Sex Work Regulation, Anti-trafficking Policy, and Their Effects on the Labour Rights of Sex Workers in Germany

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This article provides an analysis of regulatory approaches to sex work, the status of sex workers’ labour rights, and the conflation of sex work and human trafficking, with reference to the example of Germany. It assesses the strengths and weaknesses of Germany’s approach to the regulation of prostitution and the ways it has been influenced by international debates challenging the status of sex work as work, as well as concerns about human trafficking. It analyses the Prostitution Act 2002 (ProstG), and the Prostitute Protection Act 2017 (ProstSchG), and their effects on the rights and working conditions of sex workers, as well as their aim of improving the safety of vulnerable sex workers and reducing the level of human trafficking and exploitation in the German sex industry. In particular, the article considers the impact of this legislation on those working in the sex industry, especially migrant women and those at risk of exploitation. Through its analysis of the existing approach to sex work in Germany, the direction of reform and the absence of a labour-rights approach to the regulation of sex work and the prevention of trafficking, the article highlights the fact that even a country that is -in principle - willing to accept sex work as work, has failed to grant labour rights to sex workers. The article argues that the Prostitute Protection Act has in some ways increased the vulnerability of sex workers rather than promoting their safety. In addition, it is argued that legislators should consider labour protection and labour rights as an alternative means of protecting sex workers, rather than (re)criminalizing aspects of sex work in the name of ‘protecting’ women by means of prohibition or control. Adopting a labour-rights approach rather than paternalistic approach would have the potential to bring about far-reaching reform of the relevant legislation both in Germany and internationally.

Keywords: Sex Work, Human Trafficking, Labour Rights, Criminalization, Prostitution, Sex Work as Work

1 INTRODUCTION

Despite its characterization as the ‘world’s oldest profession’, sex work has been excluded from labour regulation in most countries. In fact, debates about the validity of sex work as labour have in most jurisdictions prevented a labour-rights
approach to sex work. In the past two decades, global concerns about human trafficking, combined with the conflation of human trafficking and sex work both in media discourse and in the legal definitions of human trafficking in some countries, have reinforced the tendency to disregard sex work as work.

Whereas a minority of countries have adopted regulatory approaches to sex work that include some acknowledgement of such work as labour, the majority of countries regard sex work as illegal, or tolerate some aspects of sex work while prohibiting others, or decriminalize the provision of sex services while prohibiting their purchase. This latter approach, often dubbed the ‘Swedish model’ or the ‘Nordic model’ has gained significant popularity globally, particularly in connection with anti-trafficking efforts, despite extensive research demonstrating the negative effects on sex workers. The German debate is unique in the sense that prostitution was never illegal, and since the Prostitution Act 2002, sex work has no longer been considered an offence against public morals. However, similarly to developments in other European countries, Germany has experienced a backlash against its liberal prostitution policy, primarily due to anti-trafficking campaigns focusing on the abolition of human trafficking in the sex industry by means of the abolition of the entire sex industry as one of its main goals. As a result, Germany has become (infamous for its liberal regulatory approach to sex work, and has even been dubbed ‘the brothel of Europe’.

This article argues that the Prostitution Act 2002 enacted in Germany had the potential to create the legal basis for the full inclusion of sex work in general labour and employment protections, legalizing the performance of sex work as self-

3 Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG) 2002 (from here on ‘Prostitution Act’).
employment, but also as salaried employment. Instead, the Prostitution Act 2002 has given rise to controversy over the regulation of prostitution as a potential factor in increasing levels of human trafficking, which in turn has led to the Act for the Regulation of the Sex Industry and the Protection of Persons engaged in Prostitution 2017 (hereinafter, the Prostitute Protection Act 2017), which aims to protect exploited sex workers and victims of human trafficking. Global concerns about human trafficking and an understanding of human trafficking conflating trafficking and sex work have led to an insufficient implementation of labour rights for sex workers in Germany, and also to what is essentially a counter-reform of the Prostitution Act 2002 in the form of the Prostitute Protection Act 2017. The narrow focus of the Prostitute Protection Act 2017 on sex workers and brothel owners singles out women in the sex industry as the only likely victims of human trafficking, and does so in a manner that has attracted justified criticism from sex workers, outreach workers and academics. As this article demonstrates, the Act has in some ways increased the vulnerability of workers rather than promoted their safety.

Whereas there have been multiple critiques of the Prostitution Act 2002 and the Prostitute Protection Act 2017, particularly in the context of the human rights implications of the 2017 Act and the singling out of sex workers, this article provides the first academic analysis of the potential effects of the legislation on sex workers’ working conditions and labour rights, as well as their connections with human trafficking legislation.

This article examines the regulation of sex work in Germany as a case study for countries in which the debate about international anti-trafficking, the dominant criminal law approach to human trafficking, and conflations of trafficking and sex work have not only prevented a labour-rights approach to human trafficking in the sex industry, but have also resulted in a neglect of the potential of labour protections for all sex workers. In doing so, the article examines the German case to cast light on regulatory approaches to the sex industry more broadly, their

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6 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen (ProstSchG) 2017 (hereinafter, the ‘Prostitute Protection Act’).
8 Ibid.
underutilized potential for a labour-rights approach to sex work, and their conflation of sex work and trafficking. The analysis also demonstrates that enacting legislation with the stated aim of providing protection, as in the case of the Prostitute Protection Act 2017, not only has significant unintended negative consequences for the working conditions of sex workers, but also a negative impact on attempts to protect the most vulnerable workers in particular.

The structure of this article is threefold: The first section briefly contextualizes the German approach to sex work regulation with regard to the conflation of sex work and human trafficking and the international shift towards restrictive sex work policies that prevent a labour-rights approach to sex work. The second section examines the provisions of the Prostitution Act 2002 and the Prostitute Protection Act 2017, their potential and shortcomings. Finally, the third section provides a critique of the Prostitution Act 2002 and the Prostitute Protection Act 2017 in terms of their stated aims, but particularly with regard to their effects on sex workers’ access to labour rights and protections. It argues that the implementation of the 2002 Act, especially in light of the provisions of the Prostitute Protection Act 2017, represents a missed opportunity for applying a labour-rights approach to sex work, as well as to human trafficking.

