitution* (Ashgate 2003) at xiii

40 A.P. Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) at 50, and Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987) at 31.

41 Feinberg (n 40) at 34.

42 Victor Tadros, 'Harm, Sovereignty, and Prohibition' (2011) 17(1) Legal Theory 35, 37.

43 Simester and Hirsch (n 40) at 50.

44 Persak (n 17) at 235.

defining principles. Firstly, if neither harm nor wrong principles can provide prima facie reasons for criminalisation of SW, there can be no justification and any further discussion for criminalisation. Secondly, in the case of prima facie reasons given by the defining principles, restricting principles should then be further examined to determine whether it is, all-things- considered, justifiable to criminalise SW.

A. Harm

The harm principle has been perhaps the most well-accepted principle of criminalisation.[45] The aim of this liberal principle is to determine the limitations of the power of the state to criminalise in a democratic society.[46] Mill asserts that the purpose of preventing harm to others can be the only purpose for "which power can be rightfully exercised over" any individual of society against their will.[47] He argues that individuals are "sovereign over their bodies and minds", and they can only be accountable to society when their conduct concerns *others* and causes harm to *others*.[48] Feinberg develops the harm principle, and claims that harm prevention is not the only reason for criminalisation, but "always a good reason in support of" it.[49] Therefore, he supports the idea that there can also be some other good reasons for criminalisation apart from harm prevention, "such as prevention of serious offence that does not amount to harm".[50] While Mill explains harm as "evil to others"[51], Feinberg defines harm as "setbacks of interests that are wrongs, and wrongs that are setbacks to interest"[52]. He also includes "unreasonable risk of harm" in the concept of harm.[53] Mill's harm principle is criticised for being narrow and exclusionary since it only accepts "prevention of harm to others" as a valid purpose of criminalisation and only determines "what to exclude" from criminal law.[54] On the contrary, Feinberg's harm principle is seen as the permissive and broader version that is helpful in determining "what to include" in criminal law.[55]

While the harm principle, either the exclusionary or the permissive version, has been widely recognised, Harcourt argues that it is now a collapsed principle since today's criminalisation discussion is not limited to the question of whether or not

45 Ibid 230.

46 Ibid 232. Mill and others (n 27) at 30.

47 Mill and others. (n 27) 30.

48 Mill and others. (n 27) at 30

49 Feinberg (n 40) 26.

50 Ibid. and Robin Antony Duff, *Answering for Crime Responsibility and Liability in the Criminal Law* (Hart 2007) 124.

51 Mill et al. (n 27) 31.

52 Feinberg (n 40) 36.

53 Ibid 11.

54 Duff (n 50) 123. Also see Bernard E. Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) Journal of Criminal Law and Criminology 109, 114.

55 Duff (n 50) 123, and Harcourt (n 54) 114.

conduct causes harm.[56] He claims that "what type and what amount of harms the challenged conduct causes, and how the harms compare" constitute the core questions of the issue of contemporary criminalisation.[57] However, it must be noted that even Harcourt's suggestion is centred on harm. Thus, despite the elaborated discussions on the harm principle, "harm" is still acknowledged as a strong justificatory reason for criminalisation.[58] Then, the main question regarding criminalisation of harmful conduct, regardless of which meaning or version of the harm principle is adopted, should be as follows: What does the existence of harm imply for criminalisation of the conduct that causes such harm?

According to Mill, if one performs an act that is harmful to others, there exists "a prima facie case for punishing" that person.[59] On the other hand, Feinberg argues that the harm principle should be supplemented with some other "principles of justice" before it can be applied to the "real legislative" discussions regarding criminalisation of an act.[60] Interestingly, this aspect of the harm principle and its effect on criminalisation is mostly ignored, and perhaps this is why the harm discussions for justifying criminalisation often reach a dead end. It is significant to recognise that the harm principle has never actually been suggested as a firm reason that indicates the necessity of criminalisation of harmful conduct.[61] According to the harm principle, the existence of harm can only provide "prima facie" justification for criminalisation, since it only gives prima facie reasons for criminalisation.[62] This implies that proving the existence of harm does not suffice to justify criminalisation per se, and there needs to be some further inquiry to decide whether a harmful act deserves criminalisation. On the other hand, the harm principle also indicates that there should not even be a matter of debate on the criminalisation of those conducts that are judged to be harmless to others.[63] Therefore, the harm principle can only be a defining principle that determines which acts of conduct can be discussed in the realm of criminal law, because it does not suggest any specific limitations on the authority to criminalise. Accordingly, while it averts the possibility of justified criminalisation to conclude that SW is not harmful, proving that it is harmful does not justify criminalisation of it per se because it requires a further evaluation of restricting principles.[64]

56 Harcourt (n 54) at 113.

57 Ibid 113.

58 Persak (n 17) 230. Also see Lindsay Farmer, 'Criminal Wrongs in Historical Perspective' in Robin Antony Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford 2010) at 214.

59 Mill and others (n 27) 32.

60 Feinberg (n 40) 36.

61 Mill and others (n 27) 32.

62 Ibid.

63 Tadros (n 42) at 37.

64 See "Human Rights and Sex Work" title in this article.

Meanwhile, when assessing harm, it must not be overlooked that the harm principle objects to paternalism and enforcement of morals.[65] The opinion of the majority cannot be a sufficient warrant to criminalise an act of conduct.[66] An act might be considered by the majority of society as wicked or immoral, and there might be a great desire for its avoidance. However, individual liberty and the capacity of individuals to make their own choices should not be interfered with unless their conduct is proven to be harmful to others.[67] At this point, it is helpful to make a distinction between "harmed condition" and "harmful condition".[68] Conduct can lead to a harmed condition in which the actor feels deep pain, sorrow or despair. However, this does not, on its own, show that such conduct causes harm to others.[69] In order to agree that there is a prima facie reason for criminalisation on the ground of harm, there should be a harmful condition in which harm perceptibly affects others.[70] Therefore, even if a harmed condition exists, one's own good, as well as the opinions and morals of the majority or the annoyance caused by the conduct cannot provide a prima facie reason for criminalising it.[71]

When we look at SW, bearing all these aspects of the harm principle in mind, we see that harm is at the centre of the arguments for criminalising it.[72] It has often been claimed that SW is inherently harmful because of the notion that the reasons behind SW, the environment in which it occurs, and ultimately SW itself are all harmful.[73] The reasons that lead to SW are mostly explained by the social and economic backgrounds of sex workers.[74] Poor economic conditions, lack of education opportunities, racism, abuse or neglect in the family, sexism, and previously experienced "physical and emotional harm" have been discussed to be the main reasons why sex workers choose, or are forced to choose, to engage in SW.[75] This view is supported by some sex workers who also see themselves as the victims of their own lives since they were "born victims" and indicate that they were "already victims" even before SW.[76] Accordingly, sex workers are even described as persons with "histories of victimisation".[77] However, not all sex workers define themselves as

65 Persak (n 17) at 230.

66 Mill and others (n 27) at 30.

67 Ibid.

68 Feinberg (n 40) 31.

69 Ibid.

70 Ibid.

71 Mill and others (n 27) at 30.

72 Peter de Marneffe, *Liberalism and Prostitution* (Oxford University Press 2009) at 73.

73 Ole Martin Moen, 'Is prostitution harmful?' (2014) 40(2) Journal of Medical Ethics 73, 74.

74 Jennifer James 'The prostitute as victim' in Jane Roberts Chapman and Margaret Gates (eds) *The victimization of women* (Sage 1978) at 183. Also see Sanders and others (n 2) at 3.

