

She is not just a victim.

**An intersectional feminist labour law
approach to human trafficking into the sex
industry**

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Declaration

I, Inga Kristina Thiemann, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

Existing legislation and policy has mostly considered human trafficking as a criminal law problem. When the needs of trafficked persons have been taken into account, this has been on a victim protection basis, rather than by focussing on their rights as workers, migrants and women.

This thesis conceptualises human trafficking into the sex industry as an intersectional issue of gendered labour law, gendered migration law and policy, and patriarchal concepts of appropriate female sexuality and resulting views on prostitution.

By exploring existing human trafficking narratives and legislation from this intersectional perspective, this thesis exposes the idealised victim category in human trafficking discourse. Further, an analysis of international and domestic human trafficking legislation demonstrates that this victim category persists at UN and EU level, as well as in the domestic legislation of England and Wales and Germany. Whereas the international level includes the problematic legacy of historic counter-trafficking legislation, the analysis of the domestic implementation is enriched with on-the-ground experiences of non-governmental organisations work with and on behalf of actual trafficked women and migrant sex workers.

Finally, this thesis introduces an intersectional feminist reproductive labour law approach, which is based on the acknowledgment of the intersectional vulnerability of migrant women sex workers. This approach combines existing work, which reframes human trafficking within labour exploitation with a feminist critique of existing labour law. Taking into account migration as an additional layer of vulnerability for women reproductive workers, this approach reframes reproductive labour, including sex work, as commodifiable work. This re-conceptualisation creates the foundation for the extension of labour protections to all workers, including trafficked persons. By doing so, it also creates the possibility to oppose the existing trafficking narrative.

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Introduction & Methodology

In the following I provide the context of this thesis on human trafficking into the sex industry. Firstly, I introduce the legal definition of human trafficking and the most common approaches to tackling the problem of human trafficking. Secondly I define key terminology and concepts which I will utilise recurrently throughout the thesis. Thirdly, I introduce my own approach to human trafficking, as well as the main questions this thesis aims to answer and the key contributions this thesis makes to the literature on human trafficking. In Section 4, I briefly highlight the main themes I will analyse in the different contexts within the thesis. In Section 5, I provide an outline for the two parts of the thesis and the chapters contained therein, as well as an overview of the methodology used throughout the thesis. Finally, I define the scope of the thesis and areas not covered within it.

1) Context of the Thesis

Human trafficking has featured heavily on the international political and legal agenda in recent years and has been evaluated from various angles by different scholarly disciplines, including law and sociology, economics, policy, migration studies and development studies. Human trafficking has been defined in the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (from here on UN Trafficking Protocol),¹

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000.

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exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.²

Within law, human trafficking has mostly been described as a transnational crime, which requires a criminal law response. This criminal law response is enshrined in the UN Trafficking Protocol,³ and its regional and domestic implementations. The UN Trafficking Protocol also includes the so-called ‘3P’ approach, which proposes tackling human trafficking through a combination of prosecutions of traffickers, prevention of human trafficking, and protection for victims of trafficking. The protection for victims of trafficking is considered to introduce a human rights element to the criminal law approach. However, many scholars have criticised the limited victim protection and prevention measures enshrined both in the UN Protocol, and subsequently in regional and domestic implementations, as insufficient to provide meaningful human rights protections for victims of human trafficking.⁴

Some scholars, particularly in sociology and criminology, have gone beyond that criticism and see human trafficking in a wider context of inequalities in status and vulnerabilities to exploitation. Julia O’Connell Davidson, for example, has

² *ibid.*

³ *ibid.*

⁴ Kelly H Heinrich, ‘Ten Years After the Palermo Protocol: Where Are Protections for Human Trafficking Victims?’ (2010) 18(1) *Human Rights Brief* 2; Dina F Haynes, ‘(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act’ (2006) 21 *Georgetown Immigration Law Journal* 382; Jonathan Todres, ‘Law, Otherness, and Human Trafficking’ (2009) 49 *Santa Clara Law Review* 605; Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Bloomsbury 2007).

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criticised the concepts of freedom and slavery as absolute and dichotomous categories and challenged the notion that people are either completely free or completely un-free.⁵ Bridget Anderson has highlighted state complicity in creating precariousness for workers, particularly for foreign workers who are barred from resident or citizen rights.⁶ Both authors have convincingly argued that the current approach to human trafficking, which focuses on prosecuting traffickers and 'rescuing' trafficked persons obscures governments' role in creating the conditions in which people are rendered exploitable. Equally, Rutvica Andrijasevic has criticised the moralistic approach to human trafficking into the sex industry and challenges the assumption that all aspects of women's migratory journeys into the sex industry are beyond their control. She instead proposes to understand human trafficking as a combined problem of third party control, governments' power over migrants and women's personal circumstances.⁷

In law, Hila Shamir has challenged the existing 'human rights paradigm' for victims' rights by proposing a labour law approach, in which she seeks to prevent the criminalisation of workers who report exploitation, guarantee rights to unionise and to extend the application of labour and employment laws to vulnerable groups of workers.⁸ However, as Shamir acknowledges herself, most anti-trafficking approaches focus on trafficking for sexual exploitation. Combined with the exclusion of prostitution from what is deemed to be work, this focus on sex trafficking makes a labour paradigm unlikely.⁹

⁵ Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "Freedom"' (2010) 10 *Global Networks* 244.

⁶ Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment & Society* 300.

⁷ Rutvica Andrijasevic, *Migration, Agency & Citizenship in Sex Trafficking* (Palgrave Macmillan 2010).

⁸ Hila Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76.

⁹ *ibid.*

2) Key Terminology

This section introduces some of the terminology I will be using throughout this thesis, which I clarify here as some of these concepts have different meanings within different disciplines.

Intersectionality: Historically, exclusion, marginalisation and discrimination on the grounds of sex, ethnic or racial origin and so on, have been understood as separate issues, though they have largely been treated in a parallel way. The term intersectionality describes the notion that various types of marginalisation or discrimination can, and often do, interact with each other and result in specific experiences of discrimination that amount to more than just the addition of these factors.¹⁰ The term was first coined by African-American feminist Kimberlé Crenshaw who experienced disenfranchisement both with the mostly-white feminist movement and with the male-dominated black rights movement, as neither fully encompassed her experiences of discrimination.¹¹ In feminist theory, the intersectional approach 'directs attention to those who are the most disadvantaged, i.e. those who are disadvantaged within the disadvantaged, those who constitute a minority within a minority, those who have been marginalised both within the general society and their primary reference group.'¹² For women who are exploited migrant workers and/or trafficked persons in the sex industry, this means that the intersectional approach I am proposing acknowledges the exclusions and marginalisation that they experience as women, as migrants, as sex workers and, if they are identified as such, as victims of trafficking – but it

¹⁰ See e.g. Hae Yeon Choo and Myra Marx Ferree, 'Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities*' (2010) 28 *Sociological Theory* 129; Esther Ngan-Ling Chow, Marcia Texler Segal and Lin Tan, *Analyzing Gender, Intersectionality, and Multiple Inequalities: Global, Transnational and Local Contexts* (Emerald Group 2011); Evelyn Nakano Glenn, 'Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression' (1985) 17 *Review of Radical Political Economics* 86; Ange-Marie Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3(2) *Politics & Gender* 248; Timo Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore' (2002), Åbo Akademi University Research Reports 11/2002, <<http://www.abo.fi/media/24259/report11.pdf>>.

¹¹ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241; Sandra Fredman and Erika Szyszczak, 'The Interaction of Race and Gender', in Bob Hepple and Erika Szyszczak (eds) *Discrimination: The Limits of Law* (Mansell, 1993).

¹² Makkonen (n10).

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acknowledges that the specific marginalisation they experience amounts to more than its parts.

The concept of intersectionality is also acknowledged in the context of discrimination law.¹³ However, in practice, discrimination law cases often focus on demonstrating discrimination within individual categories (such as sex or race), rather than attempt to account for the full experiences of those who suffer discrimination at the intersection of these categories.¹⁴ Particularly in the context of labour discrimination, sex work needs to be understood as labour first in order for discrimination law to become applicable.¹⁵ Discrimination law may thus (currently) not prove to be the most useful tool in addressing the marginalisation experienced by exploited migrant sex workers and women trafficked into the sex industry.

Labour rights and labour standards: Labour rights are contested, both in relation to whether or not they constitute human rights,¹⁶ and in terms of their applicability to all workers, particularly to workers who are not covered by classic employer-employee relationships. Especially with regard to undocumented workers, there is debate as to whether or not workers who have no right to work can nonetheless have rights at work.¹⁷ Equally, in the realm of reproductive work in private households, protections for employers' privacy often overrules concerns for domestic workers' or care workers' rights.¹⁸

¹³ Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (2 edition, OUP 2012) 156–157; Sandra Fredman, *Discrimination Law* (OUP 2011) 139–143; Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context, Text and Materials* (Sweet&Maxwell 2008) 531–546.

¹⁴ Ibid.

¹⁵ A case in which discrimination law successfully captures both intersectional discrimination and the discrimination of (legal) sex workers has been analysed in the following article: Keina Yoshida 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain' (2013) 21 Fem Leg Stud 195

¹⁶ Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Virginia Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 European Labour Law Journal 151; Judy Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37 Dalhousie Law Journal 601.

¹⁷ Virginia Mantouvalou, 'Workers without Rights as Citizens at the Margins' (2013) 16 Critical Review of International Social and Political Philosophy 366; David S Weissbrodt, *The Human Rights of Non-Citizens* (OUP 2008).

¹⁸ Fátima Suleman, 'The Employment Relationship in an (almost) Structureless Labour Market: The Case of Domestic Work' (2015) 39(3) Cambridge Journal of Economics 733; Bridget Anderson, *Doing the Dirty Work?: The Global Politics of Domestic Labour*

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In essence, **labour rights** protect workers' rights to a fair bargaining process between workers and employers.¹⁹ In the European context, labour rights are enshrined in the Council of Europe's European Social Charter and the Charter of Fundamental Rights of the European Union (EUCFR).²⁰ Some of the key ones in the European Social Charter are: The freedom to choose one's work (Article 1), a right to just working conditions (Article 2) and health and safety at work (Article 3), sufficient remuneration for 'a decent standard of living for themselves and their families' (Article 4), the right to freedom of association (Article 5) and collective bargaining (Article 6). Furthermore, all workers 'have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex' (Article 20).²¹

Contrary to labour rights, **labour standards or labour regulations** aim to remedy the difference in bargaining power between workers and employers by regulating, usually through statutes, issues such as maximum hours, vacations, minimum wages, health and safety regulations, parental leave, etc.²² Most labour standards are enacted on domestic level and exist for "employees" who are in a contract of employment with an employer, whereas certain labour standards also apply to 'workers', as I will detail in Chapter 1.²³

Victims' Rights: These are the protections for officially recognised victims of trafficking,²⁴ which are enshrined in counter-trafficking legislation.²⁵ Often these

(Palgrave Macmillan 2000); Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 *Comparative Labor Law & Policy Journal* 133.

¹⁹ Brian A Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16 *European Journal of International Law* 409, 428–429.

²⁰ Council of Europe, *European Social Charter (Revised) 1996* (from here on *European Social Charter*); European Union, 'Charter of Fundamental Rights of the European Union, (2000/C 364/01)' (2000) C 364 *Official Journal of the European Union* (from here on *EU Charter of Fundamental Rights*).

²¹ *European Social Charter* (n19).

²² Langille (n18).

²³ Hugh Collins, KD Ewing and Aileen McColgan, *Labour Law* (CUP 2012).

²⁴ For a human rights approach, see e.g. Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006); Elaine Pearson, 'Human Traffic Human Rights: Redefining Witness Protection' (Anti Slavery International 2002); For a critique of the human rights approach, see e.g. Shamir (n 9); Claudia Aradau, 'The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking' (2004) 33 *Millennium - Journal of International Studies* 251; Edith Kinney, 'Victims, Villains, and Valiant Rescuers: Unpacking Sociolegal Constructions of Human Trafficking and Crimmigration in Popular Culture' in Maria João Guia (ed), *The Illegal Business of Human Trafficking* (Springer 2015).

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so-called victims' *rights* are protections which are conditional on official victim status and/or victims' usefulness for criminal proceedings against traffickers.²⁶ I argue that victims' rights constitute a misnomer, as they render conditional what should be universal human and labour rights.

Human Rights: This thesis defines human rights as contained in the United Nations Universal Declaration of Human Rights,²⁷ the International Covenant on Civil and Political Rights,²⁸ and the International Covenant on Economic, Social and Cultural Rights.²⁹ As the regional focus of this thesis is on Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),³⁰ the European Social Charter,³¹ and the Charter of Fundamental Rights of the European Union equally apply.³² Consequently, while I acknowledge the existing debate within labour law scholarship,³³ I consider the core labour rights contained within these human rights treaties to be human rights. The core human rights most relevant to this thesis are the elimination of all forms of forced and compulsory labour and the elimination of discrimination. Human rights are not conditional on nationality or status. Therefore, I reject the

²⁵ For an analysis of existing victim-focussed policy, see e.g. Claudia Aradau, 'Good Practices in Response to Trafficking in Human Beings: Cooperation between Civil Society and Law Enforcement in Europe' (Danish Red Cross 2005); Thanh-Dam Truong and Maria Belen Angeles, 'Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children' (UNESCO 2005); Govt. of India and UNODC, 'Compendium of Best Practices on Anti Human Trafficking by Non Governmental Organisations' (2008).

²⁶ Haynes (n4); 'Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA' (2012) 57 Official Journal of the European Union.

²⁷ United Nations Universal Declaration of Human Rights 1948.

²⁸ United Nations, International Covenant on Civil and Political Rights 1966.

²⁹ United Nations, International Covenant on Economic, Social and Cultural Rights 1966.

³⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 & 14 (ECHR) 1950 [ETS 5] (from here on ECHR).

³¹ CoE European Social Charter

³² EU Charter of Fundamental Rights

³³ Some scholars have argued that the human rights regime is unsuitable for the realisation of labour rights, or that the two systems exist in parallel, rather than jointly, whereas others have argued that labour rights are human rights. See e.g. Mantouvalou (n16); Kevin Kolben, 'Labor Rights as Human Rights' (2009) 50 *Virginia Journal of International Law* 449; Collins (n15). For a discussion as to whether or not labour rights are implementable within a human rights regime, see e.g. Philip Alston (ed), *Labour Rights as Human Rights* (OUP 2005).

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notion of calling a victims' rights approach to human trafficking - which renders basic rights conditional on victim status – a 'human rights approach'.³⁴

Agency: While there are differing definitions in various disciplines on what exactly agency is,³⁵ in the context of this thesis it is used in the following way: Agency describes the capacity to act in a given environment, which includes the possibility of making choices and acting upon them. In the context of human trafficking, victimhood and agency are often constructed as mutually exclusive.³⁶ Trafficked persons' victimhood is perceived as so absolute that being labelled a trafficked person 'erases many women's active participation in the daily survival of their families and themselves. It renders their labour invisible.'³⁷ However, situations in which coercion or force are at play do not preclude agency as such. Women migrants, including migrant sex workers as well as victims of trafficking, have and exercise agency, even within their constrained set of options.³⁸

Reproductive labour: For the purpose of this thesis, reproductive labour is defined as all 'work necessary for the reproduction of families,'³⁹ which I understand to include not only domestic work and care work, but also sex work. Sex work could alternatively be defined as a service sector job, and for related sectors, such as the porn industry this definition may in fact be more suitable. Subsuming sex work under the umbrella of reproductive work illuminates the parallels between women performing paid sex work in the public sphere and women performing unpaid sex work in the private sphere. Particularly the shared notion of all reproductive work that men can expect and demand this work for free from 'their' women, and that it simultaneously serves no real role and has no real value, as it does not 'produce' anything, certainly exists for sex work.

³⁴ For a critique of the so-called human rights approach, see Shamir (n9); Aradau (n23).

³⁵ For a discussion of different conceptualisations of agency, see Mustafa Emirbayer and Ann Mische, 'What Is Agency?' (1998) 103 *American Journal of Sociology* 962.

³⁶ Carolyn Hoyle, Mary Bosworth and Michelle Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 *Social & Legal Studies* 313.

³⁷ Deborah Brock and others, 'Migrant Sex Work: A Roundtable Analysis' (2000) *Canadian Woman Studies* 84.

³⁸ Nandita Sharma, 'Travel Agency: A Critique of Anti-Trafficking Campaigns' (2003) 21 *Refuge: Canada's Journal on Refugees* 62; Anna Szörényi, 'Rethinking the Boundaries: Towards a Butlerian Ethics of Vulnerability in Sex Trafficking Debates' (2014) 107 *Feminist Review* 20.

³⁹ Pei-Chia Lan, 'New Global Politics of Reproductive Labor: Gendered Labor and Marriage Migration' (2008) 2/6 *Sociology Compass* 1801.

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Furthermore, there are parallels between sex workers and wives in conceptualisations of sex workers as 'belonging' to their pimps like wives belong to husbands. Ideas of 'private' and 'public' women, which I address in Chapter 3, further manifests the idea of women as property and of women's sex work as work that is owed. Sex workers have historically been viewed as women who are borrowed or rented from another man, not women selling a service. The notion of sex workers independently and freely selling their own labour is recent and not universally accepted in any type of discourse. Thus for the purposes of this thesis, reproductive work can be defined as work that requires 'inherently' female skills and work that women are expected to perform for free.

3) Themes

The main theme that runs throughout this thesis is that of gender as a factor in vulnerability to human trafficking, as well as in the responses to human trafficking and perceptions of actors within labour, migration, sex work and human trafficking narratives. While my thesis questions the construction of these narratives as binaries, I will utilise these binaries – and challenge them throughout the thesis to illustrate the ways in which existing narratives and legislation perpetuate the construction of simplistic explanations of human trafficking based on supposedly polar opposites.

Julia O'Connell Davidson's argues that existing human trafficking narratives, particularly ones that employ the use of the terminology of 'Modern Slavery', set up exploitation as a binary of **slavery vs. freedom**, which ignores the grey areas between enslavement in a sense that meets the criteria of the 1926 Slavery Convention and the 1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,⁴⁰ and being completely free.⁴¹

⁴⁰ Slavery Convention 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1957.

⁴¹ O'Connell Davidson (n5).

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As I will discuss in more detail in the context of migration in Chapter 3, O'Connell Davidson,⁴² as well as Bridget Anderson,⁴³ have also argued that the **trafficker vs. victims of trafficking** binary also creates the notion of human trafficking as a crime that exists outside the scope of any state involvement in creating vulnerabilities to trafficking, as well as any wider issues such as demand for exploitable labour and root causes in countries of origin.⁴⁴ This notion of evil trafficker vs. innocent victim of trafficking also contributes to the idealised concept of the victim of trafficking, one of the most troubling aspects of current counter-trafficking narratives, which I will discuss throughout the thesis, but particularly in my criticism of the criminal law response in Chapter 4.

Another binary, which also contributes to the idealised victim of trafficking, is that of **innocent victims of trafficking vs. guilty migrants**,⁴⁵ which creates an often artificial distinction between trafficked persons, smuggled persons and other irregular migrants and seemingly legitimises some exploitation, but not others.

Beyond these binaries that are visible at the surface level of the human trafficking discourse, I also highlight some of the binaries that contribute to the human trafficking discourse in more subtle ways. In the context of sex work, I highlight the **'happy hooker' vs. 'exploited prostitute'** narrative that has dominated the prostitution debate between abolitionist and sex-workers' rights feminists and has contributed to framing the debate along the lines of choice vs. exploitation, as if these were inherently opposing concepts.⁴⁶ Again, the victim category in the human trafficking narrative builds on this notion by depicting only those who have been forced as worthy of protection, rather than looking for ways to empower all women in sex work.

⁴² *ibid*; Julia O'Connell Davidson, 'Will the Real Sex Slave Please Stand Up?' (2006) 83 *Feminist Review* 4.

⁴³ Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment & Society* 300; Bridget Anderson, 'Where's the Harm in That? Immigration Enforcement, Trafficking, and the Protection of Migrants' Rights' (2012) 56 *American Behavioral Scientist* 1241; Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013).

⁴⁴ Bridget Anderson and Julia O'Connell Davidson, 'Trafficking - A Demand Led Problem?: A Multi-Country Pilot Study.' (Save the Children 2002).

⁴⁵ Heli Askola, 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13 *European Law Journal* 204.

⁴⁶ Anna Carline, 'Constructing the Subject of Prostitution: A Butlerian Reading of the Regulation of Sex Work' (2010) 24 *International Journal for the Semiotics of Law* 61.

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Another dichotomy that operates in the background of the victim category in human trafficking is the **Madonna vs. whore** narrative. This narrative builds on notions of **active male vs. passive female sexuality** and pits 'good women', who are innocent, sexually passive and chaste, against 'bad women', who are too sexually active, either in their private sex lives or by engaging in sex work and are therefore constructed as 'deviant'.⁴⁷ The notion of prostitutes as the ultimate incarnation of the 'whore' of the Madonna vs. whore narrative creates the ambiguity with which trafficked women are viewed. Their position as 'deviant victims' may cause suspicion and require their advocates to frame them as particularly helpless and agency-less in order to present them as 'deserving' victims in the public eye.

Finally, operating primarily in the context of labour regulations, but also affecting migrant women as workers and women as the majority of sex workers, is the binary of **productive vs. reproductive labour**, or, to return to the primary theme of gender, the binary of traditionally male labour in the public sphere and traditionally female labour in the private sphere.⁴⁸ The exclusion of reproductive labour from key labour protections, as well as the lack of validation of women's labour,⁴⁹ up to and including migrant women's sex work is a key concern and fundamental theme in this thesis. This theme builds the foundation on which my critique of existing vulnerabilities to human trafficking, but also my proposal for a response to human trafficking, is built.

⁴⁷ See the discussion of male and female sexuality and the social construction of 'the prostitute' in chapter 4 of this thesis.

⁴⁸ Umut Erel, 'Migration, Domestic Work and Affect: A Decolonial Approach on Value and the Feminization of Labour' (2012) 38 *Journal of Ethnic and Migration Studies* 1703; Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Bloomsbury 2006).

⁴⁹ Francine D Blau and Lawrence M Kahn, 'The Gender Wage Gap: Extent, Trends and Explanations' (National Bureau of Economic Research 2016) Working Paper No. 21913 <<http://www.nber.org/papers/w21913>>; Bryce Covert, 'New Evidence That Women Make Less Than Their Male Coworkers With The Same Titles' *Think Progress* (23 March 2016) <<http://thinkprogress.org/economy/2016/03/23/3762543/gender-wage-gap-job-title/>>; Andrew Chamberlain, 'Demystifying the Gender Pay Gap: Evidence from Glassdoor Salary Data' (23 March 2016) <<http://www.glassdoor.com/research/studies/gender-pay-gap/>>; Claire Cain Miller, 'Pay Gap Is Because of Gender, Not Jobs' *The New York Times* (23 April 2014) <<http://www.nytimes.com/2014/04/24/upshot/the-pay-gap-is-because-of-gender-not-jobs.html>>.

4) My Approach and Original Contribution

Building on the criticisms raised by these scholars, I propose to look at the phenomenon of human trafficking through an alternative lens: I argue that in order to understand human trafficking, we have to look at it as an intersectional vulnerability, which is caused by overlapping exclusions from rights.

The key questions are:

Can a reframing of human trafficking as an intersectional vulnerability lead to a better understanding of the underlying problems of the phenomenon as well as the problematic aspects of the responses to it?

If labour is a factor at the root of human trafficking and exploitation, can a feminist reframing of labour law lead to a better response to human trafficking and exploitation than the current criminal law approach?

To answer these questions, I provide a feminist critique of the ways in which current legislation and policy addresses human trafficking for sexual exploitation, on an international, regional as well as domestic level. In my analysis, gender is the continuous theme, with which other exclusions overlap. When analysing human trafficking legislation, I not only evaluate whether or not gender is a factor that shapes legislation, but also how.

I argue that current counter-trafficking legislation builds on problematic notions of feminised victimhood, appropriate female conduct and their interplay in regulating prostitution and preventing human trafficking.⁵⁰ Additionally, the legacy of 'White Slavery' legislation builds the entire conceptualisation of human trafficking on a problematic foundation, as it excludes prostitution from being seen as work and offers little nuance to the way migration for sex work and exploitative prostitution are viewed.⁵¹ While current legislation has linguistically moved away from this approach, the conflation of human trafficking for sexual exploitation and of

⁵⁰ For a detailed discussion see Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010).

⁵¹ *ibid.*

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prostitution in general is on-going in international, regional and domestic counter-trafficking law and policy.⁵²

The distinction between human trafficking for sexual exploitation and human trafficking for labour exploitation in official definitions of human trafficking is really a separation of exploitation in sex work and in other work. This distinction thus reinforces the idea that sex work cannot really be work. I challenge the notion of human trafficking for sexual exploitation as it exists today, since it only encompasses human trafficking into work in the sex industry. By defining sexual exploitation this way, the dominant counter-trafficking narrative simultaneously refuses to treat trafficking into exploitation in the sex industry as labour exploitation and either ignores entirely the sexual exploitation of other workers by traffickers or employers or treats it as ‘collateral damage’ of labour exploitation and trafficking. The distinction between human trafficking for sexual exploitation and human trafficking for labour exploitation is wrong, unless we want to identify all sexual violence which happens in the context of abuse of a position of power as human trafficking for sexual exploitation. It makes no sense to view rape of a migrant sex worker as human trafficking for sexual exploitation, but view rape of a domestic worker as collateral damage in the context of human trafficking for labour exploitation.

I propose that the separation of trafficking for sexual exploitation and trafficking for labour exploitation within the criminal law approach poses an additional problem: As already mentioned, this approach actively creates a neat dichotomy of perpetrators and victims. In order to establish this dichotomy, there is a need for ‘pure’ victims. Particularly in the context of ‘trafficking for sexual exploitation’,⁵³ we see the idealised victim, an innocent young woman snatched off the streets somewhere and forced into prostitution. But this need for ‘perfection’ in victimhood excludes the majority of persons exploited in the sex industry, as engagement in sex work renders these women dubious as victims. Thus, in order to constitute ‘worthy victims’, these ‘deviant women’ need to go to extra lengths to conform to concepts of female passivity and idealised

⁵² As I will demonstrate in Chapters 5-8 of this thesis.

⁵³ This terminology is used throughout the thesis as it appears in official documents and legislation. However, as mentioned above, I challenge the distinction between human trafficking for sexual exploitation and human trafficking for labour exploitation.

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victimhood. As human trafficking for sexual exploitation builds the starting point for other human trafficking concerns, this idealised passivity is extended to other types of trafficking.

In this paradigm, trafficked persons are only ever victims, who are at best entitled to beneficence, but are never autonomous right holders like full citizens, who are entitled to the enjoyment of their rights and who can make legal claims against those who have infringed upon those rights.

4.1) Original Contributions

My first contribution to the literature is the reframing of the human trafficking debate on the basis of defining human trafficking as an intersectional vulnerability based on gendered labour and migration discriminations, combined with vulnerability created by traditional understandings of sex work. By looking at the combined vulnerabilities of migrant sex workers and potential victims of trafficking as a problem stemming from existing exclusions in labour and migration, combined with a revised pragmatic understanding of 'sex work as work', I offer an intersectional view of the vulnerabilities of migrant women sex workers and women trafficked into the sex industry.

Secondly, my framing of the critique of the criminal law approach in Chapter 4 as an issue of rights-holding and charity-receiving victims identifies it as a gendered problem which should concern feminists because the victim category in human trafficking not only denies women's agency, as others have argued before, but also denies them their rights on the basis of a gendered norm.

Furthermore, my interviews with NGOs and sex workers' rights organisations offer a unique insight into the perception of 'on the ground' policies and legislation that are supposed to protect trafficked women, in both the UK and the German context.

Finally, I also propose an intersectional feminist labour law paradigm, which not only acknowledges sex work as work for pragmatic reasons, but untangles the commodification of sex work and the treatment of women as a commodity. It

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provides a basis for tackling human trafficking in a way that perceives vulnerable women as right-holders, not only as victims, and tackles vulnerabilities regardless of whether women meet idealised notions of victimhood.

In this I go beyond existing feminist approaches to reforming labour law based solely on the acknowledgment of reproductive labour, but which usually exclude sex work or push it to the margins of their approach.

5) Chapter Overview & Methodology

The thesis is split into two parts, the first of which provides the theoretical foundation of the thesis and illustrates the intersectionality of root causes, which contribute to vulnerability to human trafficking. Tying together the strands of labour, migration and gender, Part I offers my approach to human trafficking as an intersectional vulnerability.

Part II illustrates the themes identified in the theoretical approach in the context of international, regional and domestic legislation (in England & Wales and Germany) on human trafficking. It is complemented by interviews with a range of non-governmental actors working with victims of trafficking and/or sex workers, which demonstrates the presence of both the notion of the idealised victim and the inconsistencies in the separation of human trafficking for sexual and for labour exploitation. These interviews contrast the dominant narratives in law and official policies with those of people who are in direct contact with trafficked persons and/or sex workers and offer an insight into the lived realities of these women and their views of the effectiveness of existing law and policies, as well as their views on prostitution and trafficking.

Finally, I introduce an alternative response, which returns to the foundation of gendered labour discriminations in Part I and proposes an alternative intersectional feminist labour paradigm.

5.1) Part I - Theoretical Foundations

My theory section builds on existing literature on the interplay of gender and access to labour rights and labour protections, the relationship of gender, immigration regimes and migration routes, and the gendered bias affecting the dominant discourses on prostitution.

Chapter 1 discusses labour rights and labour standards and the so-called 'standard employment contract' as gendered categories. In this, my specific focus lies on women's historical explicit (and contemporary implicit) exclusion from labour rights and labour standards, particularly in female-dominated modes of work (part-time, short-term, hyper-flexible and bogus self-employment) and feminised labour sectors. I argue that the exclusion from labour rights and protections is particularly severe in reproductive work, i.e. care work, domestic work and sex work. Women in these labour sectors have always been precarious workers and often cannot access or utilise 'standard' remedies against the unequal bargaining power between employers and employees/workers. Additionally, women are affected by gendered burdens of unpaid work and resulting expectations of the value of women's labour. As sex work falls into the traditionally unpaid sphere of reproductive work, these issues, too, reflect on sex workers and potential victims of trafficking.

Chapter 2 approaches vulnerability through the lens of migration. Similar to labour law and policy, migration policy assumes a male subject. Partly due to visa regimes, which target male-dominated 'regular' jobs, and, building on exclusion in labour law, also assumes regular workplaces for migrants, women migrate into already precarious sectors, in which they experience additional exclusions due to their migrant status. Additionally, migrant women experience further exclusions through nationalist concepts of belonging and through the lack of value placed on their work.

Chapter 3 demonstrates the additional burdens placed on women in the sex industry through stigma created by moralism based on a double standard of acceptable sexual conduct for men and women. The ideological debate on prostitution, with radical feminists aiming to abolish all prostitution and liberal

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feminists describing prostitution as a choice, creates an additional dichotomy for sex workers to navigate. The final section of this chapter argues for a pragmatic response to prostitution, in which I demonstrate that a labour rights response and the desire to abolish prostitution as a highly gendered industry are not necessarily contradictory.

Chapter 4 brings together the three strands of labour, migration and sex work and outlines my approach to human trafficking in the sex industry, which I perceive as an intersectional problem created by gendered norms of labour, migration and sexual behaviour. I argue that the existing response to human trafficking ignores the factors of vulnerability faced by migrant women engaged in sex work in destination countries. By treating trafficked persons as victims of a unique crime, their plight is separated from the structural exclusions faced by women as a class and by migrants as a class in labour contexts and excludes them from the category of 'rights-bearer'. Doing so also absolves governments from meaningful change.

5.2) Part II - Analysis of the Criminal Law Approach to Human Trafficking in International Treaties and Domestic Legislation

Part II contrasts my view of human trafficking as an intersectional vulnerability with the existing criminal law approach. This part provides an analysis of the UN Trafficking Protocol and its subsequent regional and domestic implementation, under the consideration of the issues identified in Part I and with a special focus on the way gendered stereotypes and narratives are reproduced in the treaties.

In Chapter 5, I argue that the UN Trafficking Protocol, while highlighting gender as an issue, does so for the wrong reasons. More importantly, the UN Trafficking Protocol builds on historical legislation, the White Slavery agreements, which rely upon moralistic views of human trafficking for sexual exploitation. Returning to the themes in Part I, and the arguments developed in Chapter 4 specifically, I argue that the UN Trafficking Protocol provides a unifying approach to transnational trafficking, but that this approach is problematic. The definition of human trafficking used in the protocol separates human trafficking for sexual exploitation and human trafficking for labour exploitation. As a criminal law

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instrument in the context of transnational crime, the UN Trafficking Protocol focuses the attention of counter-trafficking measures on border controls and control of migration. Considering it is the first criminal law instrument to combat human trafficking, it can be largely held responsible for the current approach to human trafficking.

Chapter 6 constitutes an evaluation of European law, which build on the UN Trafficking Protocol. It offers an analysis of the Council of Europe Trafficking Convention, which has been named *the* 'human rights instrument' amongst the human trafficking treaties, and the EU Human Trafficking Directive, which claims to have a multi-disciplinary approach to human trafficking. I argue that both instruments, while offering increased protections to victims of trafficking, nonetheless maintain the notion of victim's rights, which are only granted to those with official victim status.

Chapters 7 and 8 assess the implementation of international law in the national contexts in England & Wales and Germany. The chapters explore the two countries' laws and policies on human trafficking and prostitution for their impact both on the rights of women trafficked for sexual exploitation and on sex workers' rights, as well as highlighting best practices and areas for improvement identified in my interviews with non-governmental organisations.

In Chapter 9 I draw upon the analysis made in Part II on the basis of the themes drawn out in Part I. I argue that the criminal law approach not only obscures the underlying issues in human trafficking, but continues the conflation of human trafficking and prostitution. Additionally, it relies on a highly gendered victim category, which is exclusionary and removes trafficked persons' agency. I also challenge the separate categories of human trafficking for sexual exploitation and human trafficking for labour exploitation, as they maintain the artificial separation of sex work and other labour.

Finally, I propose an intersectional feminist paradigm of labour standards, which includes the validation of reproductive labour, including sex work, through commodification of said labour. Such commodification of labour can work in

opposition to the perceived commodification of the woman worker herself and could shift the existing paradigms of productive and reproductive labour.

5.3 Critique and Conclusion

My conclusion brings together the themes that run throughout the thesis, and summarises my analysis of the existing legislative approach to human trafficking. It also juxtaposes it with my proposed alternative approach, the feminist labour standards paradigm. Additionally, I give a brief outlook on future research.

5.4) Why England & Wales and Germany?

I chose England & Wales and Germany as the two countries for my domestic legislation case studies as the two countries are both destination countries for human trafficking. However, they also have a number of interesting differences: German workers generally benefit from stronger labour protections than their UK counterparts in all sectors. Germany adopted the EU Directive on Sanctions Against Employers of Illegally Staying Third-Country Nationals (2009 Employers Sanctions Directive),⁵⁴ whereas the labour protections in England & Wales are weaker and the United Kingdom has implemented its own strategies to combat the exploitation of foreign workers and opted out of the 2009 Employer Sanctions Directive.⁵⁵

More importantly, prostitution was never illegal in Germany and was regulated in German legislation in 2002, rendering it labour, which can be performed either as a self-employed person or as an employee. In England and Wales prostitution does not enjoy any labour protections and certain prostitution-related activities, such as soliciting or kerb crawling, are prohibited.

⁵⁴ European Union 'Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures against Employers of Illegally Staying Third-Country Nationals' (2009) Official Journal of the European Union.

⁵⁵ Labour legislation and the Modern Slavery Act affect the entire United Kingdom, whereas England & Wales have separate laws on prostitution from those in Scotland and Northern Ireland.

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The two countries' differences stem from different historic developments in views of prostitution: in Victorian England, not only those involved in prostitution were condemned, but prostitution was considered as requiring abolishment for the greater good of society. Victorian feminists such as Judith Butler argued for the abolishment of prostitution for the benefit of sex workers, who had been blamed as the source of venereal disease, and aimed to 'rescue' them from a life of deprivation.⁵⁶

In Germany, the notion of prostitution as a necessary evil prevailed: Brothels had historically been and continued to be tolerated.⁵⁷ At the turn of the 20th century, legal responses to the spread of venereal disease led to a de-facto decriminalisation of prostitution, with compulsory health-checks implemented in only a few states (later extended to all of West-Germany).⁵⁸ Thus, the current regulatory approaches in the two countries reflect their historical conceptualisations of prostitution.

Additionally, England & Wales has recently passed new counter-trafficking legislation, the 2015 Modern Slavery Act, which codifies existing offences on human trafficking for sexual exploitation, human trafficking for labour exploitation and slavery, servitude and forced and compulsory labour. Germany is in the process of reforming both its human trafficking and prostitution legislation.⁵⁹

6) Methodology for the Empirical Part

6.1) The Interviews

In order to complement the analysis of legislation in the UK and Germany, and to explore the effects of legislation on migrant sex workers and trafficked persons, this thesis uses qualitative interviews with non-governmental organisations.

⁵⁶ EM Sigsworth & TJ Wyke 'A Study of Victorian Prostitution and Venereal Disease' in M Vicinus *Suffer and Be Still (Routledge Revivals): Women in the Victorian Age* (Routledge 2014); Judith Walkowitz *Prostitution and Victorian Society: Women, Class, and the State* (CUP 1982).

⁵⁷ Rebecca Pates 'Liberal laws Juxtaposed with Rigid Control: an Analysis of the Logics of Governing Sex Work in Germany' (2012) 9 *SexResSocPolicy* 212, 216.