1.1 SEX WORK, HUMAN TRAFFICKING AND ITS CONTEXTUALIZATION

The regulation of sex work and labour-rights approaches to sex work are affected by moral conceptualizations of the relationship between sex and work, as well as feminist debates that equally challenge whether or not sex work constitutes work. This article does not contribute to this discussion. It is instead grounded in the premise that sex workers are workers and their working relationships are worthy of protection. Nonetheless, it is important to acknowledge these debates around the validity of sex work, as they play into the perception of who or what needs to be protected in sex work legislation, while influencing the international approach towards restrictive sex work policies that prevent a labour-rights approach to sex work. The challenge of the validity of sex work as work is therefore tied up with the debates around human trafficking.

9 For key contributions to this debate see e.g. C. Pateman, The Sexual Contract 207 (Cambridge: Polity-Press 1988); S. Jeffreys, The Industrial Vagina (London: Routledge 2009); Doezema, supra n. 1; Agustín, supra n. 1.

Human trafficking is defined in the UN Trafficking Protocol, which criminalizes human trafficking for a number of purposes. The Trafficking Protocol lays down separate categories of exploitation, including ‘exploitation of prostitution’, but also for ‘other forms of sexual exploitation’, as well as ‘forced labour or services’ in addition to the ‘removal of organs’. Whereas the different types of exploitation defined in the UN Protocol form a non-exhaustive list, many countries, including Germany, have implemented them as separate, distinct categories with different conditions in their national legislation (i.e. §232 1.1a Criminal Code (Strafgesetzbuch (StGB)) for prostitution and sexual exploitation and §232 1.1.b for labour exploitation). This separation of prostitution and other forms of sexual exploitation from the exploitation of labour or services has contributed to an approach to human trafficking that focuses either exclusively on eliminating exploitation in the sex industry, or, at a minimum, one that treats human trafficking and labour exploitation in the sex industry as a phenomenon that is separate from human trafficking in all other industries. This separation has further fuelled the idea that sex work is different from other work, even in countries that accept sex work as a form of labour. As a result, sex work is seen to require a paternalistic response grounded in the protection of women as victims, rather than rights-based labour protections for workers in the sex industry. The stigma associated with sex work also gives rise to a level of scrutiny that is not matched in relation to other occupations with large numbers of trafficking victims, such as domestic work, agriculture or construction work.

The development of sex work policies and legislation must be viewed in the context of these increasing concerns about human trafficking, which have led to paternalistic government responses and a politicized climate surrounding these debates. This can be seen for example in the rise of the so-called ‘Nordic model’ of criminalizing the purchasers of sexual services, which has gained popularity internationally since its initial introduction in Sweden, despite reports of its negative effects on sex workers’ safety and access to rights. At the same time, liberal regulatory approaches to sex work, like those pursued by Germany and the Netherlands, have been criticized as ‘failed’ attempts and blamed for increasing levels of prostitution with decreasing remuneration. Such simplifications ignore broader links to the decline in social security protections, overall

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11 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Art. 3.
12 See J. O’Connell Davidson, Will the Real Sex Slave Please Stand Up?, 83(1) Feminist Rev. 4–22 (2006); Doezema, supra n. 1; Thiemann, supra n. 10.
13 Ibid.
14 Ibid.
15 EU Committee on Women’s Rights and Gender Equality (2013/2103(INI)); Wersig, supra n. 4.
falling wages in the aftermath of the financial crisis, and the effects of austerity politics on sex work.\footnote{17}

The German case illustrates this well: concerns about the Prostitution Act 2002 are partially founded on fears about increases in exploitative prostitution and trafficking into the sex industry, which have been attributed to the liberalized legal approach to sex work. Such narratives are prevalent despite federal crime agency statistics that refute such claims, as well as government reports that acknowledge the conflation of correlation and causation in relation to links between the Prostitution Act and the alleged increase in exploitative prostitution and trafficking in the sex industry.\footnote{18}

External factors have shaped the changes in levels of prostitution, as well as the numbers of both German and migrant sex workers involved in exploitative forms of prostitution. The economic crisis has led more women turn to prostitution due to their exclusion from other job markets and difficulties in finding work in other fields.\footnote{19}

Especially for migrant sex workers, the increasing numbers of people seeking employment in the sex industry in Germany are partly caused by the restrictions on movement for migrants from certain EU Member States, such as Bulgaria and Romania. Migrants from Bulgaria and Romania were not allowed to apply for jobs as employees in other EU Member States until 2014, but could be self-employed in any EU Member State.\footnote{20} As Germany is one of the few countries in the EU where any EU citizen can legally work as a self-employed sex worker, the restriction on other types of employment made Bulgarian and Romanian women who wanted to work in Germany significantly more likely to enter sex work. The fact that this was one of few options available increased their likelihood of being exploited. Particularly if they lead a double life due to stigma, they can easily become victims of blackmail and could be forced to continue to work as prostitutes involuntarily.\footnote{21}

However, depicting the migration of Bulgarian and Romanian women into sex work in Germany as an indicator that the Prostitution Act 2002 increases cross-

\footnote{17} For example, for the UK see P. Butler, Universal Credit Hardship ‘Linked to Prostitution’, The Guardian (22 May 2019), https://www.theguardian.com/society/2019/may/22/universal-credit-hardship-linked-to-prostitution (accessed 15 Jan. 2020).


\footnote{19} For anecdotal evidence on this point (from the UK) see e.g. P. Butler supra n. 18.


\footnote{21} B. Najafi, Current Situation and Problem Description, Trafficking in Women in Germany 27 (KOK 2008).
border trafficking within the European Union is misleading. It identifies the legalization of prostitution as the reason for women’s exploitation, whereas the restriction on women’s migration into other lines of work and the stigma surrounding prostitution play a much more significant role in restricting women’s choices and making them vulnerable.

In public discourse, the vulnerability of poor migrant sex workers is often construed as ‘forced prostitution’, which is then considered the same as trafficking for sexual exploitation. The lack of differentiation between what constitutes ‘merely’ exploitative working conditions in sex work and exploitation that meets the threshold of §232a, forced prostitution, or §232, human trafficking, fails to take account of the realities of many exploited workers in the sex industry. Many, if not most, exploited workers in the sex industry are not victims forced into prostitution, but victims of unfavourable working conditions in prostitution. While this problem is not unique to sex work, it is the only industry for which banning or restricting an entire industry is considered to be the best strategy. As Niveta Prasad poignantly states:

[Exploited sex workers] lament the working conditions and the associated exploitation, but not the fact that they are working in the sex industry. In addition, nobody ever speaks of forced cooks or something similar when referring to trafficking in human beings for the purpose of labour exploitation.

Nonetheless, public debate and the media often fail to differentiate between prostitution and trafficking in women, even though this would be crucial to a fundamental change of paradigm. The German government coalition also conflates human trafficking and prostitution and tends to blame the Prostitution Act 2002, which legitimized contracts between sex workers and clients and made employed sex work possible.