75 Melissa Farley, 'Prostitution and the Invisibility of Harm' (2003) 26(3-4) Women & Therapy 247, 251.

76 Phoenix (n 8) 50.

77 James (n 74) 193.

"victims" in this sense. Some do choose to be a SW, even if they have other appealing job opportunities, because they prefer making money easily and quickly in this way.[78] Also, some prefer to be sex workers to have an independent lifestyle, although they have not experienced victimisation in their lives in any respect.[79] Therefore, it is neither right nor explanatory to generalise the existence of devastating background and victimisation to each sex worker. In other words, harm is not always the reason for engaging in SW. On the other hand, even if victimisation is held as a common situation, this kind of harm cannot be applied to the harm principle. This is because the grievous social and economic conditions that lead to SW can only be seen as a "harmed condition" in which some sex workers find themselves, like in any social problem that many people might partially or wholly face, but this does not prove that SW is harmful to *others*.[80] The harmed condition of sex workers is irrelevant to the harm principle in this sense.

As for the argument that the environment in which SW operates is harmful, we see that this aspect is often explained with the claim that the environment is intrinsically associated with serious crimes.[81] Among those that are alleged to be directly related to SW are drug-related crimes, forced and controlled SW by pimps, and exploitation of sex workers by human traffickers.[82] It is frequently argued that sex and drug markets flourish with SW, and so it serves as an environment in which serious crimes are committed and more people are driven into SW.[83] In this respect, the suggestion that dealing with SW is a necessary step in reducing the rates of sex and drug-related crimes is particularly directed at street SW because the high rates of crimes on the streets visibly disturb society.[84] This argument seems substantially powerful at first, since it, as per the harm principle, asserts that SW affects *others* in a harmful way. However, when it is elaborated, it can be seen that the argument is mistaken in two respects. Firstly, when it comes to the exploitation of sex workers, it should be noted that abused or coerced SW is not SW, it is "abuse" or "coercion".[85] It is a fact that human trafficking involves the exploitation of persons for commercial sexual activity, and the commercial sex market paves the way for the abuse of SW.[86] Nevertheless, this only shows that SW is easy and open to abuse, but does not prove that SW

78 de Marneffe (n 72) at 14.

79 James (n 74) at 186.

80 See Feinberg (n 40) at 31.

81 Home Office (n 15) at 74., also see Paul Bisschop, Stephen Kastoryano and Bas van der Klaauw, 'Street Prostitution Zones and Crime' (2015) IDEAS Working Paper Series from RePEc Discussion Paper No. 9038 at 6.

82 Daniela Danna, *Report on prostitution laws in the European Union* (2014), <http://lastradainternational.org/lsidocs/3048-EU-prostitution-laws.pdf> 'accessed 3 September 2023' at 30.

83 Home Office (n 15) at 74.

84 Ibid.

85 Persak (n 17) 231.

86 See United Nations Office on Drugs and Crime, *Human Trafficking,* <www.unodc.org/unodc/en/human-Trafficking/Human-Trafficking.html> 'accessed 4 Sep 2023'. Also see Crown Prosecution Service, *Prostitution and Exploitation of Prostitution*, <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution> 'accessed 4 Sep 2023'.

promotes these kinds of exploitation.[87] Secondly, claiming that the environment in which SW occurs is "a den of iniquity" that harms others is not convincing enough to prove that SW is also harmful. Although drug dealing or any other crime is often committed within SW, this does not indicate that these crimes are intrinsic to it.[88] We do not claim that being poor is harmful because the places poor people live and work have high crime rates, nor do we prohibit marriage just because domestic abuse is frequent in marriages. The link between crimes and some specific activities can help us understand why, how, and by whom these crimes are committed. However, these links do not demonstrate that any activity that is related to a specific crime is automatically harmful. Asserting the contrary would mean contributing to the enforcement of morals since the link between SW and other crimes can only support the claim that SW is an undesirable activity, rather than that it is harmful.

Lastly, the problem with the claim that SW itself is harmful should be briefly elaborated. According to this claim, even if there is a consensual agreement between sex workers and clients, SW seriously harms sex workers because it involves violence, objectification, and exploitation.[89] Moreover, the argument is that sex workers find themselves in adverse physical and psychological conditions that cause serious problems involving drug or alcohol abuse, depression, or disease.[90] Although much can be said for and against these claims, the significant point to consider here is that the asserted harm is self-harm and the harm principle is essentially concerned about harm to *others*.[91] Self-harm is a much-debated issue, and the questions about whether self-harm should be included in the harm principle and whether it should be criminalised require further deliberation. However, without deciding whether or not self-harm should be criminalised, it should be noted here again that the harm principle should not be turned into a paternalistic principle that determines what should be seen as harmful for people and their own good.[92]

For SW, the risk of falling into the trap of paternalism is high because harm assessment of the activity is often influenced by the opinion that SW is immoral. First and foremost, the evidence indicates that self-harm in SW can be considerably reduced through social support and health care, and this type of self-harm is neither inevitable nor irreducible.[93] Also, if we put aside the moral discussions around SW

87 Persak (n 17) 231.

88 Ibid at 230.

89 Farley (n 75) at 249, and Teela Sanders, 'The Risks of Street Prostitution: Punters, Police and Protesters' (2004) 41(9) Urban Studies 1703, 1705.

90 Moen (n 73) at 75. Also see Tiggey May and others, *Police Research Paper Series 118 Street business: The links between sex and drug markets* (1999) at 9.

91 Mill and others (n 27) at 30.

92 Laura Stoker, 'Political Value Judgments' in James H. Kuklinski (ed.) *Citizens and Politics* (Cambridge University Press 2001) 450.

93 Michael L. Rekart 'Sex-work harm reduction' (2005) 366(9503) The Lancet 2123, 2125., Andrea Krüsi and others, 'Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in

and say that it is, after all, work, it is easy to admit that some other exhausting jobs, e.g. garbage collecting or construction, can be just as dangerous and harmful as SW. The distinction made between SW and other jobs in this respect appears to be based on moral values. If not, those who claim that SW is harmful because it is risky and dangerous must prove why they do not find other jobs equally harmful in this sense. Therefore, even if this kind of harm is to be included in the harm principle, it is not convincing enough to conclude that SW is harmful. This is because the harm in focus is only the harm inflicted upon sex workers by society with their discriminatory attitude of leaving them alone with no support.[94] Criminal law is not a means for thinking of what would be the least harmful and best for sex workers while ignoring their demands for better conditions which would reduce the harm. Therefore, any given prima facie reason for criminalisation in this respect is weak and questionable as it has potential for being paternalistic.