⁵⁸ *Ibid*; Romina Schmitter 'Prostitution – Das älteste Gewerbe der Welt?' (2013) *APuZ* 23.

⁵⁹ For the purpose of this thesis changes in legislation, including in draft bills, are considered up to February 2016.

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Specifically, the data collected through the interviews is used to investigate a potential disconnect between human trafficking and prostitution - related legislation, and the experiences of those working directly with trafficked persons. Additionally, I hoped to get a grassroots perspective on government and law enforcement responses to human trafficking and whether or not trafficked persons from certain groups (i.e. third country nationals or sex workers) experienced bias. I was also interested in the kinds of policies grassroots organisations and service providers considered effective responses to human trafficking and whether or not such approaches were present in official government policy and legislation.

The source of this complementary data is 10 semi-structured interviews with key professionals in service-providing non-governmental organisations in the UK and Germany. The interview partners were recruited from a broad range of service providers. The purpose of the study was not to find a representative sample or to produce quantitative analysis of attitudes amongst organisations working with trafficked persons. In order to do so, a much larger study with a more narrowly defined group of service providers would have been necessary. Instead, this qualitative approach was aimed at getting an insight into the 'on the ground' experiences of those working with migrant sex workers and trafficked persons in the sex industry, their views and experiences of government policies and legislation.

6.1.1) Sample

I conducted 10 in-depth semi-structured interviews with participants from two different countries (Germany (n=6+1)⁶⁰ and the United Kingdom (n=4+1), which belonged to a wide spectrum of non-governmental organisations and service providers. The German organisations can be categorised into faith-based service providers (n=1), feminist service providers (n=2) sex-workers' rights organisations (n=2) and 'uncategorised', which fit none of these labels (n=2). The British organisations can be categorised into sex-workers' rights organisations (n=1), faith-based organisations (n=2) and 'uncategorised' (n=2).

⁶⁰ Six interviews and one written response, equally for the UK four interviews and one written response.

6.1.2) Participants

Participants were not asked to provide any personal information, as they were speaking in their roles as representatives of the organisations I had contacted.

In Germany, most organisations are members of the ‘federal association coordinators against human trafficking,’ the ‘KOK bundesweiter Koordinierungskreis gegen Menschenhandel e.V.,’⁶¹ the German umbrella organisation of independent charities, advisory centres and safe houses. In the UK, the majority of NGOs and service providers attend the Human Trafficking Foundation’s ‘Advisory Forum.’

6.1.3) Recruitment

The initial method of recruiting was to contact relevant non-governmental organisations and service providers within each country via email or phone. Of the member organisations within each country, my aim was to interview a cross-section of organisations, ranging from charities within four categories:

- 1) Faith-based organisations
- 2) Feminist organisations
- 3) Sex workers’ rights organisations
- 4) Other/non-categorised organisations

Additionally, I hoped to interview the main service providers or umbrella organisations in each country, i.e. the Salvation Army as the official, government-funded service provider for trafficked persons in the UK and KOK, the German umbrella organisation.

I originally identified ten organisations to contact in each country, giving a cross-section of publicised views and approaches to human trafficking in both countries, on the basis of how these organisations self-identified on their websites and in their mission statements.

⁶¹ From here on KOK.

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However, finding interview partners proved more difficult than anticipated. From 20 organisations I eventually contacted in the UK, only four were willing to be interviewed, with one additional one answering my questionnaire in writing. Of my final interviewees, no organisation met the primarily 'feminist' category and three of the five organisations were faith-based, one was a sex workers' rights organisation and one was an awareness-raising project, which I considered to fall into the 'other' category.

In Germany, the distribution was slightly better – from 15 organisations contacted, I received six positive responses as well as one written answer to my questionnaire. Of the seven organisations, one was faith based, two organisations identified as feminist organisations serving migrant women, and two were sex workers' rights organisations. The final two organisations fit the 'other' category: the umbrella organisation of counter-trafficking service providers represents faith-based as well as sex workers' rights and feminist organisations, and a EU-funded outreach project, did not fit within any of the three categories.

6.1.4) Process

The interview questions were broad and open-ended. The questions used were designed to elicit indicators of official and practiced attitudes towards prostitution, conceptualisations of sex work and human trafficking as separate or equal phenomena, familiarity with cases of racial or anti-immigrant bias,

About half of the interviews were conducted in person (n=6), either at the organisations' offices in Berlin (n=3), or alternative locations chosen by the interviewees, such as quiet café's (n=3) in Berlin or London. Organisations based in other cities, as well as participants who found a phone interview more convenient, were thus interviewed by phone (n=4). Two additional organisations were unable to commit to being interviewed, but submitted answers to the questions in the topic guide (Appendix A) in writing.

The Participant Consent form (Appendix B) stated that interviews would take up to an hour to complete. This was intended to include time spent discussing and signing the consent form, as well as any questions and suggestions after the

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official interview. The average length of the recorded interview was 30 minutes. The shortest interview lasted 18 minutes, the longest 36 minutes. All interviews were recorded and transcribed, after prior consent of the interviewees, which was granted in all cases. All interviews were transcribed by an external contractor. I checked the transcripts against the audio recording and made small variations.

6.1.5) Coding and Analysis

I started my analysis with open coding, categorising the data by themes emerging from the interviews themselves, with interviews coded manually.

Respondents had a wide range of things to say, many of which were not common across organisations. Nonetheless, several themes arose from the interviews: The interviewees mentioned prejudice against some groups of third country nationals and against sex workers. A number of interviewees identified policy areas neglected or completely unexplored by current government policy and legislation, as well as problematic aspects within existing legislation. Additionally, a number of interviewees spoke of idealised victims and the harm of that category in identifying 'less than ideal victims' as trafficked persons. Several interviewees expressed the need to take seriously the experiences of the women themselves. These themes are explored in Chapters 7 and 8, which focus on the counter-trafficking legislation in England and Wales, and the German counter-trafficking legislation respectively.

7) Scope & Exclusions

My research is focussed on human trafficking into the sex industry, or as it is normally named 'human trafficking for sexual exploitation.' I question the separation of trafficking for sexual exploitation and labour exploitation, and this comparison is at the core of my analysis. However, this thesis does not look at issues within legislation on human trafficking for labour exploitation in its own right.

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Neither does it cover human trafficking for services, or trafficking for the removal of organs. Not only would the inclusion of these issues exceed the scope of this thesis, it would also shift its angle. While human trafficking for service and for the removal of organs are covered under the UN Trafficking Protocol, I believe they raise different issues from those raised by human trafficking for sexual exploitation and labour exploitation.

I focus only on international and regional treaties and domestic legislation that directly focus on human trafficking or on prostitution, as the two issues have been historically conflated. I do not include an analysis of existing international law that may be applicable to victims of human trafficking,⁶² since my approach focuses on the human trafficking narrative. Building on my approach to human trafficking as an intersectional problem, future research could however identify how meaningful connections between different treaties on human rights, labour rights and women's rights could be made to tackle the issues of sexual violence and on labour offenses in a cohesive manner.

Furthermore, this thesis does not focus on existing case law in Germany and the UK, as my interests lie in the effects of gendered narratives on the legislative and policy-making approaches, rather than on the implementation of such legislation.

⁶² An excellent book that does just that is: Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010).

PART I – Theoretical Foundations

1) Introduction

The first part of my thesis sets out my theoretical approach to human trafficking. Based on an analysis of labour relations, prostitution and migration, I argue that human trafficking is a gender issue linking extremely precarious labour, assumptions about female and male sexuality and increasing restrictions on migration.

Thus, I first explore the gendered dimension of labour rights, combined with an analysis of the decline of labour rights for all workers. I propose that labour rights have always been granted on the basis of a male norm, which was gradually extended to women, but continues to exclude the most precarious forms of labour, which remain gendered, both in terms of type of labour (part-time, short term and bogus self-employment), as well as in terms of labour sectors (domestic work, care work, and sex work, which is not even considered work). It is no coincidence that trafficking mostly occurs where these sectors and types of labour coexist.

Chapter 2 illustrates the gendered dimension of migration, looking at the standard assumption of a male migrant, which erases the differences in women's migratory experiences. I explore the gendered restrictions on visas and regular migration routes, as well as the vulnerabilities of migrant women to precarious migration routes ending in precarious labour, particularly in under- or unregulated industries, such as care work, domestic work and sex work.

In addition to the particular challenges for female migrants, I also look at the interplay of nationalist ideologies, gendered ideas of the nation and resulting restrictions on women's migration. Finally, Chapter 2 joins the issues of migration, labour and human trafficking, by evaluating how migrant status contributes to creating precarious labour situations. After looking at the effects of migration policies on migrants as workers, I examine the continuities between the

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exploitability of migrants on a scale from regular migrants to trafficked persons, challenging the idea of human trafficking as a category in its own right.

Chapter 3 complements the two preceding chapters by illustrating prevailing opinions about female sexuality, how these limit women's sexual expression and how this determines the way we view prostitution.¹ I then turn to feminist discourses about prostitution and how they have linked to migrant prostitution and ultimately human trafficking. I claim that feminist debates have mostly argued over whether or not prostitution can constitute labour as a matter of moral debate and by viewing prostitution either as patriarchal oppression or as 'a job like any other'. Instead, I propose that an approach to prostitution as work is not necessarily an ideological position, but instead a pragmatic one, considering the particular power imbalance between sex workers, their clients and intermediaries. In this, I argue that while prostitution is unique, a 'sex work as labour' approach is nonetheless the way to assert sex workers' agency within their limited choices, while also ensuring their rights are protected as workers and as vulnerable workers at that.

The final chapter (Chapter 4) of the theoretical foundations part of the thesis then joins the three strands of labour, migration and prostitution and offers an analysis of the gendered vulnerabilities of trafficked persons in the sex industries. Migrant women sex workers face triple prejudice in their roles as unwanted –and often irregular – migrants, they are stigmatised as sexually deviant women and rendered precarious workers through a system which does not afford full labour rights for anyone but directly-employed full-time workers. Migrant workers, particularly female migrant sex workers, do not fit this ideal of full-time, 'productive' labour, and consequently their work is neither protected, nor considered worth protecting.

I contrast this view of human trafficking as an intersectional vulnerability with the currently prevailing approach to human trafficking, which is founded in criminal

¹ I use the terms 'prostitution' and 'sex work' throughout this thesis. Whereas I prefer the term sex work as it clearly identifies sex work as a form of labour, the term prostitution is sometimes more precise as it describes only a certain type of sex work. Sex work instead is not restricted to prostitution, but includes a range of occupations, from erotic dancer to actors in pornography to tantric massage or phone sex.

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law. This criminal law approach is focussed on protecting trafficked persons only in their role as victims. This 'victim protection' dimension creates the illusion that trafficking is an exceptional crime rather than the culmination of multiple discriminatory factors.

In reality, these exclusions affect all women, migrants and precarious workers, but they do so on a scale. Those who we deem trafficked are at the extreme end of this scale in all three categories and are thus rendered ultra-vulnerable to exploitation. However, in order to be a worthy victim of human trafficking, they also have to fulfil an idealised victim category, which is attainable only for a small number of exploited workers. I illustrate how the victim protection approach ignores the rights of trafficked persons as workers and as human beings and instead allows them protections only if they fulfil this arbitrary victim category of a 'real' victim of human trafficking.

Chapter 1: The Gendered Dimensions of Labour Law

1.1) Introduction

This chapter builds the core of the theoretical foundation of this thesis. The other theory chapters, as well as the final chapter of the thesis, build on the assumption that human trafficking is partly fostered by labour law that insufficiently protects certain groups of workers. Additionally, my alternative approach to human trafficking, which I detail in Chapter 9, builds on the hypothesis that labour law *could* provide the basis for empowering workers who deviate from the male white citizen norm and that such empowerment could benefit trafficked persons as some of *the most* disadvantaged workers.

This chapter discusses the gendered dimension of labour regulations and labour rights. It introduces the traditional foundation of labour law, the standard employment contract, and demonstrates the historical exclusion of female employees, both directly and indirectly, from a number of employment rights.

Further, it highlights the precariousness of labour relationships in part-time, short-term and hyper-flexible work, which do not fit the mould of the standard employment contract. While some authors view this precariousness of workers as a historically recent phenomenon,¹ I argue that not only 'non-standard' hours of work, but also certain under-regulated fields of work, particularly reproductive work, have always been highly precarious. Reproductive work and non-standard hours are both exemplary of female working relationships and thus demonstrate women's particular likelihood to engage in non-standard labour relations.²

¹ Maarten Keune, 'Trade Unions, Precarious Work and Dualisation in Europe' in Werner Eichhorst and Paul Marx (eds), *Non-Standard Employment in Post-Industrial Labour Markets: An Occupational Perspective* (Edward Elgar 2015); G and J Rodgers (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (International Institute for Labour Studies 1989).

² Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP 2009); Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Bloomsbury 2006); Sandra Fredman and Judy Fudge, 'The Contract of Employment and Gendered Work' in Mark Freedland (ed), *The Contract of Employment* (OUP 2016); Fiona Williams, 'Towards a Transnational Analysis of the Political Economy of Care' in Rianne

This chapter demonstrates that labour law today fails to ensure its protective goals, at least for some groups of workers, both regarding working time patterns and types of jobs. Both women, and - as the next chapter will show in greater detail - migrants disproportionately find themselves in labour situations in which the equalising effect of labour law on the bargaining powers of the parties involved is greatly diminished.

1.2) The Standard Employment Contract – An Exclusive Category

Traditionally, labour legislation is implemented to reduce the power imbalance between the employer and the employee. The employee is in a disadvantaged position vis-à-vis her employer, as she is reliant on her salary to ensure her livelihood.³ Additionally, there is inequality in the worker's and the employer's bargaining positions, as workers cannot demand too much when negotiating their conditions of labour, as they risk not getting hired at all.⁴ Furthermore, the worker is reliant on the 'continuity of employment and dignity at work for well-being and self-worth.'⁵

The development of labour rights and labour standards to redress this imbalance is based on the 'standard employment contract', a category that does not include all workers equally.⁶ Employment, which does not fit into the standard employment contract is considered atypical or, more recently, 'precarious'.⁷ In UK

Mahon and Fiona Robinson (eds), *Feminist Ethics and Social Policy: Towards a New Global Political Economy of Care* (2011).

³ Hugh Collins, KD Ewing and Aileen McColgan, *Labour Law* (CUP 2012) 97–100; Alan Hyde, 'What Is Labour Law?' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (OUP 2006).

⁴ Collins, Ewing and McColgan (n3) 99.

⁵ Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015) 193.

⁶ David and Margaret Collinson, 'Barriers to Employee Rights: Gender, Selection, and the Labor Process' (1996) 9 *Employee Responsibilities and Rights Journal* 229; Judy Fudge, Leah Vosko and Eric Tucker, 'The Legal Concept of Employment: Marginalizing Workers' (Law Commission of Canada 2002); Vosko (n2).

⁷ Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95; Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment & Society* 300; Rosemary Hunter, 'The

law, only employees enjoy full entitlements to sick pay and emergency time off, paid maternity, paternity, adoption or shared parental leave, minimum notice periods, unfair dismissal protection, the right to request flexible working and statutory redundancy pay,⁸ amongst others. Workers, which includes all short-term workers and those in freelance, zero-hours or 'as required' arrangements, are only entitled to the minimum wage, working time limitations, protection from unlawful deductions from wages, unlawful discrimination protection and discrimination against part-time workers.⁹

Additionally, some female-dominated jobs enjoy fewer protections: Live-in domestic workers, while classed as employees, do not have a limit on maximum weekly working hours,¹⁰ and au pairs are not classified as workers at all.¹¹ Equally, self-employed workers, as well as undocumented workers, do not usually enjoy any labour protections.¹² Thus, already at the definitional level not all workers enjoy equal protections.

1.1.1) Early Labour Protections for Women and the Development of Gendered Labour Norms

In fact labour legislation and labour protections are based upon and reproduce highly gendered norms. Some of the earliest women-focussed labour protections concerned night work and maternity leave, as well as protections for women against handling dangerous substances and lifting heavy loads, and the introduction of maximum weekly work hours.¹³ While these protections could be

Legal Production of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women and the New Economy* (Hart 2006); Einat Albin 'Human Rights and the Multiple Dimensions of Precarious Work' (2012/2013) 34 *Comparative Labor Law & Policy Journal* 193.

⁸ UK Employment Rights Act 1996, 230.

⁹ *ibid*; UK The Working Time Regulations 1998 (Terms and Conditions of Employment); Collins, Ewing and McColgan (n1) 224.

¹⁰ UK The Working Time Regulations 1998 (n9).

¹¹ Nicole Busch, 'When Work Doesn't Pay: Outcomes of a Deregulated Childcare Market and Au Pair Policy Vacuum in the UK' in Rosie Cox (ed), *Au Pairs' Lives in Global Context* (Palgrave Macmillan 2015).

¹² However, they may under certain circumstances be protected under anti-discrimination legislation. See Alan Bogg and Sarah Green, 'Rights Are Not Just for the Virtuous: What Houna Means for the Illegality Defence in the Discrimination Torts' (2015) 44 *Industrial Law Journal* 101.

¹³ Vosko (n2) 26–43.

perceived as positive, and were indeed often welcomed by female workers, they were also criticised by women's rights and labour rights activists at the time. For example German Marxist theorist, women's rights activist and politician Clara Zetkin's criticism was rooted in the fact that these measures created special conditions for women,¹⁴ which acted both as protections as well as restrictions for women and treated them differently from men.¹⁵ Some activists called for collective action for rest periods, maximum hours and minimum wages for all workers, both male and female, rather than special protections for women.¹⁶

Indeed, the protections for female workers were both a blessing and a curse, as they also prohibited women from night work and from competing with men on equal terms. Limitations on women's working hours were justified by their additional duties at home, whereas restrictions on jobs that were potentially damaging to their health were mainly concerned with their reproductive health.¹⁷ Thus, protections for women were focussed on protecting their capacity to continuously perform unpaid labour as wives and mothers, and, in line with nationalist sentiments at the turn of the twentieth century, protecting their capacity of producing and raising loyal citizens.¹⁸ Such an approach further cemented women's role as that of providing unpaid, 'reproductive' labour at home, rather than challenging the division of men and women's domestic duties.

¹⁴ *ibid* 85–86; Ulla Wikander, 'Some "Kept the Flag of Feminist Demands Waving": Debates at International Congresses on Protecting Women Workers' in Ulla Wikander, Alice Kessler-Harris, Jane E. Lewis (eds) *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995) 34; Valerie Bryson, *Feminist Political Theory: An Introduction* (Palgrave Macmillan 2003) 108–112.

¹⁵ Wikander (n14); Susan Lehrer, *Origins of Protective Labor Legislation for Women, 1905-1925* (SUNY Press 1987).

¹⁶ Vosko (n58) 46–50.

¹⁷ Efi Avdela, "'To the Most Weak and Needy": Women's Protective Labor Legislation in Greece' in Ulla Wikander, Alice Kessler-Harris, Jane E. Lewis (eds) *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995) 296, 309; Margarete Grandner, 'Special Labor Protection for Women in Austria 1860-1918' in Ulla Wikander, Alice Kessler-Harris, Jane E. Lewis (eds) *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995) 155–156; Alice Kessler-Harris, 'The Paradox of Motherhood: Night Work Restrictions in the United States' in Ulla Wikander, Alice Kessler-Harris, Jane E. Lewis (eds) *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995).

¹⁸ Vosko (n2) 47; See also Yuval-Davis, Nira, 'Women and the Biological Reproduction of "the Nation".' (1996) 19 *Women's Studies International Forum*.

Equally, while some theorists tried to highlight the importance of reproductive labour for the economy,¹⁹ these considerations neither reached mainstream debates, nor resulted in comprehensive regulation of paid or unpaid reproductive labour in ways analogous to the regulation of 'productive' labour.

Instead, the labour protections for women only applied to jobs in the public sphere, whereas women who worked in family-owned workplaces, in private households or performed piecework at home were excluded from labour protections and continue to do so today.²⁰ Women who were in the position of performing unpaid reproductive labour at home, who were working for their husband or father in the family business, or who were working for another man and his family as domestic workers in his private household were not protected by these early restrictions on women's labour.²¹ Thus, women working in the private sphere, often living at their place of work, sometimes without much contact with the outside world, did not enjoy limitations to their working hours or other key workers' rights, even though they may have been particularly vulnerable. Thus we can assume that these restrictions were not primarily about protecting women at work, but about protecting women in the public sphere in a manner that pushed them back into the private sphere.

Such an approach was linked to the idea of the private sphere as a safe haven for women, in which a male guardian protected them from the dangers of the outside world. For example in the case of night work, the presence of a male family member during the same shift could lift women's exclusion from working past a certain hour.²² While the majority of violence against women occurs in the supposed safe haven of private households and at the hands of men they are in intimate or family relationships with, there was no interference in the private sphere through labour regulations.²³ This lack of interference ties in with ideas of

¹⁹ Sandra Fredman and Judy Fudge (n2); Sandra Fredman, *Women and the Law* (OUP 1998); Vosko (n2).

²⁰ Vosko (n2) 67-69; Fredman (n19).

²¹ *ibid.*

²² Vosko (n2) 89, 96.

²³ Sally F Goldfarb, 'Violence against Women and the Persistence of Privacy' (2000) 61 *Ohio State Law Journal* 1; Jennifer Koshan, 'Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women' in Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997); Rene I Augustine, 'Marriage: The Safe Haven for Rapists' (1990) 29 *Journal of*

women being safe as long as they stayed in their homes and the nationalistic idea of the 'wider home' of one's community and one's country.²⁴ Women's rejection of these flawed concepts of safety and women's drive for independence has been considered deviant throughout history.²⁵ Independent women's 'honour' was regularly challenged and independent women were portrayed as synonymous with 'fallen women'.²⁶

Thus unsurprisingly women's paid, underpaid and unpaid work in the private sphere simply was of no concern to governments and trade unions.²⁷ Instead, women's labour was only restricted in places in which they were in direct competition with men's labour and where protecting women also indirectly protected men's interests.²⁸ In this, restrictions on women's labour protected patriarchal structures through the protection of women's reproductive capabilities and by giving them time to perform reproductive work at home.²⁹ Furthermore, by creating limitations on women's working hours and by arguing for men's need to earn for his family, such restrictions also strengthened men's bargaining power vis-à-vis employers.³⁰

Family Law 559; Nira Yuval-Davis, Floya Anthias and Eleonore Kofman, 'Secure Borders and Safe Haven and the Gendered Politics of Belonging: Beyond Social Cohesion' (2005) 28 *Ethnic and Racial Studies* 513.

²⁴ Yuval-Davis, Anthias and Kofman (n23); Joshua M Price, 'The Apotheosis of Home and the Maintenance of Spaces of Violence' (2002) 17 *Hypatia* 39; Sita Ranchod-Nilsson and Mary Ann Tetreault, *Women, States and Nationalism: At Home in the Nation?* (Routledge 2003); Iris Marion Young, 'House and Home: Feminist Variations on a Theme' in Constance L Mui and Julien S Murphy (eds), *Gender Struggles* (Rowman & Littlefield 2002).

²⁵ Martha Vicinus, *Independent Women: Work and Community for Single Women, 1850-1920* (University of Chicago Press 1988); Regina Austin, 'Black Women, Sisterhood, and the Difference/Deviance Divide' (1991) 26 *New England Law Review* 877; Marvin D Krohn, Alan J Lizotte and Gina Penly Hall, *Handbook on Crime and Deviance* (Springer 2010).

²⁶ See, for example Jo Doezema, *Sex Slaves and Discourse Masters* (Zed Books 2010).; Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books 2007).

²⁷ Vosko (n2); Fudge and Owens (n2); Fredman (n19).

²⁸ Vosko (n2) 33; Fredman (n19) 77.

²⁹ Vosko (n2) 76–79; Jane Lewis and Sonya O Rose, "'Let England Blush": Protective Labor Legislation, 1820-1914', in Ulla Wikander, Alice Kessler-Harris, Jane E. Lewis (eds) *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995) 94; Avdela (n 17) 296.

³⁰ Vosko (n2) 34–35.

With regard to minimum wage levels, the focus on women's requirements to fulfil unpaid labour at home ironically did not increase their bargaining power for higher wages. On the contrary, the focus on women's reproductive work as their natural (unpaid) role helped establish the category of the male breadwinner, who needed to earn enough to provide for his family.³¹

Paying significantly less to women was the norm, which applied both to unmarried women, because they were presumed to be in a state of full-time labour only temporarily, and to married women, who were supposedly only supplementing their husband's income. At the same time, men's salary was not curtailed dependent on whether or not they supported a family, thus single men were not by default paid less than married men or fathers.³²

It is noteworthy that in the early twentieth century regulations suggesting paying women half of what men earned for the same labour still constituted an improvement over previous wage gaps between men and women and were thus welcomed by many women workers at the time.³³ However, the emergence of labour protections still contributed to the creation of a gendered division of labour in which only men's work in the public sphere counted as real work and women's work, both in public and in the home, was considered to be less worthy. Together with exclusions from certain supposedly more dangerous jobs and with restrictions on their working hours, the devaluing of women's work effectively excluded women from labour protections, which were built on a male norm.

Difference in men's and women's salaries, coupled with the assumption that women need less pay since they can rely on their breadwinning husband persists even today, despite equal pay initiatives and efforts to close the 'gender pay-

³¹ *ibid* 73–76; Fredman and Fudge (n2); Renate Howe, 'A Paradise for Working Men, But Not Working Women: Women's Wagework and Protective Legislation in Australia, 1890-1914' in Ulla Wikander, Alice Kessler-Harris, Jane E. Lewis (eds) *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995).

³² Judy Fudge and Rosemary Owens, 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women and the New Economy* (Hart 2006) 12; Vosko (n 2) 177.

³³ Vosko (n2) 74–76.

gap'.³⁴ Again, the legacy of the presumed temporariness of women's work means that women are perceived as needing less remuneration, as well as fewer protections since they could always leave work to return to their 'natural' sphere of unpaid domestic labour.³⁵ Women's career advancements and pay increases are often hindered by the assumption that they do not 'need' the money, as they do not need to support their family. If women *do* have a family, they are seen as primarily committed to their family duties rather than their work.³⁶ Even with regard to high profile positions, women are in a disadvantaged bargaining position, as they are sometimes penalised financially for having a high-earning partner, or for their presumed domestic duties.³⁷

The lower wages for women and the assumption of women's natural surroundings to be in the private sphere further cemented the already existing gender contract. The gender contract assumed on the one hand 'a male breadwinner pursuing his occupation and employment freely in the public sphere, with access to a full-time continuous employment relationship with a single employer and in receipt of a family wage. On the other hand, it assumed a female caregiver performing unpaid work necessary for social reproduction, principally in the context of a heterosexual household.'³⁸ This resulted in an expectation for women to perform unpaid, unrecognised labour at home and for their work and

³⁴ Andrew Chamberlain, 'Demystifying the Gender Pay Gap: Evidence from Glassdoor Salary Data' (23 March 2016) <<http://www.glassdoor.com/research/studies/gender-pay-gap/>>; Dirk Antonczyk, Bernd Fitzenberger and Katrin Sommerfeld, 'Rising Wage Inequality, the Decline of Collective Bargaining, and the Gender Wage Gap' (2010) 17 *Labour Economics* 835; Francine D Blau and Lawrence M Kahn, 'The Gender Wage Gap: Extent, Trends and Explanations' (National Bureau of Economic Research 2016) Working Paper No. 21913 <<http://www.nber.org/papers/w21913>>.

³⁵ See e.g. Wilma Dunaway, *Gendered Commodity Chains* (Stanford UP 2013); Fredman and Fudge (n2).

³⁶ Nanneke Redclift and Thea Sinclair (eds) *Working Women: International Perspectives on Labour and Gender Ideology* (Routledge 1991).

³⁷ Richard Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)' (2001) 28 *Journal of Law and Society* 520, 530; Lisa Webley and Liz Duff, 'Women Solicitors as a Barometer for Problems within the Legal Profession – Time to Put Values before Profits?' (2007) 34 *Journal of Law and Society* 374, 376–377; Claire C Miller, 'Pay Gap Is Because of Gender, Not Jobs' *The New York Times* (23 April 2014) <<http://www.nytimes.com/2014/04/24/upshot/the-pay-gap-is-because-of-gender-not-jobs.html>>; 'Diskriminierung: "Frauen Wird Der Gut Verdienende Partner Vorgehalten"' *Die Zeit* (23 June 2015) <<http://www.zeit.de/karriere/beruf/2015-06/diskriminierung-frauen-fuehrungsposition>>.

³⁸ Vosko (n2) 35–36; see also Carole Pateman, *The Sexual Contract* (Stanford UP 1988); Jacqueline O'Reilly and Claudia Spee, 'The Future Regulation of Work and Welfare: Time for a Revised Social and Gender Contract?' (1998) 4 *European Journal of Industrial Relations* 259.

wage-earning in the real labour market being more restricted and less remunerated than men's.³⁹ This division also leads to an assumption that women are less dedicated to their work and arrange their – often part-time- work around their domestic life, rather than their domestic life around their work, contrary to research, which shows that in fact women do arrange their domestic life around their work.⁴⁰

Again, this legacy carries on until today – domestic chores are considered to naturally be a woman's work and even in families in which women participate in the 'productive' labour market to the same degree as their partner, this usually results in either a double-shift for the female partner or an outsourcing of domestic duties to employees, usually women, often migrants, rather than a true shift in the gender contract, with both men and women participating equally in the public and the private sphere.⁴¹

1.1.2) The Standard Employment Contract – a Male Norm

Traditional labour legislation originally only applied to 'standard employment', which is considered to be full-time employment with a single employer, for an indefinite duration,⁴² and it traditionally only applied to jobs that fell into the public sphere or primary sector, thus 'labour law' had a specific field of application.⁴³ This field of application excluded women performing work in private households and indeed relied on women's unpaid reproductive labour in order for men to be able to make claims for higher wages, which would support both themselves and their families.⁴⁴

³⁹ Redclift and Sinclair (n36); Antonczyk, Fitzenberger and Sommerfeld (n34).

⁴⁰ Redclift and Sinclair (n36) 18.

⁴¹ Agustín (n26); Rachel L Cohen and others, 'The Body/Sex/Work Nexus: A Critical Perspective on Body Work and Sex Work', *Body/Sex/Work* (Palgrave Macmillan 2013); Irene Gedalof, 'Birth, Belonging and Migrant Mothers: Narratives of Reproduction in Feminist Migration Studies' (2009) 93 *Feminist Review* 81.

⁴² Fudge (n7) 98.

⁴³ Costello (n5) 192.

⁴⁴ Vosko (n2).

Thus, the predominantly male employees in standard employment contracts could rely on labour law for a range of entitlements, including pensions and unemployment insurance,⁴⁵ as well as minimum wages, maximum hours, holiday entitlements and the right to collective bargaining. Together with the standard employment contract's restriction to the public sphere, it was further limited to full-time work.⁴⁶

Since then there have been equality measures, most recently in the UK Equality Act 2010,⁴⁷ technically ensuring women's equal wages for the same labour or labour of equal value.⁴⁸ However, this does not make up for women's 'second shift' of unpaid labour at home and fails to take into account decades of women's exclusion from jobs in the primary employment sector. This exclusion has first created and then maintained the assumption that female workers possess fewer 'skills' than men or voluntarily cluster in sectors which offer lower pay and less labour protections, ignoring the restrictions on women's labour which have shaped women's access to certain jobs over others.⁴⁹

As women's 'natural' role is seen to be in the private sphere, women's work, not only their unpaid work, but also their paid work, is often also within the private sphere. Even today, women, more often than men, are dominant in caring, domestic help and other occupations, which do not enjoy the labour protections of the public sphere and are often built on precarious contracts, unstable hours and hyper-flexibility.⁵⁰ As women's work is seen as supplementary to a man's income,⁵¹ this precariousness was historically not seen as problematic. Additionally, the skills required for traditional 'women's work' are considered to be

⁴⁵ Fudge (n7) 98.

⁴⁶ Vosko (n2).

⁴⁷ UK Equality Act 2010.

⁴⁸ Sandra Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193; Linda Hantrais, 'From Equal Pay to Reconciliation of Employment and Family Life' in Linda Hantrais and Jo Campling (eds), *Gendered Policies in Europe* (Palgrave Macmillan 2000)

⁴⁹ Redclift and Sinclair (n36); Mark Freedland, 'The Segmentation of Workers' Rights and the Legal Analysis of Personal Work Relations: Redefining a Problem,' (2014) 36 *Comparative Labor Law & Policy Journal* 241.

⁵⁰ International Labour Organisation, 'Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection' (2013).

⁵¹ Agustín (n38).

inherent female traits, rather than learned or acquired skills,⁵² rendering women's labour 'unskilled' and therefore of lower value.⁵³

This view of women's work as supplementary indicates not only a male norm, but also a white, middle-class norm, as working class families often relied on two incomes despite different gender roles.⁵⁴ Further, in post-war Britain, white middle-class women were supposed to stay at home and fulfil their roles as mothers of the nation, whereas Afro-Caribbean women were encouraged to take on low-paid care work or domestic work, while 'outsourcing' their childcare to their families back in the Caribbean.⁵⁵

Thus, labour legislation was founded on a male, white citizen who was a directly employed worker in full-time employment. Nowadays, the advantages of the standard employment contract have gradually - and sometimes reluctantly - been extended to women, at least in areas where they perform the same or comparable work to men and for similar hours.⁵⁶ Equally, there have been attempts to extend workers' rights to part-time workers under anti-discrimination lawsuits. Part-time workers have often been successful in terms of securing equal pay per hour for the same labour as full-time workers.⁵⁷ However, this often amounts to 'formal rather than substantive equality',⁵⁸ and has often only affected pay, not an extension of other labour protections.

Workers with part-time or short-term contracts often do not enjoy the same benefits as full-time employees when it comes to flexible working, unfair dismissal, redundancy pay and pension entitlements, as well as access to maternity or parental leave.⁵⁹ These exclusions disproportionately affect women as

⁵² Redclift and Sinclair (n36); Cohen and others (n41).

⁵³ Fudge and Owens (n32) 12; Fredman and Fudge (n16) 232.

⁵⁴ Redclift and Sinclair (n36).

⁵⁵ *ibid.*

⁵⁶ Freedland (n49); Hartmann, Heidi I and Donald J Treiman (eds), *Women, Work, and Wages: Equal Pay for Jobs of Equal Value* (1981).

⁵⁷ Nicole Busby, "'The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000" Righting a Wrong or Out of Proportion?' (2001) *Journal of Business Law* 344.

⁵⁸ *ibid.*

⁵⁹ For example in the UK, provisions under the 'Employment Rights Act 1996', the 'Maternity and Parental Leave etc. Regulations 1999' and the 'Children and Families Act 2014' only apply to employees.

their unpaid, unrecognised domestic duties make them more likely to be in part-time or short-term employment. Thus, the protections of the standard employment contract apply only to those women who are able to meet the male norm of employee, but not to those in precarious casual work relations.

Furthermore, women's and minorities' access to labour rights has been based on equal treatment⁶⁰ adopting the male norm as the comparator for that treatment and thus the granting of rights. Particularly in areas of work that are female-dominated, there is often no male full-time worker who enjoys better pay or better working conditions to compare oneself to.⁶¹ Thus, workers in sectors, which have been traditionally female-dominated continue to suffer from lesser access to labour rights and meaningful labour protections (such as *employee* protections), despite non-discrimination legislation.⁶² This has led some, such as Leah Vosko, to argue for fundamental minimum labour standards instead.⁶³

1.2) The Standard Employment Contract Today – a Norm For All or a Disappearing Norm?

While the full range of benefits of the standard employment contract has never been completely extended to all workers, particularly not to women working in the private sphere, the standard employment contract is also considered to be a disappearing norm itself. Some scholars, including Mark Freedland and Judy Fudge, have argued that labour rights are on the decline through a 'segmentation of workers' rights' (Freedland) or an increased 'precariousness of labour relations' (Fudge).⁶⁴

In the context of such limitations on rights to certain groups of workers, Freedland criticises what he calls 'the segmentation of labour rights'. This segmentation

⁶⁰ Katherine VW Stone, 'The New Face of Employment Discrimination' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy* (Hart 2006); Sandra Fredman and E Szyszak, 'The Interaction of Race and Gender', *Discrimination: The Limits of Law* (1993); Collinson and Collinson (n6).

⁶¹ Sandra Fredman, *Discrimination Law* (OUP 2011).

⁶² *ibid*; Stone (n60).

⁶³ Vosko (n2).

⁶⁴ Freedland (n49); Encarnación Gutiérrez-Rodríguez, 'The Precarity of Feminisation' (2013) 27 *International Journal of Politics, Culture, and Society* 191; Anderson (n 7).

describes the favourable and protected conditions of employment for some groups of workers and the exclusion of other workers from these same rights.⁶⁵ To Freedland the segmentation of workers' rights is a recent phenomenon, which has increased over the last twenty years or so.⁶⁶ He argues that the segmentation of workers' rights started in the 1990's through 'the rapid growth of part-time employment, short-fixed-term employment, temporary agency employment, and of employment on the basis of variable hours and variable remuneration'.⁶⁷ All these forms of employment come with fewer workers' rights than those granted to full-time, directly employed and permanent employees, who are the beneficiaries of the standard employment contract. Indeed, in many countries, including the UK, most employment rights are only granted to "employees", defined as working under contracts of employment, while some other statutorily conferred employment rights are accorded to a wider category of "workers" working under "workers' contracts."⁶⁸

Similarly, Judy Fudge claims that deregulation in recent years has resulted in a 'downgrading for new jobs for all labour force participants' and a decline in 'union density [which] is linked to increasing labour market inequality'.⁶⁹ At the same time as union participation decreases, the collective bargaining of shrinking trade unions has created advantageous employment conditions for some workers, who are still unionised, over others, who are not. Freedland argues that labour law often endorses such different conditions for different groups of workers through a reinforcement of collective bargaining processes and the adoption of their outcomes for the workers in question, resulting in the exclusion of other workers.⁷⁰ Those workers, who are not part of unions or are employed through intermediaries, have worse working conditions, shorter contracts and fewer protections against dismissal.⁷¹ Furthermore, the protections for unionised workers increase incentives for employers to employ workers indirectly through

⁶⁵ Freedland (n49).