Dr Volker Ullrich (CDU/CSU) stated during a parliamentary debate:

if you talk to victim protection organizations, with people who work with the effects of human trafficking, you are unanimously told that the Prostitution Act 2002 made it possible in the first place for hundreds of thousands of young women to be exploited in brothels, as the lax legal situation made such exploitation possible. Legal prostitution can often not be differentiated from forced prostitution in grey areas.

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22 Czarnecki et al., supra n. 20, at 25–26.
23 See e.g. I. K. Thiemann, Human Trafficking as a Migration Crisis: Gender, Precariousness, and Access to Labor Rights, in Handbook of Migration Crises (I. Ness & M. Ruiz eds, OUP 2019).
24 N. Prasad, Trafficking in Human Beings for the Purpose of Sexual Exploitation, Trafficking in women in Germany 65 (KOK 2008).
25 Ibid., at 66.
26 Deutscher Bundestag, Deutscher Bundestag Stenografischer Bericht 74. Sitzung Plenarprotokoll 18/74, 7131.
27 Ibid.
Contrary to this claim, the organization of German Women Lawyers and the German ‘Berufsverband Erotische und sexuelle Dienstleistungen’ (BeSD, Professional Organization for Erotic and Sexual Services [registered society]) dispute the simplified claim of the Prostitution Act 2002 and the resulting liberalization of sex work in Germany and consider it to be the cause of human trafficking and exploitation. Jörn Blicke, head of the organized crime unit at the Hamburg State Office for Criminal Investigation (Landeskriminalamt (LKA)) even mentioned that the effect of the Prostitution Act on the reality on the ground was almost non-existent, as most prostitutes, particularly migrant sex workers, were unaware of the changes in their legal situation. Additionally, the German Federal Crime Agency (Bundeskriminalamt (BKA)) cites a slow decline in the number of trafficking victims since the change in legislation. Critics of the Prostitution Act claim that this decline is due to an increasing difficulty in investigating brothels. However, there is no evidence that such allegations are true.

Thus, the German case demonstrates that there is an increase in the perceived threat of human trafficking, affecting the way sex work is viewed and regulated. Germany is by no means the only country affected by this phenomenon, as claims of increased exploitative sex work as well as fears of human trafficking and calls for a Nordic model approach by activist groups and politicians are reported all over Europe on a recurring basis. Such views have a negative effect on rights-based approaches, and this in turn harms sex workers.

With this in mind, the following sections will seek to demonstrate that the effects of the politicization of the debate around sex work have resulted in an under-utilization of the labour rights potential of the Prostitution Act 2002 and have instead resulted in a paternalistic approach devoid of labour considerations in the Prostitute Protection Act 2017.

2 THE GERMAN LAW AND POLICY ON PROSTITUTION

2.1 THE PROSTITUTION ACT 2002

The original Prostitution Act 2002 was passed with the aim of improving the situation of sex workers by abolishing the applicability of the indecency provision of the Bundesgesetzbuch (BGB) to prostitution, which states ‘(1) A transaction which violates the norms of decency is void’. Prior to the passing of the Act, prostitution was legal, but
the ‘encouragement of prostitution’ in bars and brothels was illegal (formerly §180a StGB), and this included ‘behaviour which encouraged prostitution through measures beyond simply providing accommodation, shelter and related services’. This sometimes led to cases in which brothel owners or landlords providing superior accommodation were at an increased risk of being prosecuted under §180a StGB as they were seen to be encouraging prostitution, whereas brothels with less favourable conditions were usually safe from such accusations, as they were only providing shelter. Furthermore, as prostitution was considered contrary to public morals and decency under §138(1) BGB, sex workers had no chance to claim payment from non-paying clients, since a transaction contrary to public morals was deemed to be an invalid transaction.

The main intention of the Prostitution Act 2002 was thus to strengthen sex workers’ rights vis-à-vis their employers and customers, and to improve their working conditions. The reform can be seen as a reaction to two cases, one of an independent sex worker suing a client who had not paid her, the other of a bar owner who had been prosecuted under §180a StGB. Their lobbying work resulted in challenges to the presumption of indecency, raising the question as to whether or not it was outdated.

As a result, the Prostitution Act 2002 included three main clauses, with §1 and §3 being the most relevant from a labour-rights perspective. Paragraph 1 states:

> If sexual acts have been carried out against a previously agreed payment, this agreement constitutes a legally enforceable claim. The same applies if a person, in particular in the context of an employment relationship, is available for the provision of such acts for a previously agreed payment for a certain period of time.

Thus paragraph 1 of the Prostitution Act legitimizes the contract between sex worker and client, while contemplating an employment relationship in the context of sex work.

The Prostitution Act 2002 introduces only a limited right of direction for employers in relation to sex work, stating that sex workers cannot be told to have sex with specific clients. Paragraph 3 clarifies that this limitation on the rights of the employer does not preclude an employment relationship: ‘For prostitutes, the limited right to give instructions in the context of a dependent activity does not preclude the assumption of employment within the meaning of social security law’.

The German government put forward a moral argument based on personal freedom in its reasoning for the change in legislation, and its subsequent defence:

> In an ideologically neutral state the decision to freely engage in prostitution has to be considered an autonomous decision and has to be respected, as long as it does not violate the rights of others. Equally, a constitutional state valuing personal freedom cannot confront the risks, disadvantages and problems linked to prostitution by pushing it into a

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32 2002 Prostitution Act (Prostitutionsgesetz – ProstG), §1.
33 2002 Prostitution Act (Prostitutionsgesetz – ProstG), §3.
grey zone through repressive measures. [...] At the same time it is the duty of all societal institutions to evaluate the effect of the commercialization of sex and its potentially problematic results on gender equality. Particularly boys and men need to be sensitized to a value-based discussion regarding their responsibility in this context.

This reasoning demonstrates a balance between the need to protect personal freedom and the need to monitor the effects of prostitution on society at large. However, whereas the aim of the Prostitution Act 2002 was to improve the situation of sex workers, there has been intense criticism that the law may have benefited brothel keepers more than sex workers. Indeed, the Prostitution Act not only legitimized sex workers, but also brothel keepers. In fact, the brothel keepers of non-exploitative brothels may be the most significant beneficiaries of the Prostitution Act, as they no longer face prosecution for keeping a brothel. As a result, there has been a significant increase in the number of large brothels and sauna clubs since 2002.