B. Wrong

The concept of wrong is another significant basis for discussions on criminalisation. It emerged as a complementary concept to the harm principle, yet it developed the harm principle into the "wrongful harm" principle.[95] After Feinberg argued that the harm principle aims to prevent "only those harms that are wrongs"[96], the view that criminal law should only be concerned with wrongful harms became a commonly shared one.[97] However, the concept of wrong has not remained limited to the harm principle or its explication but has also evolved as a discrete principle of criminalisation.[98] According to Husak, the "wrongfulness constraint" is a principle of its own that has already existed in the general part of criminal law as one of the internal constraints on criminalisation because criminal liability can only be imposed for wrongdoings.[99] For Husak, even the defence of excuse presupposes the existence of a wrongdoing which proves the principle.[100]

However, we need further explanation of the wrong principle to determine which conduct can be seen wrongful and whether all wrongful acts can be justifiably criminalised. In this respect, the concept of "public wrong" has been suggested, and it has been claimed that only those kinds of wrongs that increase public concern

Canada – a qualitative study' (2014) 4(6) BMJ Open <http://dx.doi.org/10.1136/bmjopen-2014-005191> 'accessed 5 Sep 2023' at 7.

94 For detail, please see "Human Rights and Sex Work" title in this article.

95 Farmer (n 58) 215.

96 Feinberg (n 40) 36.

97 Farmer (n 58) at 215, Also see Duff (n 50) at 127.

98 Farmer (n 58) 215.

99 Husak (n 26) at 66.

100 Ibid.

and require "collective response" can be criminalised.[101] Public wrongs have been defined as wrongs that are considered as done to "individual members of the community" as a whole, in terms of their "shared membership" due to their shared interests.[102] Therefore, for this principle, crimes require a public condemnation of the public wrongs, and they declare that some specific conduct is wrongful because there is a "shared and public view" that such conduct concerns all individuals in the community even if it is directed against one individual member.[103]

Nonetheless, not every conduct that is unanimously considered wrong by the community can be a concern of criminal law. Criminalisation should only aim to respond to those wrongs that are sufficiently serious.[104] Sufficient seriousness here does not refer to a degree, but to the characteristic of a wrongdoing that makes it "public".[105] Determining the characteristics of a wrong is not simple, but two aspects can help assess the seriousness of a wrong. Firstly, what makes a wrong sufficiently serious in this respect is its capacity to interest the community as if it were done to *all* individual members of the community.[106] This is the point where public wrongs differ from private wrongs, and merit criminalisation. Violating a contract can be commonly seen as a wrong by the community, but its wrongness only concerns the parties to the contract. Thus, a breach of contract can only be seen as a private wrong, and its wrongness cannot lead to criminalisation.[107] Secondly, a sufficiently serious wrong, in addition to the existent concern of the community, should necessitate censure by criminal law.[108] This implies that every situation in which a wrong threatens public order and/or interest does not inevitably require criminal censure.[109] In order to require criminal censure, a sufficiently serious wrong should concern individual rights and interests which are under the protection of the state.[110] Therefore, censure by criminal law should be understood as part of the state's duty to protect and "to promote respect" for such rights and interests.[111]

As it is seen, just like the harm principle, the wrong principle is a defining principle that determines which acts can be a concern of criminal law. However, it does not demand that all determined public wrongs must be criminalised since the existence

101 Sandra Marshall and Robin Antony Duff, 'Criminalization and Sharing Wrongs' (1998) 11 Canadian Journal of Law and Jurisprudence 7, 7.

102 Ibid 20. and Robin Antony Duff, 'Perversions and Subversions of Criminal Law' in Robin Antony Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010) 89.

103 Marshall and Duff (n 101) at 13.

104 Ashworth (n 31) at 241.

105 Marshall and Duff (n 101) 8.

106 Ibid at 18.

107 Ibid 8.

108 Duff (n 31) at 219.

109 Marshall and Duff (n 101) at 9.

110 Ibid.

111 Ibid.

of a public wrong does not suffice to justify criminalisation per se.[112] As the wrong principle only gives prima facie reasons for criminalisation, determining a public wrong can only provide prima facie justification for criminalisation. In other words, that there can be some countervailing reasons against criminalisation, and the decision on whether a public wrong can be justifiably criminalised needs further inquiry.[113] On the other hand, concluding that a wrong is not a *public* wrong indicates that there should not even be a discussion for criminalisation. Accordingly, while deciding that SW is not a public wrong, which averts the possibility of justified criminalisation, defining it as a public wrong only provides a prima facie reason for criminalisation and necessitates an evaluation of restricting principles.[114]

SW has been claimed to be wrong in several respects. One claim is that SW constitutes a wrong because it is degrading to sex workers.[115] According to this claim, sex workers have the lowest social status in society for they engage in exploitative sexual activity which is often violent, humiliating, and stigmatizing.[116] Also, it has been argued that SW degrades the quality of the lives of sex workers since it causes psychological problems, drug and alcohol abuse, and some other diseases.[117] As is understood from the underlying reasons why SW is seen as degrading, the wrongness of SW here has been explained with its harm, especially self-harm, and it is claimed to be a "harmful wrong". However, to decide whether SW can be seen as a public wrong in this respect, the abovementioned two points should be assessed.

Firstly, does wrongness of SW concern all individuals in society as if it were done to them? Since the wrong discussed here is fundamentally self-harm, it might seem difficult to admit that it also concerns society. However, there is a strong radical feminist argument that the way SW harms sex workers is also degrading to all women in society, on the grounds that SW objectifies women's bodies and promotes the patriarchal perception of women.[118] Taking this further and considering the existence of transgender or male sex workers, it can even be argued that SW wrongs all individuals of society since it harms sex workers as a group by objectifying and exploiting them as members of society.[119] However, this interpretation is too broad

112 Duff (n 31) 230.

113 Ibid.

114 See "Human Rights and Sex Work" title in this article.

115 de Marneffe (n 72) at 49.

116 Ibid. and also see Igor Primoratz, 'What's Wrong with Prostitution?' (1993) 68(264) Philosophy 159 at 162.

117 Ibid. Also see (n 93)

118 Jane Scoular, 'The 'subject' of prostitution: interpreting the discursive, symbolic and material position of sex/work in feminist theory' (2004) 5(3) Feminist theory 343, 343.