⁶⁶ *ibid* 245.

⁶⁷ *ibid* 246.

⁶⁸ *ibid* 243.

⁶⁹ Judy Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37 *Dalhousie Law Journal* 601, 608.

⁷⁰ Freedland (n49) 245.

⁷¹ Stefanie Gundert and Christian Hohendanner, 'Do Fixed-Term and Temporary Agency Workers Feel Socially Excluded? Labour Market Integration and Social Well-Being in Germany' (2014) 57 *Acta Sociologica* 135.

agencies. Whereas agency workers are not always cheaper for employers, they do not have the same rights and protections as direct employees and may face difficulties in joining unions and engaging in collective action.⁷²

1.2.1) Work Outside the Standard Employment Contract

Other labour agreements in which workers enjoy few labour rights, such as zero hour contracts, or no labour rights at all, such as false or bogus self-employment and sham contracts have increased in recent years.⁷³ Bogus self-employment is also referred to as sham contracts. Both phenomena describe cases in which workers are de facto working for a single employer, but do so on a pretend freelance or self-employed basis, therefore being excluded from all benefits normally attached to employee status, ranging from sick pay and holiday pay to social security and pension contributions.⁷⁴ Additionally, employers are able to shift the risk attached to fluctuations in supply and demand – and, in some industries, the risk of reparation payments – to the pretend self-employed worker, as they only contract for the workers services as and when they need them.⁷⁵ This creates additional precariousness for workers, as they have no guaranteed income. Both the UK and Germany have made efforts to prohibit false self-employment.

⁷² In Germany, agency-workers are sometimes legally precluded from joining industry-specific unions, see e.g. Stefanie Gundert and Christian Hohendanner, 'Do Fixed-Term and Temporary Agency Workers Feel Socially Excluded? Labour Market Integration and Social Well-Being in Germany' (2014) 57 *Acta Sociologica* 135.

⁷³ René Böheim and Ulrike Mühlberger, 'Dependent Forms of Self-Employment in the UK: Identifying Workers on the Border between Employment and Self-Employment' (2006) Vienna University of Economics and Business, Department of Economics Working Paper ; Felix Behling and Mark Harvey, 'The Evolution of False Self-Employment in the British Construction Industry: A Neo-Polanyian Account of Labour Market Formation' (2015) 29(6) *Work, Employment & Society* 969; Werner Eichhorst and Paul Marx, *Non-Standard Employment in Post-Industrial Labour Markets: An Occupational Perspective* (Edward Elgar 2015).

⁷⁴ Fredman and Fudge (n2) 243; Claire Adams, 'Sham Contracting Rife in Sex Industry' (2014) *Green Left Weekly* 11; Behling and Harvey (n 73); Sarah O'Connor, "'Bogus" Self-Employment Deprives Workers of Their Rights' *Financial Times* (19 August 2015) <<http://www.ft.com/cms/s/0/e6231ad6-45a6-11e5-af2f-4d6e0e5eda22.html#axzz3jNaL4lfq>>.

⁷⁵ Anderson (n7) 308.

In Germany, this has taken the shape of demanding proof from workers that they have a number of different employers in order to maintain self-employed status.⁷⁶ However, this legislation, while intended to protect workers and establish real employment contracts, in fact does not put the burden on employers to regularly employ the workers whose 'independent' services they have been purchasing. Instead, it again places the burden on the person in this irregular type of employment, as they are the ones who have to prove they have additional clients or cease working in false self-employment. The amount of effort to curb pretend self-employment also depend on the industry, with sex work being one of the notable exceptions, as I will show in more detail in chapter 8.

Equally, in the UK employers may be retroactively liable to pay tax and employee entitlements such as holiday pay and sick pay, if a worker is found to be a worker or an employee rather than self-employed.⁷⁷ However, precarious workers, particularly migrants, may be reluctant to challenge their self-employed status. Even if a court identifies them as employees rather than self-employed and holds their employer accountable, this does not necessarily result in a permanent employment contract with their current employer for them. Therefore, it may well be in the best interest of precarious workers to disguise their false self-employment and continue to carry the economic risks of such bogus self-employment, rather than to risk having no job at all. Zero hour contracts, on the other hand, are an ultra-casual work arrangement, in which workers have no fixed hours and therefore no guaranteed levels of income. This type of contract has been increasing in the United Kingdom, with limited considerations for its implications for workers' rights by the Government.⁷⁸

Both Fudge and Freedland identify a connection between the increase in precarious employment and such new types of work arrangements. In this, work arrangements that deviate from the standard employment contract, the 'so-called "atypical forms of employment" – part-time, short-fixed-term, via an intermediary agency, casual in the sense of not being for regular or guaranteed hours of work,

⁷⁶ Horst Henrici, *Der rechtliche Schutz für Scheinselbständige: eine Untersuchung unter besonderer Berücksichtigung des Verlagsbereiches* (Driesen 2002); Gregor Thüsing, *Scheinselbständigkeit Im Internationalen Vergleich* (Peter Lang 2011).

⁷⁷ UK Employment Rights Act 1996

⁷⁸ Freedland (n49) 255.

being on a freelance, or self-employed basis' result in workers enjoying less protections and labour rights than directly employed full time workers.⁷⁹ Whereas non-standard employment relationships have featured in labour markets for a long time, they have become more pervasive in recent years, resulting in a decrease in labour rights and an increase in insecurity for all workers.⁸⁰

1.2.2) Feminised Labour and the Decline of the Standard Employment Contract

The increase in labour, which is not fully protected by labour law is indeed worrisome, but I question whether 'segmentation of labour rights' or the 'increasing precariousness of labour' accurately describe this development. The increase of part-time and hyper-flexible employment coincides with increases in women's labour force participation in the public sphere and with women's struggle for equal rights and equal pay in labour relations,⁸¹ through anti-discrimination law suits.

In the private sphere, female migrants, who are already burdened with multiple forms of discrimination, took on work in the traditionally 'feminised labour sectors' of care work and domestic work.⁸² Feminised labour describes occupations, which have a mostly female workforce, and often suffer from low wages, low status and low upward mobility. Jobs, which have not always been female-dominated, often show a decrease in labour protections upon feminisation.⁸³ Particularly in feminised work in the service industry and the private sphere, workers suffer from isolation and are unable to engage in collective bargaining. Whereas some male-dominated spheres such as construction and agricultural work also suffer from isolation and low status, there are nonetheless unions

⁷⁹ *ibid* 248; Fudge (n7) 99.

⁸⁰ Fudge (n7) 99; Freedland (n49) 248.

⁸¹ Helma Lutz, 'Gender in the Migratory Process' (2010) 36 *Journal of Ethnic and Migration Studies* 1647.

⁸² Barbara Ehrenreich and Arlie Russell Hochschild (eds), *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (Holt 2004) 3; Mary Romero, *Maid in the USA: 10th Anniversary Edition* (Routledge 2002).

⁸³ Lutz (n81) 1652.

taking on lobbying work for exploited workers in these fields.⁸⁴ Maarten Keune even argues that it may be in the best interest for unions to lobby on behalf of precarious migrant workers, as their lower wages and higher retention rates may otherwise make those workers more attractive to employers than workers in standard employment contracts.⁸⁵ Increasing numbers of highly precarious workers also reduce potential union membership and therefore decrease union's lobbying power and ultimately all workers' job security,⁸⁶ as agency workers are often unable to join unions and short-term workers have no incentive in doing so.

However, feminised labour sectors are less frequently unionised, as trade unions have traditionally been male-dominated and continue to operate in patterns, which often exclude women workers, such as through after-work meetings.⁸⁷ Even more so, for jobs that have always been female-dominated, the gender divide between the public and the private sphere continues to shape what working conditions can be interfered with,⁸⁸ as well as which jobs are even considered to be work.⁸⁹ Unsurprisingly, care work and domestic work, as well as sex work, none of which are considered to be on an equal footing with 'normal' labour, are still amongst the most marginalised occupations today.⁹⁰

Thus, the inability of workers to meet the norm of a male, white citizen worker with a full-time job and no domestic duties coincides with their inability to access labour rights – e.g. as their jobs are too isolated to lend themselves to collective bargaining or too female-dominated to make non-discrimination claims on the basis of gender – or labour protections, which are usually only granted on the basis of employee status. I would therefore argue that the current limits of labour rights do not constitute a 'segmentation of labour rights' or 'atypical

⁸⁴ Bridget Anderson, *Doing the Dirty Work?: The Global Politics of Domestic Labour* (Palgrave Macmillan 2000).

⁸⁵ Keune (n1); Anderson (n7); Fudge (n7).

⁸⁶ Keune (n1).

⁸⁷ Vosko (n2); Redclift and Sinclair (n36).

⁸⁸ Lutz (n81) 1652.

⁸⁹ Carol Wolkowitz and others (eds), *Body/Sex/Work: Intimate, Embodied and Sexualised Labour* (Palgrave Macmillan 2013); Teela Sanders and Kate Hardy, 'Sex Work: The Ultimate Precarious Labour?' (2013) 93 *Criminal Justice Matters* 16.

⁹⁰ Anderson (n84); Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 *Comparative Labor Law & Policy Journal* 133.

employment.⁹¹ What has been deemed atypical is only atypical from a male perspective, as women's labour has always deviated from the standard and thus enjoyed less labour protections.

Instead, the existence of work outside of labour protections is an on-going failure to extend labour rights to already marginalised groups, not only women, but also migrant workers and all those who cannot access the norm of the skilled, full-time, directly employed worker. In fact, those workers' existing marginalisation as women, as people of colour, as migrants, as disabled or as unpaid carers for children or elderly already act as limitations on the jobs they can access, because they deviate from the male norm. These limitations further affect their working hours, the types of contract available to them and the types of sectors they can engage in and often are the very reasons for which workers are excluded from full-scale standard employment contracts. Thus, the already marginalised workers experience further marginalisation through their lack of access to both labour rights and labour protections. This is not a new development.

Instead the recognition of increasing numbers of workers who fall outside the scope of the standard employment contract might demonstrate a shift in perspective: the labour of marginalised workers is seen as worth protecting, at least on a theoretical level. This could be attributed to the increasing visibility of women in the work force and the rejection of inequalities such as the gender pay gap as given or natural.⁹² The more likely explanation is instead that men's part time or atypical employment and other 'feminised' work patterns has increased in the last four decades, turning some of the issues of part time and other 'atypical' workers into concerns for men as well.⁹³ Thus, it can be said that precarious labour has only started to become a concern since men are increasingly affected by it. Laura Fantone attests that increased precariousness has been 'discussed

⁹¹ Rodgers and Rodgers (n1); Efrén Cordova, 'From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations' (1986) 125 *International Labour Review* 641.

⁹² For a discussion of the 'human capital' theory of gendered differences, see e.g. Webley and Duff (n37) 377.

⁹³ Louisa Blackwell, 'Occupational Sex Segregation and Part-Time Work in Modern Britain' (2001) 8 *Gender, Work & Organization* 146.

only at the moment when the western, male worker began feeling the negative effects of the new, post-industrial, flexible job market.⁹⁴

1.2.3) Labour Law's Role in Creating and Maintaining Precarious Employment

Despite my criticism of the concepts of 'segmentation of workers' rights' and increased 'precariousness of labour', the key concerns behind these concepts are highly relevant. The fact that some groups of workers are placed into segments of the workforce, which enjoy reduced labour rights or no labour rights at all, is obviously problematic.

As Freedland points out, labour law itself could have a corrective role when it comes to precarious work. Indeed, Freedland argues that criticising employment law systems, which fall short of providing such corrective measures underestimates the contribution labour law systems have in actually creating precarious conditions.⁹⁵ According to him, employment law systems do not simply fail to counteract rights-exclusionary practices by employers. Instead, entire labour law systems are framed in ways that make employers' choices to create 'atypical' work arrangements possible and beneficial for them, as they can avoid workers' rights.⁹⁶ Using the example of UK legislation in the face of EU efforts to combat 'atypical' work arrangements, in the 1990s and 2000s, Freedland argues that the UK is a prime example of such a systematic segmentation of labour rights:

As has been very fully demonstrated in existing writings, the legislation purporting to implement those already quite strongly qualified [EU] measures in the United Kingdom became steadily more minimalist and evasive in character, so much so that we can fairly [...] regard the resulting body of work-type equality legislation in the United Kingdom as having a generally regressive character.⁹⁷

⁹⁴ Laura Fantone, 'Precarious Changes: Gender and Generational Politics in Contemporary Italy' (2007) 87 *Feminist Review* 5.

⁹⁵ Freedland (n49) 249.

⁹⁶ *ibid.*

⁹⁷ *ibid* 254.

Thus, while exclusions in labour legislation are by no means new, as the case of the standard employment contract illustrates,⁹⁸ labour law regimes have opted to water down the rights granted in the standard employment contract, rather than to extend them to all workers.⁹⁹ What can be seen as an erosion of workers' rights for all workers, with ever decreasing baselines for labour standards, also has damaging effects on those areas of work which have always been precarious.¹⁰⁰

1.3) 'Not a real job' – Highly Precarious Work, Women's Work and Exclusion from Labour Rights

As already discussed, women-dominated work spheres,¹⁰¹ particularly those that have not recently been 'feminised', but have traditionally been considered women's work (paid or unpaid), such as domestic work and care work, are often excluded from full labour protections.¹⁰² The areas of care work and domestic work either have exceptions to or lack enforceability of rest periods and maximum working hours. Sex work is an example of a type of work which enjoys no labour protections at all (at least in most countries).¹⁰³ This exclusion from labour protections can be explained with the continuing notion that women's work is not *real work*. Traditional notions of work focus on work as an 'impersonal activity, with bodies, emotion, sexuality and even one's physical attractiveness

⁹⁸ Vosko (n2) 25.

⁹⁹ Antonczyk, Fitzenberger and Sommerfeld (n 34); Adelle Blackett, 'Emancipation in the Idea of Labour Law', *The Idea of Labour Law* (OUP 2011); Keune (n1); Nicolas Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' *Comparative Labor Law & Policy Journal*; Rodgers and Rodgers (n1).

¹⁰⁰ Fudge (n7); Anderson (n7); Ragnhild Aslaug Sollund, *Transnational Migration, Gender and Rights* (Emerald Group 2012).

¹⁰¹ Juliet Webster, *Shaping Women's Work: Gender, Employment and Information Technology* (Routledge 2014); HI Hartmann and BF Reskin, *Women's Work, Men's Work: Sex Segregation on the Job* (National Academies Press 1986); Margarita Torre, 'The Scarring Effect of "Women's Work": The Determinants of Women's Attrition from Male-Dominated Occupations' (2014) 93(1) *Social Forces* 1.

¹⁰² Anderson (n84); Deirdre McCann, 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms' [2012] *Comparative Labor Law & Policy Journal* 167; Gutiérrez-Rodríguez (n 64); Vanessa H May, *Unprotected Labor: Household Workers, Politics, and Middle-Class Reform in New York, 1870-1940* (UNC Press 2011).

¹⁰³ An exception to this are countries like Germany, which have regulated sex work as work and where sex workers can therefore theoretically be employees (see Chapter 8).

restricted to the province of private, family life and associated with women rather than men.¹⁰⁴ Additionally, as women have entered the 'real' labour force of employment in the public sphere, those who remain engaged in traditional female labour continue to be seen as outside of the 'normal' labour force. This separation is amplified by the fact that traditional women's labour is performed either by women or racialised, often migrant, minorities, or women migrants, who experience intersectional exclusions.¹⁰⁵ The ultra-feminisation of this labour force 'contributes to the marginalization of this work and increases workers' vulnerability.'¹⁰⁶

1.4) Conclusion

This chapter has demonstrated that labour law has mostly benefitted workers who can be classified as employees vis-à-vis their employers, but has done less for workers who find themselves in non-standard types of work. For women in particular so-called atypical work has been the norm and it could be argued that the standard employment contract was never meant for them. Recent concerns about the situation of atypical or precarious workers are thus welcome because they do affect women and migrants, but for both groups there is no precaritisation of labour. Their work has always been precarious.

Particularly in the reproductive labour sphere, there is not only a need to acknowledge the precarious working conditions that, if they affect already vulnerable workers, may amount to human trafficking. Additionally, the effects of the devaluation of women's work, particularly women's so-called reproductive work, have resulted in these types of work being classified as 'not really work' and have further worsened women's ability to access standard labour protections. In this sex work is the type of work that seems furthest removed from

¹⁰⁴ Cohen and others (n41) 8; Debra Gimlin, 'What Is "Body Work"? A Review of the Literature' (2007) 1 *Sociology Compass* 353.

¹⁰⁵ Fiona Williams, 'Towards a Transnational Analysis of the Political Economy of Care' in Rianne Mahon and Fiona Robinson (eds), *Feminist Ethics and Social Policy: Towards a New Global Political Economy of Care* (2011) 21, 25; Floya Anthias, Maria Kontos and Mirjana Morokvasic-Müller (eds), *Paradoxes of Integration: Female Migrants in Europe* (2012).

¹⁰⁶ Cohen and others (n41).

Chapter 1: The Gendered Dimensions of Labour Law

being classified as labour, and thus sex workers are least likely to be able to claim labour rights and be protected by labour standards, as I will show in Chapter 3.

As the following two chapters will show, the marginalisation caused by gender in the labour market is amplified both through the exclusions caused by migrant status, particularly for migrant women, who often find themselves in precarious reproductive labour, and the particular exclusions faced by sex workers. Sex workers' exclusions are caused both by stigma in the sex industry and the complete denial of workers' rights in framing sex work as either immoral or a transaction that does not constitute work, or both.

Chapter 2: Migration, Gender and Precariousness

2.1) Introduction

Following the issue of labour rights, gender and precarious labour, this chapter on migration is divided in two parts. The first part looks at the similarly gendered issue of migration and how a male norm has influenced not only the way migration is perceived and regulated, but how gender norms also influence, sometimes purposefully, sometimes only consequentially, nationalist sentiments and policies to prevent women from traveling. The second part then illustrates the interplay of migration policies, on the one hand, and migrants' perceived and actual access to labour rights, on the other. It links precarious and feminised labour and demonstrates how trafficked persons constitute the ultimate exploitable workers.

Part I illustrates gendered assumptions about migration and demonstrates that studies on migratory patterns, as well as migration law and policy, similar to labour policies, have assumed a male migrant. While women's migration, like women's labour, has existed for a long time, women's migratory patterns, their reasons to migrate and their obstacles to migration have been under-studied.

Furthermore, the interplay of nationality, gender and migration affects emigration and immigration rules for women in ways that are different from those affecting men. Ideas about motherhood and belonging have particular consequences for women when it comes to citizenship and restrictions on women's travel. Gendered notions of belonging and citizenship are important to understand the ways in which women's immigration is perceived as different from men's. Nonetheless, this chapter does not aim to provide an exhaustive analysis of the role of gender in the construction of citizenship and in nation- building, which would be beyond the scope of this thesis.

A brief analysis of women as 'mothers of the nation' and the 'othering' of migrant women is included, as migrant women, particularly those engaged in reproductive labour, are othered on multiple levels. As the next chapter will

demonstrate, sex workers also experience othering and stigma as non-desirable citizens. Consequently migrant women in sex work are othered on multiple levels, rendering them more vulnerable to exploitation.

Part II joins these gender-specific issues with concerns about all migrants' vulnerability to ending up in highly precarious working conditions. It joins the theme of precarious and ultra-flexible labour from Chapter 1 with exacerbating factors created through immigration and emigration policy. By viewing immigrant status as a legal category, which fosters precarious working conditions, I demonstrate that the combination of insufficient labour protections and increased vulnerability can culminate in human trafficking as one of the most severe forms of exploitation.

2.2) Gendered Assumptions about Migration

Migration theory has always assumed migration to be a male-dominated process.¹ Women traditionally are seen as migrating only as spouses or children of migrating men. However, since the early 1980s, more women have been migrating independently in search of jobs, rather than travelling with their husbands or joining them abroad.² According to data from the United Nations Population Division the number of female migrants grew faster than the number of male migrants between 1965 and 1990 in most receiving countries. It is assumed that at least half of all international migrants today are women.³ The International Labour Organisation (from here on ILO) even argues that, if the numbers of official and unofficial flows of migrants are added, the proportion of women migrants is likely to be much higher than that of men.⁴ The increase in female migration is due to a combination of factors, including the feminisation of

¹ See e.g. Monica Boyd, 'Immigrant Women in Canada' in R Simon and C Brettell (eds), *International Migration: The Female Experience* (Rowman&Allanheld 1986); Anna Katherine Boucher, 'Picking the Best and the Brightest: Gendering Skilled Immigration Policy in Australia and Canada' (2009); Heidi Bludau and Petra Ezzeddine, 'Seeing Gender in Migration. An Introduction.' *Urban People (Lide mestra)* 179.

² Olga Zhyvytsya and Karin Keil 'The Female Face Of Migration' (Caritas Internationalis 2012).

³ *ibid* 1.

⁴ Gloria Chammartin, 'The Feminization of International Migration' (2002) ILO 37, 39.

the labour market, a greater demand for women's labour, particularly their care work, domestic work and sex work, as well as changing views on women's mobility.⁵

However, women's migration is not a new thing. Women have always been present in migratory flows, but their experiences of migration have mainly been ignored. Maxine Seller argues that so little has been written about female migration due to the persistence of negative stereotypes according to which women did little worth writing about.⁶ Similar to labour issues, most migration theories write about the migratory process in a gender-neutral language, but base their assumptions on men's migratory experiences.⁷ Men were seen as the primary migrants, while women were considered to be secondary migrants who migrated as wives and dependents and for reasons of family reunification.⁸ The prevalence of this historic assumption is illustrated in the ILO's 'Migrant Workers (Supplementary Provisions) Recommendation, 1949 (No. 86),' in which a migrant worker's family was described as being 'his wife and minor children'.⁹ Just like a worker was and is assumed to be male by default, so is the migrant worker.

Ruby Dhar argues that this lack of focus on women's participation in the migratory process is connected to assumptions about labour. An emphasis on the human capital model values productive labour conducted by men outside the house and neglects the importance of women's reproductive labour at home and in private households in terms of economic activity and labour force participation.¹⁰ Women are estimated to spend around 70 per cent of their unpaid time caring for family members. Due to its classification as unpaid, reproductive work, this contribution to the global economy remains largely unrecognised,¹¹ as does women's paid work in the informal sector and private households. In addition to ignoring reproductive labour, the focus on productive labour in migration research also neglects the impact of family life, gender norms in

⁵ Ruby Dhar, 'Women and International Migration: A Cross-Cultural Analysis' (2012) 42 *Social Change* 93, 94.

⁶ Silvia Pedraza, 'Women and Migration: The Social Consequences of Gender' (1991) 17 *Annual Review of Sociology* 303, 304.

⁷ Zhyvytsya and Keil (n2); Boyd (n1).

⁸ *ibid.*

⁹ Dhar (n5) 93.

¹⁰ *ibid.*

¹¹ Zhyvytsya and Keil (n2) 9.

countries of origin and destination, as well as the interdependence of productive and reproductive spheres on the migratory process.¹²

This outlook also fails to acknowledge other differences in male and female migration such as reasons to migrate, migratory channels to destination industries and working conditions. Male migrants usually migrate for mainly economic reasons, while women often have more diverse reasons for migration, including improving their social conditions and to provide a better future for their children and wider family,¹³ along with economic motivations.

2.2.1) Women's Reasons to Migrate

When it comes to motivations to migrate, most studies of migration simply apply the male norm and assume poverty to be the main driver for women to migrate. This assumption does not take into account factors like women's social status in their state and community settings, traditions and family and individual circumstances, which play into women's decisions to migrate.¹⁴ Furthermore, it also fails to explain why many low-income women in poor countries do not try to emigrate abroad.¹⁵

Women's reasons to migrate are often more multi-faceted than men's and depend on a multitude of factors, ranging from conditions in the labour market to discrimination and exclusion in their country of origin.¹⁶ Economic factors are important, and economic and social unrest can cause educated women who are

¹² Carina Meares, 'A Fine Balance: Women, Work and Skilled Migration' (2010) 33 Women's Studies International Forum 473, 474.

¹³ Eleonore Kofman, 'The Invisibility of Skilled Female Migrants and Gender Relations in Studies of Skilled Migration in Europe' (2000) 6 International Journal of Population Geography 45; Mirjana Morokvasic, 'Why Do Women Migrate? Towards Understanding of the Sex-Selectivity in the Migratory Movements of Labour' (1983) 20 Studi Emigrazione: International Journal of Migration Studies 132; Gregory A Kelson and Debra L DeLaet (eds), *Gender and Immigration* (Palgrave Macmillan 1999); Siriporn Skrobaneck, Nattaya Boonpakdi and Chutimā Chanthathirō, *The Traffic in Women: Human Realities of the International Sex Trade* (Palgrave Macmillan 1997).

¹⁴ Zhyvytsya and Keil (n2).

¹⁵ Nana Oishi, 'Gender and Migration: An Integrative Approach' (Center for Comparative Immigration Studies 2002) 4.

¹⁶ Zhyvytsya and Keil (n2) 5.

unable to overcome employment discrimination in their own country to migrate in search of work opportunities that match their skills and are better paid. But female migration is also motivated by other non-economic factors. For example, gender inequality can also be the impetus for women to migrate. Reasons ranging from constant surveillance by community and patriarchal traditions that limit women's opportunities and freedom to individual matters such as getting out of a bad and abusive marriage, fleeing from domestic violence or a general desire for equal opportunities.¹⁷ By becoming the principal breadwinner of the family, they can overcome traditional gender roles and gain significant decision-making power within the family.¹⁸ This ability to break with traditional roles and patterns of dependency can make migration a more positive experience for women than for men, despite the difficulties of the migratory process.¹⁹ Equally, women often think about migration as a means to improve their situation beyond monetary gains, for example to be able to allow children to grow up in a society that is free from poverty, disease or war.²⁰

In addition to migrating for different reasons, female migrants affect labour markets and societies in receiving countries in ways that are different from how men do, as they tend to migrate into other fields of labour, predominantly in the reproductive work sphere. Women also confront difficulties in host societies that are specifically due to hierarchies that enforce gender difference.²¹ However, due to the assumption that men and women decide to migrate for the same reasons, it is expected that men and women will face similar situations in receiving countries and react to situations and structures in similar ways.²² Challenging such assumptions, studies that include gender as a factor in migration demonstrate that in fact male and female migrants show significant differences in their migratory behaviours, as well as different opportunities and different risks and challenges, such as vulnerability to human rights abuses, exploitation,

¹⁷ *ibid* 4.

¹⁸ Chammartin (n4) 40–41.

¹⁹ Pedraza (n6) 321.

²⁰ Eleanor Morris, *Second Class Migrants? Gender and Migration in the European Union: Explaining Gender (In)Equality in EU Immigration, Asylum, and Trafficking Policymaking* (VDM 2009) 10–11.

²¹ *ibid* 5.

²² *ibid* 10; Kofman (n13).

discrimination and specific health risks.²³ There is a need to understand the unique challenges of female migration such as the poor working conditions in the female-dominated fields of domestic work and caregiving jobs,²⁴ the changing role of women in the family and in their community due to migration and the vulnerability and exposure of migrant women to different kinds of risks, including trafficking.²⁵

2.2.2) Effect of Gender on Migration Policies

Furthermore, it is necessary to analyse how migration policy based on a male norm reinforces gender norms and contributes to some of the risks of female migration by creating female dependency and denying official access to women-dominated fields of work.²⁶ In combination with a migration theory that is gender-neutral on the surface, but founded on the concept of a male (migrant) worker, gendered institutions in receiving countries, which are also based on a male norm, further affect migrant women's wellbeing. The assumption of an independent male migrant and a dependent female migrant increases women's vulnerability. The idea of the male breadwinner means that women's legal status in a country is often tied to the status of their spouse, which creates a situation in which women are indeed dependent on their spouses and this dependency increases their vulnerability.²⁷ In many countries, if domestic violence occurs, women risk losing their residence rights if they decide to leave their spouses or are forced to stay with the abuser.²⁸

²³ Zhyvytsya and Keil (n2) 2; Rhacel Salazar Parreñas, *Servants of Globalization: Women, Migration and Domestic Work* (Stanford UP 2001) 61.

²⁴ Bridget Anderson, *Doing the Dirty Work?: The Global Politics of Domestic Labour* (Palgrave Macmillan 2000); Helen Schwenken and Lisa-Marie Heimeshoff, *Domestic Workers Count: Global Data on an Often Invisible Sector* (Kassel UP 2011); Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 *Comparative Labor Law & Policy Journal* 133.

²⁵ Zhyvytsya and Keil (n2) 2; Mary Kavar, 'Gender and Migration: Why Are Women More Vulnerable?' in Fenneke Reysoo and CJ Verschuur (eds), *Femmes en mouvement: genre, migrations et nouvelle division internationale du travail*. (IUED 2004).

²⁶ Jacqui True, *The Political Economy of Violence against Women* (OUP 2012); Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13 *Indiana Journal of Global Legal Studies* 137.

²⁷ Paul Boyle and Keith Halfacree, *Migration and Gender in the Developed World* (Routledge 2002) 143.

²⁸ Zhyvytsya and Keil (n2) 5; True (n26) 60.

Migration policies of Western countries are not openly gender-biased. However, legal, official recruitment efforts are frequently indirectly aimed at male workers through minimum income, education or work experience requirements.²⁹ Additionally, some countries have imposed restrictions on admissions of migrants for feminised occupations and the demand for domestic, care and sex workers does not translate into legal immigration routes for these occupations.³⁰ Therefore women's opportunities for legal migration are limited to the extent to which they are able to meet the male norms both in the ability to move and in the work they are able to do. These limits mean that women's migration is more limited than men's in most countries.³¹ Partly due to these male-focussed migration policies, much of the feminization of migration will go undocumented. Furthermore, female migrants will struggle even more than their male counterparts to receive decent remuneration for their work, acceptable working conditions or labour protection as a whole.³²

2.3) Gendered Job Opportunities and Related Risks

When women are able to migrate legally, they often take up positions at the lowest end of the economy, jobs that male migrants and female nationals refuse to do, such as work in the domestic and sex industries.³³ Therefore, even when

²⁹ Boucher (n1); Helen Schwenken, 'Guide to Gender Sensitive Labour Market Policies' (OSCE 2009); Eleonore Kofman, 'Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe' (2014) 52 *International Migration* 116; Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books 2007) 8.

³⁰ Clíodhna Murphy, 'Access to Justice for Undocumented Migrant Domestic Workers in Europe: The Consequences of Constructed Illegality' in Siobhán Mullally (ed), *Care, Migration and Human Rights: Law and Practice* (Routledge 2015) 114–115; Margarita León, 'Migration and Care Work in Spain: The Domestic Sector Revisited' (2010) 9 *Social Policy and Society* 409; Franca van Hooren, 'When Families Need Immigrants: The Exceptional Position of Migrant Domestic Workers and Care Assistants in Italian Immigration Policy' (2010) 2 *Bulletin of Italian Politics* 21.

³¹ Chammartin (n4) 39.

³² *ibid* 46.

³³ Anderson (n24); Thanh-Dam Truong, 'Gender, International Migration and Social Reproduction: Implications for Theory, Policy, Research and Networking' (1996) 5 *Asian and Pacific Migration Journal* 27; Bridget Anderson and Annie Phizacklea, 'Migrant Domestic Workers. A European Perspective.' (1997) *Commission of the European Communities Report for the Equal Opportunities Unit*; Monica Boyd, 'Migration

they migrate through legal channels, women end up working in sectors in which they can easily become subject to discrimination and arbitrary employment terms, as well as abuses, exploitation and human trafficking.³⁴

Gender also affects the industries both nationals and migrants end up working in. Men still form the majority in the information technology and scientific sectors, while women more often work in the welfare and care professions, including education and health sectors, which are closer to traditional 'women's work'.³⁵ Since policy in receiving countries assumes a male migrant, these female-dominated sectors are open to official migration only in some countries, and tend to be marked by low wages, by absence of social services and by poor working conditions.³⁶

With regard to the ILO's Conventions that deal specifically with migrant workers' rights, only the Domestic Workers' Convention³⁷ acknowledges the specific vulnerabilities of female migrants in jobs in the reproductive sphere.³⁸ Equally, the United Nations Convention on the Protection of the Rights of All Migrant Workers has recognised female migrant workers but not specifically in their role as workers in the care and sex trades or in other areas of reproductive work.³⁹

2.3.1) Migration into 'Women's Work'

Despite the limited official recruitment and visa opportunities, there is nonetheless demand for women migrant workers in the 'women's work' sectors - as nurses, cleaners, domestic workers and sex workers. This demand reflects

Regulations and Sex Selective Outcomes in Developed Countries. *International Migration Policies and the Status of Female Migrants.* (1995) 28 San Miniato, Italia, del 83.

³⁴ Zhyvytsya and Keil (n2) 7; Bridget Anderson, 'Where's the Harm in That? Immigration Enforcement, Trafficking, and the Protection of Migrants' Rights' (2012) 56 *American Behavioral Scientist* 1241.

³⁵ Morris (n20) 10; True (n26) 63.

³⁶ Mantouvalou (n24); Anderson (n24); Helma Lutz, *Migration and Domestic Work: A European Perspective on a Global Theme* (Ashgate 2012).

³⁷ ILO 'Convention concerning decent work for domestic workers', C 189, 2011.

³⁸ Zhyvytsya and Keil (n2) 15.

³⁹ Nicola Piper, 'Feminization of Labor Migration as Violence Against Women International, Regional, and Local Nongovernmental Organization Responses in Asia' (2003) 9 *Violence Against Women* 723, 729.

traditional female roles and sex stereotypes and conceals the reality that a significant proportion of women has professional qualifications, but cannot access appropriate jobs after relocation.⁴⁰ Even for the most highly skilled professional women, who do have access to the job market, migration can have a negative impact on their careers.⁴¹ These effects include downward occupational mobility and/or a re-focus on unpaid reproductive work at home.⁴² Additionally, professional accreditation barriers lead to devaluation of merit and experience. Further amplified by racial discrimination, cultural stereotyping and social isolation, the psychosocial impact of non-accreditation leads to 'erosion of skills, loss of technical idiom and diminishing confidence in ones capabilities.'⁴⁴ These factors also lead to skilled female migrants ending up in jobs in the unskilled labour sectors.⁵⁰ This 'downgrading' works to the advantage of employers and customers in some of the unskilled labour sectors: for example in the care and sex work sectors, jobs tend to require language skills and certain education levels as well as good manners.⁵¹

In addition to affecting the industries women end up working in, the amount of unpaid work they are required to do and the visa-statuses they are able to attain, receiving states' migration policies also affect women in other ways. In many states, residency requirements are based on minimum income, employment and housing criteria. Due to a policy focus on male wage earners, these criteria are set on the basis of male earners' incomes and much harder to meet for female migrants, who on average earn less than their male counterparts.⁵³ This is due to

⁴⁰ Chammartin (n4); Zhyvytsya and Keil (n2).

⁴¹ Irene Hardill, *Gender, Migration and the Dual Career Household* (Routledge 2002); Janet Salaff and Arent Greve 'Why do Skilled Women and Men Migrating from China to Canada get Bad Jobs?', in Alexandra Dobrowolsky and Evangelia Tastsoglou (eds), *Women, Migration and Citizenship: Making Local, National and Transnational Connections* (Ashgate 2006); Melinda Suto, 'Compromised Careers: The Occupational Transition of Immigration and Resettlement' (2009) 32 *Work* 417; Robyn Iredale, 'The Migration of Professionals: Theories and Typologies' (2001) 39 *International Migration* 7; Guida Man, 'Gender, Work and Migration: Deskilling Chinese Immigrant Women in Canada' (2004) 27 *Women's Studies International Forum* 135; Rachel L Cohen and others, 'The Body/Sex/Work Nexus: A Critical Perspective on Body Work and Sex Work', *Body/Sex/Work* (Palgrave Macmillan 2013).

⁴² Meares (n12) 473.

⁴⁴ Zhyvytsya and Keil (n2) 10.

⁵⁰ Eleonore Kofman and others, *Gender and International Migration in Europe: Employment, Welfare, and Politics* (Psychology Press 2000) 131–132.

⁵¹ Oishi (n15) 3.

⁵³ Morris (n20) 12.

two factors: firstly, the pay gap which affects women as the gender pay gap and equally negatively affects male migrants and minority men, creating double disadvantage for minority and migrant women. Additionally, female migrants often work either in highly unregulated sectors or in those with low wages, or both, further decreasing their already disadvantageous wages.⁵⁴

2.4) Gender, Nationality and the Restrictions on Female Migration

Some fears of women's migration and resulting 'protective' emigration and immigration policies, which aim to prevent women from migrating,⁵⁵ are founded in the role women play in nation-building and in the creation of national identities. Their roots lie in nationalist narratives of common origin, shared destiny and joint identity.⁵⁶

Women are crucial for the creation of emotional identity in early childhood: There is possibly a greater fear of 'foreign women' than of 'foreign men' when it comes to immigration, because mothers are usually the primary caregivers influencing early childhood development. They are feared as potentially alienating children from the national culture by instilling 'foreign' values in their children.⁵⁷ This fear can be illustrated with a quote from a report of the Royal Commission on Population in Britain from 1949:

British traditions, manners, and ideas in the world have to be borne in mind. Immigration is thus not a desirable means of keeping the population at a replacement level as it would in effect reduce the proportion of home-bred stock in the population.⁵⁸

⁵⁴ Zhyvytsya and Keil (n2) 16.