At the same time, the 2002 Act failed to lead to a significant number of employment relationships in the sex industry. This can be attributed to a reluctance of sex workers to be employees, due to ongoing stigma affecting outed sex workers in other areas of their lives, but also due to the (perceived or real) independence of self-employed sex work (independent sex workers equally benefited from §1 of the Prostitution Act). Equally, particularly due to the limited right of direction, but also due to the associated costs of employment status, owners of brothels and sauna clubs were reluctant to become employers. More importantly, subsequent German governments were interested neither in enforcing potential employment contracts, nor in addressing bogus self-employment in the sex industry. As a result, the workers' rights potential of the Prostitution Act 2002 was for the most part not utilized.

2.2 The Act for the Regulation of the Sex Industry and the Protection of Persons Engaged in Prostitution, or the Prostitute Protection Act 2017

The declared aims of the Prostitute Protection Act 2017 were to lay down minimum standards for the sex industry, to promote protection for sex workers and to reduce violence against and exploitation of sex workers. Additionally, the Act was supposed to create a more unified legal situation with regard to the regulation of brothels, the registration of sex workers, and so on. Despite its

54 Bundesregierung Deutschland, supra n. 18, at 9.
55 Ibid.
56 Ibid., at 10.
57 2017 Prostitute Protection Act, supra n. 6.
58 Ibid.
good intentions, the Act gave rise to negative reactions both prior to and after its enactment. Sex workers feel singled out as a group of workers, as they are now subject to a number of regulations that are unique to the sex industry, separating this occupation from other work and reinforcing the notion that sex work is not like any other work.

The Prostitute Protection Act 2017 introduced a number of provisions, some of which could be considered positive, as well as others that are more controversial. Among the seemingly least controversial provisions of the Prostitute Protection Act are (1) the exclusion of persons who have been convicted of certain crimes from running a brothel, (2) the introduction of a licensing requirement for ‘prostitution businesses’, and (3) the introduction of minimum building standards for brothels of all sizes, such as requirements for sanitary facilities and emergency call buttons. However, even these measures engender fear among sex workers.

The list of crimes that precludes an individual from running a brothel includes violations of the Residence Act (AufenthG), which includes illegal entry or overstaying of visas, a provision that might make it harder for migrant sex workers to run their own brothels at some stage in the future, even as a collective. Thus, one of the groups most vulnerable to exploitation is restricted in their ability to run independent sex work businesses, and excluded from it in cases of violation of the Residence Act. Additionally, sex workers who are in violation of the Residence Act struggle to fulfil other obligations under the Prostitute Protection Act, such as registration, as discussed in greater detail below.

Equally, the licensing requirement can be used to ban brothels from entire areas through the so-called ‘Sperrbezirk’ regulations, which prohibit sex work licenses in some areas or even entire cities, as is the case in cities like Munich. This might eventually restrict sex workers to large brothels outside city borders, which tend to be controlled by large-scale, anonymous brothel owners, rather than smaller ‘family-run’ brothels or brothels run by sex workers themselves.

The use of the rooms forming part of a ‘prostitution business’ as both a place to work and a place to live is now also generally prohibited due to new building codes, with exceptions to this rule at the discretion of the local authority. Particularly a reluctance to allow exceptions to this rule may force low-income and more vulnerable sex workers to work in large-scale brothels where they have less autonomy, as they may not be able to maintain two apartments. Thus, this seemingly protective measure may have negative effects on vulnerable sex workers.
A recent report in the state of North-Rhine Westphalia (NRW) on the effects of the Prostitute Protection Act shows that large-scale brothels have in some cases created or transformed some rooms into private accommodation. This could generally be seen as a positive development, but the report also mentions that sex workers are often overcharged for these rooms. Equally, vulnerable sex workers who are unable to afford both a room to work in, as well as an apartment or hotel room to sleep in, often end up in even more vulnerable situations. Social workers in NRW reported the case of women who tried to sleep at clients’ homes or simply stay awake and spend the time until the club reopened on the streets. As a result, some sex workers were subject to violence, theft and sexual exploitation. In the case of these particularly vulnerable workers, the effect of the forced separation of work space and private space mostly had negative implications.

Additionally, many self-employed working women who used to work in shared apartment brothels have moved their advertising online, working alone in private apartments or meeting their clients in hotels or their homes. This change has reduced the ability of social workers to keep in touch with vulnerable self-employed workers. Workers who have tried to register apartment brothels have had their applications turned down in many regions and cities. One particularly significant example is the city of Wiesbaden, where the majority of applications for apartment brothels have been turned down, allowing exceptions only for women who work alone in their own homes. Lone working is considered one of the key risk factors in sex work, as it significantly increases the risk of sex workers becoming victims of sexual violence and harassment, which puts these decisions by some municipalities in direct contrast with the stated aims of the Prostitute Protection Act.

The NRW report reveals that the combination of building codes and licensing requirements has resulted in some cases in refurbishments and in other cases in the closing down of brothels. The refurbishments can be considered a positive development in most cases, as they have led to improvements such as the introduction of coffee break rooms for workers, separate sanitary facilities and in the case of some brothels also separate private bedrooms for workers to sleep in. According to the report, the hygienic conditions in many workplaces which underwent refurbishment also improved. Overall it may be

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44 Ibid., at 36.
45 Ibid., at 38.
47 Degenhardt & Lintzen, supra n. 43, at 26.
said that the building code requirements of the Prostitute Protection Act have had a positive effect on brothels with the financial means to comply with the requirements.

However, the new requirements have also led to a number of closures. This may be considered positive in relation to certain brothels operating in substandard conditions. At the same time, a lot of smaller brothels or clubs have closed for ‘preventive’ reasons, in an awareness that the size of the building made it unlikely that they could comply with the new building codes and/or because refurbishments would be too costly. A lot of these smaller brothels were considered to be particularly well run, established workplaces with a ‘family-run atmosphere’, where sex workers had been working autonomously, often for decades, with a large number of regular clients. Thus, in these cases the closures resulted in the loss of comparatively safe and stable jobs in the sex industry.

Additionally, the licensing requirement and the minimum standard requirements also apply to ‘apartment brothels’, which sometimes function simultaneously as both the home and the workplace of a small number of sex workers living and working together. Pursuant to the recent legislation, any apartment that is used as the place of work for more than one sex worker counts as a brothel and requires a license. In NRW, many of these apartment brothels disappeared following the introduction of the Prostitute Protection Act, often due to fears of failing to meet the licensing requirements, again leading to an increase in sex workers who work in isolated conditions with the associated risks.