119 See Ine Vanwesenbeeck, 'Prostitution Push and Pull: Male and Female Perspectives' (2013) 50(1) The Journal of Sex Research 11 at 12, and Erika Schulze and others, *Sexual exploitation and prostitution and its impact on gender equality* (2014) European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs PE 493.040, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf> 'accessed 15 Sep 2023' 29.

that every wrong can be defined as a public wrong in this respect. Besides, as SW is a consensual activity, the claim that this consensual self-harm extends to society can be criticised for being a paternalistic argument.[120] Each individual must choose their own lifestyle for their own benefit, even if it appears harmful or wrongful to the general public.[121] As for SW, any "paternalist interference" with it can be criticised for being excessive because sex workers, by definition, *choose* this occupation and the harm supposedly intrinsic to it.[122] On the other hand, the second point that whether this harmful wrong deserves criminal censure is open to the same criticism, since such censure would imply that the state should protect sex workers from the self-harm caused by their own activities which would only be a paternalistic censure.

The other claim is that a distinction should be made between street and off-street SW because only street SW can be defined as a public wrong.[123] According to this claim, though off-street SW can also be defined as immoral and wrong, it can only be a "private" wrong since it falls within a realm of private immorality which should not be intervened by criminal law.[124] In return, street SW is seen as a public wrong which concerns and affects other individuals because it is practiced within the public space.[125] Street SW is seen as a significant concern for society, as the evidence demonstrates that, when compared to off-street SW, it is more violent, dangerous, and damaging.[126] Both customers' or pimps' brutal violence towards street sex workers as well as the vulnerability of sex workers to other criminal behaviour have been discussed as reasons why street SW is riskier for sex workers.[127] Moreover, society has been claimed to be affected by street SW since it causes "residential discontent" and insecurity in the neighbourhood due to the violent and criminal environment caused by SW and SW-related activities such as kerb-crawling.[128]

Regarding the violence and risk that sex workers face while working, the explanation made in the previous paragraph also applies to street SW because this kind of harm is self-harm caused by a consented activity. However, whether public nuisance caused by SW constitutes a public wrong is another point. As it concerns the individuals of society, the main point to be focused on here is whether street SW deserves criminal censure. At first glance, it appears that such censure is necessary in

120 Husak (n 26) at 88.

121 Mill and others (n 27) at 90.

122 Primoratz (n 116) 165.

123 See John Lowman, 'Street Prostitution Control: Some Canadian Reflections on the Finsbury Park Experience' (1992) 32(1) The British Journal of Criminology 1 at 1, Sanders (n 89) at 1705.

124 See Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 1957) at 80.

125 Home Office (n 124) at 80.

126 Celia Williamson and Gail Folaron, 'Violence, Risk and Survival Strategies of Street Prostitution' (2001) 23(5) Western Journal of Nursing Research 463 at 464.

127 Williamson and Folaron (n 126) at 464, and Danna (n 82) at 22.

128 Tracey Sagar, 'Street Watch: Concept and Practice' (2005) 45(1) The British Journal of Criminology 98, 100.

this regard because the state has the duty to ensure security and to take precautions for the activities that cause public nuisance. However, when we take the claims in question as a basis, it is important to realise that it is not street SW itself, but the surrounding violent and criminal environment that concerns the society. As street SW does not directly wrong the interests of the individuals of society, it is dubious whether it is a valid reason to censure the activity because of its indirect effects when the effects can be addressed separately. Therefore, even if street SW is seen as disturbing and morally wrong, this must not suffice to claim that it should be censured by criminal law.

II. Human Rights and Sex Work: The Restricting Principles

Today, human rights are recognised as the rights of each human being in the world, regardless of their "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[129] While one aspect of human rights is that all human beings have "universal and inalienable" rights, another aspect is the obligation of states to respect and protect them.[130] Accordingly, the right of individuals to demand that their human rights are not violated is enshrined in the very concept of human rights. This makes it both critical and difficult to determine the scope of human rights and to answer the question of which rights are "human rights". With regard to SW, discussing and determining the extent of human rights has been even more problematic. There are diametrically opposing views on this issue. While some define SW as a human rights violation just as human trafficking or slavery[131], others argue that SW is an exercise of the right to personal autonomy, and thus not a human rights violation but a component of human rights.[132] However, although much is said about the connection between *SW* and *human rights*, there is little discussion about the link between the *criminalisation of SW* and *human rights*. This deficiency is evident in the discussions about criminalising SW, but not specific to this activity. The significance and the role of human rights have been mostly ignored while discussing whether conduct should be criminalised, even though criminalisation has been one of the most severe powers of the sovereign to intervene in individual liberties.[133]

In this section, I will contend that the issue of human rights should be the restricting principle on criminalisation, and I will argue for the prohibition of discrimination and

129 United Nations, *The Universal Declaration of Human Rights* (UDHR) (1948), <http://www.un.org/en/universal-declaration-human-rights/> 'accessed 16 Sep 2023' Article 2.

130 United Nations Human Rights Office of the High Commissioner, *What are human rights?* < www.ohchr.org/en/what-are-human-rights#:~:text=These%20universal%20rights%20are%20inherent,work%2C%20health%2C%20and%20liberty.> 'accessed 16 Sep 2023'.

131 Laura Reanda, 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' (1991) 13(2) Human Rights Quarterly 202, 207.

132 de Marneffe (n 72) at 115.

133 Persak (n 17) 233.

proportionality as the restricting principles. It should be noted here that the discussion will not focus on the liberty of SW, but on the impact of the criminalisation of SW on freedom. As Husak indicates, "when any criminal law is enacted", it is not about the liberty to perform specific types of conduct, but rather it is about other fundamental liberties which might be at stake.[134] Therefore, the main constraint on criminalisation should be the protection of human rights, and so the question of how criminalisation might affect these rights must be rigorously evaluated when deciding whether a type of conduct is to be criminalised.

A. Prohibition of Discrimination

Prohibition of discrimination is one of the essential principles which is safeguarded by many international and regional human rights instruments.[135] Discrimination is described as "distinction, exclusion, restriction or preference" made on the basis of any status of a person or a group of persons.[136] The prohibition of discrimination and the principle of equality are two sides of the same coin because prohibiting discrimination is the necessary element for ensuring equality.[137] In this respect, the right to equality before the law and the right to equal protection of the law have been guaranteed under the principle of prohibition of discrimination.[138] Although they often overlap, the right to equality before the law requires that everyone is subject to the same law and that the law is applied impartially, while the right to equal protection of the law necessitates that "the substantive provisions of the law" provide the same rights and protections to everyone without discrimination.[139] However, it should be pointed out that these principles aim for "fair equality", rather than "absolute equality", and only those differential treatments that have no "reasonable and objective justification" can be considered as discrimination.[140]

134 de Marneffe (n 72) 101.