⁵⁵ Sharron Fitzgerald, *Regulating the International Movement of Women: From Protection to Control* (Routledge 2012); Céline Nieuwenhuys and Antoine Pécoud, 'Human Trafficking, Information Campaigns, and Strategies of Migration Control' (2007) 50 *American Behavioral Scientist* 1674; Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border* (University of Minnesota Press 2002).

⁵⁶ Tamar Mayer, *Gender Ironies of Nationalism: Sexing the Nation* (Psychology Press 2000) 3–10.

⁵⁷ Nira Yuval-Davis, 'Belonging and the Politics of Belonging' (2006) 40 *Patterns of Prejudice* 197.

⁵⁸ Royal Commission on Immigration, quoted in Ashley Dawson, *Mongrel Nation: Diasporic Culture and the Making of Postcolonial Britain* (University of Michigan Press 2007) 16.

While such fears of foreign cultural influence are morally questionable to start with, research also indicates that they are unfounded. In fact, female migrants are sometimes more likely to adopt the host cultures' norms and values than male migrants and therefore are more likely to integrate themselves and their children into the host culture.⁵⁹ The reasons for this are not completely clear, but may be due to the often greater gender equality in destination countries, which enables migrant women to exercise greater personal freedom, thus making it desirable for women to adopt the host culture. Nonetheless, the idea that women, through their child-rearing practices, transmit the cultures and values of the nation, remain.⁶⁰

However, nations are not only concerned with women's ability to reproduce cultural concepts – or to instil foreign ones - but also with their ability to quite literally 'reproduce the nation' (or fail to do so). By bearing children, women are the literal reproducers of the collective's members.⁶¹ Secondly, through their procreative choices, women are also responsible for recreating – or failing to recreate – the boundaries of racial, ethnic, or national collectives.⁶² The national myth of common origin, of being parts of one collective, gives central importance to women's reproductive roles within a society, as the 'normal' way to join the collective is by being born into it.⁶³

Such concepts of nationality are closely linked to ideas of ethnicity and with concepts of keeping certain ethnicities 'pure'. In the United States, for example, 'who is Black' has been constructed as being everyone who is not 'purely' white.⁶⁴ Consequently, those who are not white cannot fully claim common origin and the resulting levels of belonging. While the United States, as a settler society, has a concept of nationality that is founded more on 'common destiny'

⁵⁹ Pedraza (n6); Nancy Foner, 'Women, Work and Migration: Jamaicans in London' (1975) 4 *Urban Anthropology* 229.

⁶⁰ Eithne Luibhéid, 'Childbearing against the State? Asylum Seeker Women in the Irish Republic' (2004) 27 *Women's Studies International Forum* 335, 341.

⁶¹ Julie Mostov, 'Sexing the Nation/ Desexing the Body. Politics of National Identity in the Former Yugoslavia.' in Tamar Mayer (ed), *Gender Ironies of Nationalism: Sexing the Nation* (Psychology Press 2000) 89.

⁶² Luibhéid (n60) 341.

⁶³ Nira Yuval-Davis, 'Women and the Biological Reproduction of "the Nation".' (1996) 19 *Women's Studies International Forum* 17.

⁶⁴ *ibid* 18.

than common origin, there are nonetheless implicit (and sometimes explicit) hierarchies of desirable 'origin' and culture.⁶⁵ These hierarchies are relevant in the nation-building process and influence prenatal policies and immigration policies, which both affect female migrants and - depending on their countries of origin, education levels and their ethnicities - render them undesirable as migrants.⁶⁶ Nationalist ideas identify certain bodies as desirable, particularly those who fit hetero-normative ideals and also conform to race-ideals of the national identity. Eithne Luibhéid argues that men are racialised through their labour, whereas women are racialised through their child-bearing.⁷³ The nation's or the ethnicity's women are the symbolic collective, the allegorical mother of the nation, 'whose offspring belong to the entire country's guardians, heroes and martyrs.'⁷⁴

'Deviant' sexuality of women then becomes a threat to the nation, which is why women's sexuality needs to be policed.⁷⁵ Border controls and immigration regulations hence play a role in upholding a certain type of acceptable, patriarchal heterosexuality as a norm,⁷⁸ as well as in creating and maintaining notions of citizenship which exclude women.

Women, who migrate for work in prostitution or are trafficked into it, are then doubly outside the norm of 'desirable' mothers of the nation. They are considered deviant both in their foreignness and through their work as prostitutes. They evoke fears of being unable or unwilling to comply with socially 'acceptable' notions of femininity, both due to the assumed 'uncontrollable' sexuality of prostitutes, a concept I will address in more detail in the following chapter, and equally, due to their perceived otherness as non-nationals.⁷⁹

⁶⁵ Daiva Stasiulis and Nira Yuval-Davis, *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (SAGE 1995).

⁶⁶ *ibid.*

⁷³ Luibhéid (n60) 343.

⁷⁴ Mostov (n61) 91.

⁷⁵ *ibid.* 92.

⁷⁸ Priscilla Alexander, 'Prostitutes Are People Too' (1994) 24 *Off Our Backs* 26.

⁷⁹ Nandita Sharma, 'Travel Agency: A Critique of Anti-Trafficking Campaigns' (2003) 21 *Refuge: Canada's Journal on Refugees*; Nieuwenhuys and Pécoud (n54).

2.4.1) Discrimination in Emigration Policy

This exclusion of women from migration is by no means an issue only in destination countries. Countries of origin also have concerns about the migration of 'their' women, as it can reduce the number of 'mothers of the nation' at home. Particularly when countries experience a so-called 'brain-drain',⁸⁰ a case of the most highly educated and skilled young people leaving a country to work elsewhere, this may correlate with fears of also losing the young women most able to raise the nation.⁸¹ Just like immigration policies treat men and women differently, so do emigration policies. In some countries male emigration is completely unregulated, but female migration is restricted or even banned.⁸²

Restrictive emigration policies of developing countries are not just the simple products of economic concerns. Instead, Nana Oishi's case studies show that both policy on and public perception of female migration is different from male migration and limits female migration.⁸³ Whereas economic concerns form the main reason for policies on male migration, and, as I argued earlier, are indeed also the main driver for men to migrate, emigration policies for women are 'value-driven.' Women's migration is more emotionally laden for the state than men's migration, because women are not considered a value-neutral workforce. Women are considered the nurturers of the nation, as well as the symbols of national dignity and pride. Due to this, the number of female emigrants is low in countries in which independent female migration carries social prejudice, despite economic hardship. This indicates social stigma of women's migration that is strong enough to effectively discourage a significant number of women from leaving the country, despite the economic effects of such a decision.⁸⁴

The phenomenon of human trafficking has exacerbated the problem insofar as the governments of some countries of origin have taken steps to curb or outright prevent women's migration in order to 'protect' women from abuse and

⁸⁰ Frédéric Docquier and Hillel Rapoport, 'Globalization, Brain Drain and Development' (2011) Institute for the Study of Labor Discussion Paper 5590 <<http://econpapers.repec.org/paper/izaizadps/dp5590.htm>>.

⁸¹ Frédéric Docquier, Lindsay Lowell and Abdeslam Marfouk, 'A Gendered Assessment of Highly Skilled Emigration' (2009) 35 Population and Development Review 297.

⁸² Oishi, (n15) 16–18.

⁸³ *ibid.*

⁸⁴ *ibid.*

exploitation.⁸⁵ Annalee Lepp explains this phenomenon with the example of Thailand:

On the one hand, the Ministry of Labour and Social Welfare tends to encourage Thai people, especially men, to seek employment abroad through various program and government-endorsed employment agencies, it promotes and facilitates “safe” and legal labour migration, because the remittances sent from workers abroad contribute to boosting the economy, especially in terms of earning foreign currency. At the same time, other government agencies, such as the Department of Public Welfare, tend to discourage female migration, by providing information about potential abuses and warning women about the difficulties they may encounter abroad.⁸⁶

The Global Alliance Against Trafficking in Women (GAATW) condemns such policies, as they operate on the assumption that trafficking will be reduced if the flow of female migration will be reduced. This occurs without taking into account the root causes of migration, such as a need to provide for their families and the absence of employment in the country of origin.⁸⁷

Such restrictive approaches echo ‘protective’ policies, in which women were excluded from night work as a protective measure to prevent them from being attacked or sexually assaulted.⁸⁸ There is significant feminist scholarship criticising ‘protective’ approaches to prevent women’s vulnerability in the public sphere.⁸⁹ Protective measures essentially result in excluding women from that sphere. In this, they fail to provide any real protection for women and fail to create the public sphere as a space that is safe for all members of society.

⁸⁵ See Ratna Kapur and Jyoti Sanghera, ‘An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal’ (The Asia Foundation and New Delhi 2000); Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harvard Human Rights Journal*, Annalee Lepp, ‘Trafficking in Women and the Feminization of Migration: The Canadian Context’ (2002) 21 *Canadian Woman Studies* 90.

⁸⁶ Lepp (n84) 94.

⁸⁷ *ibid.*

⁸⁸ Ulla Wikander, Alice Kessler-Harris and Jane E Lewis, *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995).

⁸⁹ *ibid.*; Tamako Nakanishi, ‘Equality or Protection - Protective Legislation for Women in Japan’ (1983) 122 *International Labour Review* 609; JA Baer, *The Chains of Protection: The Judicial Response to Women’s Protective Legislation* (Greenwood 1978); Alice M Miller, ‘Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection’ (2004) 7 *Health and Human Rights Journal* 16.

Instead, such measures perpetuate the idea that for women only the home (the literal home, but also the home community, or, in this case the home country) is a safe space, rendering women's attempts to operate in the public sphere as risky and ultimately shift the blame for violence against women onto the victims of such violence.⁹⁰

2.4.2) Discrimination through Restrictive Immigration Policies

Female migrants also face particular risks due to the gendered nature of immigration policy. Since women have a lesser chance of migrating legally, they are more vulnerable to discrimination, abuse and violence than male migrants are in the migration process.⁹¹ The policies of some receiving countries include bans and restrictions on female migration in order to 'prevent' women from falling into the hands of traffickers and smugglers.⁹² Contrary to its intention, restrictive regulation often drives the migratory process further underground and forces women migrants into even more vulnerable positions, since it increases their

⁹⁰ Joshua M Price, 'The Apotheosis of Home and the Maintenance of Spaces of Violence' (2002) 17 *Hypatia* 39; Andrijasevic, Rutvica, 'The Difference Borders Make: (Il)legality, Migration and Trafficking in Italy among Eastern European Women in Prostitution' in Sara Ahmed, Claudia Castaneda and Anne-Marie Fortie (eds), *Uprootings/Regroundings: Questions of Home and Migration* (Berg 2003); Laura Goldsack, 'A Haven in a Heartless World? Women and Domestic Violence' in Tony Chapman and Jennifer Lorna Hockey (eds), *Ideal Homes?: Social Change and Domestic Life* (Routledge 1999); Tony Chapman and Jennifer Lorna Hockey, 'The Ideal Home as It Is Imagined and as It Is Lived', in Tony Chapman and Jennifer Lorna Hockey (eds), *Ideal Homes?: Social Change and Domestic Life* (Routledge 1999) 11.

⁹¹ Chammartin (n4) 40.

⁹² Niki Adams, 'Anti-Trafficking Legislation: Protection or Deportation?' (2003) 73 *Feminist Review* 135; Beate Andrees and Mariska NJ van der Linden, 'Designing Trafficking Research from a Labour Market Perspective: The ILO Experience' (2005) 43 *International Migration* 55; Rutvica Andrijasevic and Bridget Anderson, 'Anti-Trafficking Campaigns: Decent? Honest? Truthful?' (2009) 92 *Feminist Review* 151; John Davies, *'My Name Is Not Natasha': How Albanian Women in France Use Trafficking to Overcome Social Exclusion (1998-2001)* (Amsterdam UP 2009); Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010); Audrey Macklin, 'Dancing Across Borders: "Exotic Dancers," Trafficking, and Canadian Immigration Policy' (2003) 37 *International Migration Review* 464; Lynn McDonald and Natalya Timoshkina, 'The Life of Trafficked Sex Workers From the Former Eastern Bloc: The Canadian Dimension' (2007) 31 *International Journal of Comparative and Applied Criminal Justice* 211; Jennifer Lynne Musto, 'What's in a Name?: Conflations and Contradictions in Contemporary U.S. Discourses of Human Trafficking' (2009) 32 *Women's Studies International Forum* 281; Arthur Rizer and Sheri R Glaser, 'Breach: The National Security Implications of Human Trafficking' (2011) 17 *Widener Law Review* 69; Natalya Timoshkina, 'Human Trafficking: Assumption, Evidence, Responses' (2014) 7 *International Journal of Arts & Sciences* 409.

need for assistance to migrate clandestinely.⁹³ For women, this trend of migration regulation and tightened border controls causes increased vulnerability to exploitation and abuse, and continuing inequality with men.⁹⁴

Women migrants are already more vulnerable *during* the journey, due to being both a woman and a migrant. This risk is aggravated by policies limiting the forms of migration available to women, meaning their migratory journeys often include flight, trafficking and undocumented migration. While protecting women is at the forefront of the debate, especially with regard to trafficking,⁹⁵ policy responses still adhere to male categories and the trafficking debate has failed to translate into a migration policy that takes the specific needs and rights of women into consideration and to offer women-specific migration routes. This makes them more likely to utilise the services of smugglers and other intermediaries, and ultimately renders them more vulnerable to traffickers.⁹⁶

Equally, once they have arrived in a receiving country, women's immigration status often does not allow them to work legally. They are therefore forced to work in the informal sectors of the economy, where there is less regulation and protection and at the same time are not considered active participants in the labour market by the state.⁹⁷ Such continuous exclusion then also leads to women being unable to claim residency or citizenship, as their 'informal' labour in the underground economy does not qualify them for residency in most countries.⁹⁸

Some of these informal, feminised jobs, particularly domestic and sex work, make female migrants more vulnerable to exploitation than male migrants. The

⁹³ Chammartin (n4) 40.

⁹⁴ Zhyvytsya and Keil (n2) 15.

⁹⁵ Adams (n91); Wendy Chapkis, 'Trafficking, Migration, and the Law Protecting Innocents, Punishing Immigrants' (2003) 17 *Gender & Society* 923.

⁹⁶ Zhyvytsya and Keil (n2) 16; Rutvica Andrijasevic, 'Sex on the Move: Gender, Subjectivity and Differential Inclusion' (2009) 29 *Subjectivity* 389; Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015); Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment & Society* 300.

⁹⁷ Morris (n20) 13.

⁹⁸ Kitty Calavita, 'Gender, Migration, and Law: Crossing Borders and Bridging Disciplines' (2006) 40 *International Migration Review* 104, 118.

lack of regulations and labour controls regarding work in private houses and in the sex industry,⁹⁹ coupled with the solitude of individualised work environments in these sectors, creates greater vulnerabilities than the work environments of migrant men, who tend to work in groups in construction sites or on farms. This lack of scrutiny in the private sphere is a gender-specific issue affecting migrant women.¹⁰⁰ Work in private households, e.g. as a care, domestic or sex worker, involves greater risks of being exploited and/or being treated badly due to the lack of laws and standards regulating it. Therefore, it often involves unregulated, long work hours with too few rest days, no monitoring of work-place conditions and a heightened risk of abuse by employers.

The informal sector and private households also form a 'dead end' in terms of labour mobility – jobs in it neither equip women with skills that are recognised in other areas of work and therefore further their employability, nor with formal qualifications or education.¹⁰¹ There is little chance of establishing a network of contacts and to progress to other occupations. Furthermore, it can also become an obstacle to the formation or consolidation of their own families for women.¹⁰² Single women are isolated from the outside world and might have difficulties finding a partner, while women who leave their families in order to support them financially as independent migrants face an even stronger emotional burden. During the months or years in which these women provide affection and care to their employer's children and relatives, they often do not see their own children and families. Again, migration legislation, which assumes a male migrant as the norm, benefits employers of domestic workers and disadvantages their employees. Domestic workers and live-in care workers usually do not have any competing responsibilities besides their work, due to the absence of their own families. At the same time, the male-focussed norm disfavours the migrant women who have neither the financial means nor the legal basis to reunite with their families in the country they work in, since family reunification is assumed to

⁹⁹ See Chapter 1 of this thesis. For a discussion of the lack of legal protections for domestic workers see Mantouvalou (n24). Sex workers enjoy no labour protections in most countries as their work is not considered 'real work'.

¹⁰⁰ Chammartin (n4); Piper (n39) 729.

¹⁰¹ Zhyvytsya and Keil (n1); International Labour Office, *Gender Equality at the Heart of Decent Work: Sixth Item on the Agenda* (ILO 2009).

¹⁰² Zhyvytsya and Keil (n2).

follow a male, rather than the female breadwinner and thus sets income thresholds which are less achievable for most women.¹⁰³

Thus, gendered notions of citizenship, nationality and women's appropriate place within the nation and within the labour force have significant effects on women trying to migrate. As a result, women are often more likely than men to turn to irregular channels to realise their migratory projects and to end up in precarious forms of labour.

2.5) Citizenship and 'Alien'- Status as Factors of Precariousness

While women experience particular exclusion due to their gender, all migrant workers share vulnerabilities created through their immigration status. In the UK, even the least precarious forms of non-citizen workers, third country nationals with work permits, experience restrictions to their access to the labour market.¹⁰⁴ If directly employed, they require an employer who holds a recognised work permit for them, a so-called sponsor.¹⁰⁵ Their visa and immigration status is then tied to their employment with said sponsor, making them vulnerable vis-à-vis their employer. The sponsor can fire them like any other employee and thereby force them to leave the country – unless they manage to find a new authorised sponsor within 60 days.¹⁰⁶ Furthermore, the employer can also withdraw the certificate of sponsorship at any point, possibly circumventing normal dismissal procedures and again subjecting the migrant employee to either find a new sponsor or leave the country.¹⁰⁷ Thus, the directly employed migrant worker experiences restrictions on her mobility within the labour market, even within her job sector.

¹⁰³ UK Immigration Rules 1990 (HC 251) (last amended 22/04/2016) Appendix FM; Madeleine Sumption and Carlos Vargas-Silva, 'The Minimum Income Requirement for Non-EEA Family Members in the UK' (COMPAS, University of Oxford 2016); Zhyvytsya and Keil (n2) 11; Carol Wolkowitz and others (eds), *Body/Sex/Work: Intimate, Embodied and Sexualised Labour* (Palgrave Macmillan 2013).

¹⁰⁴ *ibid*, Paragraphs 245AAA- 245ZZE.

¹⁰⁵ Anderson (n95) 309.

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid*.

This shifts the power-balance between employer and migrant employee to the advantage of the employer and creates a situation ripe for abuse.¹⁰⁸

As Bridget Anderson succinctly describes:

[C]ompliant workers can feel unable to challenge employers and in some instances employers have taken advantage of immigration status as a means of exercising control over work permit holders, including forbidding union membership.¹⁰⁹

Equally, other groups of workers, who are not restricted to certain sectors or employers, such as working holidaymakers and students, may instead be limited to part time or temporary work.¹¹⁰ Again, this creates an imbalance between employers and employees, as both part-time and short-term work come with fewer labour protections than full time work in the standard employment contract. Irregular migrants on the other hand are likely to stay with their employer due to fears of deportation and lack of other options,¹¹¹ making them even more vulnerable to exploitation than regular migrants.

Consequently, when asked why they employ migrant workers, employers regularly mention the better retention rates of migrant workers.¹¹² Other reasons, such as migrant workers' reliability, honesty and work ethic are often at least partly caused by the migrant workers' highly dependent status. Employers often ignore this fact and instead make gendered and racial assumptions about the reasons for their workers' 'qualities',¹¹³ tying back in with the assumption that certain skills or attitudes to work are inherent, rather than learned, and thus ignoring skill sets which lie outside of traditional male skills.

¹⁰⁸ Anderson (n95); Costello (n95); Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95.

¹⁰⁹ Anderson (n95) 310.

¹¹⁰ *ibid* 311.

¹¹¹ Andrijasevic and Anderson (n91) 152.

¹¹² Sally Dench and others, 'Employers' Use of Migrant Labour: Main Report.' (Home Office 2006); Roger Waldinger and Michael I Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* (University of California Press 2003); Anderson (n95).

¹¹³ Anderson (n95) 310.

In certain sectors, immigration controls and restrictions on migration ‘effectively create a group of workers that are *more desirable* as employees through enforcing atypical employment relations such as fixed term contracts or self-employment and direct dependence on employers for legal status.’¹¹⁴ Thus, governments’ claims to use immigration restrictions to protect citizen workers against an influx of cheap migrant labour may not only be ineffective, but outright contradictory.¹¹⁵

Instead of rendering migrant labour undesirable, immigration law’s restrictions on the sector, the length, the number of hours and for whom migrant labourers can work actively contribute to creating precarious labour conditions for workers.¹¹⁶ The limitations on their labour mobility can contribute to an overall reduction of wage levels and an increase in ultra-flexible employment practices. Ultimately, the fact that migrant workers are present in an economy, while they enjoy limited access to their labour rights, can lower labour standards for all workers.¹¹⁷ Thus, exclusions for migrant workers, which are sometimes hailed to protect local workers ultimately hurt them as well.

For migrant workers the effects are more immediate, as they essentially create a form of un-free labour. Thirty years ago, Robert Miles already argued that state imposed restrictions on migrants prevented them from commodifying their labour, resulting in un-free labour.¹¹⁸ What we can see now is that freedom and un-freedom in labour occurs on a scale, rather than as absolute categories.¹¹⁹

2.6) Migration, Human Smuggling or Human Trafficking?

This leads us to one of the definitional problems in migration – when does migration turn into irregular migration, where are the lines between irregular

¹¹⁴ *ibid* 312–313.

¹¹⁵ *ibid* 301–302.

¹¹⁶ Fudge (n107) 96.

¹¹⁷ *ibid* 95.

¹¹⁸ Robert Miles, ‘Recent Marxist Theories of Nationalism and the Issue of Racism’ (1987)

38 *The British Journal of Sociology* 24.

¹¹⁹ Julia O’Connell Davidson, ‘New Slavery, Old Binaries: Human Trafficking and the Borders of “freedom”’ (2010) 10 *Global Networks* 244; Costello (n95).

migration and human smuggling and how do smuggling and human trafficking differ? There are definitions of human trafficking in the 2000 UN Trafficking Protocol, which I discuss in much more detail in Chapter 6, and of human smuggling in its sister protocol, the Smuggling Protocol.¹²⁰ However, these definitions are vague, as I describe in more detail in my analysis of the UN Trafficking Protocol in Chapter 6, and in reality the experiences of trafficked and smuggled persons cannot easily be distinguished. Smuggled persons can become trafficked persons and the early stages of a person being trafficked may look like smuggling.¹²¹ Equally, common concepts of legal or illegal migration are challenged through people who enter a country legally, overstay their visa or lose their status by violating their visa regulations.¹²² Governments' policies that aim to deter both illegal migration and human trafficking through means of stricter border controls might thus be ineffective in curbing migratory flows. Instead, they might increase the vulnerabilities of irregular migrants in general and trafficked persons in particular.

2.6.1) Links Between Trafficking and 'Normal' Migration

This section looks at continuities between regular migrant status and the most precarious form of irregular migrant status, a trafficked person. Furthermore, it also illustrates the role of immigration and labour policies in creating the specific vulnerabilities amongst migrants, which then lead to an exploitability in precarious labour and human trafficking.

Already the lines between migration, smuggling of humans and human trafficking are blurry. Trafficking is often presented as being different from other kinds of

¹²⁰ UN Trafficking Protocol; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime 2000.

¹²¹ Inga Thiemann, 'Villains and Victims, but No Workers – Why a Prosecution-Focused Approach to Human Trafficking Fails Trafficked Persons.' [2016] *Anti-Trafficking Review*; O'Connell Davidson (n116) 249; Ilse Van Liempt, *Navigating Borders: Inside Perspectives on the Process of Human Smuggling into the Netherlands* (Amsterdam UP 2007) 40–41; Anne T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 163, 166.

¹²² Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013).

migration or not a migratory process at all.¹²³ Trafficked persons, unlike migrants, are assumed to have been coerced into crossing borders. As a result, trafficked persons receive greater sympathy and official concern than those who are considered illegal immigrants.¹²⁴ However, it also means that the solution to trafficking becomes the removal or arrest of traffickers and repatriation of trafficked persons.¹²⁵ Thus, the result is largely the same as for irregular migration, but it is presented as helping a victim, rather than expelling an irregular migrant.

Furthermore, framing the problem as voluntary vs. involuntary migration shifts attention away from immigration laws in Western host countries and ignores the close links between migration and trafficking which have been demonstrated in studies based on primary interviews.¹²⁶ If, for example, human smuggling is considered to be only 'largely voluntary', human smuggling and human trafficking have to be viewed on a scale such that the difference between the two might be in the different levels of abuse experienced by trafficked persons and smuggled persons rather than viewing the two as separate phenomena with different responses.¹²⁷ This distinction might be difficult to make, both legally and practically.

Equally, other kinds of irregular and even legal migration can and often do involve violence, confinement, coercion, deception and exploitation.¹²⁸ As we have seen, employers actively seek migrant workers because they are exploitable. In this context, creating a distinction between trafficking and exploited migrant labour then means defining what constitutes acceptable and

¹²³ Annuska Derks, Roger Henke and Ly Vanna, 'Review of a Decade of Research on Trafficking in Persons, Cambodia.' (The Asia Foundation 2006).

¹²⁴ Marta Pérez, 'Emergency Frames: Gender Violence and Immigration Status in Spain' (2012) 18 *Feminist Economics* 265; Tanya Basok and Nicola Piper, 'Management Versus Rights: Women's Migration and Global Governance in Latin America and the Caribbean' (2012) 18 *Feminist Economics* 35.

¹²⁵ Nandita Sharma, 'Anti-Trafficking Rhetoric and the Making of a Global Apartheid' (2005) 17 *NWSA Journal* 88.

¹²⁶ Smriti Rao and Christina Presenti, 'Understanding Human Trafficking Origin: A Cross-Country Empirical Analysis' (2012) 18 *Feminist Economics* 231, 232.

¹²⁷ *ibid* 234.

¹²⁸ Derks, Henke and Vanna (n122); Rutvica Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking* (Palgrave Macmillan 2010); Bridget Anderson and Julia O'Connell Davidson, 'Trafficking - A Demand Led Problem?: A Multi-Country Pilot Study.' (Save the Children 2002).

unacceptable levels of exploitation.¹²⁹ This distinction is both difficult to make and morally questionable, as it creates hierarchies of suffering which 'may reflect more the preconceptions and feelings of those who devise them than those who experience them.'¹³⁰

In addition to exploitation of trafficked persons and other migrants being on a scale, there are additional features that make trafficking appear similar to migration rather than being a distinct category. For example, a study conducted by Smriti Rao and Christina Presenti found a significantly higher likelihood for a country to have high numbers of persons trafficked out of the country if said state is a transition economy, in which women have already achieved some level of economic mobility and independence.¹³¹ Equally, Rutvica Andrijasevic found in interviews conducted with trafficked women that their accounts of why and how they migrated did not differ significantly from other female migrants, mostly quoting dire economic conditions, problems at home and desire for independence.¹³²

Immigration controls and stronger border protections are more likely to keep out women trying to migrate into the sex industry (as well as domestic work), which makes them more likely to engage third parties in the migration process, further amplifying their vulnerability. Depending on their involvement and on their willingness to exploit others, these third parties could in retrospect turn out to be agents, smugglers or traffickers. Additionally, long travelling distances to consulates and embassies, and the difficulties of obtaining visas through regular channels also often leads to women (and men) requesting services from a third party, regardless of whether or not they qualify for an official visa and regardless of the third party charging more than official consulate's visa rates.¹³³

Thus, visa regulations and border controls that attempt to channel migration into legally sanctioned schemes often increase the likelihood of third party

¹²⁹ Bridget Anderson and Rutvica Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 2008 Soundings 135, 141; Anderson and O'Connell Davidson (n 127); Andrijasevic (n127); Andrijasevic and Anderson (n91) 154.

¹³⁰ Andrijasevic and Anderson (n91) 154.

¹³¹ Rao and Presenti (n125) 252.

¹³² Andrijasevic (n127) 56.

¹³³ *ibid* 38–40.

involvement in facilitating travel and employment and consequently increase migrants' vulnerability to abuse and exploitation.¹³⁴ Rutvica Andrijasevic reports from her interviews the recurring case of female migrants incurring debt and becoming dependent on third parties due to their status as undocumented migrants. In addition to being vulnerable to abuse by third parties exploiting their labour, undocumented status also exposes migrants to potential ill-treatment by border police.¹³⁵

Stricter immigration controls often unintentionally serve the economic interests of third parties. Paying third parties for irregular migration, as well as being apprehended by border police en route and the journey being prolonged, increases the migrants' debt to the third party and increases third parties' levels of control over migrants.¹³⁶ Andrijasevic goes as far as to say that in an EU context 'immigration regulations that aim at suppressing 'trafficking' and hampering the illegal movements of people work in favour of third parties as these become an alternative to the formally sanctioned EU migratory channels.'¹³⁷

Trafficked persons, like other undocumented migrants, choose not to seek help from the police due to fears of deportation. In Andrijasevic's interviews, women reported that they would only go to the police if all attempts to get hold of their passports failed, accepting the risk of getting deported.¹³⁸ This further demonstrates that immigration status plays a key factor in creating vulnerability and exploitation, which is confirmed by other studies.¹³⁹

¹³⁴ *ibid* 45.

¹³⁵ *ibid* 44.

¹³⁶ *ibid* 43–56.

¹³⁷ *ibid* 45.

¹³⁸ *ibid* 75.

¹³⁹ *ibid* 75–76; Nicola Mai, 'Between Minor and Errant Mobility: The Relation Between Psychological Dynamics and Migration Patterns of Young Men Selling Sex in the EU' (2009) 4 *Mobilities* 349; Julia O'Connell Davidson, 'Will the Real Sex Slave Please Stand Up?' (2006) 83 *Feminist Review* 4.

2.7) Conclusion

As discussed earlier in this chapter, routes for skilled, regular migration exclude women, as there is a perceived higher demand for migrants in male-dominated professions.¹⁴⁰

Migration policies also often ignore that women are much more likely to be in part-time instead of full-time employment, due to childcare and other reproductive labour responsibilities within their own homes, excluding them further from accessing labour rights that resemble the standard employment contract for male citizen workers. Additionally, visa requirements often set minimum income levels which are based on men's averagely higher earnings and ignore women's unpaid labour as well as the gender pay gap, which affects migrant women as much if not more as female citizens.¹⁴¹

These obvious differences in women's access to regular migration do not even factor in more structural issues, such as many countries of origin's greater gender inequalities, for example in terms of girls' access to education and women's access to wealth and property. Equally, certain high-paying and high-mobility jobs, for example in the STEM (science, technology, engineering & mathematics) field,¹⁴² are still considered unfeminine and girls' recruitment into these fields is not encouraged sufficiently, even in receiving countries, let alone in sending countries with more traditional gender perceptions.

Women are thus more likely to enter precarious working conditions in the informal sector, particularly in domestic work and prostitution, since additional

¹⁴⁰ Kofman (n29); E Kofman and P Raghuram, *Gendered Migrations and Global Social Reproduction* (Springer 2015); Catherine Briddick, 'Sex Discrimination and UK Immigration Law' <<http://compasoxfordblog.co.uk/2015/07/sex-discrimination-and-uk-immigration-law/>>.

¹⁴¹ 'Automatic Settlement for Unskilled Workers to End - News Stories - GOV.UK' <<https://www.gov.uk/government/news/automatic-settlement-for-unskilled-workers-to-end>>; Equally, for restrictions affecting British women trying to achieve family reunification with their husbands, see Carlos Vargas-Silva and Yvonne Markaki, 'Love and Money: How Immigration Policy Discriminates between Families' *The Conversation* 17 Nov 2014 <<http://theconversation.com/love-and-money-how-immigration-policy-discriminates-between-families-34253>>.

¹⁴² Kofman and Raghuram (n139) 135.

stereotypes attributed to women are those of providing care at home and of providing sexual gratification.¹⁴³

Additionally, immigration policies render all migrant workers more vulnerable than citizen-employees vis-à-vis their employers. Taking these exclusions from rights into account, it might be more useful to understand regular migration, irregular migration, human smuggling and human trafficking as lying along a continuum, rather than as truly distinct phenomena.¹⁴⁴ Consequently, they require similar or unified, rather than separate policy responses, as I illustrate in Chapter 4, after having explored the additional vulnerabilities for women, particularly for vulnerable migrant women, in the sex industry, through societal stigma and exclusion from labour rights.

¹⁴³ Chammartin (n4); Wolkowitz and others (n102).

¹⁴⁴ Rao and Presenti (n125) 253–254.

Chapter 3: Gender and Prostitution

3.1) Introduction

This chapter focuses on sex work as the type of reproductive labour whose status as 'work' is most contested and which is considered the most female-dominated. Sex work can be called the 'ultimate precarious labour', as the issues faced by women workers and migrant workers through the devaluation of reproductive work, precariousness caused by immigration status and exclusions from labour protections are amplified through stigma and prejudices affecting sex workers. Migrant sex workers' risks of precarious, stigmatised as well as often dangerous and illegal working conditions are an intersectional problem. Additionally, it is impossible to discuss human trafficking for sexual exploitation without also discussing sex work. Debates about human trafficking and prostitution are intrinsically linked, as human trafficking was historically constructed as analogous to migrant prostitution, as I will outline in more detail in Chapter 5 on the international law on human trafficking.¹

I argue that in order to identify and address the structural vulnerabilities of women at risk of human trafficking for sexual exploitation,² we need to understand the root causes of exclusionary policies and societal attitudes that help create such structural exclusions. Therefore, the first part of this chapter addresses gender stereotypes and resulting ideas about prostitution and the (predominantly) women who sell sexual services as well as the (predominantly) men who buy prostitution. In this, I address the question of the origin of preconceptions about women trafficked for sexual exploitation as well as broader stereotypes about women working in the sex industry, which influence these preconceptions. The chapter demonstrates that double standards regarding women's and men's sexuality create a climate of hostility towards women working in the sex industry and results in the assumption that sex work is not work. In the context of the thesis, this chapter explores reasons for the prevalence of negative assumptions about women in the sex industry, which

¹ See Chapter 5 of this thesis.

² As well as the vulnerabilities which exist for most sex workers.

consequently also affect women trafficked for sexual exploitation. It identifies key areas of prejudice, whose legacy in legislation and policymaking will be analysed throughout the remainder of the thesis.

The first half of this chapter looks at dominant discourses about prostitution and their origin in assumptions about male and female sexuality. It discusses societal concepts of female honour and morality, which inform ideas about appropriate female behaviour, and, by extension, how society views women who engage in prostitution. This assessment also includes the examination of race and class aspects of the prostitution discourse as well as the ways in which these stereotypes may or may not also affect men who are consumers of prostitution.

The second part introduces the views of representatives of two feminist responses to these discourses, which have dominated debates about prostitution, as well as human trafficking. The two groups can be generally split into those who see prostitution as a form of violence against women, and those who see prostitution as sex work that should be treated like any other job. I will then look at the strengths and weaknesses in both feminist views and also take into account other avenues, such as a labour law approach. This is followed by my critique of the dominant discourses and the feminist responses.

3.2) Assumptions about Prostitution

The traditional assumption about prostitution is that it is 'the oldest human profession', a natural occurrence in society, caused by the differences in male and female sexual desire and the need to 'sate an uncontrollable male sexuality'.³ This belief persists, despite research such as Kinsey's, which postulated that sex drive was learned behaviour,⁴ or Conley and others' study, which demonstrates the similarities in male and female sexual behaviour in

³ Jean D'Cunha, 'Prostitution Laws: Ideological Dimensions and Enforcement Practices' (1992) 27 *Economic and Political Weekly* WS34.

⁴ Referred to in Kathleen Barry, *Female Sexual Slavery* (NYU Press 1984).

settings where the effects of learned, gender-specific sexual behaviour are eliminated.⁵

Nonetheless, the double standard related to assumptions of dramatically different levels of male and female sexual desire has permeated societies' ideas of 'normal' sexual behaviour for centuries and still does so today. As a result, female sexuality is guarded and restricted, while male sexuality is comparatively open. This is explained through supposedly "natural" differences in male and female behaviour, which results in fixed concepts of "normal" sexualities. Consequently, male demand for prostitution is explained through this perceived natural male desire, which is incompatible with perceived low levels of female sexual desire. Meanwhile, prostitution is explained either through individual women's deviance from 'normal' and respectable female sexuality or through extreme desperation (although the latter possibility is rarely acknowledged by men paying for prostitution).