Furthermore, there are cases of brothels that have gone underground, claiming to have closed down due to the new regulations, but continuing to operate. Other establishments have changed their description to that of swingers clubs or escort agencies, both of which fall outside the explicit remit of the Prostitute Protection Act. In some cases, these establishments continue to operate under the same conditions as before, rendering the new legislation ineffective and possibly making the workers more vulnerable.

In addition to the measures primarily aimed at workplaces in the sex industry, which affect sex workers significantly, but mostly indirectly, there are some measures in the Prostitute Protection Act that are directly targeted at sex workers themselves. The most contested one is the requirement for sex workers to register with the local authorities and to carry a registration card, a ‘Prostitute ID’ which sex workers derogatorily call ‘whore passport’.

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48 Ibid., at 34.
49 2017 Prostitute Protection Act, supra n. 6, §18(7).
50 Degenhardt & Lintzen, supra n. 43.
51 2017 Prostitute Protection Act, supra n. 6, §3–55.
The registration process is problematic in itself. However, to make matters worse, there is an additional requirement in §4(3), which demands ‘proof of a health check performed within the last three months prior to registration’ in order to register.\(^5\) This provision seems like a return to Victorian laws on sexually transmitted disease.\(^5\) Such mandatory health checks are strongly opposed by NGOs, the health services, the German Federation of Female Lawyers and the sex workers’ rights lobby.\(^5\) Many sex workers have stated that they find the provisions demeaning. Migrant sex workers in particular, especially those from countries where sex work is prohibited and sexuality is not openly discussed, described unease during the health checks, with one sex worker reporting feelings of humiliation as a result of having to demonstrate condom use on a dummy in front of a male case worker.\(^5\) Sex workers’ rights organizations have criticized the singling out of the sex industry, separating it yet again from other occupations. According to the legislation, local authorities are also supposed to deny the registration and the Prostitute ID to workers who lack the required documentation, which includes a passport and, in the case of migrant sex workers, documentation of the right to work, passport size pictures, proof of the health inspection, proof of a valid place of residence, and of a tax identification number (§§4–5). In actual fact, many migrant sex workers from within the European Union – ergo with the right to work – struggle to provide a valid place of residence and a tax ID and may therefore be unable to register. For migrant sex workers from third countries without documentation attesting to the right to work, registration becomes impossible, making these sex workers, who are at an increased risk of labour exploitation and human trafficking, unable to work in registered brothels. These workers equally become more vulnerable with regard to police checks of on-street prostitution, making them more likely to work in non-registered brothels. Such vulnerabilities are not unique to sex work, but are shared by all irregular migrant workers in occupations where some kind of registration is mandatory. Nonetheless, this effect of the Prostitution Protection Act seems to directly undermine its stated aim of protecting vulnerable sex workers, who may be victims of trafficking or who are at risk of becoming victims of trafficking. Inability to work in safer environments due to lack of status makes workers more vulnerable, not less.

The NRW report also mentions initial signs of an illegal trade in prostitute IDs, as in the case of groups of women in which only one was officially registered but all of them used that ID. There have also been cases in which the prostitute

\(^{52}\) *Ibid.*, §4(3).


\(^{54}\) Pisal et al., *supra* n. 7; Klee, *supra* n. 9; Deutsche Aidshilfe e.V, *supra* n. 7.

\(^{55}\) Degenhardt & Lintzen, *supra* n. 43, at 32, 41.
IDs were kept by male managers of the brothels, indicating worrying levels of control and again conflicting with the stated aims of the Act. Additionally, local authorities report that sex workers sometimes return after a few days to request replacement documents, claiming that their documents have been stolen. These incidents imply that there is an illegal market for prostitute IDs, with documents being sold or passed on, demonstrating the possibility not only for other sex workers, but also pimps and traffickers to buy IDs to create a front of legitimacy. Additionally, there have been reports of people in the sex industry acting as ‘service providers’ for migrant sex workers, helping them to arrange prostitute IDs for a fee, despite all relevant government services being free of charge. Furthermore, there is a trade in postal addresses for the purpose of obtaining a fictitious place of residence. Thus, shortly after the introduction of the Prostitute Protection Act, some of the measures adopted to protect vulnerable workers actually increased their vulnerability. This is particularly the case for migrant workers, but also for workers engaged in sex work due to substance abuse, as they often do not have a fixed place of residence.

Beyond this immediate impact, the requirement for sex worker IDs makes sex workers afraid of potential stalking and blackmail. Many workers are afraid of being outed as sex workers, as the IDs contain both personal information and a picture. Amplifying these fears, there have been reported cases of migrant sex workers whose tax details have been sent to their registered address in their home country instead of their German address. Such incidents increase sex workers justified fear of an accidental outing through the German authorities. This is particularly problematic for workers from countries where sex work is illegal, but can also cause problems for workers who are afraid of their family’s or partner’s reaction, or workers who have additional, ‘regular’ jobs, as well as mothers.

With regard to trafficking and exploitation, the local authorities are required to provide information and counselling during the registration process (§7), in a language that the sex worker is able to understand. If the local authority suspects a sex worker to be a victim of trafficking (§9(2.3)) or if the sex worker is under twenty-one and suspected of being coerced (§9(2.2)) they are to ‘immediately implement the measures required to ensure the protection of this person’ (§9(2)). However, in practice local authorities report of an inability to assess whether or not the person has been the victim of coercion or trafficking.

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56 Ibid., at 33.
57 Ibid.
58 Ibid., at 40.
59 Ibid., at 31.
Thus, the enactment of the Prostitute Protection Act has brought some limited positive changes in certain areas, mainly with regard to the regulation of employers and/or landlords. Some of these positive developments could equally have been achieved through consistent application of existing commerce and industry regulation and building codes, that had been inconsistently applied in the context of brothels and other sex work establishments. The new sex-work specific building codes in the Prostitute Protection Act are more stringent than their entertainment industry counterparts and have reinforced a notion of sex work as a special category distinct from other occupations.

Inspired in part by a desire to combat human trafficking, the Prostitute Protection Act reinforces the notion that the sex industry does not require labour-focused policies combined with a labour-rights approach to human trafficking, but instead a paternalistic view of sex work. The results of the paternalistic legislation are harmful for the already stigmatized population of sex workers, particularly for the most vulnerable workers. Registration and compulsory health checks have created a two-tier system of sex workers, exacerbating the vulnerabilities of workers in many ways. The intended positive effects of the law on reducing exploitation and human trafficking are widespread at best and non-existent at worst. At the same time, the law has contributed to a further othering of sex workers in general.