135 See UDHR (n 129) Articles 2 and 7, United Nations, *International Covenant on Civil and Political Rights* (ICCPR) (1966) <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> 'accessed 9 Oct 2023' Article 26., United Nations, *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966) <www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> 'accessed 9 Oct 2023> Articles 2 and 3., African Commission, *African Charter on Human and Peoples' Rights* (ACHPR) (1998) < https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> 'accessed 9 Oct 2023' Articles 2 and 3., Council of Europe, *European Convention on Human Rights* (ECHR) (1950) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> 'accessed 9 Oct 2023' Article 14.

136 United Nations, *The Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1965) <www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> 'accessed 8 Oct 2023' Article 1., Also see United Nations, *The Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979) <www.un.org/womenwatch/daw/cedaw/text/econvention.htm> 'accessed 9 Oct 2023' Article 1.

137 Daniel Moeckli and others, (eds) *International human rights law* (Oxford University Press 2014) at 158.

138 Li Weiwei, 'Equality and Non-Discrimination Under International Human Rights Law' (2004) 03/2004 The Norwegian Centre for Human Rights Research Notes, 14.

139 Ibid 15.

140 Weiwei (n 138) 8. Also see Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law* (2011) European Commission Directorate-General for Justice, < www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_3_diger/human_rights/prohibition_of_discrimination_under_european_human_rights_law.pdf > 'accessed 19 Sep 2023', 28.

Discrimination can exist in various forms, namely direct and indirect discrimination.[141] It is called "direct discrimination" when specific groups of persons are treated differently without a legitimate purpose and proportionate means to achieve that purpose.[142] Prohibition of direct discrimination is enshrined in criminal law because criminal law should equally censure those who "commit wrongs of equivalent seriousness in relevantly similar circumstances".[143] When direct discrimination is considered in terms of criminalisation of SW, there can be two cases. Firstly, it can be claimed that distinguishing between street and off-street SW and criminalising only one of them can be seen as discrimination because both street and off-street sex workers perform the same activity. Secondly, distinguishing between selling and buying of sex, and criminalising only the buying of sex (or only the selling of sex) can also be regarded as discrimination, since both parties mutually and consensually engage in the same activity, which is SW in the framework of a buy-sell relationship.

It is certain that treating people differently does not automatically constitute discrimination. However, under the prohibition of discrimination, if the state treats some or all parties to SW differently through criminal law, it must be based on a legitimate aim and proportionate means. Nonetheless, in this justification, the existence of harm or public wrong per se is no longer enough because what is needed to be justified here is the differentiation between the same activities conducted by similar groups of people. In other words, the question changes from "why SW should be criminalised" to "why this type of SW should be criminalised while other types cannot". As discussed above, off-street sex work does not differ significantly from street SW nor does buying SW differ significantly from selling it. Therefore, it is not easy to find a reasonable justification for separating them. Beyond that, however, the criminal law's preference for one over the other constitutes unfair treatment on the one hand and has the more serious consequence of preventing the realisation of the legitimate aim through disproportionate negative implications on the other. As this part of the question will be examined in detail below, to avoid repetition, it should be noted here that such a distinction by criminal law would bear the risk of discrimination as it requires a legitimate aim and a proportionate means, which are difficult to find.

On the other hand, indirect discrimination occurs when an apparently neutral and equal law creates a disadvantage for a certain group of people or adversely and disproportionately affects a specific group within "disparate impact, except it is "reasonably and objectively justified".[144] Moreover, in case the law fails to provide an

141 de Schutter (n 140) at 21.

142 Ibid.

143 Ashworth (n 31) 245.

144 de Schutter (n 140) 23.

exception for the individuals of a certain group that need different treatment and treat them differently, this again constitutes indirect discrimination.[145] As is seen, making neutral and equal laws does not suffice to ensure equality since there is also a need for preventing predictable adverse effects of the laws on certain groups.

Considering indirect discrimination as a limitation of criminal law may seem challenging at first. It is obvious that criminal law, by its nature and by the means of censure and punishment, adversely affects those who fail to comply with the law.[146] Indeed, criminal law distinguishes between law-abiding citizens and those who are criminally liable for a crime and creates a "criminal status" in which convicted persons are treated differently from law-abiding individuals.[147] However, the fact that one of its functions is to treat differently those who commit harmful and/or wrongful conduct does not imply that criminal law is not subject to the prohibition of discrimination. The principles of equality and prohibition of discrimination should be respected and protected by criminal law, and criminalisation should be enacted only if it complies with these principles.[148] Accordingly, while deciding whether or not a defined conduct, SW in our case, can be justifiably criminalised, the following questions should be asked: Does criminalisation of the defined conduct target a group that is already in need of protection of the law, or will criminalisation disproportionately and adversely affect a specific group? Unless the answers are negative, it should be acknowledged that criminalisation is not justified since it violates the restricting principles.

For SW, it has often been stated that the specific group that will be affected by criminalisation is women because the majority of sex workers are women and SW should be understood in terms of gender inequality.[149] Although this seems a reasonable argument, the specific group here will be recognised as *sex workers*, rather than *women*. This is because criminalisation of SW affects all sex workers as a social group, and discrimination against them is based on what they do in common. Nonetheless, this approach only aims to focus on the activity threatened with criminalisation and does not deny the fact that when, e.g., a *woman* or *LGBTI+* identity is combined with a *sex worker* identity the compound discrimination on different grounds is seriously at stake. With this in mind, the question to be answered in this part is whether or not sex workers are already a disadvantaged group that should be protected by the law, and whether criminalisation might affect sex workers adversely.

145 European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law* (2010) <www.refworld.org/pdfid/4d886bf02.pdf > 'accessed 9 Oct 2023' at 30.

146 Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15(4) New Criminal Law Review 542, 568.

147 Persak (n 17) 233.

148 Ashworth (n 31) at 245

149 Don Soo Chon, 'Gender Equality, Liberalism, and Attitude Toward Prostitution: Variation in Cross-National Study' (2015) 30(7) Journal of Family Violence 827, 828. Also see European Parliament (n 13)

There is a wide range of evidence demonstrating that sex workers are frequently exposed to human rights abuses just because they are sex workers.[150] These abuses mainly concern sex workers' right to life, right to security, and right to access to justice, as well as their equal opportunity to benefit from health services.[151] The evidence proves that human rights abuses against sex workers are prevalent due to social perception of sex workers and the states' attitude towards them.[152] This is facilitated by the common perception that any violent, abusive, or discriminatory behaviour against sex workers can be seen to be tolerable.[153] Moreover, despite the fact that the human rights of sex workers have often been violated in many respects, there is little effort by the states to tackle the situation.[154] Thus, while society ignores or normalises the abuses that sex workers experience, the states fail to protect, or prefer not to protect, them from these abuses.