3.2.1) The Double Standard – a Root Cause of Prostitution Prejudice

This section looks at the concept and origin of the double standard, resulting ideas of 'appropriate' male and female behaviour and the resulting dominant discourse about prostitution. The 'double standard' means different concepts for men and women of what are considered 'normal' expressions of sexuality. Whereas claims to the double standard's 'biological' origin are often made, there is no reason to believe that its cause is indeed natural or biological.⁶ The origin of the double standard is contested, but it occurs in societies which value female chastity, which means it has been present in the majority of patriarchal cultures.⁷

⁵ Terri D Conley and others, 'Women, Men, and the Bedroom Methodological and Conceptual Insights That Narrow, Reframe, and Eliminate Gender Differences in Sexuality' (2011) 20 *Current Directions in Psychological Science* 296.

⁶ Keith Thomas, 'The Double Standard' (1959) 20 *Journal of the History of Ideas* 195.

⁷ *ibid* 205.

Some scholars⁸ have given a variety of problematic explanations for the double standard: Keith Thomas argues that the double standard within Anglo-Saxon societies existed to varying degrees within different sections of society. According to him, there was much less of a gender divide in the lower classes, both in rural settings and among the working class in cities. He suspects that 'the tradition of promiscuity was too strong to allow the emergence of so sophisticated a concept as that of the double standard.'⁹ This is in itself a classist assumption. It can instead be assumed that different social statuses required varying levels of *compliance with* the double standard.

Freud explained the double standard as a problem resulting from men's 'tendency to find with women of a lower social order, whom they despise, that sexual satisfaction which they are unable to obtain from their relationship with their wives, for whom they feel only tenderness'.¹⁰ Freud's explanation is problematic since it both ignores the reality of men being attracted to their wives, as well as the reality of those men who had no 'class of socially inferior women at whose expense they may gratify their sexual appetite.'¹¹ Freud interpreted the learned behaviour of his time, including the almost complete desexualisation of women of a certain social standing, as the natural state of being, even though it did not reflect the realities of most people at the time.

Friedrich Engels argued that the double standard developed out of men's desire to 'guarantee that his wealth be inherited by his true children. If the woman remained chaste until marriage and faithful thereafter, the certainty of such lines of inheritance would be guaranteed.'¹² However, this line of argument is not sufficient to explain the double standard in cases of women's adultery if there is no possibility of confusion of progeny or simply no progeny.¹³

⁸ *ibid*; Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume I (1886-1899): Pre-Psycho-Analytic Publications and Unpublished Drafts*. (James Strachey tr); Friedrich Engels and Tristram Hunt, *The Origin of the Family, Private Property and the State* (Penguin 2010); Harold C Barnett and Harold C Barnett, 'The Political Economy of Rape and Prostitution' (1976) 8 *Review of Radical Political Economics* 59. Curiously all these scholars are male.

⁹ Thomas (n6) 206. This is in itself a classist assumption.

¹⁰ Freud (n8).

¹¹ Thomas (n6) 208.

¹² Engels and Hunt (n8).

¹³ Thomas (n6) 209.

More likely than these explanations is that the double standard is an expression of women's historical status as male property. The reasons for the high value set on virginity before marriage and fidelity within marriage thus stem from men's desire to have the sole right of sexual access to 'their' women.¹⁴ This theory also explains why the double standard was more prominent among higher social classes than among lower ones – the property of powerful men had to be protected more fiercely than that of working class men. While society's attitudes regarding sexual property have changed among some parts of some societies,¹⁵ institutional concerns with chastity still exist, as do beliefs in different levels of sexual appetite in men and women.¹⁶

Ine Vanwesenbeeck argues that even today the relationship between femininity, masculinity and sexuality is problematic, because it is created by moral judgmentalism and heteronormative and sex-negative gender ideologies. In heteronormative gender concepts heterosexual men of the dominant race are seen as the norm and perceived deviant forms of sexuality, gender and sometimes race are oppressed or marginalised.¹⁷ Sex-negativity describes the perception in Western cultures that sex itself is inherently dangerous and sinful. In Christian tradition sex can be redeemed if it happens for reasons of procreation, within marriage and is not enjoyed too much.¹⁸ The legacy of these two traditions causes society to favour monogamous heterosexual relationships and reject promiscuity and other 'deviant' sexualities. Particularly female promiscuity is considered dishonourable and negative and women's sexual honour is tied to monogamous romantic (marital) relationships that conform to

¹⁴ *ibid* 210; Barnett and Barnett (n8) 60.

¹⁵ For a discussion of a shift of 'property' from the father or husband to the woman herself, see e.g. Thomas Macaulay Millar, 'Toward a Performance Model of Sex' in Jaclyn Friedman and Jessica Valenti (eds), *Yes Means Yes: Visions of Female Sexual Power and A World Without Rape* (Seal Press 2008) 32–37.

¹⁶ Barnett and Barnett (n8) 60.

¹⁷ Michael Warner, *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press 1993) 3–17.

¹⁸ Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carol S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge 1993) 150.

heteronormativity. This leaves no room to envisage a positive concept of active female (hetero)sexual agency.¹⁹

As a result women who engage in unrestricted sexual initiative risk being judged either as 'bad' or as being 'taken advantage of'. This means that all women who actively pursue sexual relations are seen as 'unfeminine'. Their conduct is seen as 'so inherently intolerable that no rational person could freely choose it for themselves'.²⁰ It can indicate only that something is 'wrong' with the women involved, they are 'not rational, or they are victims of coercion or deception, that is to say victims of trafficking.'²¹

In the same way the double standard has shaped and still influences concepts of appropriate female conduct, it also establishes the basis for the assumed reasons for prostitution. If male sex drive was considered naturally uncontrollable, there was a need to provide a way to accommodate this without risking the 'purity' of virtuous women. This assumption about male desire established prostitution as 'the oldest profession', a universal and inevitable social evil, needed to satiate uncontrollable male sexuality. Prostitution is therefore considered society's safety valve against the rape of 'innocent women' and the disintegration of the institution of the family.²²

The assumption that prostitution existed to protect 'innocent' women's honour means that the prostitute becomes 'the fallen woman', a woman who had lost her honour. Her role was seen to be both that of an immoral person, but at the same time the protector of the virtue of all other women, which is illustrated in W.E.H. Lecky's 1913 description of the prostitute in the *History of European Morals*:

A figure which is certainly the most mournful, and in some respects the most awful, upon which the eye of the moralist can dwell. That unhappy being whose very name is a shame to speak; who counterfeits with a cold heart the transports of affection, and submits herself as the passive

¹⁹ Ine Vanwesenbeeck, 'Sex Workers' Rights and Health: The Case of the Netherlands' in Rochelle L Dalla and Lynda M Baker (eds), *Global Perspectives on Prostitution and Sex Trafficking* (Lexington Books 2011) 4.

²⁰ *ibid.*

²¹ *ibid.*

²² Ann M Lucas, 'Race, Class, Gender, and Deviancy: The Criminalization of Prostitution' (1995) 10 *Berkeley Women's Law Journal* 47, 51; D'Cunha (n3) 36; Thomas (n6) 197.

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instrument of lust, who is scorned and insulted as the vilest of her sex, and doomed, for the most part, to disease and abject wretchedness and an early death, appears in every age as the perpetual symbol of the degradation and the sinfulness of man. Herself the supreme type of vice, she is ultimately the most efficient guardian of virtue. But for her, the unchallenged purity of countless happy homes would be polluted, and not a few who, in the pride of their untempted chastity, think of her with an indignant shudder, would have known the agony of remorse and despair.²³

Prostitutes were seen as having 'fallen from virtue', which resulted in them being capable of any crime. According to Barbara Meil Hobson, popular opinion in Victorian times assumed that 'a woman who crossed the great divide between chastity and unchastity had no way back, not only because of society's condemnation but also because she had upset the delicate mechanism that governed her nature.'²⁴ Due to the assumptions based on the double standard, a large amount of time was spent on determining reasons why women could possibly become prostitutes, but not why men engaged in sex with them. This can be illustrated by an 1871 Royal Commission's declaration:

[We] may at once dispose of (any recommendation) founded on the principle of putting both parties to the sin of fornication on the same footing by the obvious but not less conclusive reply that there is no comparison to be made between prostitutes and the men who consort with them. With the one sex the offence is committed as a matter of gain; with the other it is an irregular indulgence of a natural impulse."²⁵

In a male-dominated cultural setting where the use of women for sexual satisfaction and economic gain is seen so much as the norm that it is perceived as 'natural', all the blame falls with the prostitute. Equally, the prostitute must bear the main burden of social and legal efforts to enforce morality. Legislation has historically targeted women to enforce the control of female rather than of male sexuality – and continues to do so in many parts of the world today.²⁶ Even today, there is a focus on the visible 'immoral' conduct of street prostitution and women working on the streets are much more likely to be arrested, fined or jailed

²³ quoted in Thomas (n6) 197.

²⁴ Babara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition* (Basic Books 1987) 110.

²⁵ Thomas (n6) 198.

²⁶ Alison Diduck and William Wilson, 'Prostitutes and Persons' (1997) 24 *Journal of Law and Society* 504, 510.

than both the consumers of prostitutes' services or those who own the brothels or alternative places of business.²⁷ There seems to be less concern about brothel or 'massage parlour' type prostitution.²⁸ Equally, regulations of prostitution usually affect the sex workers, such as in the case of registrations, health checks or tax (in Germany a special 'joy tax' (Vergnuegenssteuer) is charged in some cities, which is theoretically paid by the clients, but collected from the sex workers).

The focus of the blame on prostitutes is also true when it comes to issues of 'public health'. Prostitutes have been the ones, who have been blamed for spreading sexually transmitted diseases, which has enabled authorities to justify the social and legal control of prostitutes as a 'public health measure'.²⁹ In contrast to this, throughout history, male customers have rarely been 'arrested, tested for disease, or confined to the extent that female prostitutes were, even though men are a necessary and integral part of the prostitution contract and the spread of disease through commercial sex.'³⁰

The exclusion of men from such initiatives may be grounded in the idea that 'fallen women' become in a sense public property in the same way that our society's legal, social and economic institutions make 'honourable women' private property, while men are never property.³¹ Thus, just like there is a legacy of men being able to control 'their' women, there is a legacy of the state exercising control over its 'common women'. This perception of women as public property may go to extremes, as the following statement by Kingsley Davis shows:

Enabling a small number of women to take care of the needs of a large number of men, it is the most convenient sexual outlet for an army, and for the legions of strangers, perverts, and physically repulsive in our midst. It performs a function, apparently, which no other institution fully performs.³²

²⁷ Barnett and Barnett (n8) 64.

²⁸ John Scott, 'Governing Prostitution: Differentiating the Bad from the Bad' (2011) 23 *Current Issues in Criminal Justice* 53, 65.

²⁹ D'Cunha (n3) 37.

³⁰ Lucas (n22) 60.

³¹ Barnett and Barnett (n8) 64.

³² Kingsley Davis, 'The Sociology of Prostitution' (1937) 2 *American Sociological Review* 744, 755.

Davis seems to think that it is justifiable to make women engaging in prostitution not only take the blame and the social stigma of being considered 'fallen women', but also that they should have no say in whose 'needs' they should take care of. He does truly see them as public property, and as required to perform an 'institutional function'. W.E.H. Lecky's statement above also shows that he is not alone with this perception, as will my following discourse of perceptions of sexual violence towards prostitutes.

3.2.2) Sexual Violence Against Women Working in Prostitution

Stereotypes about acceptable female behaviour also affect the perceived credibility and the worthiness of assistance of women working in prostitution when they are affected by sexual violence. Firstly, the sexually non-exclusive nature of prostitution violates the idea of a woman as sole sexual property of any one man. Instead, due to her job, she is perceived as common property, as a 'bad woman', who is 'fair game' for rapists.³³ Prostitutes are seen to violate fundamental expectations of how women should act. They are openly selling sex, dressing for sex and making themselves available for sex. By doing so, they are *the* 'model' of female un-chastity. Since they violate norms of how women should act, they are in turn thought of as inviting their own violation. This line of thinking, like Davis', leads to the idea that prostitutes cannot be raped because of the work they do.³⁴

Secondly, women in prostitution also internalise these assumptions. According to McKeganey and Barnard, many women seem to have resignedly accepted that at one point or another they will become victims of sexual violence.³⁵ Worse even, they anticipate unhelpful reactions to their assault and expect to be held responsible for the sexual violence committed against them, since they supposedly placed themselves in the situation where such assaults are likely to occur.³⁶ The prostitutes interviewed by McKeganey and Barnard doubted that the

³³ D'Cunha (n3) 37.

³⁴ Neill McKeganey and Marina Barnard, *Sex Work on the Streets: Prostitutes and Their Clients* (Open UP 1996) 80.

³⁵ *ibid* 70.

³⁶ *ibid* 80.

police would successfully pursue the men concerned. They also believed that even if the case was brought to court, there would not be a chance of it resulting in a conviction once their occupation would be known and they would be labelled as prostitutes.³⁷

Equally, because prostitution is seen to describe the person and not the type of work or the service rendered, the stereotypes about prostitutes and the attitude that they cannot be raped, also influence their private sexual encounters. It is perceived that women working as prostitutes cannot be raped by their boyfriends, just like they cannot be raped by their clients, because they 'give sex away' for money.³⁸ Prostitutes therefore are one of the most vulnerable groups of women in society and most likely to be subjected to sexual and physical violence by men. Both rape and prostitution are manifestations of women's subordination and powerlessness in society.³⁹

3.2.3) Race Dimensions of Prostitution Prejudice

The concepts of female virtue and the prostitute as a fallen woman are not only misogynist, they also include race and class dimensions. In a colonial context, white women were guardians of 'civilisation', responsible for limiting access to physical European features and thereby European status. They reproduced the ruling elite, therefore their sexual encounters had to be limited to suitable men and their behaviour had to be watched and scrutinised by their social group.⁴⁰ Equally, colonised women were perceived as 'exotic, socially prohibited, but available and subjugated sexual objects.'⁴¹ Because colonisers' children from sexual encounters with colonised women could be denied, sex with them was a

³⁷ *ibid* 74.

³⁸ Sophie E Day, 'What Counts as Rape? Physical Assault and Broken Contracts: Contrasting Views of Rape among London Sex Workers' in Penelope Harvey and Peter Gow (eds), *Sex and Violence: Issues in Representation and Experience* (Routledge 1994) 184; Lynn Sharon Chancer, 'Prostitution, Feminist Theory, and Ambivalence: Notes from the Sociological Underground' (1993) *Social Text* 143, 156.

³⁹ D'Cunha (n3) 37.

⁴⁰ Tessie Liu, 'Teaching the Differences among Women from a Historical Perspective: Rethinking Race and Gender as Social Categories' (1991) 14 *Women's Studies International Forum* 265, 272.

⁴¹ *ibid*.

question of personal enjoyment for the men, without the usual obligations and responsibilities.⁴²

In a European context, similar conditions applied to aspects of class. Upper class women were seen as the guardians of social boundaries and were responsible for keeping the bloodlines clean and retain the upper class as 'a race apart from the common rabble'. The order of the upper class home was equally the ideal for society's order, while the working class was considered a source of contagious disorder.⁴³

Working class and colonised women were seen as sexually available and unrestrained by class concerns. As much as they were sexualised, they were also seen as dangerous, a threat not only in terms of possibly spreading disease, but also with regard to poisoning the public order.⁴⁴ Working class and immigrant communities were seen as dangerous, immoral and potentially sexually deviant. This perception was aggravated by the fact that brothels tended (and still tend) to be in working class and immigrant neighbourhoods. Immigrant women and women of colour were thought of as 'promiscuous, indiscriminate in choice of sexual partner, and likely to be prostitutes.'⁴⁵ Because their perceived value to society was lower, they were considered to be more readily available as 'public property'.

According to Judith Walkowitz, even early feminists, who rejected the idea of prostitutes as fallen women, 'were still limited by their own class bias and by their continued adherence to a "separate sphere" ideology that stressed women's purity, moral supremacy, and domestic virtues.'⁴⁶ Some Victorian feminists referred to themselves as 'mothers' defending fallen daughters, implying a hierarchical relationship between older, middle class women and younger, working class women.⁴⁷ While they opposed the sexual privileges of men, they still felt ambivalent about prostitution and working class women's seemingly

⁴² *ibid* 272–273.

⁴³ *ibid* 273.

⁴⁴ *ibid*.

⁴⁵ Lucas (n22) 56.

⁴⁶ Judith R Walkowitz, 'The Politics of Prostitution' 6 *Signs* 123, 135.

⁴⁷ *ibid* 125.

greater rights to sexual self-determination, a right that was not available to upper class women if they wanted to keep the social order. Victorian feminists also already conflated prostitution, particularly the prostitution of young working class women migrating either from rural to urban areas or from one country to another, with human trafficking, which they referred to as 'white slavery'.⁴⁸

The legacy of prejudices against working class women and women from the former colonies still remains today: Vednita Nelson argues that racist stereotypes in media and pornography still portrait Black women as promiscuous and readily available for anyone at any time, which is further amplified by the location of brothels in Black neighbourhoods in the US.⁴⁹ Nelson illustrates the influence of this on women within the community as follows:

On almost any night, you can see [white men] slowly cruising around our neighbourhoods, rolling down their windows, calling out to women and girls. And we got the message growing up, just like our daughters are getting it today, that this is how it is, this is who we are, this is what we are for.⁵⁰

Racialised assumptions about women of colour being more likely to engage in prostitution also affect ideas of who is deserving of help when experiencing violence in a sex work context. When sex workers who are women of colour, and immigrant women of colour in particular, report being in an exploitative situation or indeed having being trafficked, they are less likely to receive help and to be seen as victims of a crime than their white counterparts.⁵¹ This is in part based on the problematic victim category in human trafficking, which I describe in more detail in the following chapter.

Equally, the clichéd concept of 'the pimp' reflects misogynist and racist fears. As Julia O'Connell Davidson states, pimps are not only perceived as men who 'live off' women and are thereby inverting the 'proper' order between the sexes as male earner and female dependent, but they are also often assumed to be Black

⁴⁸ See Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010) and Chapter 5 of this thesis.

⁴⁹ Vednita Nelson, 'Prostitution: Where Racism & Sexism Intersect' (1993) 1 Michigan Journal of Gender & Law 81, 83.

⁵⁰ *ibid* 84.

⁵¹ Interview with UK Sex Workers Rights Organisation (London, 29 April 2015)

males. These imaginary black pimps control the sexuality of several 'fallen', usually white women and therefore also act against the 'proper' racial order.⁵² Prostitution is assumed to be so degrading and dehumanizing that no one would want to be in an intimate relationship with a woman working as a prostitute. Thus, any man who forms a relationship with a prostitute must be doing it for economic gain and becomes, by definition, a pimp.⁵³

3.3) Feminist Positions on Prostitution

3.3.1) The Abolitionist Feminist View

This section introduces some key scholars on prostitution, whose views can be grouped under abolitionist feminism. They all view prostitution as expressions of male domination over women and want to abolish prostitution. Their views are all nuances of the same theme: Catharine MacKinnon views prostitution as violence against women and women who engage in prostitution as victims without a choice; Kathleen Barry sees prostitution as a form of exploitation and rejects the possibility of consent to this exploitation; Sheila Jeffreys views prostitution as the commercialised subordination of women and Melissa Farley argues that the circumstances of prostitution amount to sexual violence.

McKinnon writes that prostitution is 'the denial of women's humanity, no matter how humanity is defined.'⁵⁴ To her, prostitution robs women of their liberty and is the ultimate reduction of all women to sex. She rejects the idea that there is an element of choice for women working in prostitution and argues that it is only the choice of those with the fewest choices.⁵⁵

Kathleen Barry is not only a feminist scholar, but also a founding member of the Coalition Against Trafficking in Women (CATW), a non-governmental organisation whose goal is the abolition of prostitution as a form of sexual exploitation. She argues that prostitution is exactly that, a form of sexual

⁵² Julia O'Connell Davidson, *Prostitution, Power and Freedom* (Polity 1998) 43.

⁵³ *ibid* 44.

⁵⁴ Catharine A Mackinnon, *Women's Lives, Men's Laws* (Harvard UP 2007) 151.

⁵⁵ *ibid* 159.

exploitation of women that 'reduces women to a body'⁵⁶ and is harmful to women, regardless of whether or not there is an element of consent. To her, prostitution violates the human right to dignity and therefore there is no distinction to be made between 'free' and 'forced' prostitution, or as she put it: 'People cannot give meaningful consent to the violation of their human rights.'⁵⁷

Kathleen Barry denies the legitimacy of First World sex workers' and sex work activists' view of prostitution and argues that in order 'to "embrace" prostitution sex as one's self-chosen identity [one must be] actively engaged in promoting women's oppression on behalf of oneself'.⁵⁸ It is curious that she equates prostitution with a self-chosen identity. This view echoes patriarchal ideas of women engaging in prostitution becoming 'the prostitute,' or, even in legal terms 'a common prostitute,' an identity and legal status that is not removable, regardless of whether or not they have worked in prostitution in days, weeks or years. Whereas there is no evidence that Kathleen Barry agrees that 'common prostitute' is an unalterable status, she seems to argue that prostitutes' line of work alters their self-perception and that in order for them to identify prostitution as their preferred current occupation, they have to adopt 'the prostitute' as their identity and embrace all the stigma and prejudices that come with it.

She equally denies the agency of Third World sex workers, claiming that in the context of the situation of women in developing countries "Sex work" language has been adopted out of despair, not because these women promote prostitution, but because it seems impossible to conceive of any other way to treat prostitute women with dignity and respect than through normalizing their exploitation'.⁵⁹

Sex workers' rights feminist Jo Doezema points out the problem in the idea of the perpetual violence in prostitution in her critique of Kathleen Barry. According to Doezema, Barry's concept of the injury in prostitution is circular. It is injurious because of the dehumanising nature of the sex in it, while the sex in it is dehumanizing because it happens within prostitution. Within this argument, there

⁵⁶ Kathleen L Barry, *The Prostitution of Sexuality* (NYU Press 1996).

⁵⁷ *ibid.*

⁵⁸ *ibid* 71.

⁵⁹ Catherine A MacKinnon, 'Trafficking, Prostitution, and Inequality' (2011) 46 *Harvard Civil Rights Civil Liberties Law Review* 271, 296.

is 'no place for the experiences of sex workers who claim their work is not harmful or alienating.'⁶⁰

Sheila Jeffreys, another founding member of CATW, also supports the 'prostitution as sexual violence' approach. She does however show some understanding for the need to give sex workers a voice and to 'listen to and respect the views of those women who represented themselves as having experience of prostitution'.⁶¹ However, she criticises spokespersons of sex work organisations for being too uncritical of their own work situations and for downplaying the harms of prostitution. In her opinion, an approach to prostitution that focuses on choice and sex workers' agency denies the realities of most women and girls who enter prostitution.⁶²

According to Jeffreys, it is important to see prostitution as different from ordinary work, because of the similarities 'between the experience of prostituted women and rape victims, such as having to disassociate emotionally from their bodies to survive, and suffering symptoms of post-traumatic shock and negative feelings about their bodies and their selves.'⁶³ It is true that women involved in prostitution often show signs of trauma similar to those of sexual violence. However, many of them have been subject to sexual violence and rape either in their youth or while working as prostitutes. It is therefore not clear whether their trauma roots in the prostitution itself or in the additional sexual violence that happens to them due to their status as prostitutes and which experience it is that makes them disassociate from their bodies.

Melissa Farley equally rejects the ideas of consent in prostitution or of a difference between prostitution and human trafficking. She also makes similar statements as Sheila Jeffreys about the post-traumatic stress in prostitution. She goes even further, stating that 'descriptions of prostituted women as sex workers promote an acceptance of conditions that in any other employment context would

⁶⁰ Doezema (n48) 137.

⁶¹ Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Routledge 2008) 17.

⁶² *ibid* 37.

⁶³ *ibid* 17.

be [...] described as sexual harassment, sexual exploitation, or rape.’⁶⁴ Farley also raises the issue of sex, class and race equality. She argues that until such equality exists, there must be laws that protect people from exploitation that seems voluntary.⁶⁵

Melissa Farley’s rejection of the ability to give any level of (however limited) consent to prostitution is problematic: if we characterise the act of having sex for money as itself a form of sexual violence, it becomes difficult to appropriately define any abuse they may suffer while they engage in sex for money. Since they are not considered to *really* be able to consent to their work in a meaningful way, it is hard to argue that they are consenting to some things that happen within their work, but not to others.⁶⁶ Such a view negates the experience of rape and other forms of sexual violence within prostitution. This conceptualisation can play into the hands of those who believe that prostitutes are somehow ‘publicly available to be raped,’ or, by being publicly available for sex, ‘unrapeable’. It also perpetuates the ‘Madonna-versus-whore’ stigma, or the sense that only those who unwittingly ended up in prostitution are deserving of protection.’⁶⁷

3.3.2) The Liberal Feminist Response

On the other side of the debate is a liberal feminist response, the sex workers’ rights approach, which has grown out of a critique of the abolitionist feminist approach. Sex-workers rights’ activists and theorists dispute most of the claims made by anti-prostitution feminists. Instead, their approach rejects the opinion that sex workers are victims of coercion or circumstance. They emphasise sex workers’ agency, strength, and self-determination.⁶⁸ The sex work approach favours decriminalisation of prostitution, up to various forms of legalisation. It

⁶⁴ Melissa Farley, ‘Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly’ (2006) 18 *Yale Journal of Law and Feminism* 109, 133.

⁶⁵ *ibid* 110.

⁶⁶ Sophie E Day, *On the Game: Women and Sex Work* (Pluto Press 2007) 114; Vicki Schultz, ‘Sex and Work’ (2006) 18 *Yale Journal of Law and Feminism* 223.

⁶⁷ Janie A Chuang, ‘Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy’ (2010) 158 *University of Pennsylvania Law Review* 1655, 1701.

⁶⁸ Vanwesenbeeck (n19) 7.

aims to remove criminal sanctions from prostitutes, so that prostitution becomes as legitimate as any other mode of livelihood.⁶⁹ The term 'sex work' was coined by Carol Leigh, a First World sex worker and activist in 1998 and subsequently adopted by sex workers worldwide.⁷⁰ Some of the most prominent advocates of the regulatory pro-sex work approach are Jo Doezema, a First World sex workers' rights activist, Kamala Kempadoo, a researcher on Third World sex worker's activism and Richard Weitzer, a proponent of legalisation of prostitution.

Jo Doezema, like abolitionist feminists, argues, that sex workers reject the old position that prostitution is 'a necessary evil', and that 'a certain group of women, who 'consented' to be prostitutes, had to be put under extra state discipline and control.'⁷¹ According to her, they instead aim to detach prostitution from its historical association with sin, criminality and illicit sex.⁷² Where they differ from the abolitionist feminist view, however, is that pro sex work feminists consider prostitution to be a profession like any other and that those who chose prostitution should be recognised as workers and given labour rights. Their arguments are framed in terms of choice and consent.⁷³

Kamala Kempadoo emphasises the importance of giving a voice to sex workers worldwide. She wants to move away from the idea of sex work as an identity and towards a concept of sex work as a normal income-generating activity.⁷⁴ She particularly rejects attempts to 'rescue' sex workers in the developing world and, by extension migrant sex workers.

Ronald Weitzer argues that most anti-prostitution research is undifferentiated, exaggerates some of the negative side effects of prostitution and conflates prostitution with human trafficking. He argues that legalising prostitution would

⁶⁹ MacKinnon (n59) 274.

⁷⁰ Doezema (n48) 136.

⁷¹ *ibid* 113.

⁷² Valerie Jenness, 'From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem' (1990) 37 *Social Problems* 403, 417.

⁷³ Doezema (n48) 113.

⁷⁴ Kamala Kempadoo, 'Introduction - Globalising Sex Workers' Rights' in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Psychology Press 1998) 3.

make it easier to safeguard sex workers.⁷⁵ He also suggests that since some studies show varying degrees of violence in prostitution against female and male prostitutes, a closer look at gender dynamics in prostitution, rather than at prostitution per se, is necessary.⁷⁶

For most pro-sex workers' rights feminists, legislation that criminalises prostitution is the main factor that renders prostitutes vulnerable to coercion, abuse and exploitation. They therefore argue that 'prostitution should be recognised as a form of work that can be actively chosen and prostitutes accorded the rights and protection that is given to other groups of wage workers.'⁷⁷

Pro-sex workers' rights feminists claim that street prostitutes are particularly affected by this governmental bias, because they are more publicly visible than other prostitutes and often less financially stable. Street prostitutes are also more often poor women, migrant women and women of colour, which makes them particularly vulnerable. They are disproportionately more likely to suffer police harassment, arrest and to be sentenced to jail.⁷⁸

3.3.3) Respective Criticism and Joint Problems of the Two Viewpoints

A key criticism of the abolitionist feminist approach stems from abolitionist feminists' view of prostitution as oppression. This interpretation leaves no room for women who see themselves as sex workers who made a choice of employment, rather than as having been prostituted through someone else. This is the main issue sex workers' rights activists have with the abolitionist feminist perspective. The abolitionists' reasoning is that the agency in prostitution is reduced to the agency of no other options. While this sentiment is understandable taking into account the situation of many women in prostitution

⁷⁵ See e.g. Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (NYU Press 2012).

⁷⁶ Ronald Weitzer, 'Flawed Theory and Method in Studies of Prostitution' (2005) 11 *Violence Against Women* 934, 946.

⁷⁷ O'Connell Davidson (n52) 16.

⁷⁸ Lucas (n22) 49.

worldwide, especially those in social conditions where they are almost born into prostitution because their mothers were prostitutes and they grow up as social outcast, it is not true for all women in prostitution. Furthermore, choosing prostitution from a group of very limited and limiting choices still constitutes a choice. Kapur argues that focussing on the economic situation of third world women and viewing them as perpetually underprivileged and marginalised serves to equate choice with wealth and consequently poverty with coercion. In such a paradigm there is no room to recognise and validate the choices women make amongst the limited opportunities they possess.⁷⁹

The blanket assumption that all prostitution is oppression with no room for personal agency ignores the vastly different experiences of women who work in the sex industry. It seems cynical to claim that the experience of a self-employed sex worker who engages in dominatrix role-play and does not have any direct physical contact with her clients is comparable to the experience of a woman who is a victim of forced prostitution, held in debt-bondage or even captivity. Julia O'Connell Davidson describes the working situation of the independent, self-employed prostitute 'Desiree':

[She] dictates the terms upon which she transfers powers over her person to clients. It is also [she] who sets the boundaries of that transfer. She does not sell clients an unlimited, absolute licence to do as they will with her for the duration of the encounter. [...] She absolutely refuses to grant clients the power to perform acts of physical violence against her person, and she will not contract to perform/ submit to acts which she finds particularly repulsive (like giving enemas or receiving anal penetration) or excessively intimate (like kissing or cunnilingus), nor will she contract to transfer to clients powers to perform acts upon her person which she views as especially hostile, like ejaculating in her face. In short, the individual client's freedom to satisfy his wants is constrained by the control Desiree exercises over the terms and limits of the contract.⁸⁰

On the basis of Desiree's experience, O'Connell Davidson rejects the assumption that prostitutes are *always* at a disadvantage and can *always* be refused

⁷⁹ Ratna Kapur, 'Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern' (2000) 78 *Denver University Law Review* 855, 869.

⁸⁰ O'Connell Davidson (n52) 92.

payment.⁸¹ While Desiree's experience may not be the norm, her perspective and her reality of prostitution cannot be dismissed.

The abolitionist feminist counter-argument is that even if the transactions in question are not harmful to the specific prostitutes involved, there is still a negative impact on all women.⁸² This means the individual women are seen as exploiting that which substantiates all women's oppression. While this may not be untrue, it is argued from a level of relative privilege. Assuming that women who benefit from the - often unfair - exchanges in prostitution should give up prostitution for the advantage of a prostitution-free world for all women means that they should sacrifice the (often small) improvements to their standard of living that they can attain through engaging in prostitution for an advancement of all women. This advancement is most likely to benefit those who are already in a situation of greater freedom, namely Western or upper class women.⁸³

This does not mean that complex issues of exploitation, harm and limitations should be ignored and that all strategic intervention abolitionist feminists propose should be ruled out.⁸⁴ However, it is necessary to remember the realities and struggles of women actually working in prostitution worldwide.

The Indian 'Durbar Mahila Samanwaya Committee' sex worker collective states that currently charities try to 'rescue' them, developmental organisations try to 'rehabilitate' them through initiatives that generate meagre incomes at best, and the police raids their private quarters in the name of controlling trafficking. They argue that even when dominant discourses aim to describe them sympathetically, as I believe the abolitionist feminist discourse does, they are portrayed as 'powerless, abused victims with no resources, [...] as objects of pity.'⁸⁵ This shows the importance of taking into account that all perspectives, including our own, are influenced by individual circumstances. I believe that we can only

⁸¹ *ibid* 95.

⁸² Vanessa E Munro, 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work' in Vanessa E Munro and Marina Della Giusta (eds), *Demanding Sex. Critical Reflections on the Regulation of Prostitution*. (Routledge 2008) 93.

⁸³ Alan Wertheimer, *Exploitation* (Princeton UP 1996) 121–122 (in the context of surrogacy).

⁸⁴ Munro (n82) 93.

⁸⁵ Quoted in Doezema (n48) 136.

expect the wider harm of prostitution to all women to be taken into account by those who are working in prostitution by creating viable job alternatives or by restructuring the character of prostitution in a way that is no longer harmful to women. Both will require broader and more radical reforms towards gender equality and equality of opportunity.

Liberal feminists have also accused abolitionist feminists of having entered strange alliances on the issues of human trafficking and prostitution with groups who follow essentially anti-feminist agendas, such as Christian groups, in order to abolish prostitution.⁸⁶ Ronald Weitzer claims that although 'these religious and feminist activists are fierce opponents on other social issues such as abortion and same-sex marriage, they have entered into a marriage of convenience in their campaign against the sex industry.'⁸⁷ Not only do abolitionist feminists ally with religious groups who want to abolish prostitution for completely different reason, namely 'moral' ones that reflect patriarchal ideas about what prostitution does and who women working in prostitution are, they often also jointly influence government policy, particularly in the US counter-trafficking response, which routinely conflates human trafficking and sex work.⁸⁸ Furthermore, criminalising the purchase of prostitution can give more power to those who traffic women and forced their prostitution, because prostitutes have to give up their independent status and seek working situations where these third parties protect them from arrest and police abuse.

This approach not only opens up the possibility of police corruption, it also makes prostitutes vulnerable to increasing demands, abuse and violence from those

⁸⁶ Wendy Hesford, *Spectacular Rhetorics: Human Rights Visions, Recognitions, Feminisms* (Duke UP 2011) 132–133; Alicia W Peters, *Responding to Human Trafficking: Sex, Gender, and Culture in the Law* (University of Pennsylvania Press 2015) 53–54; Jacqueline Berman, 'Biopolitical Management, Economic Calculation and "Trafficked Women"' (2010) 48 *International Migration* 84.

⁸⁷ Ronald Weitzer, 'Moral Crusade against Prostitution' (2006) 43 *Society* 33, 33.

⁸⁸ Peters (n86); Berman (n86); Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36 *Signs* 45; Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 *The American Journal of International Law* 609; Jennifer Lynne Musto, 'What's in a Name?: Conflations and Contradictions in Contemporary U.S. Discourses of Human Trafficking' (2009) 32 *Women's Studies International Forum* 281; Lara Gerassi, 'From Exploitation to Industry: Definitions, Risks, and Consequences of Domestic Sexual Exploitation and Sex Work Among Women and Girls' (2015) 25 *Journal of Human Behavior in the Social Environment* 591, 592.

who 'protect' them. Ronald Weitzer claims that 'once the industry is pushed underground, organized crime takes over, and trafficking into forced prostitution increases.'⁸⁹ This claim seems to be substantiated: sex workers in San Francisco reported increasing fears of violence from clients, as well as threats from potential pimps after the FBI closed the city's prime online sex work marketing website. In an attempt to rescue sex workers from traffickers, the FBI not only closed down 'MyRedbook', the business side of the website, but also 'MyPinkbook', a database including safety tips, blacklists describing abusive clients and a community of support for sex workers. After the shutdown, many younger sex workers worked on the streets for the first time, after previously having been able to vet clients online.⁹⁰

Equally, despite abolitionist feminists often favouring the 'Swedish model' of decriminalising sex workers, while criminalising buyers, research from Sweden shows that it drives prostitution underground and makes sex workers more vulnerable to exploitation, as they have fewer clients to choose from and are thus more likely to engage with clients and to perform service they would otherwise refuse.⁹¹

However, there is a similar criticism about authorities' ability to abuse the sex workers' rights perspective: the focus on self-determination in this approach makes it easier for authorities to ignore the struggles of sex workers who have not been forced.⁹² The assumption that those who have not been trafficked are there voluntarily means that 'innocent, vulnerable trafficking victims' need help,

⁸⁹ Weitzer (n87) 33.

⁹⁰ Kristen DiAngelo and Serpent Libertine 'Anti-Trafficking Trends: Harmful or Helpful? Through The Eyes Of Sex Workers' (International Human Trafficking Conference, Toledo OH, September 2014)

⁹¹ Susanne Dodillet and Petra Östergren, 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects' (2011)
<http://www.policeprostitutionandpolitics.com/pdfs_all/Swedish%20Model/54259-1.pdf>; Mikael Delin, 'Sexköpslag får underkänt' *Dagens Nyheter* (2 February 2015)
<<http://www.dn.se/nyheter/sverige/sexkopslag-far-underkant/>>; 'Schweden: Prostitution Verboten, Die Freier Bleiben' *Die Zeit* (Dezember 2013)
<<http://www.zeit.de/gesellschaft/zeitgeschehen/2013-12/schweden-prostitution-verbot-freier-strafe>>.