3 CRITIQUE

As a result of registration requirements for sex workers, as well as the introduction of mandatory health checks, the Prostitute Protection Act 2017 risks undermining the trust built up between advisory services, health services and sex workers. More importantly, it is unlikely to achieve its intended aim of improving the safety of sex workers, particularly for those who can be classified as vulnerable and those who are, or are at risk of becoming, victims of human trafficking.

One of the stated reasons for these restrictive and controlling policies is the protection of sex workers against exploitation, human trafficking and modern slavery. However, there are a number of reasons for vulnerable groups of sex workers not to register with the authorities. Particularly those groups who are subject to additional restrictions, in particular young sex workers, pregnant sex workers or those who are unable or unwilling to undergo the mandatory health checks and advisory talks, will be increasingly reluctant to register. Migrant sex workers face additional burdens when it comes to registration. Third-country nationals without residence permits will not be able to register, as they would be

60 Ibid.
denied registration and possibly prosecuted for violating immigration rules. Even those migrant workers who have been granted legal residency may be excluded as they may lack language skills and access to information about registration. Thus, the most vulnerable sex workers would be forced to work in illegal brothels, or, if working independently, to accept clients willing to use the services of unregistered sex workers. Research from countries that have introduced other restrictive models of sex work regulation, such as the Nordic model, demonstrates that de facto criminalization of parts of the sex industry effectively renders affected workers more vulnerable.\textsuperscript{61} The same is true for other occupations in which vulnerable migrant workers are effectively excluded from labour protections and rendered highly dependent on employers and clients, not only sex work.\textsuperscript{62} Equally, exploited or trafficked women who do possess valid travel documents and work permits (as the majority of trafficking victims do) may be coerced by pimps or traffickers to register as official sex workers, creating an illusion of those workers being ‘safe’ and of the government as ‘doing something’.

Just as worryingly, the new legislation explicitly permits police checks on brothels and flats, including ID checks on sex workers.\textsuperscript{63} This legislative change will in all probability be used to raid brothels and red-light districts, a highly likely prospect as German police have complained that they can no longer randomly raid brothels since the reform of 2002.\textsuperscript{64} These raids will most likely result in deportations, driving migrant sex workers, who are already at an increased risk of exploitation, further underground. The increased likelihood of raids will also increase vulnerable workers’ reliance on third parties to be able to earn an income.

Unsurprisingly, sex workers’ organizations and NGOs working with sex workers and with victims of trafficking have heavily criticized the Prostitute Protection Act. The German association of women lawyers considers the Act to be in violation of the German Basic Law (Grundgesetz), particularly the freedom to choose an occupation (Article 12(1) Grundgesetz) and the right to determine the use of one’s personal data, arising from the right to personal freedom (Article 2(1) Grundgesetz) in conjunction with the right to human dignity (Article 1(1) Grundgesetz).\textsuperscript{65} Sex workers’ rights organizations and advisory services and NGOs

\begin{itemize}
\item \textsuperscript{63} 2017 Prostitute Protection Act, \textit{ supra} n. 6, §§29–31.
\item \textsuperscript{64} Bundesregierung Deutschland, \textit{ supra} n. 18.
\item \textsuperscript{65} Pisal et al., \textit{ supra} n. 7.
\end{itemize}
instead lobby for a shift towards full decriminalization of sex work, or at a minimum better information about the modalities of sex work, rather than outright banning or restriction of sex work or sanctioning of sex workers or their clients.

More importantly, the changes introduced in the Prostitute Protection Act focus exclusively on creating increased restrictions on, and obligations for, both employers and workers in the sex industry. None of the provisions in the Prostitute Protection Act addresses the applicability of labour regulations and labour rights in this occupation, let alone a labour-rights approach to human trafficking and exploitation. The failure to address these issues demonstrates a departure from the Prostitution Act 2002, which, despite its lack of concrete measures, opened up at least the possibility of a labour-rights approach to sex work in Germany through its explicit acknowledgement of the possibility of employment, as well as its implicit acknowledgement of self-employment, in the sex industry. With the theoretical possibility of salaried employment relationships, as well as self-employment, which was introduced through the legal changes in the Prostitution Act discussed above, there would have been a possibility to simply extend existing labour protections and regulations to sex workers. Furthermore, the Prostitution Act 2002 should have resulted in the availability of all labour protections available to workers in other industries, both in terms of criminal law remedies for victims of exploitation and human trafficking, as well as access to compensatory schemes, e.g. for wages not received, as it explicitly mentions the possibility of salaried employment (§1 Prostitution Act).

3.1 Rights to compensation for severely exploited workers in the sex industry?

One of the areas in which consistent application of the Prostitution Act 2002 should have resulted in increased protection for victims of human trafficking as well as victims of labour exploitation in the sex industry is the applicability of compensatory laws for victims of labour exploitation and of victimization at work. Theoretically, victims of all types of trafficking as well as victims of forced prostitution can make claims under the Victim Compensation Act, which applies to German citizens, EU nationals, and third-country nationals with a residence permit as well as third-country nationals with exceptional leave to remain for a variety of reasons. This includes leave to remain for humanitarian reasons, for reasons of public interest (if they are witnesses in court), for the duration of a

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66 Author’s own interviews with sex workers’ rights and anti-trafficking NGOs (Berlin 5 May 2014 & 6 May 2014).
prison sentence, or for people whose removal has been halted for de jure or de facto reasons (§60a Residence Act (AufenthG)). However, compensation under the Victim Compensation Act is dependent on the duration of the legal residency of a person in Germany. Those who have been legally residing in Germany for less than six months have no right to compensation, and those who have been legally residing for less than three years only have access to limited compensation, such as a basic pension and medical costs. Thus, despite the explicit inclusion of victims of trafficking in the scope of the Victim Compensation Act, they may access it only if they have been legally residing for more than six months.

In practice, the Victim Compensation Act is less likely to be applied to trafficked persons or victims of forced prostitution and victims of labour exploitation in the sex industry for a number of reasons. First, the legislation only applies to cases of direct violence against the victim, and this has to be proven in criminal proceedings against the perpetrator. In trafficking cases, as well as in cases of forced prostitution and labour exploitation in the sex industry, perpetrators often exert control through deception and threat of violence. However, in the absence of physical violence, deception and threats are often insufficient for the applicability of the Victim Compensation Act. Second, the requirement of at least six months of legal stay often further complicates trafficked persons’ ability to claim for compensation, as their status is only regularized for extended periods if they are needed as witnesses for the prosecution in criminal law proceedings. Even in cases in which victims of trafficking for sexual exploitation do manage to prove direct violence against them, their compensation is often particularly low, compared to victim compensation for similar violence, for example in rape cases.