As indicated in the previous sections, sex workers are often exposed to work-related violence, including physical, psychological and sexual violence.[155] Even in cases where the risk of violence amounts to death, sex workers find themselves isolated.[156] This is because there is a great "deviant" and "criminal" stigma attached to them, and this stigma affects the criminal justice system's response to the incidents in which they are victimised.[157] Due to this stigma, it is surprisingly common for sex workers to get arrested or exploited while trying to report their victimisation to the police.[158] In the incidents in which a sex worker is threatened with death, physically attacked, or raped, reporting the incident to the police often makes it worse.[159] Sex workers feel more abused when they are told by the police that they "deserve" whatever happens to them.[160] Especially in case of a sexual assault by a client or a pimp, the police response can be even more problematic because the perception that "sex workers are unrapable" causes the police officers to see the incident as a "normal" incident, rather than a criminal one.[161] It has even been suggested that serial killers prefer sex

150 Amnesty International (n 11) at 10.

151 Ibid.

152 Ibid 9.

153 Ibid 10.

154 Ibid at 5.

155 Also see Yan Alicia Hong and others, 'Self-Perceived Stigma, Depressive Symptoms, and Suicidal Behaviors Among Female Sex Workers in China' (2010) 21(1) Journal of Transcultural Nursing 29, 32.

156 Schulze and others. (n 119) 14. Also see Home Office, *A Review of Effective Practice in Responding to Prostitution* (2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97778/responding-to-prostitution.pdf> 'accessed 7 Oct 2020' 3.

157 Juline Koken, 'Independent Female Escort's Strategies for Coping with Sex Work Related Stigma' (2012) 16(3) Sexuality & Culture 209, 209.

158 House of Commons (n 23) 31., Danielle Friedman Nestadt and others, 'Criminalization and coercion: sexual encounters with police among a longitudinal cohort of women who exchange sex in Baltimore, Maryland' (2023) 20(11) Harm Reduction Journal 1.

159 Jolanda Sallmann, 'Living With Stigma: Women's Experiences of Prostitution and Substance Use' (2010) 25(2) Affilia Journal of Women and Social Work 146, 151.

160 Ibid.

161 Williamson and Folaron (n 126) 464.

workers as their victims because their death is not seen as an "incident" that should be proceeded with investigation.[162] As it is seen, sex workers are not even seen as *victims* because it is categorically accepted in the criminal justice system that they are not "ideal victims".[163] This is perhaps the most significant, yet ignored, reason why sex workers try to find their own survival strategies to protect themselves from such high risk of violence instead of applying to the criminal justice system.[164] They do not have any expectations of the system with regard to the protection of their lives, security and safety.[165]

On the other hand, the same situation applies to the opportunity for sex workers to equally enjoy health services. To prevent sexually transmitted diseases such as HIV, sex workers must use condoms and receive regular health checks since SW is a risky activity.[166] Health checks are especially crucial for sex workers due to inconsistent condom use, as either clients insist on not using one or sex workers prefer high-priced unprotected sex.[167] However, they usually face stigma and discrimination when they use health services.[168] Some sex workers describe their experiences with health care providers as judgmental because they are often treated as "dirty" or "undeserving of respect".[169] Therefore, for many sex workers, accessing health services means adding more stigma from others when they already suffer from that stigma in other aspects of their lives.[170] This results in either avoidance of using health care services or sharing less information about themselves and hiding the "medically relevant" information that is necessary for proper care to protect themselves from the stigma.[171]

Under these circumstances, it can be conveniently argued that sex workers are systematically ignored in the criminal justice system, and they are often treated differently, in a discriminatory manner, in health care services. Their access to justice and health care is significantly hindered by discrimination. Therefore, it can be claimed that sex workers constitute a specific disadvantaged group that needs

162 Brian Simpson, 'Murder, prostitution and patriarchy: why serial killing is a feminist issue' (2001) 26(6) Alternative Law Journal 278, 279.

163 Nils Christie, 'The Ideal Victim' in Ezzat A. Fattah (ed) *From Crime Policy to Victim Policy*: *Reorienting the Justice System* (Palgrave Macmillan 1986) 19.

164 Williamson and Folaron (n 126) at 470.

165 House of Commons (n 23) 17.

166 Krüsi (n 93) at 1.

167 See Elena Regushevskaya and Tuija Tuormaa, 'How do prostitution consumers value health and position health in their discussions? Qualitative analysis of online forums' (2014) 42(7) Scandinavian Journal of Public Health 603, 605., Rekart (n 93) 2123.

168 Koken (n 157) 212.

169 Ibid. and also see Teresa Whitaker, Paul Ryan and Gemma Cox, 'Stigmatization Among Drug-Using Sex Workers Accessing Support Services in Dublin' (2011) 21(8) Qualitative health research 1086, 1095.

170 Kirsten Roche and Corey Keith, 'How stigma affects healthcare access for transgender sex workers' 23(21) British Journal of Nursing 1147 at 1148.

171 Ibid., and Koken (n 157) 212.

equal treatment and equal protection of the law and its application.[172] In this respect, the evidence indicates that criminalisation of sex workers might lead to indirect discrimination against them since it might promote the stigma and discrimination that sex workers already experience by failing to recognise their disadvantaged status and so enhancing their victimisation.[173]

B. Proportionality

Proportionality is another fundamental principle of justification for interference with human rights.[174] This principle requires that any interference with a right be proportionate to the legitimate aim pursued by that interference.[175] When it comes to criminal law, though much-discussed and widely accepted for the relationship between the seriousness of a crime and punishment, proportionality has often been overlooked in regard to the link between criminalisation and the aim pursued by it.[176] However, it should be one of the essential principles of criminalisation, because it interferes with freedoms in the most powerful way, through censure and punishment.[177] Husak clearly explains this point with "the right not to be punished", and argues that enacting criminal law should be an exception because criminalisation intervenes in individual liberties.[178] This is also in compliance with the standard that criminal law should be the last resort of legal protection, as it is the "ultimate measure" only for those serious types of conduct that are "socially damaging and unbearable" for society.[179] Therefore, criminal law should be a *proportionate* response to the defined harmful and/or wrongful acts. In this respect, to justify criminalisation, states must prove that they have respected the principle of proportionality which is another restricting principle for criminalisation.

The principle of proportionality is composed of three sub-principles, namely suitability, necessity, and absence of excessive burden, and all these sub-principles must be fulfilled for an interference to be considered proportionate.[180] The suitability principle requires that a means adopted for a legitimate aim be "appropriate to achieving" that aim, while the necessity principle entails the means "necessary in

172 House of Commons (n 23) 17.

173 Also see pages between 22-25 in this article.

174 Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 467.

175 Jan Sieckmann, 'Proportionality as a Universal Human Rights Principe' in David Duarte, Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer 2018) 5.

176 See William Wilson, *Central Issues in Criminal Theory* (Hart 2002) at 54, and Douglas Husak, 'Why Punish the Deserving?' (1992) 26(4) Noûs 447, 462.

177 Persak (n 17) 233.

178 Husak (n 26) 101.

179 Rudolf Wendt, 'The principle of "Ultima Ratio" And/Or the Principle of Proportionality' (2013) 3(1) Oñati Socio-Legal Series 81, 87.