⁹² Interview with UK Sex Workers Rights Organisation (London, 29 April 2015)

whereas prostitutes who consented need redemption and rehabilitation.⁹³ Even worse, some governments and some NGOs are only eager to help ‘madonna’ victims of abuse, but not ‘whore’ victims.⁹⁴ The consent element in international anti-trafficking legislation and most states’ definitions of trafficking makes it difficult to argue that migrant women who entered work in the sex industry without coercion ‘should not be deprived of their rights on the grounds that they are undocumented migrants who ‘knew’ what to expect and so deserved what they ‘got’.’⁹⁵ This is not exclusively a problem of the sex workers rights’ approach, but a result of the stereotypes generally affecting migrant women in prostitution. However, the element of ‘consent’ and calls of sex workers’ rights activists to leave women who entered the sex industry without being forced alone makes it easier to twist around the argument for those who want to ignore the need to protect the rights of prostitutes.

Another problem with the pro-sex work approach is that the financial realities of sex workers often negatively influence their control of their working hours, services provided and clients served. Also, many of the prostitutes Julia O’Connell Davidson interviewed did not identify with their work in the way some sex-worker advocates seem to do. To most women involved in sex work, it is a temporary financial measure, not something to self-identify with.⁹⁶ As they are not invested in sex work as a long term career, they may also have limited interest in improving their medium or long term working conditions. Furthermore, as Catharine MacKinnon puts it in her critique of the pro-sex work approach, most women in prostitution do not want to think that prostitution is all that they are ever going to do. A legal status as a prostitute requires disclosing a real name, official registration and so forth, all of which creates records and makes prostitution part of those women’s official lives.⁹⁷ In Germany, where registration and ‘whore IDs’ are part of the current draft bill to regulate sex work and curb human trafficking, this way of formalising sex workers’ status is met with protest by sex workers’

⁹³ Wendy Chapkis, ‘Trafficking, Migration, and the Law Protecting Innocents, Punishing Immigrants’ (2003) 17 *Gender & Society* 923; Niki Adams, ‘Anti-Trafficking Legislation: Protection or Deportation?’ (2003) 73 *Feminist Review* 135.

⁹⁴ Ann D Jordan, ‘Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings’ (2002) 10 *Gender & Development* 28, 31.

⁹⁵ *ibid* 29–30.

⁹⁶ Chuang (n67) 1700–1701.

⁹⁷ MacKinnon (n59) 306.

rights activists.⁹⁸ In addition to women not necessarily wanting to become ‘official’ prostitutes, the regulation of sex work has also some other negative aspects. If the working relationship between prostitutes and licensed operators of brothels is official and formalised, the latter may be able to impose rules and demands on a sex worker who is an official employee.⁹⁹ While she would become generally protected through employment law, she would lose the freedom to choose her clients.

Evidence from Germany and the Netherlands shows that mainly big actors who already controlled large, at the time illegal, brothels before the introduction of regulatory legislation, control the majority of the legal sex industry.¹⁰⁰ This means that former pimps, including those who ran brothels with very oppressive work arrangements and those with close ties to criminal organisations, now legally run brothels. Since there is no evidence that they have undergone an attitude-shift and now value their female employees as sex workers with legally protected rights, it is likely that they still operate in the same manner. Furthermore, their market strength probably makes it hard for sex workers collectives to open their own, self-governed brothels within the same areas. Nonetheless, the German example with its limited right of direction for employers in the sex industry, which I discuss in greater detail in chapter 8, demonstrates the possibility for employer employee relationships which come with rights and obligations, but do not treat prostitution as exactly a job like any other.

3.3.4) Beyond the Abolitionist – Liberal Paradigm

Going beyond the distinct concepts of the two opposing groups, some feminist scholars have aimed to explore new paths. Michelle Madden Dempsey offers a qualified version of radical feminist abolitionism,¹⁰¹ while Ine Vanwesenbeeck provides a pro-sex work approach that does not shy away from highlighting some

⁹⁸ See Chapter 8.

⁹⁹ Vanwesenbeeck (n19) 13.

¹⁰⁰ Day (n66) 118.

¹⁰¹ Michelle Madden Dempsey, ‘Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism’ (2010) 158 *University of Pennsylvania Law Review* 1729.

of the problems arising from legalisation.¹⁰² Finally, Vicky Schultz illustrates how a labour perspective can enrich the debate.¹⁰³

Michelle Madden Dempsey acknowledges the possibility that, while most people in prostitution experience substantial harm, there are instances of prostitution that do not amount to sex trafficking and that some people view selling sex as a genuinely valuable option. She further takes into account that by viewing prostitution as a valuable option in their lives, people who engage in it are not necessarily mistaken or suffering from some form of false consciousness. Her argument, in line with radical feminist thought is, that while she acknowledges the value prostitution may have to some people, it is never valuable enough to outweigh the harms experienced by many other prostituted people.¹⁰⁴ To her, the 'goal of the feminist-abolitionist project is a long-term transformation to a post-patriarchal society: one in which prostitution likely would not exist at all, and if it did, would represent one of a range of valuable options available to all people.'¹⁰⁵ This is clearly a laudable goal. Whereas I question the possibility of prostitution not existing at all, I do believe that in a post-patriarchal society prostitution would be non-gendered and not exploitative and would have little in common with prostitution today.

Dempsey also argues that the costs of abolishing prostitution to those who might be unable to exit it might be increased. In her opinion this is a tolerable temporary situation on the way to abolishing prostitution.¹⁰⁶ But, to me, the argument that the only way to abolish oppressive forms of prostitution in the long run is to sacrifice the well-being of those who would not be able to exit it in the short run is problematic. While the end goal may still be the same, a labour law approach might offer a better way to approach this aim.

Ine Vanwesenbeeck argues that sex workers should be enabled by law to control their working conditions on the issues of working hours, the services provided

¹⁰² Vanwesenbeeck (n19)

¹⁰³ Schultz (n66); Vicki Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107 Yale Law Journal 1683.

¹⁰⁴ Dempsey (n101), 1746.

¹⁰⁵ *ibid* 1775.

¹⁰⁶ *ibid*.

and clients served. This should also include the right to safeguard their health and bodily integrity, encompassing the freedom to refuse working without a condom or working with violent clients. Sex workers should be sufficiently informed about these rights, trained to use them and have the required knowledge (and trust in the police system) to act when these rights are violated.¹⁰⁷

As Ine Vanwesenbeeck notes regarding 'official' sex workers in the Netherlands, municipalities are in control of the number of licences issued and the areas they allow licensed businesses to be located in. In the case of the Netherlands that caused mostly large companies to take all the licenses available from councils, making it nearly impossible for new, small size, self-controlled partnerships of sex workers to obtain licenses. This policing has impacted the situation in a way that has prevented more substantial innovation, including working relations and sex workers' control of their own work from taking place.¹⁰⁸ She concludes that so far pimps and customers have benefited more from the reforms than sex workers, who continue to suffer negative consequences. Furthermore, at least in the Netherlands, sex workers and brothel operators worry 'that state and municipalities are investing more, and unjustly so, in controlling the licensed sector than in combating the illegal one.'¹⁰⁹ Nonetheless, she also makes the point that the legislation in the Netherlands is still relatively young and that, 'despite increasing awareness among sex workers that they do not need to passively accept operators' rules and directives, a long tradition of 'obey and keep your mouth shut' does not evaporate overnight. The authorities have expected prostitutes to come forward much too easily and have seriously underestimated the pervasiveness of stigma and the fear and shame associated with it.'¹¹⁰

Vicki Schultz argues that a sex work as labour approach could highlight the sexist aspects of prostitution in a way that leaves open the possibility of a kind of prostitution that is not inherently sexist or degrading. To her, the problem in prostitution lies not in the act itself, which, like administrative work,

¹⁰⁷ Vanwesenbeeck (n19) 7.

¹⁰⁸ *ibid* 14.

¹⁰⁹ *ibid* 12.

¹¹⁰ *ibid* 13.

housekeeping, cooking or serving food is not in itself sexist or degrading. However, that does not mean we should not be worried that it is predominantly women selling sex and almost exclusively men who are buying it.¹¹¹ In this sense it is the way prostitution happens, and not the transaction of sex for money that is problematic. Characterizing prostitution and related activities such as housework, child care and elder care as work, and approaching them from a labour law perspective can 'open up the conceptual space to challenge the fact that these activities are often reserved only for women and, in so doing, challenge the underlying system of sex segregation that is so fundamental to gender inequality.'¹¹² Equally, the sex work as labour perspective creates room to acknowledge that while 'normalizing sex work through harm-reduction strategies cannot avoid the practical obstacles to agency that most migrant sex workers suffer as a result of their unlawful migration status',¹¹³ it can help to focus on certain factors of inequality, for example 'the fact that certain working conditions are better for some (e.g., nationals) than others (e.g., migrants).'¹¹⁴

As Vicki Schultz rightly points out, acknowledging prostitution as a type of work does not, as some people claim, deny the fact that it is often performed under conditions of exploitation, with a lack of viable alternatives and usually has a sexist dimension to it. She argues, however, that many jobs are 'exploitative, dangerous, emotionally damaging, health-destroying, misery-inducing, and suffused with racism and sexism and abuses of authority.'¹¹⁵ That does not necessarily mean that there is a reason for a general ban of these occupations or that the problem lies in the work itself. It does however call for a stronger focus on the rights of those working in these fields. The same can be said about prostitution.

¹¹¹ Schultz (n66) 228; Ann C McGinley, 'Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries' (2006) 18 *Yale Journal of Law and Feminism* 65.

¹¹² Schultz (n66) 228.

¹¹³ Chuang (n67) 1701.

¹¹⁴ Margaret Jane Radin and Madhavi Sunder, 'Introduction: The Subject and Object of Commodification' in Martha Ertman and Joan C Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (NYU Press 2005) 14.

¹¹⁵ Schultz (n66) 233.

3.4) A Pragmatic Approach to Sex Work as Work

Sex workers rightly say that their work is described as either complete oppression or as an exclusively joyful experience for sexually liberated women.¹¹⁶ Whereas the latter tries to give sex work a more positive reputation, it still frames prostitution in self-expression terms and thereby separates it from other work. There is an underlying assumption that no woman would voluntarily choose sex work, unless she derives extreme joy and fulfilment from it. In this narrative, prostitutes' work remains the embodiment of the 'whore' side of the 'Madonna – whore' dichotomy, which no woman is believed voluntarily to choose unless she is sexually deviant. This approach suggests that we should make room for deviance, which is now repackaged as women sex workers' self-fulfilment. This leaves no room, however, for sex workers as workers, who sometimes enjoy their job, sometimes see it as a means to an end, and sometimes loathe it.

The other approach - banning prostitution as a step to end women's sexual oppression - is neither feasible nor effective. While I think that eliminating prostitution in its current form and, more importantly, its root causes in patriarchal structures, is a desirable end goal, I agree with Jody Freeman that 'only broad social and economic reforms, coupled with profound changes in our most deeply entrenched cultural norms of sexed behaviour, would eliminate the causes of prostitution' and that, unfortunately, this is an unrealistic immediate goal.¹¹⁷ I particularly question the criminalisation of sex work or of sex workers' clients before creating true equality between men and women in other areas, such as equal access to jobs, including high-paying and prestigious jobs, equal distribution of unpaid reproductive labour (and the validation thereof) and equal pay for women and people of colour to that of white men.

Particularly for migrant women, who are excluded from other work for a number of reasons,¹¹⁸ but also for other women, whose domestic duties or limited access

¹¹⁶ Niki Adams and others 'Buying and Selling Sex: the Big Debate' ('London Thinks' Roundtable, Conway Hall, London, May 2015)

¹¹⁷ Jody Freeman, 'The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)Possibility of Consent' (1989) 5 Berkeley Women's LJ 75, 76.

¹¹⁸ See Chapter 2.

to wealth and education prevent them from accessing other viable job opportunities, sex work can be the best choice of few available choices. These choices may be more meaningful in a context in which male and female sexuality were less restricted, and female sexual agency less stigmatised. If it is possible to eradicate the 'Madonna vs. whore' dichotomy – a goal both radical and liberal feminists can agree on – there is room for women to become subjects of their own sexuality instead of being seen as belonging to either of the two categories.

Thus, a pragmatic sex work as work approach, which is embedded in a wider attempt to validate and value, as well as to financially compensate for, all reproductive work, as I will explain in greater detail in Chapter 9, would not only challenge norms of appropriate and inappropriate sexual behaviour of men and women, it would make it possible to ask important questions about sex workers' working conditions and about how they came to be in that work in the first place. These are crucial questions for addressing trafficking for sexual exploitation. By viewing prostitution through a feminist and workers' rights and labour protections lens, it is possible to link the sexism in prostitution, in debates on prostitution and in trafficking narratives.

As Laura María Agustín so perfectly describes:

Sex workers often perform their own sexual arousal and orgasms for clients who feel more excited and gratified if they believe that workers are, they also act out flirting, counselling and diplomacy. But there is no reason to limit such faking to those selling sex: babysitters and carers of grannies may also pretend to care, by smiling on demand, listening to boring stories, or doling out caresses without feeling affection.

These kinds of practices can be viewed as conventional professional efforts to control the job, reduce risk, guard against annoyance, and maximize profits, all 'considered admirable demonstrations of sound work ethic in any other regular profession' but read as 'signs of greed and laziness' when associated with sex.¹¹⁹

As with all women's reproductive work, the skills deployed by sex workers are not valued as true skills in this context, but as 'given' female traits. However, unlike other supposedly inherently female traits, in the case of sex work they are judged

¹¹⁹ Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books 2007) 62–63.

as greedy and immoral. I argue that these skills are still perceived as inherently female traits, but as those of deviant women, or an expression of the potential deviance of all women. An approach that views sex work as work uncovers the double standard that underlies these assumptions.

Vicki Schultz demonstrates that viewing sex work as work also creates a space to question the male and female ratios within prostitution. It might force owners of legal brothels to employ male prostitutes for female customers alongside female prostitutes for male customers for reasons of non-discrimination.¹²⁰ Such non-discrimination requirements would highlight the sexism and gender inequality in the current sex industry.

However, changes in attitudes about gendered behaviour are necessary to make the selling of sex thinkable to men and the purchase of sex thinkable for women. Issues of non-discrimination would also demonstrate that currently male prostitutes for female customers only exist in the cases of well-paid call boys and male escorts.¹²¹ It is noteworthy that, unlike 'rent boys' who serve other men, male sex workers who provide services to women tend to occupy the niches of prostitution that are relatively well-paid and less stigmatised than other areas of the sex industry. This difference illustrates that the problem lies in gendered intersectional inequality. Currently, the male gaze defines who is 'feminine' in prostitution: anyone who services male sexual desires. 'Rent boys' are thus included in the group of feminised sufferers of stigma and discrimination. Thus discrimination law might serve only a limited purpose in this context.

Instead, like defining trafficked and migrated through the voices of those who experienced it, defining sex work from the perspective of those who offer it would also open up the possibility to include clearly defined rules of sexual harassment within prostitution and make it easier for individual women to clearly state what they consider part of their work or the service they offer. Such clearly defined job- and task-descriptions would make it easier to highlight abuse and to create the

¹²⁰ Schultz (n66).

¹²¹ For a discussion of male sex work with female customers see e.g. Rachel Smith, 'Would You Pay for Sex?' *The Hoopla* (12 May 2012) <<http://thehoopla.com.au/pay-sex/>>.

potential to identify clients' behaviour as sexual harassment or even sexual assault.

Equally, if sex work were considered to be legitimate work, the current practice of protecting the privacy of customers to a greater extent than in other businesses would become questionable. This would mean a loss of the gendered privacy for men and might contribute to the safety of sex workers. Furthermore, concepts of 'the prostitute' as a permanent 'title' would have to be abolished. If prostitution is a legitimate occupation, former prostitutes must be able to leave the job title when they leave the job.

At the same time, viewing sex work as labour creates the possibility of acknowledging the vulnerability of precarious workers in the sex industry, including workers who migrated for sex work. It acknowledges that people can both migrate for sex work and initially consent to working in the sex industry in their country of destination, yet also face (sexual) abuse and inhumane working conditions upon arrival. This view eliminates the basis for the "she knew what she was getting into" rhetoric often present in the human trafficking debate.

Like the abolitionist feminist position, a pragmatic feminist 'sex work as labour' approach highlights problems in prostitution as issues of unacceptable working conditions and problematic gendered norms of sexual behaviour. It offers a pragmatic response to sex work and leaves moralistic judgements out of the equation. By placing sex work in the realm of labour, the particular precariousness of sex workers also becomes evident. The next chapter illustrates how the heightened vulnerability and the stigma of sex work, combined with exclusions from labour rights and regulations, and migration policies which amplify the exploitability of migrants, create a toxic mix which amounts to the abuse of migrant sex workers which are described as victims of 'human trafficking for sexual exploitation' in human trafficking legislation. I argue that their exploitation is partly built on their exclusion from fundamental labour protections, and on the way existing human trafficking legislation frames their situation, which is deeply rooted in the concepts of prostitution as a moral question discussed in this chapter.

Chapter 4: How a Criminal Law Approach to Human Trafficking Neglects Intersectional Vulnerabilities

4.1) Introduction

This chapter first explores the coming together of the three different legal and societal exclusions and the resulting vulnerabilities of women in labour, migration and in prostitution, within the overarching theme of gendered exclusion and vulnerability. I argue that the exclusions and vulnerabilities faced by migrant women workers in the sex industry are a case of intersectional vulnerability, which is compounded by highly problematic concepts of victimhood and agency. Migrant women's exploitation in the sex industry is complex and multifaceted and involves narratives of agency as well as exploitation, whereas the victim category ascribed in definitions of human trafficking requires 'perfect passivity' in order to establish victimhood.

Thus, in the following section I criticise the existing human trafficking narrative in criminal law, which portrays human trafficking as a system of two opponents, the trafficker and his victim. It requires polar opposites and, in order to create perfect perpetrators, requires perfect victims. I argue that this approach not only obscures intersectional vulnerabilities suffered by trafficked women, but also blurs the role government policies play in creating and maintaining the structures that let human trafficking flourish.

In the third section I explore the idealised victimhood of female victims of trafficking under consideration of the theoretical concepts of pathetic and heroic victims. I demonstrate that the nature of human trafficking for sexual exploitation makes it so that even in their victimhood women victims of trafficking face restrictions placed upon them by gender roles.

4.2) Intersectional Vulnerability

Why is human trafficking for sexual exploitation unique? As I have demonstrated in the previous chapters, there are a number of overlapping vulnerabilities.

Firstly, history has borne out that women are more likely to be engaged in precarious work, thanks to exclusions from labour rights and standard employment contracts favouring men. Women's (unpaid) childcare and other reproductive labour responsibilities have furthered this precariousness by pushing women into part-time instead of full-time employment, while simultaneously devaluing their reproductive work as 'not work'. This devaluation of women's unpaid work also contributes to lower value attached to women's paid work, regardless of whether it is in the 'productive' or 'reproductive' sphere.¹

Secondly, migrants also fall outside the norm of a white male full-time employee, thus there are parallels between women's and migrants' vulnerability to exploitation, which is then exacerbated for migrant women.² This exacerbation is created through nationalist concepts of citizenship, which perceive migrants, and particularly migrant women as threats. Women migrants' experience of immigration is further adversely affected by immigration policies that favour skilled work, a term which is usually determined on traditional 'productive labour' terms. Whereas there are areas of unskilled work, which are traditionally male-dominated, the perception of reproductive labour as unskilled is linked to the concept that women are 'naturally' capable of reproductive labour.³ 'Women's work' or reproductive labour neither enjoys similarly open migration routes as skilled productive labour, it is also less protected and less well-paid in destination countries. Thus, routes for skilled, regular migration exclude women, as migrants

¹ See Chapter 1.

² Joana Ruivo, 'The Fragilities of Human Trafficking Victims' in Maria João Guia (ed), *The Illegal Business of Human Trafficking* (Springer 2015); Amy M Russell, "'Victims of Trafficking": The Feminisation of Poverty and Migration in the Gendered Narratives of Human Trafficking' (2014) 4 *Societies* 532.

³ Jacqueline Andall, 'Gendered Mobilities and Work in Europe: An Introduction' (2013) 39 *Journal of Ethnic and Migration Studies* 525; Rachel Lara Cohen and others, 'The Body/Sex/Work Nexus: A Critical Perspective on Body Work and Sex Work', *Body/Sex/Work* (Palgrave Macmillan 2013); Nanneke Redclift and Thea Sinclair (eds), *Working Women: International Perspectives on Labour and Gender Ideology* (Routledge 1991).

are more likely to be requested for male-dominated professions.⁴ The lower value attached to women's work, combined with women's greater likelihood to be engaged in part-time instead of full-time employment, due to (unpaid) childcare and other reproductive labour responsibilities within their own homes, complicates women migrants' situation as it renders them unlikely to meet income thresholds required to be granted leave to remain.⁵

Thirdly, sex workers, similar to migrants, have been excluded from notions of good citizenship, and are perceived as threats to social order.⁶ This perception especially affects migrant sex workers who are seen as doubly deviant and therefore non-credible even when exploited. There is another layer of gendered bias at work in the context of prostitution: Discourses on prostitution openly or subliminally judge women's sexual self-expression and debate prostitution as a moral issue, rather than an issue of work relations with specific vulnerabilities, caused by gendered double standards, devaluation of reproductive work and moral outrage.

Thus women's obstacles in access to labour rights become amplified through migration issues and labour rights issues for migrants, which again include gendered barriers. On a final level, sex work adds another layer as work that is – like most reproductive labour – incompletely or not at all acknowledged as work and carries absolutely no labour rights in most countries' legislation.

In summation, the marginalisation caused by gender in the labour market is amplified both through the exclusions caused by migrant status and the particular exclusions of sex workers, which are caused by stigma in the sex industry and

⁴ Briddick, Catherine, 'Sex Discrimination and UK Immigration Law' <<http://bordercriminologies.law.ox.ac.uk/sex-discrimination-and-uk-immigration-law/>>; Scott Blinder, 'Briefing: Non-European Labour Migration to the UK' (University of Oxford 2012); Helen Muggerridge and Chen Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims.' (Asylum Aid 2011) <<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>>.

⁵ 'Automatic Settlement for Unskilled Workers to End - News Stories - GOV.UK' <<https://www.gov.uk/government/news/automatic-settlement-for-unskilled-workers-to-end>>; Equally, for restrictions affecting British women trying to achieve family reunification with their husbands see Carlos Vargas-Silva and Yvonne Markaki, 'Love and Money: How Immigration Policy Discriminates between Families' (*The Conversation*) <<http://theconversation.com/love-and-money-how-immigration-policy-discriminates-between-families-34253>>.

⁶ See Chapters 2 and 3.

the complete denial of workers' rights in framing sex work as either immoral or not really work, or both.

4.2.1) Exploitation and Human Trafficking in the Sex Industry

As a result of these overlaps I argue that we need to look at exploitation in the sex industry, including human trafficking for sexual exploitation, as the exploitation of a multi-layered vulnerability with concerns regarding gender equality and access to labour protection at its core.

The exploitability of women in the sex industry is not tied to the kind of work they are engaged in, but to the conditions under which they perform it. It is not only women trafficked for work in the sex industry who are affected by violence and coercion in prostitution, but their migration status exacerbates existing problems and exploitative forms of sex work.⁷ Migrant women are more likely than nationals to end up in third party controlled prostitution, as they migrate through structures which involve third parties at most stages of their migratory process.⁸ Thus, the particular confinement experienced by migrant women in the sex industry, trafficked or not, lies in the overlap of third party control and the limits imposed by residency and employment regulations. Therefore attempts to restrict migration and efforts to criminalise exploitative practices in the sex industry, ironically often contribute to (as opposed to cracking down on) confining migrant women in prostitution and increase women's dependency on a third party.⁹ Thus, their ability to exit exploitative third-party controlled prostitution (or prostitution altogether) may be limited. This is exactly what Cathryn Costello describes as the defining feature of precarious labour:

[...] unfree labour in the contemporary era is constituted primarily, although not exclusively, by the constraints that are imposed on a person's ability to leave a particular arrangement – unfreedom at the point of exit.

⁷ Rutvica Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking* (Palgrave Macmillan 2010) 60–65.

⁸ *ibid.*

⁹ *ibid.* 77.

[Constraints on exit are] particularly important to understanding ‘forced labour’ in the legal sense, so there can be a helpful cross-fertilization here.¹⁰

These factors lead to a situation, which - when they come together as a multi-layered, intersectional vulnerability - renders women in prostitution particularly vulnerable to exploitation, including human trafficking. Social pressure and exclusion, together with legislation that systematically excludes women’s labour from protections and legal rights, while rendering migrants vulnerable by forcing them into precarious labour relations, have created the conditions for vulnerability towards this extreme form of exploitation.

4.2.2) The Problem with Current Counter-Trafficking Approaches

Counter-trafficking policies often affect immigration policy in ways that result in more tightly controlled borders and more restrictive visa regulations as well as more extensive police investigations and raids, claiming that they will control or at least deter trafficking by reducing the involvement of organised crime in migratory processes.¹¹ Evidence, however, points towards the opposite. Stronger borders force migration further underground, increase the potential violence and abuse to which women are subjected, and make facilitating cross-border movement, forced labour and exploitative practices more profitable.¹² Equally, rescue missions in red light districts often lead to a criminalisation of migrant sex workers who are unwilling to be ‘rescued’ as victims of trafficking, but may nonetheless find themselves in exploitative working conditions.

¹⁰ Cathryn Costello, ‘Migrants and Forced Labour: A Labour Law Response’ in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 198.

¹¹ Annalee Lepp, ‘Trafficking in Women and the Feminization of Migration: The Canadian Context’ (2002) 21 *Canadian Woman Studies* 96; Bridget Anderson and Rutvica Andrijasevic, ‘Sex, Slaves and Citizens: The Politics of Anti-Trafficking’ (2008) 2008 *Soundings* 135, 144; Edith Kinney, ‘Victims, Villains, and Valiant Rescuers: Unpacking Sociological Constructions of Human Trafficking and Crimmigration in Popular Culture’ in Maria João Guia (ed), *The Illegal Business of Human Trafficking* (Springer 2015) 95; Jennifer M Chacon, ‘Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking’ (2005) 74 *Fordham Law Review* 2977.

¹² Anderson and Andrijasevic (n11); Lepp (n11).

Instead of focussing on the exclusions that lead to exploitation and human trafficking, human trafficking is normally treated as an exceptional crime, which requires criminal law solutions, with victims who require 'rescue' and temporary paternalistic protections. Thus, traffickers' explicit exploitation - of the vulnerabilities and implicit exclusions of trafficked persons from the political community - is maintained in trafficked persons continued status as non-right holders as 'rescued' victims of trafficking.

The 2015 UK Modern Slavery Act illustrates this beautifully: The Act does not have a single section about improving the rights, or the enforceability of rights, of vulnerable workers.¹³ Instead, significant sections of the MSA focus on punishment of traffickers, and, to a lesser degree, on temporary victim protections (as I will discuss in greater detail in Chapter 7 of this thesis).

In the following section I illustrate the criminal law approach to human trafficking and its problematic victim category, which builds on this notion of the right-less victim. The following chapters will demonstrate the effects of legislation based on such a criminal law approach through analysis of the UN Trafficking Protocol, its regional implementation in the European Union and Council of Europe agreements and finally the domestic approaches in the UK and Germany.

4.3) The Criminal Law Approach and its Perfect Victims

Today human trafficking is predominantly conceptualised within a criminal law framework at international level and in most domestic legislation.¹⁴ The UN Trafficking Protocol, the key international agreement on human trafficking, is part of the UN Convention Against Transnational Organised Crime,¹⁵ establishing the focus of counter- human trafficking action as both cross-border/transnational and crime-focussed. In this, the UN Trafficking protocol takes the so-called '3P'-approach, focussing on a combination of prosecution, prevention and victim-protection. This approach is also reflected in regional and domestic responses to

¹³ UK Modern Slavery Act 2015.

¹⁴ See Chapters 5-8 of this thesis.

¹⁵ UN Trafficking Protocol.

human trafficking. Both on international and domestic level, the focus within this approach is on the criminalisation of human trafficking and the prosecution of its perpetrators.¹⁶

The approach is sometimes *wrongly* called a 'human rights approach', as it incorporates certain protections for victims.¹⁷ However, the protections are only afforded to those who meet a narrow victim category and behave in certain ways deemed acceptable by governments in receiving countries,¹⁸ as I will demonstrate later in this chapter (and in more specific contexts in the second half of this thesis).

The UN Trafficking Protocol includes not only human trafficking for the exploitation of the prostitution, but also for other forms of sexual exploitation, as well as forced labour or services and even the removal of organs. However, historical legislation on human trafficking dealt exclusively with human trafficking for sexual exploitation, which was used synonymously with prostitution.¹⁹ I trace the influence of these historical treaties on current anti-trafficking approaches and contemporary legislation in the following chapter. In the context of the contemporary criminal law approach and its victim category, the historical treaties' focus on 'protecting innocent women' plays a role in shaping a narrative that continues until today.²⁰ This narrative affects both the demands it places on 'innocence' for victims, as well as in a conceptualisation of trafficked persons as requiring rescue and charity, rather than rights.

The continuation of the historical victim category, placed into the context of a criminal law approach then sets trafficking up as a binary criminal act with two polar opposites, the trafficker as the perpetrator and the trafficked person as the

¹⁶ For a detailed discussion, see Chapters 5-8 of this thesis.

¹⁷ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006); James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 *Virginia Journal of International Law* 1; Sarah H Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights' (2009) 15 *European Law Journal* 775.

¹⁸ Global Alliance Against Trafficking in Women (GAATW), 'Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World' (2007).

¹⁹ Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010).

²⁰ *ibid.*

victim. By defining trafficking as a phenomenon that only concerns criminals in their active role as traffickers and trafficked persons as their passive victims, trafficking is placed outside of any larger societal context and trafficked persons are defined as mere props to the traffickers' crimes. Additionally, this binary approach obscures state contributions to conditions, which foster trafficking,²¹ such as exclusionary immigration regimes and lack of labour controls.²² This approach is problematic, as it ignores governments' involvements through the complex interplay of economic inequalities between countries of origin and destination countries, as well as the role of destination countries' immigration controls and labour regulations in creating the conditions, which render people vulnerable to human trafficking.²³

The UN Protocol's definition of trafficking is founded on a narrow historic concept of human trafficking as 'sexual slavery in migrant prostitution.'²⁴ However, its definition encompasses both human trafficking for sexual exploitation, human trafficking for labour exploitation and services, as well as the exploitation of organ trading.²⁵ Such a broad definition, built on such a narrow original victim category, makes it both too wide and too narrow, if trafficking is to be distinguished from other forms of exploitation, and from human smuggling. NGOs, the media and government policy-makers - by keeping the broad definition of human trafficking in the UN Protocol - equally use human trafficking as an umbrella term and sometimes blur the lines of the definition even further. This definition includes everyone who may be a trafficked person, including people who might be described as smuggled or as irregular migrants under different circumstances. In non-binding statements, policymakers often state that trafficking victims make up a large percentage of irregular migrants, evoking an emotional response based on a curious combination of pity for the 'Victim of Trafficking' and fear of the influx

²¹ Anderson and Andrijasevic (n11) 137.

²² Costello (n10); Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014); Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95.

²³ Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013); Rutvica Andrijasevic and Bridget Anderson, 'Conflicts of Mobility: Migration, Labour and Political Subjectivities' (2009) 29 *Subjectivity* 363.

²⁴ See Chapter 5 of this thesis, as well as Doezema (n19).

²⁵ UN Trafficking Protocol.

of migrants in receiving states.²⁶ In political rhetoric, human trafficking has been portrayed as one of the main methods through which people enter Western countries. The British Home Office Minister stated in March 2007 that ‘three quarters of illegal immigrants to Britain are trafficked’,²⁷ giving an impression that the government wants to help all these victims of a terrible crime, while at the same time protecting Britain’s borders. Thus, for the general discourse in the media ‘Victim of Trafficking’ creates both fears of floods of irregular migrants, as well as pity for trafficked persons. This ambiguity helps to contribute to a climate of remedies for ‘real victims’ rather than rights for all irregular migrants as human beings and for (irregular) migrant workers as workers.

4.3.1) Conditional Rights for ‘Real Victims’

Trafficked persons, particularly women and particularly in the sex industry, then have to fulfil the conditions of being a ‘real’ victim in order to qualify for a ‘rescue’ from their traffickers.²⁸ Since ‘Victim of Trafficking’ is an administrative and legal category with implications for state protections and obligations towards trafficked persons, policymakers’ definition of the category is very narrow when it comes to whether or not someone qualifies as a ‘Victim of Trafficking’ in legal or administrative terms. Most of the ‘three quarters of illegal immigrants’ who could be construed as ‘Victims of Trafficking’ in the wider sense would fail to be able to claim government protections and legal status as a trafficked person. Consequently, those victims who do not meet preconceptions of idealised victimhood may find themselves denied (temporary) leave to remain, as well as social, legal, and medical services.²⁹

²⁶ Anderson and Andrijasevic (n11) 137.

²⁷ Quoted in Rutvica Andrijasevic and Bridget Anderson, ‘Anti-Trafficking Campaigns: Decent? Honest? Truthful?’ (2009) 92 *Feminist Review* 151, 153–154.

²⁸ Kinney (n11); Janie A Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 *The American Journal of International Law* 609.

²⁹ Jayashri Srikantiah, ‘Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law’ (2007) 87 *Boston University Law Review* 212; Jonathan Todres, ‘Law, Otherness, and Human Trafficking’ (2009) 49 *Santa Clara Law Review* 605; Kinney (n14).

The UK offers a good example for this: In order to be granted temporary 'potential victim of trafficking' status, a person needs to pass the so-called 'reasonable grounds decision', which is reached on the basis of 'I believe, but I cannot prove', to achieve a suspension of the potential victim's return to the country of origin. 'A positive reasonable grounds decision results in 'protection from removal for a minimum of 45 days as well as access to support arrangements, as detailed by Article 12 of the [Council of Europe] Convention which sets out victims' rights to material and psychological assistance.'³⁰ During this initial 45-day period, which is also called the 'recovery and reflection period', the relevant authority assesses the claim and makes a so-called 'conclusive grounds decision'.³¹ This 'conclusive grounds' decision determines whether or not a person is considered to be a victim of trafficking and whether or not their situation requires *temporary* leave to remain in the UK beyond the initial 45 days.³²

National Crime Agency data reveals that of 1745 cases, which entered the National Referral Mechanism, only 819 received positive conclusive grounds decisions.³³ Thus, the threshold to achieve official victim of trafficking status is much higher than politicians' blanket statements.

The categorization of trafficked persons is difficult, and, as mentioned earlier, the differentiation between smuggled persons, exploited illegal migrants and victims of trafficking is almost impossible to make in practice.³⁴ Even those who fit not only policymakers' media rhetoric, but also the administrative and legal categories of a trafficked person do not necessarily experience an improvement of their situation through the authorities. For those who do, the protections offered through the legal category of 'Victim of Trafficking' are temporary and conditional remedies, such as temporary leave to remain. In the UK, such leave

³⁰ Abigail Stepnitz, 'A Lie More Disastrous than the Truth: Asylum and the Identification of Trafficked Women in the UK' (2012) 1 Anti-Trafficking Review, 110.

³¹ UK Home Office, 'Interim Review of the National Referral Mechanism for Victims of Human Trafficking' (Home Office Reports 2014); OSCE ODIHR 'National Referral Mechanisms. Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook.' (OSCE 2004).

³² Home Office (n31); OSCE ODIHR (n31); Stepnitz (n30).

³³ NCA UKHTC, 'NCA Strategic Assessment. The Nature and Scale of Human Trafficking in 2013' (2014).

³⁴ Andrijasevic and Anderson (n27) 153; Chuang (n28).

to remain beyond the 45-day recovery and reflection period is only granted if the trafficked person is needed as a witness in criminal proceedings or on compassionate grounds.³⁵

Public statements and policy initiatives in the UK and beyond, such as posters at airports offering help for 'Victims of Trafficking' use language implying protection and help for trafficked persons. However, 'rescuing' trafficked persons usually includes first arresting and detaining, and ultimately repatriating them.³⁶ Annalee Lepp argues that migrant sex workers are the ones bearing the cost of states' 'protectionist, anti-immigration, and law and order agenda'.³⁷ They are excluded from labour protections, while being not only at risk of exploitation, but also at risk of unwelcome 'rescue' and return to their country of origin.

The argument is that this at least saves women from their captors. However, this response overlooks women's socio-economic and family conditions, which caused them to migrate in the first place and often have not changed since, making trafficked women likely to re-migrate.³⁸ It also creates an illusion of 'home' as a safe place, a narrative that is untrue for women not only in the context of 'home' as country of origin,³⁹ but also in the context of 'home' in the sense of working in the private sphere, as I will discuss later in this chapter.⁴⁰

Additionally, the conditionality of services in destination countries on 'Victim of Trafficking' status, is based either on worthiness as a victim (by fulfilling the narrow victim category) or usefulness to the prosecution (by being a credible victim). This conditionality of services, together with their temporariness, normalise trafficked persons' status as non-citizens,⁴¹ but as recipients of charity and 'protections'. Thus, the victim category, which requires absolute and passive victims, maintains trafficked persons' exclusion from labour rights and human

³⁵ Stepnitz (n30).

³⁶ Dina Francesca Haynes, '(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act' (2006) 21 *Georgetown Immigration Law Journal* 382.

³⁷ Lepp (n11) 91.

³⁸ *ibid* 96.

³⁹ Andrijasevic (n7).

⁴⁰ The same is true in the context of sexual violence and violence against women, both areas of gendered violence in which the notion of home as a safe place is an illusion.