This may be because decisions about compensation for human trafficking for sexual exploitation are usually made in criminal law cases, whereas compensation payments for rape are usually made in civil proceedings. Yet it is significant that the compensation awarded in human trafficking cases is usually lower than in comparable rape cases, even though the levels of compensation in rape cases are also generally considered to be too low. This is interesting and worrying on several levels. If the deciding factor in separating trafficking for sexual exploitation from

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69 H. Rabe, Stellungnahme Umsetzung Der EU-Menschenhandelsrichtlinie 6 (Deutsches Institut für Menschenrechte 2012).
70 H. Rabe & N. Tanis, Menschenhandel Als Menschrechtsverletzung, Strategien Und Maßnahmen Zur Stärkung Der Betroffenenrechte 42 (Schwabendruck 2013).
71 Rabe, supra n. 69, at 7.
72 Rabe & Tanis, supra n. 70, at 39–40.
trafficking for labour exploitation is the violation of sexual self-determination, this
should result in compensation that is comparable to rape cases, as in both situations
the sexual self-determination of the victim is affected. Instead, sexual violence at
the hands of the trafficker is often treated as collateral damage not only in
trafficking for sexual exploitation, but also in other cases of human trafficking,
for example in the context of domestic work. Thus, legislators seem to focus their
anti-trafficking efforts on commercial sexual exploitation through prostitution,
rather than on all sexual violence experienced by the victim.

Another underutilized option for victims of trafficking for sexual exploitation,
victims of forced prostitution and victims of labour exploitation in the sex industry
is that of compensation for unpaid wages. In fact, compensation for unpaid wages
is even rarer than compensation for harms suffered, even though there is an
impressive body of legislation on wage compensation in German law. This section
examines both the legal basis for claims and the reasons why such claims are
nonetheless often unsuccessful, as well as differences between wage compensation
for labour exploitation versus sexual exploitation.

Human trafficking, forced prostitution and labour exploitation in the sex
industry are generally not understood as part of a greater phenomenon of labour
exploitation, in which exploitation happens to different degrees, depending on the
vulnerability of the worker. Sex workers who become victims of trafficking are
considered to be victims of a different kind of trafficking (§232.1.1a Criminal
Code) from those who are victims of trafficking for labour exploitation (§232.1.1b
Criminal Code).

With regard to human trafficking for labour exploitation, German law also
includes the crimes of wage usury under §291 Criminal Code (StGB) and the
employment of migrants under unfavourable conditions (§10 Sec1, §11
Arbeitnehmerüberlassungsgesetz) as lesser crimes that can be considered in
lieu of trafficking, either in less severe cases or due to a lack of evidence.
This alternative is not without problems, as these provisions only apply to
irregular migrants, who, through their status, are under unique pressures and
are particularly vulnerable to exploitation. The exclusion of German citizens
and legally employed migrants, who have to prove compulsion or helplessness
under either §233 or §291 Criminal Code (StGB) instead, creates unequal
treatment for similar levels of exploitation. Foreign victims of wage usury,
who have access to §10 Sec1, §11 Arbeitnehmerüberlassungsgesetz, rather than
§291 Criminal Code (StGB) can also make compensation claims under the
Residence Act. By contrast, women in exploitative working conditions in the
sex industry can only make claims of exploitative prostitution, which normally

73 Ibid., at 17–20.
leads to compensation for harm rather than for unpaid wages, except in cases where additional extortion can be proven.

With the implementation of the 2009 EU Sanctions Directive, wage compensation claims have been simplified under German law and penalties for employers have increased. According to §98a Residence Act (AufenthG) employers have a duty to compensate foreign employees who were employed without a work permit. It is assumed that the employment relationship lasted (at least) three months. It is further assumed that the remuneration is in line with customary remuneration, unless the employer has agreed a lower or higher remuneration than the permissible level (§98a(2) AufenthG). As a general rule, the permissible level means the standard union wage for the same kind of work. Under German law, undercutting of wage levels agreed with unions can amount to exploitation or ‘wage usury’ if wages fall below a level of two-thirds of the relevant union wage. Union officials often help with exploited workers’ wage claims and civil law court cases or out-of-court settlements. However, such wage compensation claims do not apply to industries that are not unionized, which may instead only be able to claim the minimum wage. This includes sex work. Setting a benchmark for a regular or acceptable salary in the sex industry may be difficult, but this should not mean that sex workers are excluded from such compensation. In fact, it might be particularly beneficial for them, as they often have difficulty proving their working hours and length of exploitation, due to the unwillingness of clients to come forward as witnesses and sex workers’ perceived lack of credibility. Additionally, the exclusion of sex workers from wage usury legislation seems unjustifiable in a country in which prostitution is a legally recognized form of labour.

If victims of labour exploitation can successfully demonstrate the existence of an employment relationship, they can not only claim for unpaid wages, but also for damages by reason of breach of contract on part of the employer (§§280, 249 ff. BGB). Again, this has not been applied to sex workers even though the possibility for a dependent employee relationship in prostitution has existed in German law since the Prostitution Act 2002. Thus, the German criminal code on exploitative labour conditions is inconsistent and fails to adequately protect victims’ rights, particularly those of sex workers. The separation of sexual

74 Rabe, supra n. 69.
75 Rabe & Tanis, supra n. 70, at 35.
76 Ibid., at 18.
77 A. Würdinger, Legal Basis of the Phenomenon Trafficking in Women for the Purpose of Exploitation of Labour, Trafficking in women in Germany 56 (KOK 2008).
78 Rabe & Tanis, supra n. 70.
79 Ibid.
exploitation and labour exploitation in the legal implementation of international trafficking agreements creates parallel structures and contradicts the 2002 Prostitution Act’s inclusion of prostitution as an occupation. The possibility to engage in prostitution as a form of salaried employment makes prostitution labour.

In addition to the different standards of labour rights for trafficked persons in the sex industry as opposed to trafficked persons in other occupations, the practical implementation of the available labour legislation is weak. Even when they are successful in making their claims, victims of trafficking for sexual exploitation often do not receive any monetary payment, as there are no assets recovered from the perpetrators. Whereas exploited workers and victims of human trafficking for labour exploitation can receive compensation under §98a Sect.4 Residence Act, the same compensatory liability does not exist for sexual exploitation. Even worse, according to a Federal Crime Agency (BKA) report, only 2% to 7% of prosecutions from 2002 to 2011 for human trafficking for sexual exploitation led to a recovery of assets from the perpetrators. This is despite the fact that in cases of human trafficking, prosecuting authorities have comprehensive powers in respect of the perpetrator’s assets, both inland and abroad, according to forfeiture paragraphs §§73, 73a and 73d Criminal Code (StGB).