180 Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16(2) Ratio Juris 131, 135., and Sakari Melander, 'Ultima Ratio in European Criminal Law' (2013) 3(1) Oñati Socio-Legal Series 42, 54.

order to achieve" it.[181] The principle of non-excessive burden, on the other hand, stipulates that the means should not "impose an excessive burden on" individuals.[182] When the principle is applied to criminalisation and the means to intervene in liberties is criminal law, it is first necessary to determine the purpose of criminalisation. In the simplest term, the primary aim of criminalisation is to tackle the defined harmful and/or wrongful conduct and make the actors of those acts answerable to society.[183] Accordingly, in terms of criminalisation, these sub-principles require that criminalisation is an appropriate and necessary means to prevent the defined conduct, while the burden imposed by criminalisation is not excessive.

Then, the suitability of criminalisation should be evaluated first with respect to the question of whether criminalising SW is a proportionate means to tackle it. Criminalisation can only be seen as a suitable interference with SW if it can be proved that it is "capable of realising the aim" pursued by it.[184] As discussed in the previous sections, SW has generally been defined as a harmful and/or wrongful activity that adversely affects not only sex workers themselves but also society as a whole.[185] Accordingly, criminalisation and other means of legal interference with SW generally undertake the duty to reduce SW and/or SW-related harm, such as exploitation, violence, and crimes.[186] Therefore, within the frame of the principle of suitability, the capability of criminalisation for reducing SW and related harm becomes crucial.

Although it seems that none of the legal approaches to SW in the world can provide a "complete solution", there is evidence that some responses can help achieve the aim, while some others are counterproductive in terms of realising it.[187] For criminalisation, there is a strong claim that it is not effective in reducing SW or SW-related problems.[188] Moreover, it is also argued that criminalisation actually worsens the conditions of sex workers, and increases harm and risk of harm in SW.[189] The effects of criminalisation in this sense are much more evident in the countries where the buying of sex is criminalised because it is rather a new way to tackle SW and its effects have become comparable to pre-criminalisation. After Sweden made it illegal to buy sex in 1999, other countries such as Norway and France enacted the criminalisation of buying sex in order to fight off harm in the sex industry, especially

181 Melander (n 180) 54.

182 Melander (n 180) 54.

183 Duff (n 50) at 49.

184 Gerards (n 174) 473.

185 See "Harm, Wrong and Sex Work" title in this article.

186 See (n 15)

187 House of Commons (n 23) 35.

188 Rekart (n 93) 2124.

189 Ibid.

exploitation and violence.[190]

Nevertheless, the evidence demonstrates that criminalisation only reduced street SW in these countries, but did not have a concrete effect on SW in general.[191] Also, it has been indicated that criminalisation changed the ways sex is sold, and pushed SW underground where it became less visible but riskier.[192] Many police officers denote that criminalisation made it impossible for sex workers to report incidents of exploitation, trafficking or violence because of the fear of arrest or any other police action against them.[193] Therefore, contrary to what was aimed by criminalisation, sex workers have become more vulnerable to exploitation and violence as they have shifted to work in a more dangerous and risky environment.[194] Moreover, condoms have been used as evidence of SW in some regions, and thus sex workers became more likely to accept unprotected sex due to the desperation for money and the fear of losing clients who insist on not using condoms.[195] Besides, access to health services for regular checks decreased because of the fear of being suspected.[196] Consequently, again contrary to the pursued aim, the risk of HIV and other sexually transmitted infections increased, and the health conditions of those who engage in commercial sexual activity have been adversely affected.[197] In this respect, it is not convincing that criminalisation of SW is a suitable way to combat the activity, if that is the aim.

On the other hand, the criminalisation of SW also seems to fail the test of necessity. The sub-principle of necessity implies that the interference in question should be the least intrusive and severe means to achieve the aim, and there should be a "pressing need" for such interference.[198] Accordingly, with regard to criminalisation, necessity means that criminal law should be the last resort, as it is the most severe means of legal interference.[199] As mentioned above, apart from criminalisation, there have been several other means of interference with SW such as regulation of SW. While the existence of other means by itself proves that criminalisation is not the only, or the last, remedy for dealing with SW, the evidence discussed above indicates that criminalisation is actually not a preferable interference since it does more harm than good. Field research, especially by human rights organisations, shows that decriminalisation is more effective than criminalisation in addressing the problems

190 House of Commons (n 23) 2.

191 Ibid at 27

192 Ibid 25. Also see Schulze and others (n 119) 36., Arthur Gould, 'The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden' (2001) 30(3) Journal of Social Policy 437, 445.

193 House of Commons (n 23) 31.

194 Rekart (n 93) 2124.

195 Amnesty International (n 11) 10. Also see Susan Dewey, Tiantian Zheng and Treena Orchard, *Sex Workers and Criminalization in North America and China: Ethical and Legal Issues in Exclusionary Regimes* (Springer 2016) 29.

196 House of Commons (n 23) 26., and Koken (n 157) 212.

197 Rekart (n 93) 2124.

198 Gerards (n 174) at 467.

199 Persak (n 17) 233.

arising from SW, as seen in the New Zealand example.[200] Therefore, it is possible to achieve the desired goal when even administrative law as a less intrusive means, let alone as criminal law, is not put into effect. So, it can be claimed that there is no necessity to enact criminal law in order to tackle the issues regarding SW.

Although failure to comply with one of the sub-principles of the principle of proportionality suffices to conclude that the principle is violated, it is useful to look at the last sub-principle, the absence of an excessive burden, here. Thus, the next question to be examined is whether criminalisation might impose an excessive burden on sex workers. The social stigma on sex workers and its serious consequences, especially on the safety, security and health of sex workers have already been discussed above. However, it should be pointed out here that criminalisation is likely to place an excessive burden on sex workers by adding a "criminal" stigma on them and intensifying the existing stigma. According to the evidence, criminalisation not only worsens the conditions of sex workers but also makes it more difficult for them to exit the work and recover from the SW-related harm.[201] This is because the "criminal" stigma, combined with the pre-existing social stigma, makes it substantially harder to find the necessary means, such as a new job or a house, to make a new start.[202] Many sex workers indicate that they feel stuck in this business because their "dirty" background follows and frustrates them whenever they want to leave.[203] Moreover, it is evident that whenever a sex worker faces a fine and/or imprisonment, they have to work more in order to pay the fine or rebuild their life after imprisonment.[204] Also considering that the social stigma on sex workers even extends to social workers and health care providers who try to support them, it is not plausible to expect criminalisation to end SW and the harm related to it.[205] In this respect, it can be claimed that criminalisation imposes a great burden on sex workers by giving them no choice except to live with the stigma and to continue to engage in SW. In conclusion, if SW is criminalised, it is highly likely that the principle of proportionality will be violated in all its dimensions.

200 See Lynzi Armstrong, Gillian Abel, *Sex Work and the New Zealand Model: Decriminalisation and Social Change* (Bristol University Press 2020).