⁴¹ Anderson and Andrijasevic (n11) 143–144.

rights at the hand of the traffickers and ignores the underlying exclusions they face as women, migrants and sex workers, which facilitated their initial alienation from those rights. Through the continuous stress of the criminal- victim dichotomy, trafficking policy reiterates ideas of women as passive and naïve victims who need such 'rescue' from traffickers, even if 'rescue' means forcible return to their home country. Equally, women need 'protection' by the state, even though this may include the 'protection' of being kept out by Western countries or being forced to stay 'at home' by countries of origin.⁴²

Focussing on trafficking as a category distinct from other forms of irregular migration shifts the focus away from a larger picture of underlying vulnerabilities. It restricts the human rights violations to those perpetrated by traffickers, employers and pimps, who deny access to basic human and labour rights. However, if they were not denied access at this stage, trafficked persons and exploited migrants alike would still fail to access those rights due to state-legitimated restriction of access to social rights, such as a possibility to sue for wages not received, which is one of the main sources of all irregular migrants' vulnerabilities. In the case of human trafficking for sexual exploitation, this problem is amplified as the gains from prostitution are not considered to be wages at all, as prostitution is not considered work in most countries' legislation. By focussing the vulnerabilities of trafficked persons on the trafficker, states' role in creating such vulnerability is obscured and questions regarding the human and labour rights of migrant workers are excluded from the debate.⁴³

4.3.2) The Female Victim of Trafficking

The idealised 'victim of trafficking' concept is a highly gendered category, as it relies on the historical notion of the female victim of trafficking in the sex

⁴² Céline Nieuwenhuys and Antoine Pécoud, 'Human Trafficking, Information Campaigns, and Strategies of Migration Control' (2007) 50 *American Behavioral Scientist* 1674; Nandita Sharma, 'Travel Agency: A Critique of Anti-Trafficking Campaigns' (2003) 21 *Refuge: Canada's Journal on Refugees*.

⁴³ Anderson and Andrijasevic (n11) 142.

industry.⁴⁴ The ‘innocent victim against the evil trafficker’ dichotomy is further amplified by a second image: the exploited prostitute and evil pimp image.

The exploited prostitute category is reserved for women: the case of the recent ‘Rentboy’ raid in the USA shows that the male exploited prostitute is not a category, which readily pops up in the dominant narratives.⁴⁵ Men, even male prostitutes, tend to bear and retain a level of agency regardless of their sexual circumstances. Ironically, in the ‘Madonna’ vs. whore dichotomy, the female prostitute is the epitomised form of the whore, who is usually cast as the evil one, as she expresses agency and lack of innocence. This negative image of female sex workers may explain why extra effort has to be made to cast trafficked women in the sex industry as worthy victims of trafficking. Thus, the Madonna – whore dichotomy ensures that women, who are perceived as ‘deviants’ in the face of these social norms, are seen as immoral and therefore potentially more culpable than others for the circumstances in which they find themselves, specifically because of their gender.

In a bid to rectify this discrimination and to render women sex workers capable of victimhood, they are then treated as absolute victims without agency. They are denied personhood, which in turn renders the ‘victims’ rights’ bestowed upon them charitable gifts, conditional on their perfect victimhood, rather than the full human rights and labour rights of persons whose rights have been violated.

Amy Russell argues that the ‘depiction of the trafficked woman as an innocent, abused victim is a useful construction for the state as it removes her as an agent’,⁴⁶ who wilfully crossed a border. Instead of portraying trafficked persons as complex, the state can present itself as a saviour of the innocent and lay the

⁴⁴ Doezema (n19); C Terrot, *The Maiden Tribute: A Study of the White Slave Traffic of the Nineteenth Century* (Muller 1959).

⁴⁵ Morgan M Page, ‘What The Rentboy Raid Tells Us About The Gendered Rhetoric Of Trafficking’ (*Tits and Sass*) <<http://titsandsass.com/what-the-rentboy-raid-tells-us-about-the-gendered-rhetoric-of-trafficking/>>; ‘Rentboy Wasn’t My “Brothel”. It Was a Tool to Stay Alive in This Economy of Violence’ *The Guardian* (1 September 2015) <<http://www.theguardian.com/commentisfree/2015/sep/01/rentboy-online-brothel-tool-economy-sex-work>>; Chris Sosa ‘The Feds’ RentBoy Raid Is an Attack on LGBTs and Sex Workers’ (*Huffington Post*) <http://www.huffingtonpost.com/chris-sosa/the-feds-rentboy-raid-is-_b_8039818.html>.

⁴⁶ Amy M Russell, ‘The Boundaries of Belonging: Gender, Human Trafficking and Embodied Citizenship’ (2014) 25(3) *Journal of Gender Studies* 1, 14.

blame for trafficked persons exploitation solely on the traffickers, 'who are understood as criminal 'others'.⁴⁷ Thus, migrant women who are exploited by their employers, but have crossed borders through irregular channels, need to assert their innocence in order to claim 'victim of trafficking' status. In this, trafficked women's passivity in their victimhood is absolute and their personhood is denied, as they become objects in the traffickers' crime and in the violation of the state's borders and laws.

Casting women as helpless, agency-free victims, who are forced into prostitution and unable to escape, then absolves them of their border transgressions. If they never had a choice, they can neither violate state borders by migrating, nor act immorally by engaging in prostitution. This is what sets them apart from exploited migrants, whose exploitation does not seem to require the same level of response, as they migrated wilfully.⁴⁸ As Jacqueline Berman notes, popular narratives of trafficking describe the circumstances of trafficked women as '[a] nefarious underworld populated by "dark", haunting criminals; hundreds of thousands of young, innocent, "white" girls kidnapped and violated; sovereign borders transgressed under the cover of the night'.⁴⁹ While there are cases to which this narrative applies, it is an extreme scenario which ignores 'complexities around women's victimisation, exploitation, agency and resistance, as well as various other forms of non-sexual exploitation,'⁵⁰ as well as cases of sexual exploitation in non-sex work contexts.

This (wilful) ignorance towards other forms of exploitation that amount to human trafficking creates a victim category that is unattainable for a large number of victims, including those who do not meet racist and classist assumptions about worthy victims. Whereas these victims are theoretically covered by the UN Trafficking Protocol's definition– as I will discuss in the next chapter – they do not meet the victim category of 'whom do we think of as a victim of trafficking.'

⁴⁷ *ibid.*

⁴⁸ Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "freedom"' (2010) 10 *Global Networks* 244.

⁴⁹ Jacqueline Berman, 'Biopolitical Management, Economic Calculation and "Trafficked Women"' (2010) 48 *International Migration* 84.

⁵⁰ Selda Dagistanli and Sanja Milivojevic, 'Appropriating the Rights of Women: Moral Panics, Victims and Exclusionary Agendas in Domestic and Cross-Borders Sex Crimes' (2013) 40 *Women's Studies International Forum* 230.

4.3.3) Understanding the Idealised Victim Category – the Case for “Heroic and Pathetic” or “Right-holding and Charity-receiving” Victims

Diana Meyers offers the categorization of heroic victims and pathetic victims to understand idealised victimhood. Both types of victimhood require innocence, in that the victim’s consent to their plight needs to be ruled out.⁵¹ However, the requirements starkly differ for heroic and pathetic victims: heroic victims become deserving of assistance and compassion by pursuing a just cause and by acting within their rights. Pathetic victims on the other hand, lack this ‘worthy cause’ and need to pass a higher threshold of innocence and a higher need for intervention to be deserving of our attention and help, both of which they can only reach through extreme levels of passivity.⁵²

Meyers argues that women in exploitative conditions in the sex industry do not have a ‘higher calling’ and therefore cannot be heroic victims. They also do not fit neatly into the ‘pathetic victim’ category, as they are often active agents in their migratory projects. Many of them display ‘heroic’ levels of willingness to sacrifice themselves to save ‘themselves, their children, and sometimes extended families from homelessness, chronic hunger, and other deprivations’.⁵³ However, as Meyers describes, ‘these women do not have grand visions of justice, nor do they pursue political solutions like those that heroic victims characteristically fight for.’⁵⁴

The heroic victim category, with its focus on political action over what Meyers calls private familial care, is an essentially sexist category, as it favours traditionally male actions in the public sphere and ignores women’s actions in the private sphere that could indeed be construed as heroic on some level.⁵⁵ While Meyers offers an interesting categorisation, her angle of heroic victims as male and pathetic victims as female focuses mostly on what can be constructed as political action and that ‘pathetic victims’ need to be ‘purer’ victims because they lack this credibility of a ‘worthy cause.’

⁵¹ Diana Tietjens Meyers, ‘Two Victim Paradigms and the Problem of “Impure” Victims’ (2011) 2 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 255, 260.

⁵² *ibid.*

⁵³ *ibid* 263.

⁵⁴ *ibid* 164.

⁵⁵ *ibid.*

I argue instead that those she calls 'pathetic victims' lack credibility as full participants in the political community. These victims are not 'right-holding victims', or 'citizen victims', but victims in need of charity and protection. 'Charity-receiving victims', as I would like to call them, cannot escape the victim-category once they enter it. It could thus be argued that 'right-holding victims' are by default male citizens, who are able to express violations of their human rights and labour rights without necessarily entering an absolute and eternal victim category. They have always been considered to be full agents who demand something that is rightfully theirs. Women, persons of colour and migrants have historically had to claim their worthiness and innocence in order to access protection, rather than rights. Whereas access to rights as full citizenship has been extended beyond citizen men, legal systems are nonetheless built on the 'reasonable man' transformed into the 'reasonable person', thus historically excluded and vulnerable groups may continue to struggle to access their rights. This is particularly true for groups like (migrant) sex workers whose role as rights-holders remains contested today.⁵⁶

In this context, the victim category then becomes a form of benevolent sexism, a well-meaning protection from harm for women, rather than empowerment and access to rights. By casting women as ideal, helpless and innocent victims, their perceived passivity is amplified. Dagistanli and Milivojevic suggest that 'the notion of 'ideal victim' [is] indeed paternalistic, disempowering and harmful' as it obscures 'the realities of women's victimisation while romanticising women's struggles for disingenuous ends',⁵⁷ such as the increase of border controls and restrictive migration regimes.

⁵⁶ Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Routledge 2015); Georg Völkl, 'Amnesty International Stellt Sich Hinter Die Menschenrechte von SexarbeiterInnen Und Fordert Die Entkriminalisierung von Sexarbeit' *Voice for Sex Workers* (12 August 2015) <<http://www.voice4sexworkers.com/2015/08/12/amnesty-international-stellt-sich-hinter-die-menschenrechte-von-sexarbeiterinnen-und-fordert-die-entkriminalisierung-von-sexarbeit/>>; Michele R Decker and others, 'Human Rights Violations against Sex Workers: Burden and Effect on HIV' (2015) 385 *Lancet* 186; Kamala Kempadoo and Jo Doezema, *Global Sex Workers: Rights, Resistance, and Redefinition* (Psychology Press 1998); Ine Vanwesenbeeck, 'Sex Workers' Rights and Health: The Case of the Netherlands' in Rochelle L Dalla and Lynda M Baker (eds), *Global Perspectives on Prostitution and Sex Trafficking* (Lexington Books 2011).

⁵⁷ Dagistanli and Milivojevic (n50) 239.

The 'victim of trafficking' category in its focus on passivity is then a hyper-feminised category, an extreme of the 'charity-receiving victim', which prevents women from accessing rights and instead only offers them protection. Men who are trafficked are also harmed by the restrictive victim category of the ideal victim of trafficking, as they are essentially conceptually excluded from it. There is a strong reluctance amongst men to come forward as victims of trafficking, as they perceive the category as emasculating and shameful, even if they meet the conditions of being a victim of trafficking.⁵⁸

Women, in order to navigate the boundaries of transgressions and victimhood have to fully embrace their victim identity by displaying the passivity and lack of agency that is expected of ideal female victimhood. They are either cast as undeserving, deviant migrant sex workers, excluded from the category of the ideal victim of trafficking, or they try to navigate the small margins between asserting agency within the limited range of options available to them, and the levels of helplessness required to be worthy victims.

Establishing women's innocence and infantilising them through that discourse makes it easier to conflate the trafficking of women and children, which in turn reinforces the view of trafficking as a forceful act against 'the innocent', implying that the women have no agency in the trafficking process, and that all of them are unwilling to be prostitutes.⁵⁹ Casting women as helpless, agency-free, childlike actors who ended up in prostitution against their will and, as they lack agency, are unable to escape their predicament, then retroactively absolves them. By describing women as imprisoned, they can neither possibly have voluntarily transgressed state borders by migrating, nor the borders of acceptable moral conduct by engaging in prostitution.⁶⁰ In this "victims' naivety and powerlessness must be manifest to meet the government-set benchmark of 'genuine' and 'deserving' victimhood."⁶¹ For example in the UK, the 'binary of 'deserving victim–

⁵⁸ IOM and RTVS '0800 800 818. Documentary on Trafficking in Human Beings.' (Bratislava, 2012)

⁵⁹ Tijana Stolic 'Separating the Innocents from the Illegals: visual representation of the victims of sex trafficking in anti-trafficking campaigns' (Thesis, Helsinki University 2014) 49.

⁶⁰ Stolic (n59); Berman (n47).

⁶¹ Kiril Sharapov, "'Traffickers and Their Victims': Anti-Trafficking Policy in the United Kingdom' (2015) *Critical Sociology* 1, 9.

non-deserving illegal immigrant' runs through a range of [...] government documents.'⁶² Thus, the current victims' rights approach suggests to safe helpless victims, while creating a victim category that is almost impossible to attain and creates artificial borders between 'acceptable' exploitation of irregular immigrants and unacceptable exploitation of true victims of human trafficking.

In this, neither law nor policy acknowledges that

the fact that one occupies a position of vulnerability need not deprive one of agency; and conversely, the fact that one acted in a way that appears autonomous does not mean that one's autonomy was not in fact circumscribed or impaired by experiences of vulnerability.⁶³

The denial of a coexistence of agency and vulnerability means the victim category within the human trafficking discourse has repressive instead of emancipatory effects on the already precarious situation of the women concerned, while further denying women's agency.⁶⁴ Meanwhile the possibilities of creating policies, which are rights-based and demonstrate a government's unwillingness to accept exploitation, racism and discrimination and could enable indiscriminate access to basic human rights, are neglected.⁶⁵

4.3.4) Trafficked Persons Navigating the Victim of Trafficking Category

In the face of their absolute victimhood in official narratives, trafficked women and women migrating into the sex industry both attempt to assert their agency in the process, while also trying to fulfil the criteria of a worthy victim. Many position themselves as the main actors in their migration process and focus on their determination to migrate independently, often to support their families. These women distance themselves from the 'victim' category and often refuse to

⁶² *ibid* 9–10; see also Stepnitz (n30).

⁶³ Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Bloomsbury 2010) 22.

⁶⁴ Marjan Wijers and Lin Lap-Chew 'Trafficking in Women: Forced Labour and Slavery-like Practices in Marriage.' *Domestic Labour and Prostitution* (1997), 19.

⁶⁵ Lepp (n11) 91; Andrijasevic and Anderson (n27)153.

connect their desire for the violence they suffer to end with a wish to leave the country.⁶⁶

The women who try to achieve a right to remain have to aspire to be the ideal victim – a category that is, as discussed, often out of their reach. These women have transgressed borders of gendered acceptable behaviour, as well as national borders. In order to stay, they have to conform to acceptable normative gendered categories.⁶⁷ As Amy Russell writes about the women she interviewed in Israel:

[They] express normative gendered desires to be mothers. They distance themselves from migrant sex workers alluding to their naivety, innocence and desperation while at the same time appealing to the state to use them to reassert gendered and social boundaries that they will happily maintain if they are granted right to remain. Although these women are symbolically powerful through their lone migration and penetration of state boundaries, they present a script of helplessness to make a case for state intervention and to disrupt any notion of their own agency.⁶⁸

These narratives seem to be the same in different jurisdictions, as Andrijasevic describes similar struggles of women in Italy to manoeuvre a desire to assert their agency, while also presenting in line with expectations for trafficking victims.⁶⁹ In this, trafficked women assert the importance of ‘force’ in the violence that occurred against them, just like policy makers and NGOs do. However, their definition of force can differ greatly: women who have been identified as trafficked persons, often define force on their own terms: as the ‘force’ of their circumstances, for example the need to feed their child or help their relatives, rather than the force of having been kidnapped or forced into prostitution.⁷⁰

Thus, because women in trafficked persons’ shelters are often aware of the residency requirements in receiving countries, they stress force as a factor in order to fit the category of someone worthy of protection. This does not mean that they did not suffer violence – often they experienced a mixture of force, coercion and violence in third party prostitution, as well as during their migration

⁶⁶ Kofman (n49).

⁶⁷ Russell (n46) 15.

⁶⁸ *ibid.*

⁶⁹ Andrijasevic (n7).

⁷⁰ *ibid.*

process, but there is a tendency to normalise this kind of violence, possibly because not only migrant sex workers, but also non-migrants working in prostitution experience it. Instead trafficked women often focus on the force and coercion they experienced when trying to leave.⁷¹

For victims of trafficking for sexual exploitation the problem seems to lie at the same point, which Cathryn Costello identifies as the problem in forced labour more broadly,⁷² at the point trying to exit prostitution. Meanwhile, for policymakers and legislators, the issue at hand seems to be the entry into the forced prostitution situation and women's unwillingness to do so, rather than their inability to exit.

In addition to navigating the migration and labour side of the victim category, focussing on force also enables women to reduce some of the stigma of prostitution and the perceived deviance in transgressing this moral boundary in addition to the actual national borders. By describing their situation in their countries of origin as so dire that they were 'forced' to migrate, the women Andrijasevic interviewed were able to distance themselves from any accusations of financial greed or of working in prostitution because they enjoyed it. Establishing their situation as one of need helped women to create a narrative in which they could describe themselves as "not really prostitutes", which can be interpreted as an attempt to access the heroic victim category, while also seeming sufficiently pure. This helped the women to turn prostitution as something they do without being a prostitute.⁷³ The women tried to reject 'being' a prostitute at least as much as they are trying to conform with being a 'good' trafficking victim and conforming with visa requirements. The women described their situation as one of need to earn money – mainly for others, such as parents, siblings or children – as opposed to "real prostitutes" desire to possess money for their own benefit. Once this is established, women can return to it at different points of their narratives and reassert that they are not really prostitutes.⁷⁴

⁷¹ *ibid.*

⁷² Costello (n10).

⁷³ See Chapter 4 for a discussion of 'working in prostitution' vs. 'being a prostitute'.

⁷⁴ Gail Pheterson, *The Prostitution Prism* (Amsterdam UP 1996).

Such self-description may exist for a variety of reasons, including a genuine self-identification of these women through their role within their families, rather than within a work context, as well as women's experiences of force in human trafficking that indeed meet the 'ideal' victim experience. However, perceptions of prostitution as an immoral and unacceptable occupation, both from the outside environment in the receiving country, as well as at home, and possibly also as an internalised view, may affect the degree to which women exploited in the sex industry try to reject prostitution altogether and try to meet requirements of the idealised victim of trafficking.

4.4) Conclusion

The current victims' rights paradigm suggests the goal is to save helpless victims, while creating a victim category that is almost impossible to attain and creates artificial borders between 'acceptable' exploitation and unacceptable exploitation. In order to achieve credibility in their victimisation, women have to reject their agency in their migratory projects and present themselves as helpless and innocent. By doing so they can access charitable protection, but no rights, which in turn reinforces the notion of paternalistic, 'protective' responses to human trafficking as legitimate and useful responses to the problem.

In creating this victim of trafficking narrative of absolute helplessness, governments can be seen as saving innocent victims, while at the same time to be maintaining exclusion and restrictions in immigration regimes and silencing criticism of restrictive immigration policies. Wendy Chapkins argues that legislation on human trafficking 'create[s] a politically strategic exception to a punishing rule.'⁷⁵ Thus, the trafficking narrative keeps in place the structures that create human trafficking, while 'rescuing' those who are able and willing to present themselves as absolute victims. Furthermore, such an approach ignores the underlying structures in labour and migration created by government policy and legislation, as well as the effect of social structures and prejudice, and the

⁷⁵ Sarah H Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights' (2009) 15 *European Law Journal* 775, 789–790.

harmful exclusions and stigmatisation faced by (migrant) sex workers in particular.

As a result, criminal law based anti-trafficking initiatives are based on 'regulating women's sexuality, curtailing migration processes and protecting the State by responding to a popular idea of trafficking as transnational organised crime. [...] These interventions [are] not only futile in terms of eradicating and preventing trafficking, but also ultimately harmful for women, and for both potential and actual victims of labour and sexual exploitation,⁷⁶ as they perpetuate gendered concepts of victimhood and exclude women from a truly rights-based approach.

⁷⁶ Dagistanli and Milivojevic (n50).

PART II – Legal Implementation

1) Introduction to Part II

The second part of this thesis looks at the legal codification of counter trafficking on the international level in the UN Trafficking Protocol, as well as in regional instruments by the Council of Europe and the European Union and in domestic legislation in the United Kingdom and Germany.

In Chapter 5 I analyse the ways in which conceptualisations in the UN Trafficking Protocol of both what human trafficking is and how human trafficking is to be combatted reflect a criminal law approach. As outlined in Chapter 4, its criminal law approach is influenced by concepts about gender and its interplay with migration, reproductive labour, and sex work in particular. I demonstrate the ways in which the Trafficking Protocol focuses on prosecution of traffickers and on border control, both of actual and moral ones, rather than on rights. Additionally, I examine historical treaties and legislation on human trafficking (or the ‘White Slave Trade’,¹ as it was previously called) and their influence on the Protocol.

Following my analysis of this problematic categorisation of human trafficking, in Chapter 6 I turn to regional instruments, namely the Council of Europe Convention and the EU Directive on Human Trafficking.² I demonstrate how these regional documents maintain problematic aspects of the UN Trafficking Protocol, as well as building on their own historical treaties. Nonetheless, the European regional instruments, together with the case law of the European Court of Human Rights, have created a shift in the definition of human trafficking and focus on vulnerability to exploitation rather than being made to cross a border.

¹ Jo Doezema, ‘Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women’ (1999) 18 *Gender Issues* 23; Marlene D Beckman, ‘The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women’ (1984) 72 (1983-84) *Georgetown Law Journal* 1111.

² Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA 2011 1; Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report 2005 [CETS No. 197].

Part II: Legal Implementation

I continue this analysis by focusing on domestic responses to human trafficking and their interplay with definitions of prostitution in England & Wales (Chapter 7) and in Germany (Chapter 8). I analyse the definition of human trafficking for sexual exploitation in the 2015 Modern Slavery Act in England and Wales and the definition of prostitution and the conceptualisation of human trafficking for sexual exploitation in the 2002 Prostitution Law and the 2015 Prostitute Protection Bill in Germany.

I complement my analysis of the domestic legislation in England and Wales and in Germany with interviews I conducted with nongovernmental organisations working with migrant sex workers and/or victims of human trafficking and sex workers' rights groups in both countries.³ The interviews illustrate the effects of human trafficking legislation on those directly affected, while also demonstrating avenues for legal and policy change, which could improve the situation of sex workers, migrant sex workers and victims of trafficking for sexual exploitation.

³ The methodology used for the interviews is discussed on pp.28-31 of this thesis.

Chapter 5: Human Trafficking in International Law

5.1) Introduction

This chapter examines the most important piece of international counter-trafficking law, namely the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the UN Trafficking Protocol). Whereas other treaties have also shaped the international approach to human trafficking,¹ the UN Trafficking Protocol serves as the main international treaty on human trafficking and substantially influenced the European and national responses, which the following chapters discuss. The Protocol offers the first international definition of human trafficking and has influenced counter-trafficking legislation and policy worldwide. I analyse the Protocol in the light of its goals, while also taking into account the themes of gender and labour, gender and migration, prostitution and idealised victimhood.

This chapter is divided into two parts. The first part deals with the framework of the Protocol, the legacy of historical treaties and the way both aspects influence the Protocol's gender-dimension and its relationship to prostitution. The chapter firstly introduces the UN Trafficking Protocol and its position as a treaty in the transnational criminal law framework and the way this affects the aims of the Protocol. The second section discusses the legacy of old counter-trafficking treaties, namely the White Slavery Conventions and the 1949 Trafficking Convention. These treaties include a highly gendered view of trafficking and equate trafficking with prostitution, a history which has affected both definitional issues and feminist lobbying surrounding the UN Trafficking Protocol. Section 3 analyses these treaties' legacy in the Protocol with a focus on the gender perspective of the Protocol, as well as the Protocol's outlook on prostitution. As I discussed in Chapter 4, the victim protection aspect is highly gendered in ways that are problematic for both male and female victims of trafficking who do not fit the narrow category of an ideal victim. Thus this chapter also assesses the

¹ For a full discussion of all relevant international treaties, see Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010).

relationship between the focus on prostitution and the difficult victim categories arising from it.

The second part of the chapter focuses on the provisions of the Protocol as well as the definition of trafficking offered in the Protocol. In my analysis of the provisions of the Protocol, I evaluate the so-called 3P framework of counter-trafficking, built on the three pillars of Prosecution, Prevention and victim-Protection,² which are considered necessary for a comprehensive approach to combatting human trafficking.

The definition of human trafficking in the Protocol is considered its most significant feature, as it defined human trafficking for the first time in almost a century of counter-trafficking agreements. It separates human trafficking for sexual exploitation from other forms of human trafficking, a distinction that, as I will discuss in Chapters 6-8, has been maintained and solidified in regional and domestic definitions of trafficking. This separation perpetuates notions of human trafficking for sexual exploitation as a unique crime and sex work as different from all other kinds of potentially exploitative work.

Equally, the provisions of the Protocol focus on measures, which control and restrict international movement and strengthen international collaboration for border control, rather than measures, which prevent exploitability. The focus is thus on the prosecution element of the three P approach with prevention efforts restricted in terms of “preventing the crime of human trafficking within our borders” rather than comprehensively preventing exploitation. Equally, victim protection efforts focus on protecting victims of a crime rather than creating meaningful responses that treat trafficked persons as victims of structural disadvantage. As I discussed in Chapters 1-4, factors like restrictions on immigration, insufficient protections for reproductive workers and gendered stereotypes contribute to exploitability.

² Kelly Hyland Heinrich, ‘Ten Years After the Palermo Protocol: Where Are Protections for Human Trafficking Victims?’ (2010) 18 Human Rights Brief 2.

5.2) The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The UN Trafficking Protocol supplements the United Nations Convention against Transnational Organized Crime and addresses trafficking in persons under a different framework than all previous agreements.³ Under the UN Trafficking Protocol, trafficking is not primarily targeted as a human rights concern or as a form of slavery, but as a problem of transnational criminal law, more specifically as a matter of transnational organised crime and of border control.

In a way this is a continuation from older White Slavery, anti-prostitution and trafficking laws, which also prioritised the punishment of traffickers, and sometimes also trafficked persons engaged in prostitution, over measurements of victim protection and prevention. However, the UN Trafficking Protocol's statement of purpose includes the aim to 'protect and assist the victims of [...] trafficking, with full respect for their human rights.' This purpose reaffirms human rights enshrined in pre-existing human rights treaties, including the 1981 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the 1990 Convention on the Rights of the Child (CRC).⁴

Nonetheless, the UN Trafficking Protocol forms at least a partial departure from the historical prostitution-focussed approach to human trafficking: The inclusion of trafficking under the Convention against Transnational Organized Crime had been lobbied for by the Argentinian government, which was concerned that a purely human rights perspective to trafficking would be insufficient to tackle the problem successfully.⁵ The Argentinian proposal was welcomed by the United States as well as European countries and EU institutions, which were also aiming

³ International Agreement for the Suppression of the White Slave Traffic 1904; International Convention for the Suppression of the White Slave Trade 1910; International Convention for the Suppression of Traffic in Women and Children 1921; International Convention for the Suppression of the Traffic in Women of Full Age 1933; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949.

⁴ Convention on the Elimination of All Forms of Discrimination Against Women 1981; Convention on the Rights of the Child 1990.

⁵ D Vlassis, 'The Global Situation of Transnational Crime: The Decision of the International Community to Develop an International Convention and the Negotiation Process.' (2000) UNAFEI annual report 59.

to move towards a more comprehensive approach to trafficking.⁶ The United States submitted a draft proposal which included the phrase 'trafficking in persons' instead of only trafficking in women and children. This broader approach, together with a concept of trafficking that went beyond prostitution and sexual exploitation as the only purposes of trafficking, was embraced by most states.⁷ Thus, the preamble of the Protocol states that 'effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach.'⁸

The UN Trafficking Protocol is a criminal law instrument primarily designed to punish human traffickers, which clearly puts an emphasis on law enforcement provisions under Article 5, which criminalise human trafficking, attempts of, complicity to and organisation of human trafficking.⁹ This has an effect in how trafficking is perceived: it causes trafficking to be viewed as a threat to the nation state and to the control of territorial borders. Thus, immigration control and criminal justice measures are prioritised,¹⁰ while human rights concerns receive less importance. The UN Trafficking Protocol supplements the UN Convention against Transnational Organized Crime, a treaty with the main objective to improve international cooperation mechanisms to prevent and combat transnational organised crime.¹¹ In order to ratify the UN Trafficking Protocol, states first have to ratify the Convention, which places the UN Trafficking Protocol firmly in the criminal law framework. The Convention is considered to be the first attempt to use international law as a means against transnational organised crime.¹²

⁶ 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto' (United Nations Office on Drugs and Crime 2006); Gallagher (n1) 77.

⁷ 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto' (n2) 322.

⁸ UN Trafficking Protocol, Preamble.

⁹ *ibid.*

¹⁰ Corin Morcom and Andreas Schloenhardt, 'All about Sex?! The Evolution of Trafficking in Persons in International Law' (2011) UQ Human Trafficking Working Group Research Paper.

¹¹ Kristiina Kangaspunta, 'Was Trafficking in Persons Really Criminalised?' (2015) 5 *Anti-Trafficking Review* 80, 81; Kay Warren, 'The 2000 UN Human Trafficking Protocol; Rights, Enforcement, Vulnerabilities' in Mark Goodale and Merry, Sally Engle (eds), *The practice of human rights. Tracking law between the Global and the Local* (CUP 2007) 245.

¹² Gallagher (n1) 70.

As Anne Gallagher analysed:

While human rights concerns may have provided some impetus (or cover) for collective action, it was clearly the sovereignty/security issues surrounding trafficking and migrant smuggling, as well as the perceived link with organized criminal groups operating across national borders that provided the true driving force behind such efforts.¹³

Thus, the setting of anti-trafficking efforts in the crime prevention and criminal justice system of the United Nations has shaped the focus on all parties in human trafficking in a criminal law context, by defining them as opposing parties, as victims and perpetrators. As I have demonstrated in Chapter 4, the problematic dichotomy of villain vs. victim creates binaries that are often unattainable for trafficked persons. Additionally, the criminalisation of human trafficking has had effects on the way State Parties address policies closely related to trafficking such as migration and prostitution policies.¹⁴ In many cases they do so by focussing on measures restricting migration and prostitution rather than creating safeguards for vulnerable people post-arrival in destination countries. For example, both in the deliberations of the German draft Prostitute Protection Law¹⁵ and the English Modern Slavery Act,¹⁶ the respective members of parliament quoted the risks to potential victims of trafficking as a reason to introduce restrictive measures affecting sex workers.¹⁷

This focus also means that the criminal justice provisions of the UN Trafficking Protocol are worded as clear obligations under Article 5,¹⁸ requiring implementation from State Parties. However, the measures regulating assistance and support for trafficked persons in Article 6, use the qualifiers 'in appropriate cases' (Article 6.1 and 6.2) and 'shall consider' (Article 6.3), 'shall take into account' (Article 6.4) and 'shall endeavour' (Article 6.5), making these provisions

¹³ *ibid* 71.

¹⁴ Kangaspunta (n11) 81.

¹⁵ CDU/CSU 'Das Prostituiertenschutzgesetz Kommt' <<https://www.cducsu.de/presse/pressemitteilungen/das-prostituiertenschutzgesetz-kommt>>; SPD 'Gute Einigung Beim Prostituiertenschutzgesetz' <<http://www.spdfraktion.de/themen/gute-einigung-beim-prostituiertenschutzgesetz>>.

¹⁶ UK Modern Slavery Act 2015 (from here on MSA).

¹⁷ HC Deb, 4 November 2014, vol 587. The suggestions by Fiona Taggart did not make it into the Modern Slavery Act, but are nonetheless relevant.

¹⁸ UN Trafficking Protocol (n8).

vague and thus remain for the most part at the discretion of State Parties.¹⁹ The only victim protection provision that translates into a firm requirement is Article 6.6: 'Each State Party *shall ensure* that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.'²⁰ However, the Protocol is silent with regard as to whether or not such compensation should include compensation for wages withheld, or only compensation for physical or emotional damage. Thus, whereas this *could* amount to a provision, which brings trafficked persons' rights as workers into the debate, this has not been the case in the UK and only to some degree in Germany.²¹

Nonetheless, the inclusion of these measures and the recognition that international human rights law is a relevant supplementary framework to the criminal law framework is important.²² It is particularly significant considering that many government delegates 'did not even see the connection between combating the crime of trafficking and the need to provide assistance to trafficked persons and protect their rights'.²³ This ignorance is ironic considering the victim-focus approach the Trafficking Protocol claims to have: The preamble emphasises the importance of 'protecting [victims'] internationally recognized human rights'²⁴ as well as the importance of the new Protocol, stating that 'there is no universal instrument that addresses all aspects of trafficking in persons'.²⁵ State Parties were 'concerned that, in the absence of such an instrument, persons who are *vulnerable* to trafficking will not be sufficiently protected'.²⁶ However, the Protocol contains no element which serves to clarify what these vulnerabilities are and makes no recommendations to address the vulnerabilities as such in domestic legislation.

¹⁹ *ibid*, Article 6.

²⁰ *ibid*, Article 6.6.

²¹ See Chapter 7 and Chapter 8 of this thesis.

²² Morcom and Schloenhardt (n10).

²³ Melissa Ditmore and Marjan Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 *Nemesis* 79.

²⁴ UN Trafficking Protocol (n8).

²⁵ *ibid*.

²⁶ *ibid* (emphasis added).

Instead, Article 4 defines the scope of application of the UN Trafficking Protocol as follows:

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.²⁷

In this prevention can be interpreted as the prevention of the offences contained within the Trafficking Protocol, but not prevention of conditions that foster such exploitation, such as the insufficient labour protections for reproductive workers and visa regimes which prevent regular migration for workers in certain sectors regardless of demand.

The criminal law focus has also meant that a significant number of state parties, which created trafficking offences after the introduction of the UN Trafficking Protocol, have interpreted trafficking as an international crime problem, often focussing on repressive measures to counter trafficking, rather than empowering ones,²⁸ such as increased labour protections for workers in the private sphere and the granting of labour rights to undocumented workers, as I will discuss in more detail in the section on prevention.

Nonetheless, the Trafficking Protocol can in itself be seen as a success insofar as it led to the introduction of anti-trafficking legislation in many countries, which previously did not have any counter-trafficking measures.²⁹ It also raised awareness of human trafficking in the media and among the general public all over the world. Furthermore, the UN Trafficking Protocol also spurred on regional agreements, such as the Council of Europe Convention and the EU Trafficking Directive.

²⁷ *ibid*, Article 4.

²⁸ Heli Askola, 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13 *European Law Journal* 204.

²⁹ Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 5 *Anti-Trafficking Review* 14.

Despite its positive achievements in providing a definition of human trafficking and spurring on implementation of human trafficking legislation and international and regional cooperation, the UN Trafficking Protocol is not without flaws. It perpetuates questionable gender stereotypes and a legacy of 'White Slavery' treaties, which are founded on problematic concepts of sex work and women's role in society.

5.3) The History of the Term 'White Slavery' & Historical Counter-Trafficking Treaties

In order to demonstrate the legacy of preceding counter-trafficking treaties and to understand the gendered categorisation of victims of trafficking in the UN Trafficking Protocol, this section looks at the history of the 'White Slavery' treaties and the 'White Slavery' terminology itself.

The term 'White Slavery' emerged in the late 18th century.³⁰ The term originally referred to the sexual enslavement of white women. It was intentionally phrased as an analogy to the exploitation of African slaves, since it allowed for the language of one social phenomenon to be transferred to another.³¹ Furthermore, since it occurred at the time of the legal abolition of African slavery, it was probably hoped that not only the terminology, but also the momentum of the anti-slavery movement was transferrable to the anti-'White Slavery' movement.

The 'White Slave Trade' gained a lot of media attention in Europe and the United States.³² The issue got attention both from journalists as well as from 'defenders of public morality'.³³ The proponents of the fight against the 'White Slave Trade' can be roughly put into three categories:

³⁰ Gunther Peck, 'White Slavery and Whiteness: A Transnational View of the Sources of Working-Class Radicalism and Racism' (2004) 1 Labor 41.

³¹ Kristiina Kangaspunta, 'A Short History of Trafficking in Persons' (2008) Freedom from Fear Magazine 38, 38.

³² C Terrot, *The Maiden Tribute: A Study of the White Slave Traffic of the Nineteenth Century* (Muller 1959); Glen Petrie, *A Singular Iniquity: The Campaigns of Josephine Butler* (Viking Adult 1971).

³³ William T Stead, 'The Maiden Tribute of Modern Babylon. Parts 1-4' *Pall Mall Gazette* (6 July 1885); Edwin W Sims, 'The Menace of the White Slave Trade' in EA Bell (ed), *Fighting the Traffic in Young Girls or War on the White Slave Trade* (1910).