Thus, removing some of the obstacles to compensation claims, both in terms of harm, as well as in terms of unpaid wages, as well as unifying the approaches to compensation for sex workers and all other workers, could increase the rights of sex workers vis-à-vis exploitative employers. Such a focus on compensation could have beneficial effects on the willingness of exploited workers to report labour exploitation within the sex industry. Instead, such considerations are completely absent from the Prostitute Protection Act 2017.

Taking into account the complete absence of these concerns in the Prostitute Protection Act 2017, the rights-based empowerment of victims of exploitative labour conditions in the sex industry does not appear to be a core concern for legislators. Instead, the legislative changes implemented so far seem to be focused on reducing sex work as such, rather than increasing the rights and protections of vulnerable workers.

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80 Rabe, supra n. 69, at 3–4.
82 Rabe & Tanis, supra n. 70, at 36.
83 Ibid., at 29.
84 Ibid., at 44; Kalthegener, supra n. 81.
3.2 Labour rights and employment, self-employment and bogus self-employment in the sex industry

The complete absence of rights-based approaches as tools for improving the working conditions of sex workers is even more evident when turning to general labour protections, which would have been applicable to sex workers had the Prostitution Act 2002 been systematically implemented. Whereas various German governments have failed to implement measures to make the de jure possibility of employment in the sex industry a de facto reality, there has equally been a reluctance on the part of brothel owners and sex workers to formalize the employment relationship, despite a majority of sex workers effectively working in bogus self-employment.

Despite the stated aim of protecting sex workers, the Prostitute Protection Act 2017 makes no mention of labour and employment rights. For example, information on workers’ rights, different modes of (self-)employment, as well as general information about labour legislation and minimum labour standards in Germany could have been included in the information provided in the mandatory counselling sessions for sex workers introduced by the Prostitute Protection Act. The absence of such provisions demonstrates that empowering workers in their working relationships is not at the core of legislative concerns leading to the Prostitute Protection Act. The same can be said for the new requirements for businesses in the Prostitute Protection Act: as explained above, the Prostitute Protection Act includes numerous sex industry-specific building codes and obligations. The decision to create a unique set of building codes for sex work businesses, instead of consistently applying the general provisions available, confirms the perception of sex work as characterized by an ‘exceptional status’.

At the same time, attempts to formalize the status of sex workers as employees or workers were considered neither in the implementation of the Prostitution Act 2002, nor in the drafting of the Prostitute Protection Act 2017. The 2017 Act makes no mention of the theoretical availability of different types of employment and self-employment in the sex industry. Research shows that whereas a significant number of sex workers may not want subordinate employment status (and, particularly due to the stigma attached to sex work, should not be forced into employment relationships against their will), a significant number of sex workers are also unaware of the benefits of regulated employment. In this context, it would also be worth exploring whether or not sex workers’ reluctance to enter formalized employment contracts could be reduced through awareness-raising

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85 Bundesregierung Deutschland, supra n. 18.
about the limited right of direction for employers in the sex industry, as well as information about the potential benefits of employee status. Whereas self-employment is and should remain a valid option for sex workers in Germany, some types of arrangements in the sex industry fall into categories that would be considered employment in most other sectors. For example, brothels or sauna clubs that determine working hours and dress codes fulfil aspects of exercising the right of direction, particularly in the sense of the limited right of direction for employers in sex work set out in the Prostitution Act 2002. Sex workers’ rights organizations rightly point out that the limited right of direction in sex work makes formal employment relationships unattractive to employers. Whereas this is certainly true, there are no good reasons why the limited appeal of formalized employment for employers should be the basis for the non-applicability of employment legislation. Additionally, alternative employment concepts such as ‘dependent self-employment’ and ways of formalizing certain aspects of employer obligations for these quasi-employment relationships could be considered, as is the case for other occupations in which dependent self-employment is common.

If sex workers are seen as particularly vulnerable by the German government, as the introduction of the Prostitute Protection Act 2017 suggests, information about sex workers’ labour rights and employment options should have been included in the mandatory counselling sessions for sex workers introduced by the Act. Case workers could inform sex workers about different modes of (self-) employment, as well as providing general information about labour legislation and minimum labour standards in Germany. Again, the absence of such provisions demonstrates that empowering workers in their working relationships is not at the core of legislative concerns when it comes to sex workers. There is no intention to protect them as workers, instead the focus seems to be to protect them from their work.

4 CONCLUSION

The German legislation is a clear example of how regulatory approaches to the sex industry have the potential to promote labour rights for sex workers but have demonstrably failed to do so. Debates about the sex industry in Germany have shifted away from the potential of the Prostitution Act 2002 to improve the working conditions and rights of workers. The scope of employment and labour

86 Ibid.
87 Ibid.
88 Carmen, supra n. 7, at 143–148.
rights arising from the 2002 legislation, due to the change in the status of sex work – and how to implement such protections in the sex industry – has remained underexplored. Legislators have instead focused on paternalistic forms of protection which utilize the idea of exploitation being unique to the sex industry. Such an approach ignores exploitation as a shared problem across industries with insufficient labour standards.

Debates about the validity of sex work as work and the conflation of sex work and trafficking have led to protectionist approaches that are supposed to ‘protect’ sex workers. This protectionist approach views sex workers as victims of a system of exploitation that must be regulated by means of monitoring and varying levels of prohibition, rather than seeing them as rights-holders who should be granted protection through rights-based approaches.

The Prostitute Protection Act 2017 reflects this focus on protection through monitoring. Its impact on the working conditions of sex workers has been largely negative, with increasing levels of stigma and insecure working conditions for all workers. The othering and stigmatization caused by these practices paradoxically has had particularly negative effects on the most vulnerable groups of sex workers, including migrant sex workers. Registration is unattainable for irregular migrants, contributing further to their exclusion by preventing them from working in workplaces that are subject to checks. Ultimately, such legislation drives exploitation in the sex industry further underground. The effects of forcing vulnerable workers into illegality have been insufficiently considered. Thus, the groups supposedly at the core of the considerations for such legislation have been left particularly unprotected. The notion that sex workers are workers and need to be protected as workers has been lost completely in this approach and the labour-right potential of the Prostitution Act 2002 has been lost.