201 Sallman (n 159) 157.

202 Miyuki Tomura, 'A Prostitute's Lived Experiences of Stigma' (2009) 40(1) Journal of Phenomenological Psychology 51, 66.

203 Koken (n 157) at 217. Also see Sharon S. Oselin, 'Leaving the Streets: Transformation of Prostitute Identity Within the Prostitution Rehabilitation Program' (2009) 30(4) Deviant Behavior 379, 400.

204 Phoenix (n 8) 40.

205 See Rachel Phillips and others, 'Courtesy stigma: a hidden health concern among front-line service providers to sex workers' (2012) 34(5) Sociology of Health & Illness 681, 685.

III. Criminalisation: A Decision of Prioritising

Thus far, I have discussed that the wrong and harm principles should be acknowledged as the defining principles, because they determine which conduct can be discussed as a matter of criminal law. Moreover, I have argued that the principles of prohibition of discrimination and proportionality should be considered as the restricting principles for criminalisation, since they identify the limits of criminalisation. However, discussing these principles separately is not sufficient for answering the question of whether specific conduct should be criminalised. There is a need for further explanation of how these principles work together to help make a decision on criminalisation.

When there is a social demand for interference with conduct that gives rise to concern, the decision of criminalisation should be made through the evaluation of the defining and the restricting principles in the given order. Firstly, it should be recognised that not every conduct that leads to public disapproval requires interference by criminal law. If criminal law is considered an appropriate way to deal with such conduct, it should first be proved by the state that the conduct in question can be defined as harmful and/or wrongful conduct in accordance with the wrong and harm principles. In case the conduct cannot be defined as such, some other means to interfere with the conduct should be discussed, because criminalisation should not be enacted for those types of conduct that cannot even be defined as harmful and/or wrongful. On the other hand, in case the conduct at issue can be proved to be harmful and/or wrongful, it can be accepted that there is prima facie justification for criminalisation because the defining principles give prima facie reasons for criminalisation of the conduct. However, it should be emphasised that this only creates a *prima facie* case for criminalisation and does not provide an *all-things-considered* justification for it.

Therefore, secondly, it should be proved that criminalisation of the conduct complies with the restricting principles, namely the prohibition of discrimination and proportionality. If it can be proved that criminalisation will not substantially violate these principles, it can be concluded that criminalisation is an *all-things-considered* justified way to deal with the conduct. Otherwise, in case of a substantial violation, the restricting principles indicate the existence of *countervailing* reasons against criminalisation and prevent criminal law from interfering with the conduct in question. As criminal law is a means of protecting the rights of individuals from those defined as harmful and/or wrongful conducts, enacting criminal law should not violate them in defiance of the restricting principles.[206] It is against criminal law's nature to claim the protection of the rights of individuals by criminalisation but to cause further violations of human rights.[207] In this respect, the state bears the burden

206 Marshall and Duff (n 101) 9., and Husak (n 26) 71.

207 Ibid.

of proof to provide all-things-considered justification by ensuring the protection of human rights.[208] Therefore, whether criminalising a defined conduct can be all-things-considered justified is a decision of prioritisation of human rights and protection of these rights to the utmost with the restricting principles.

So far, with regard to criminalisation of SW, the defining and restricting principles have been evaluated without reaching a final decision. In the light of the explanation above, to decide whether criminal law can be a justifiable response to SW, the defining principles should be reviewed first. Nevertheless, in doing so, the harm and wrong principles should not be considered as paternalistic principles, and they should not be used as a means of enforcement of morals.[209] In this respect, the question of how these principles should be understood has been explained in this article, and some arguments for defining SW as harmful and/or wrongful have been criticised. Accordingly, pursuant to the harm principle, it has been discussed that SW can only be defined as harmful conduct in terms of self-harm. However, it has been noted that self-harm is not a strong claim for defining SW as harmful in terms of the harm principle, since it might give rise to paternalism. The same conclusion was reached with respect to the wrong principle as it has been determined that SW can only be defined as a public wrong on the ground of self-harm. Nonetheless, defining self-harm as a public wrong was again criticised for being open to paternalism. Therefore, if we set aside the risk of paternalism and include self-harm in the principles, it can be established that SW can be defined as harmful and/or wrongful only due to the self-harm it causes and that the defining principles give prima facie -albeit weak- reasons for criminalisation of SW in this respect.

However, as indicated above, these prima facie reasons do not suffice to justify criminalisation. It should also be proved that criminalisation of SW does not substantially violate the restricting principles. As discussed in the relevant section, sex workers constitute a vulnerable group that should be equally protected by the law, because the evidence shows that they are commonly discriminated against, due to the stigma, particularly in the criminal justice and health care systems. Moreover, it was discussed in this paper that criminalisation of SW is not a proportionate means since it is not a suitable and necessary response to it. Also, this paper indicates that criminalisation might impose an excessive burden on sex workers considering that they already suffer from stigma and discrimination in many aspects of their lives. Accordingly, the evidence discussed suggests that criminalisation of SW might cause substantial violation of the restricting principles by disproportionately interfering with SW and leading to increase in SW-related harm. Further, it should be underlined that the defining principles only give prima facie reason for the criminalisation of

208 Husak (n 26) at 99.

209 Persak (n 17) at 235

SW in terms of the self-harm it causes, whereas the restricting principles indicate that criminalisation might cause more self-harm to sex workers by intensifying the stigma and discrimination they experience. This point clearly demonstrates that the criminalisation of SW might actually contradict the aim pursued by it, and substantially violate the human rights of sex workers without having a legitimate aim. Therefore, it can be concluded that criminalisation of SW cannot be all-things-considered justified.

Conclusion

Although SW is a social activity that gives rise to serious concern with regard to its moral and social aspects, criminalising it should only be based on the principles of criminalisation. In case criminal law is considered as a possible response to SW, the state must prove that criminalisation is justified on the basis of the defining and restricting principles. The harm and wrong principles should be recognised as the defining principles, while the principles of prohibition of discrimination and proportionality should be acknowledged as the restricting principles. Accordingly, the state must prove that there is a prima facie reason for the criminalisation of SW pursuant to the defining principles, and yet no strong countervailing reason against criminalisation due to substantial violation of the restricting principles. It should be acknowledged that the decision of criminalisation should be based on the prioritisation of human rights, because the protection of these rights is one of the fundamental aims of criminal law.

While the defining principles give prima facie reason for criminalisation of SW only on the ground of the self-harm caused by it, the evaluation of the restricting principles suggests that criminalisation might lead to more harm than it aims to prevent. According to the evidence from different jurisdictions, sex workers need equal protection of the law because they are predominantly disadvantaged individuals that suffer from stigma and discrimination. Moreover, criminalisation might be a disproportionate response to SW that causes more harm. Therefore, unless the situation is proved to be contrary in a specific jurisdiction, SW should not be criminalised as it cannot be justified with the principles of criminalisation.

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