First are the 'puritans' who wanted to save only the innocent girls that had been lured away through false promises from unsuspecting parents (who should have been more cautious and prevented their abduction).³⁴ Their assumption was that no pure girl would willingly engage in prostitution and, as implied by the term 'White Slave Trade', in their perception the young victims had to be white. The sociologist Lester Ward argued in 1911 that 'women of any race will vehemently reject the men of a race which they regard as lower than their own' and that 'women of any race will freely accept the men of a race which they regard as higher.'³⁵ Consequently, a black woman unwilling to sleep with a white man was simply beyond the imagination of most white puritans at the time.³⁶ Equally, no white woman could possibly be conceived as voluntarily engaging in sex with a black man, which helped to create a concept of 'White Slavery' in which the implication of possible clients or pimps of colour alone worked to create the innocence and thus the lack of consent of pure, white women.³⁷

The second category is the 'regulationists' who argued that state regulation of prostitution was the only way to control venereal disease and perceived anti-'White Slavery' as a good method to implement stronger controls on prostitutes. In their view 'innocent women and girls', who complied with moral expectations of women at the time, needed protection from immorality and transmitted diseases. Evidently, the men were not to blame, due to their strong biological desires. Once fallen and turned into 'immoral women', it was society that needed protection in form of laws and regulations.³⁸

Last are the 'first wave feminists', whose relationship to the two other groups was often complicated, but who agreed with the puritans on the abolition of prostitution as a main goal. The first wave feminists saw prostitutes as scapegoats of society, being both victims of sexual exploitation by men and of

³⁴ Ophelia Amigh, 'Another Warning to Mothers of Innocent Country Girls' in EA Bell (ed), *Fighting the Traffic in Young Girls or War on the White Slave Trade* (GS Ball 1910).

³⁵ Lester F Ward, *Pure Sociology* (Macmillan 1911) 358–360.

³⁶ Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Cornell UP 1999) 143; Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010) 85–86.

³⁷ Doezema (n36) 85–87.

³⁸ Sims (n33) 14.

harassment by public authorities.³⁹ Josephine Butler and her followers argued that both prostitution and white slavery would end if laws targeted those who made money from prostitutes, rather than the prostitute herself. Similar to the puritans who argued that no innocent woman would enter prostitution voluntarily, they claimed that no woman at all would do so. First wave feminists argued that women's purity was ensured through women's moral superiority.⁴⁰ They did not account for the possibility that women might voluntarily enter into sex work. Given the political situation of first wave feminists, they were probably also in no position to argue anything beyond empathy, but non-association, with prostitutes.

The alleged cases of 'White Slavery' were often cited as a reason for getting rid of prostitution per se: Abolitionist campaigners were successful in shaping the laws and aimed to protect prostitutes from 'white slavers',⁴¹ 'pimps' and 'profiteers' through new international treaties and domestic legislation, such as the 1910 US 'White Slave Traffic Act' (from here on 'Mann Act').⁴² However, these new laws did not end prostitution, nor did they improve prostitutes' working conditions. Instead, they were largely used against prostitutes themselves.⁴³ The closing of brothels and red-light districts forced prostitutes into illegality. Arrests of prostitutes increased, as well as arrests of prostitutes' husbands and boyfriends as presumed pimps, especially if they were black or 'foreign'.⁴⁴

Today's debates often echo the same dichotomies. States can be categorised along the lines of regulating approaches, e.g. in Germany and the Netherlands,⁴⁵

³⁹ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Bloomsbury Publishing 2007) 23.

⁴⁰ Doezema (n 36); Judith R Walkowitz, *City of Dreadful Delight. Narratives of Sexual Danger in Late-Victorian London* (1992).

⁴¹ Marlene D Beckman, 'The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women' (1984) 72 (1983-84) *Georgetown Law Journal* 1111, 1112.

⁴² United States White Slave Traffic Act, ch. 395, 36 Stat. 825, 1910, also known as the 'Mann Act'.

⁴³ Beckman (n41) 1112.

⁴⁴ Jo Doezema, 'Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol' (2002) 10 *Gender & Development* 20, 24; Randy Roberts, *Papa Jack: Jack Johnson And The Era Of White Hopes* (Simon and Schuster 1985); Judith R Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (CUP 1982); Beckman (n41).

⁴⁵ Marina Della Giusta and Vanessa E Munro, *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate 2013); AL Daalder, 'Prostitution in the Netherlands since the Lifting of the Brothel Ban' <<http://resolver.tudelft.nl/uuid:a0ca309e-9739-49a9-a803-9820a8de0fa5>>; Ine Vanwesenbeeck, 'Sex Workers' Rights and Health: The Case

or neo-abolitionist approaches, such as in Sweden and Northern Ireland.⁴⁶ Equally, religious conservative groups and abolitionist feminists today continue to advocate for the abolition of prostitution, while sex workers' rights activists and pro-sex work feminists argue for labour rights within the sex industry.⁴⁷

5.3.1) International Agreements against 'White Slavery' & Trafficking from 1904-1949

The numbers quoted on young women and girls being trafficked, as well as the significant media attention and the 'scandalous' nature of the issue caused 'White Slavery' to be discussed at several conferences in Europe, leading to the 'International Agreement for the Suppression of the White Slave Traffic' in 1904 and its successors.⁴⁸ The 1904 International Agreement for the Suppression of the White Slave Traffic's preamble states its aim to be 'the effective protection against the criminal traffic known as the "White Slave Traffic"⁴⁹ but there is no definition of what "White Slave Traffic" means exactly. The Agreement covers only situations in which women were forced or deceived into prostitution or "debauchery" in foreign countries.

Some aspects of the contemporary 3P (prosecution, prevention, victim protection) approach were already present in the White Slavery agreements, in the sense that they contain a call for criminalisation and prosecution, a preventative effort that is focussed on the monitoring of borders and the control of ports. Thus, the preventative measures, like many preventative efforts today, focussed on restrictive measures against women's independent migration. Similarly, protection measures focussed on 'protecting' from ending up in 'debauchery' and on facilitating women's repatriation, rather than empowering measures that would have increased women's safety in migration and in working

of the Netherlands' in Rochelle L Dalla and Lynda M Baker (eds), *Global Perspectives on Prostitution and Sex Trafficking* (Lexington Books 2011).

⁴⁶ Jane Scoular, 'Criminalising "Punters": Evaluating the Swedish Position on Prostitution' (2004) 26 *Journal of Social Welfare and Family Law*.

⁴⁷ For a detailed discussion, see Chapter 3 of this thesis.

⁴⁸ Doezeema (n36).

⁴⁹ International Agreement for the Suppression of the White Slave Traffic, May 18 1904, Preamble.

in the sex industry. The notion that women should be kept away from potentially dangerous situations, rather than to make working conditions safer is a thread that ran (and often still runs) through discussions of women's work.⁵⁰ In the context of sex work, this approach is re-emerging in a number of countries, with Sweden, Norway and Northern Ireland employing a stance that criminalises the buying of sexual services, and Germany and the Netherlands considering measures to restrict and control sex workers within a regulatory context.⁵¹

Continuing in a similar vein, Article 3 does not assume that women have any level of agency, but presumes they were made to leave their country and want to return. It reads:

The Governments undertake, when the case arises, and within legal limits, to have the declarations taken of women or girls of foreign nationality who are prostitutes, in order to establish their identity and civil status, and to discover who has caused them to leave their country. [...]⁵²

Furthermore, previous legislation in some states, such as the 1864 Contagious Disease Act in the UK and the Mann Act in the USA,⁵³ had led to special controls and were to the general disadvantage of prostitutes. In this light, Article 3 could also be interpreted as indirect permission to control all prostitutes' documents and interrogate them under the pre-tense of anti-'White Slavery' precautions. Similar effects have been attributed to contemporary counter-trafficking legislation on raids in brothels and forced repatriation in cases where trafficking could not be proven, but women's irregular migration status could.⁵⁴

⁵⁰ Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books 2007).

⁵¹ Susanne Dodillet and Petra Östergren, 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects' (2011); Marie-Sophie Adeoso, 'Prostitution Gesetz Doña Carmen: „Keine Sonderregeln für Prostituierte“' *fr-online.de* (10 April 2014) <<http://www.fr-online.de/politik/prostitution-gesetz-do-a-carmen--keine-sonderregeln-fuer-prostituierte-,1472596,26811788.html>>; KOK, 'Stellungnahme zum Referentenentwurf des Bundesministeriums für Justiz und Verbraucherschutz: Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2011/36/EU des Europäischen Parlaments' <http://www.kok-gegen-menschenhandel.de/fileadmin/user_upload/medien/stellungnahmen/Stellungnahme_KOK_zum_Richtlinienumsetzungsgesetz_17.11.pdf>.

⁵² International Agreement for the Suppression of the White Slave Traffic 1904, Art 3.

⁵³ United States White Slave Traffic Act, ch. 395, 36 Stat. 825 (n42).

⁵⁴ Gallagher (n29) 23; Marjan Wijers, 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' (2015) 5 *Anti-Trafficking Review* 56; Heli Askola, "Illegal

In the 1904 agreement the repatriation of the women and girls is envisaged without taking into account the best interests of the women in question, continuing the notions that state-sanctioned and socially acceptable unfreedom in marriage or family is perceived as freedom for women, whereas potential unfreedom in a brothel is not. Article 3 continues:

The governments also undertake [...] to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them.⁵⁵

The fact that repatriation can be ordered by the women's spouses or families, even against the women's will, seems to be of little significance to the drafting parties, whereas the assumed power exercised by the (undefined) traffickers seems to be very important. Thus, there is a notion of acceptable and unacceptable control over women's lives – similarly to general notions of acceptable male ownership over wives, whereas prostitutes are considered 'public property'.⁵⁶

The 1904 Agreement was considered a draft agreement and was followed by the International Convention for the Suppression of the White Slave Trade in 1910, which was signed by 13 countries.⁵⁷ The 1910 Convention also introduces the concept of consent, which is a contested issue in human trafficking legislation. Discussions on consent are usually phrased as consent to migrate or consent to work in the sex industry, carrying forward a notion of once women have consented to this 'sin', they have consented to whatever else may happen to them in this context.

Migrants', Gender and Vulnerability: The Case of the EU's Returns Directive' (2010) 18 Feminist Legal Studies 159.

⁵⁵ International Agreement for the Suppression of the White Slave Traffic 1904.

⁵⁶ For a more detailed discussion of this issue, see Chapter 3 of this thesis.

⁵⁷ Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and the UK had already been signatories to the International Agreement for the Suppression of the White Slave Traffic 1904, whereas Austria-Hungary and Brazil were new parties to the International Convention for the Suppression of the White Slave Traffic 1910. Switzerland and Norway were signatories to the 1904 Agreement, but not to the 1910 Convention.

Interestingly, the Final Protocol mentions:

The case of detention against her will, of a woman or girl in a brothel could not, in spite of its gravity, be dealt with in the present Convention, seeing that it is governed exclusively by internal legislation.⁵⁸

Thus, already at this early stage, the focus seems to be on the transport of young women across borders, rather than on protecting women who were exploited while working in the sex industry. The focus is on controlling women, rather than on protecting their rights and limits protection to those who did not wilfully give up their 'innocence'.⁵⁹

The term 'White Slavery' also rendered women of colour, who became victims of trafficking within the US and Europe, invisible in the debate. As mentioned in the context of prostitution, women of colour were not considered to be in the same category of honourable women as white European women.⁶⁰ White male policymakers did not equate women of colour with 'their' women, who were tarnished abroad.⁶¹ The 1921 'International Convention for the Suppression of Traffic in Women and Children' put a *linguistic* end to the exclusion of women of colour and male children from the victim of trafficking category.⁶² While the official definition of who is a victim of human trafficking widened over time, starting with the 1921 Convention, the legacy of the notion of only a certain type of victim as worthy of protection continues until today.

The 1933 Convention was created in order to 'secure more completely the suppression of the traffic in women and children' and was intended to be complementary to the pre-existing Conventions. It followed recommendations by the League of Nations' Traffic in Women and Children Committee and was originally signed by 24 states.

⁵⁸ International Convention for the Suppression of the White Slave Traffic, May 4, 1910, Final Protocol D.

⁵⁹ Wijers (n54) 58; Doezema (n36) 66.

⁶⁰ Kangaspunta (n31).

⁶¹ See e.g. Ward (n35).

⁶² International Agreement for the Suppression of the White Slave Traffic 1904

Article 1 of the 1933 Convention provides as follows:

Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.⁶³

This paragraph reads exactly like the first article of the 1910 Convention, with the difference that it relates to women of full age instead of underage girls. Unlike its predecessors, the 1933 Convention excludes the notion of consent. Force or coercion was no longer considered a necessary prerequisite to constitute the crime of trafficking and even if a woman of full age consented, procuring, enticing or leading her away constituted trafficking. This denied women agency in their migration, a notion that continued in the 1949 Convention.

In all pre-1949 agreements, there was almost no attention given to the demand side of the prostitution and trafficking. International agreements focussed their obligations overwhelmingly on countries of origin, while at the same time alleged 'white slavery'/trafficking concerns allowed receiving states to enforce stronger controls on prostitution per se. States of destination also pushed for a system of compulsory return for victims, even though the League of Nations strongly advocated the supported repatriation of victims over deportation.⁶⁴ Such an approach demonstrates governments' view of human trafficking as a border problem and of counter-trafficking agreements as a way to regulate or abolish migrant prostitution. Women's own wishes and their perception of their situations at home or the countries of destination seem of little concern for governments.

⁶³ International Convention for the Suppression of the Traffic in Women of Full Age 1933

⁶⁴ Gallagher (n1) 58.

5.3.2) The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others' 1949

The 1949 'Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others' continued the definition of human trafficking as trafficking for the purpose of prostitution, but is phrased in gender-neutral terms and thus theoretically also applies to adult men trafficked into prostitution. This is a continuation of the trend of an ever-widening definition of human trafficking, while the victim category at its core continues to be the idealised white, young, innocent victim of trafficking.

The 1949 Conventions' aim is defined as prohibiting and controlling the practices of trafficking, procurement, and exploitation, both internal and across borders, regardless of the age of the victim and whether or not he or she consented to it. The convention takes a strong stance not only against trafficking, but also against prostitution, indicating a shift towards abolitionism. The preamble of the 1949 Trafficking Convention states:

[Prostitution] and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.⁶⁵

According to Article 1 State Parties are obliged to punish anyone who 'procures, entices or leads away, for purposes of prostitution' or 'exploits the prostitution of another person, even with the consent of the person'.⁶⁶ Article 2 orders to punish anyone who 'keeps or manages, or knowingly finances or takes part in the financing of a brothel' or '[knowingly] lets or rents a building or other place or any part thereof for the purpose of the prostitution of others'.⁶⁷ Despite this strong language, the 1949 Convention does not completely prohibit prostitution. However, it clearly links human trafficking to prostitution and equally links the abolition of prostitution to the abolition of human trafficking. These connections, while no longer necessarily maintained in official definitions, continue until today

⁶⁵ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949

⁶⁶ *ibid*, Art 1.

⁶⁷ *ibid*, Art 2.

and link up prostitution and human trafficking in ways that do not exist for other areas of highly precarious work.

Article 19 obliges State Parties to 'make suitable provisions for [the victims'] temporary care and maintenance' prior to repatriation. It states that victims should only be repatriated if they 'desire to be repatriated or who may be claimed by persons exercising authority over them or whose expulsion is ordered in conformity with the law.'⁶⁸ While this sounds victim-centric at first, any victim who is considered an illegal migrant could still be expelled 'in conformity with the law' under this provision.

The 1949 Trafficking Convention has some problematic aspects: Firstly, it focuses solely on trafficking for purposes of prostitution and conflates the two. Further, it also condemns all forms of prostitution. Like the 1933 Convention, it denies the possibility of women entering sex work of their own free will. Rather it states that women have to be protected from working as sex workers under all circumstances. At the same time it makes no mention of structural issues in terms of general gender discrimination and access to education and work, distribution of wealth, etc. as causes of trafficking and prostitution in general. Secondly, some of the language of the Convention is also belittling of trafficked persons and reflects stereotypes about sex workers as 'fallen women'. There is no other convention that proposes '*rehabilitation* and social adjustment' for the victims of a crime.⁶⁹ Victims do not generally have to be rehabilitated.

The UN Special Rapporteur on Violence against Women stated her opinion about the 1949 Convention in a report in 2000:

The 1949 Convention has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the "evils of prostitution". As such, the 1949 Convention does very little to protect

⁶⁸ *ibid*, Art 19.

⁶⁹ *ibid*, Art 16.

women from and provide remedies for the human rights violation committed in the course of trafficking, thereby increasing trafficked women's marginalization and vulnerability to human rights violations.⁷⁰

The legacy of the historic counter-trafficking agreements affected the UN Trafficking Protocol in many ways. Firstly, the 'White Slavery' concept of human trafficking continues to shape our vision of what trafficking looks like. As Wijers puts it 'The spectre of involuntary sex and of despoilment of innocent white maidens seized the world's attention in the late 1800's and early 1900's. Overtones of that appalled, fascinated, and condemnatory prurience continue to pervade public and institutional perceptions of the traffic in human beings in the early twenty-first century.'⁷¹ Indeed, portrayals of human trafficking, both in the media, in advocacy campaigns by NGOs, and on social networks still focus on the rescue of innocent women and girls from a life of enslavement and have influenced both the UN Trafficking Protocol and its implementation.⁷²

The existence of the previous treaties also influenced some of the formulations in the UN Trafficking Protocol, particularly in situations of dissent over the wording.⁷³ In these situations key phrases were borrowed from earlier documents, which gives groups the possibility to interpret the Protocol as standing in the tradition of its predecessors, including some of their problematic legacy.⁷⁴ Additionally, the inclusion of some of the old wording helped water down the wording of the Protocol, changing strong recommendations into vague ones.⁷⁵

⁷⁰ United Nations Economic and Social Council Commission on Human Rights, 'Integration of the Human Rights of Women and the Gender Perspective. E/CN.4/2000/68', 22.

⁷¹ Karen E Bravo, 'Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade' (2007) 25 Boston University International Law Journal 207, 207–221.

⁷² Dana Raigrodski, 'Economic Migration Gone Wrong: Trafficking in Persons Through the Lens of Gender, Labor and Globalization' 25 Indiana International & Comparative Law Review 79 (2015).

⁷³ Wijers (n54) 56; Warren (n11); Raigrodski (n72).

⁷⁴ Warren (n11) 251.

⁷⁵ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2005) 42.

5.4) Gender and Prostitution in the UN Trafficking Protocol

The UN Trafficking Protocol thus builds on a legacy of highly gendered counter-trafficking legislation. On the surface, the UN Trafficking Protocol defines trafficking in gender-neutral terms and seems to apply to all persons equally. However, there are a number of instances in which it blatantly or indirectly continues narratives of idealised victimhood and is gendered in problematic ways.

The text mentions the category of ‘women and children’ at several occasions, switching from the wider construction of exploitation of all persons to a narrower category, which focuses on the vulnerability of women and children. The phrase ‘especially women and children’ in the Preamble, but also throughout the text of the Protocol, also echoes older White Slavery and Trafficking treaties, as well as the concerns of states and NGO lobbying groups that wanted to highlight the situation of women and children in order to maintain the connection between trafficking and prostitution.⁷⁶ By mentioning the vulnerability of women and children without acknowledging the structural factors which create such vulnerability, the Protocol presents their vulnerability as inherent. Thus, while the inclusion of the term ‘especially women and children’ in the title and the definition of the Protocol *seems* to recognise the gendered history and current reality of trafficking, it perpetuates a view of trafficking that conflates trafficking and prostitution and casts all trafficked persons into one mould, that of innocent women and children. Such a categorisation makes it harder for ‘atypical’ victims to receive assistance.⁷⁷ As Kay Warren points out, this ‘coupling [of] vulnerability with the female gender and dependent children is a very potent imagery for the construction of worthy victims.’⁷⁸ This imagery both creates worthy victims and at the same time creates an idealised victim category,⁷⁹ which is unattainable for many trafficked persons,⁸⁰ as they do not fit the ‘paradigmatic horror story of human trafficking—the young (white) woman or child being duped and kidnapped

⁷⁶ Ditmore and Wijers (n23).

⁷⁷ Morcom and Schloenhardt (n10).

⁷⁸ Warren (n11) 247.

⁷⁹ *ibid* 263; Mark Goodale and Sally Engle Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local* (CUP 2007).

⁸⁰ For a more detailed discussion of this issue, see Chapter 4 of this thesis.

for exploitation in the illegal commercial sex industry.⁸¹ Equally, the special mention of 'women and children' creates a category that puts women and children on the same footing, and treats 'women as children, denying them the right to have control over their own bodies and lives.'⁸² While there is no longer an explicit mention of this idealised victim of human trafficking in the UN Trafficking Protocol, her⁸³ legacy continues in the focus on the coerced sexual exploitation of women and the special mention of 'exploitation of prostitution' and 'women and children' throughout the Protocol.⁸⁴

Such a focus on prostitution and vulnerable idealised victims ignores the global economic dimension of human trafficking.⁸⁵ Instead, it lets us view human trafficking as an issue of an exceptional exploitation committed by criminal organizations against very few individuals, which it sets up as a binary of absolute victims and absolute perpetrators. This exceptionality assumption ignores that exploitative labour situations are common, rather than exceptional and that exploitative forms of labour, including human trafficking, play a role in maintaining the global economy.⁸⁶

Furthermore, the lack of differentiation between women's and children's vulnerability to trafficking in the sex industry caused friction between the different NGOs and State parties. The debates on the definition of trafficking focussed on prostitution and whether or not it was labour or violence against women.⁸⁷ The focus on this debate took attention away from other, more pressing issues of the Protocol. This concerned not only human rights and labour rights, which play a negligible role in the Protocol, but also those aspects of gendered vulnerability,⁸⁸

⁸¹ Raigrodski (n72) 20.

⁸² Wijers (n54) 62.

⁸³ The female pronoun is used in this case, as the ideal victim is, by definition female and innocent, as I discussed in Chapter 4.

⁸⁴ Raigrodski (n72) 11; Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment & Society* 300; Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95.

⁸⁵ Raigrodski (n72) 3.

⁸⁶ *ibid.* For a more detailed discussion, see Chapter 2 of this thesis.

⁸⁷ Hila Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76, 89.

⁸⁸ *ibid.*

such as unequal opportunities to migrate, lack of access to education and property, and other issues of systemic discrimination against women, which affect women's migratory process and vulnerability towards agents, smugglers and traffickers, but are not directly linked to trafficking into prostitution.⁸⁹ Furthermore, the lobbying efforts by the two opposing camps rendered much of the wording in the Protocol ambiguous, giving NGOs and lobbying groups in State parties the opportunity to interpret the provisions as they see fit. As a result, governments may restrict funding to those NGOs, which comply with their preferred stance, for example the anti-prostitution approach in the USA.⁹⁰

Thus, whereas gender is omnipresent in the focus on women and children in the Protocol, it acts to idealise women as victims, rather than to address their gendered vulnerabilities and to empower them as agents in their own right. The approach of focussing on trafficked persons only as victims, not as persons with agency, including the focus on prostitution and on 'women and children' can be seen throughout the Protocol.

The Protocol also maintains some aspects of previous anti-trafficking treaties and is thus building on a legacy of moralistic anti-sex work agreements.

5.5) The Provisions of the Protocol

5.5.1) Definition of Trafficking

The definition of trafficking in the Protocol was originally intended to only cover trafficking in women and children, following the legacy of its predecessors.⁹¹ Whereas agreement regarding the inclusion of men in the new gender-neutral definition was relatively easily reached, the inclusion of forced labour, debt bondage and forced marriage caused opposition amongst state parties.⁹²

⁸⁹ For a discussion of women's vulnerabilities in the migration process, see Chapter 2.

⁹⁰ Warren (n11) 266.

⁹¹ Gallagher (n1).

⁹² *ibid* 26–29; Raigrodski (n72) 20.

The inclusion of these issues raised State Parties' fears about not being able to differentiate between smuggling and trafficking. This fear was not unfounded, as the two phenomena are related and exist on a scale: human smuggling is generally understood as a voluntary crossing of a border, with the help of an agent or smuggler, against a fee. Human trafficking is understood as containing an element of force or coercion, either at the point of origin, in transit, or at the destination. However, as we have seen, many victims of trafficking also voluntarily cross borders and only find themselves in exploitative scenarios or in debt bondage once they have reached their destination country, where they are particularly vulnerable to exploitation.⁹³ Taking these issues into account, the definition of trafficking in the Protocol is a great achievement, as it applies to trafficked persons of all genders and ages and covers a wide spectrum of exploitation. It reads:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

The definition is also particularly significant, as it, for the first time in almost a century of international trafficking-related treaties, provides a clear definition of trafficking.

⁹³ Tom Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2012) 54 *International and Comparative Law Quarterly* 445, 448.

The definition contains three separate elements: an action, the use of certain means against that person, and the pursuit of a purpose of exploitation. All three elements must be present for qualifying certain actions or conduct as trafficking in human beings.

The *action* element is one part of the *actus reus* of trafficking, and would be fulfilled by, but is not limited to, recruitment, transportation, transfer, harbouring or receipt of persons. The breadth of this category allows not only recruiters and transporters of trafficked persons to be prosecuted, but also owners, managers and supervisors of establishments in which trafficked persons are subjected to exploitation. However, none of the qualifying actions are defined. While this theoretically results in a wide-ranging definition, the UN Trafficking Protocol's drafters limited the potential scope of the concept of trafficking through the development of a complex, three-part test, in which the action element is just one of the steps.

The *means* element constitutes the second part of the *actus reus* of trafficking. It requires threat of or use of force or other forms of coercion. It applies only to trafficking in adults, while for trafficking in children the *means* element is waived. The abuse of power or of a position of vulnerability is identified as an additional coercive means, the most contested of the means elements. Abuse of power had appeared previously in international conventions,⁹⁴ but not even the UN Trafficking Protocol provides a precise definition. The concept of abuse of a position of vulnerability is unique to this instrument. According to the *travaux préparatoires*, it refers to 'any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved.'⁹⁵ Some states define this concept broadly, while others try to limit their definitions to more tangible forms of coercion. The Council of Europe definition includes the vulnerability of being in a foreign country as one of the possible indicators.⁹⁶

⁹⁴ See for example the International Convention for the Suppression of the White Slave Traffic, Paris, 4 May 1910, amended by the Protocol signed at Lake Success, New York, 4 May 1949, UNTS, vol. 98.

⁹⁵ 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto' (n 6) 347.

⁹⁶ For a more detailed discussion of the Council of Europe provisions, see Chapter 6. Migrants have equally defined force broadly, see Rutvica Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking* (Palgrave Macmillan 2010).

The *purpose* introduces a type of *mens rea* element into the definition of trafficking. Trafficking occurs only if the perpetrator intended for the action to lead to exploitation of the trafficked person. Again, the UN Trafficking Protocol does not define exploitation. Its drafters opted for an open-ended list, allowing state parties to elaborate on other forms of exploitation when defining trafficking in human beings in their national legislation.⁹⁷ The description in the Protocol states, that exploitation includes, at a minimum, ‘the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’⁹⁸

Trafficking for forced labour was an important addition to the crimes covered under human trafficking. The definition of trafficking for labour exploitation is borrowed from the Forced Labour Convention and includes the most seriously exploitative work practices.⁹⁹ The terms ‘slavery and practices similar to slavery’ also links the trafficking convention to the Slavery Convention and the Supplementary Slavery Convention.¹⁰⁰

Despite all its achievements and the inclusion of trafficking for forced labour, the definition is not without flaws and reflects some problems in the negotiation process. These problems in the negotiation process were not only due to the complexity of the trafficking phenomenon, but also due to strong disagreements between participants at the negotiations at the UN International Crime Commission, particularly the two opposing camps within the NGO-lobby. The NGO lobbying groups could be roughly defined into two blocs, one viewing all prostitution as trafficking, thus demanding all prostitution to be banned and the

⁹⁷ Asif Efrat, ‘Global Efforts against Human Trafficking: The Misguided Conflation of Sex, Labor, and Organ Trafficking’ (2015) *International Studies Perspectives*, 3.

⁹⁸ UN Trafficking Protocol, Article 3(a).

⁹⁹ ILO, *Forced Labour Convention*, 28 June 1930, C 29, Art 2(1) defines the term ‘forced or compulsory labour.’ The definition remains unchanged by the Abolition of Forced Labour Convention 1957, No. 105.

¹⁰⁰ League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, LNTS Vol. 60; UN General Assembly, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Geneva, 7 September 1956, UNTS, vol. 266.

other viewing prostitution as sex work, and thus demanding conditions of labour to be monitored and cases of forced labour to be stopped and prevented.¹⁰¹

One of the results of the lobbying of those two opposing camps lies in the special mentioning of 'exploitation of prostitution' and 'other forms of sexual exploitation', without a definition of what these two concepts entail. It is a compromise between the abolitionist NGOs that demanded the inclusion of prostitution in the definition of trafficking and the sex workers' rights NGOs' demand not to define the two concepts out of fear for a definition that would render all sex work exploitation. The exploitation of the prostitution of others or other forms of sexual exploitation was deliberately left undefined, to enable state parties with different legislation on prostitution, ranging from regulating sex work to banning prostitution, to be able to become party to the Protocol.¹⁰² Sexual exploitation is not defined either. Whereas the UN Trafficking Protocol overall defines trafficking in gender neutral terms, the focus on sexual exploitation and exploitation of prostitution demonstrates that there is a gender dimension to the Protocol, which has carried over from previous counter-trafficking measures and continues to affect the trafficking debates today.

The inclusion of trafficking for labour exploitation in the Protocol together with the special and separate mentioning of sexual exploitation and exploitation of prostitution has been interpreted in a way that turns them into separate categories.¹⁰³ This separation is problematic for several reasons. Firstly, many states have in practice focussed their efforts on trafficking for the exploitation of prostitution only and ignore both exploitation for forced labour and organ trafficking.¹⁰⁴ Secondly, and more importantly, this separation implies that sex work cannot be labour and that forced labour does not exist in the sex industry. Such an assumption excludes sex workers from protections against forced labour.¹⁰⁵ At the same time, it also calls for separate measures to end trafficking into the sex industry, including the further criminalization of prostitutes and their

¹⁰¹ Ditmore and Wijers (n23).

¹⁰² 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto' (n6) 347; Gallagher (n1) 38–39.

¹⁰³ Wijers (n54) 62.

¹⁰⁴ Warren (n11) 250.

¹⁰⁵ Wijers (n54) 62–63.

clients. Finally, the separation also silences victims of sexual exploitation in other lines of work, as the focus on sexual exploitation is solely focussed on exploitation in the sex industry, rendering sexual violence against trafficked persons in other employment sectors 'collateral damage' in the experience of trafficked persons.

Whereas the Protocol states that 'consent' cannot be used as a defence, if coercive or deceptive means have proved, in practice many trafficked persons, especially those in the sex industry have to prove that they did not consent. Otherwise they are not 'considered a 'real' victim.'¹⁰⁶ While the wording implies that one cannot consent to exploitation, as the focus of the Protocol is on the transnational dimension of trafficking, the focus on consent is in the context of how somebody enters the sex industry.¹⁰⁷ Thus, for trafficking into the sex industry, it changes the parameters from 'one cannot consent to exploitation' to 'if one consents to migrate into prostitution, one accepts the possibility of exploitation', which is in line with the dominant ideas about prostitution I discussed in Chapter 3. As prostitution is considered to be inherently dangerous and exploitative, and no '*normal*' woman is considered to enter prostitution voluntarily, women who do enter prostitution have to prove non-consent to prostitution, not their lack of consent to exploitation within prostitution.

The Protocol does not define either exploitation, or the conditions under which exploitation amounts to human trafficking.¹⁰⁸ Hathaway goes as far as to argue that the Protocol is only interested in the actions which *lead to* exploitation, which in turn means that there is 'no obligation flowing from the Trafficking Protocol to do anything about the condition of being exploited, much less to provide a remedy to exploited persons.'¹⁰⁹

This lack of definition shifts the focus away from the exploitation happening in the destination country and to the phase of border crossing or being in transit. This

¹⁰⁶ *ibid* 65–66.

¹⁰⁷ *ibid* 60.

¹⁰⁸ Shamir (n87) 86.

¹⁰⁹ James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 *Virginia Journal of International Law* 1.

shift can be illustrated by the UK definition of human trafficking,¹¹⁰ which focuses on 'consent to travel' rather than consent to working conditions or type of labour.

5.5.2) The '3P' approach: Prosecution, prevention & victim protection

5.5.2.1) Prosecution

The Protocol's prosecution provisions are contained within Article 5. Article 5 sets forth the measures of criminalization of trafficking, which apply regardless of whether or not the crimes are of a transnational nature. In addition to criminalising offences the practices defined as trafficking in Art. 3, it also criminalises attempts of trafficking, being an accomplice in a trafficking offence and organizing or directing others to commit trafficking offences.¹¹¹ The wording of Article 5 is binding for State parties and, as a result the criminalization of trafficking has been considered one of the strong points of the Protocol, as it has led to the establishment of trafficking offences in numerous countries, which previously had no counter-trafficking legislation.¹¹²

The criminalization of human trafficking can be considered an achievement. However, conviction rates for Human Trafficking have remained low in the 15 years since the Protocol. Over 40 per cent of countries had less than ten cases resulting in trafficking convictions between 2010 and 2012, despite having legislation criminalizing human trafficking.¹¹³ The set-up of the criminalization of trafficking in the Protocol and resulting national legislation with its stress on victims' witness statements has thus led to relatively low conviction rates and a high percentage of lower-level, often female perpetrators amongst those few convictions.¹¹⁴ At the same time, State parties have focussed the majority of their anti-trafficking efforts on criminal enforcement. Once established within a criminal law framework, it is unlikely to successfully shift the focus of combatting human trafficking to other issues, such as human rights and labour rights

¹¹⁰ UK MSA, Section 2.

¹¹¹ UN Trafficking Protocol, Art 5.

¹¹² Gallagher (n29).

¹¹³ Kangaspunta (n11) 84.

¹¹⁴ *ibid* 89–90; Wijers (n54) 56.

concerns.¹¹⁵ Thus, even in the area that is considered one of the strengths of the UN Trafficking Protocol, and the one area most states focus on in their implementation of counter-trafficking measures, the results have been weak.

5.5.2.2) Prevention

Similar to criminalization and prosecution efforts, prevention efforts have focussed on border control rather than on an end to exploitation. Part 3 of the Protocol deals with prevention, cooperation and other measures to combat trafficking.

According to Article 9 States Parties shall establish comprehensive policies, programs and other measures ‘to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity’.¹¹⁶ At first sight, these obligations sound far-reaching. However, there are no details as to how States Parties are supposed to achieve these goals and Article 9 does not translate into definitive obligations. Nothing is added about how to go about dealing with these fundamental issues.¹¹⁷

Similarly, States Parties are supposed to adopt or strengthen legislative or ‘educational, social or cultural measures [...] to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking’(Art 9(5)).¹¹⁸ This paragraph shows that the current concept of trafficking, despite the broader definition earlier in the UN Trafficking Protocol, is still focussed on trafficking for prostitution. Despite the vague wording, the demand in question is clearly the demand for prostitution and not for all sectors that may or may not exploit labour.

¹¹⁵ Raigrodski (n72) 8–9.

¹¹⁶ UN Trafficking Protocol, Art 9(4).

¹¹⁷ Warren (n11) 248.

¹¹⁸ UN Trafficking Protocol, Art 9(5).

The Protocol also makes statements about states' obligations to 'undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.'¹¹⁹ In practice, this vague requirement has, amongst other things, led to campaigns targeted at potential victims of trafficking, which glorify countries of origin as a 'home' free of violence and threats and destination countries full of looming dangers. Counter-trafficking campaigns have also often over-sexualised and fetishised women's victimhood and have resulted in countries of origin restricting or banning the migration of young women.¹²⁰

Prevention efforts are focussed on the countries of origin, whereas demand, if mentioned at all, is left ambiguous or sexualised with a focus on 'trafficking as prostitution and sexual exploitation and the refrain "especially women and children".'¹²¹ There are no concerns for the demand for cheap and exploitative labour, and the ways in which such demand is cultivated and maintained through weak labour protections in all sectors. Structural factors exist in all sectors in the form of exclusion of (irregular) migrant labourers from protections and minimum wage requirements, which exist for domestic workers. However, these structural factors are amplified by the states' unwillingness to provide any labour protections for precarious workers in the private sphere, especially domestic workers and sex workers.

Articles 10 to 13 again demonstrate the focus of the UN Trafficking Protocol on border security and transnational criminal law enforcement.¹²² The entire section describes a version of trafficking that is conducted by 'threatening strangers'.¹²³ The contrast between transnational and domestic trafficking is artificially constructed.¹²⁴ The distinction makes sense in an international instrument

¹¹⁹ *ibid*, Art 9(2).

¹²⁰ Warren (n11); Rutvica Andrijasevic, 'Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns' (2007) 86 *feminist review* 24; Rutvica Andrijasevic and Bridget Anderson, 'Conflicts of Mobility: Migration, Labour and Political Subjectivities' (2009) 29 *Subjectivity* 363; Bridget Anderson and Rutvica Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 2008 *Soundings* 135.

¹²¹ Bridget Anderson and Julia O'Connell Davidson, 'Trafficking - A Demand Led Problem?: A Multi-Country Pilot Study.' (Save the Children 2002).

¹²² Raigrodski (n72) 5-6.

¹²³ Warren (n11) 247.

¹²⁴ *ibid*.

regulating cooperation on human trafficking across borders. However, the fact that the Protocol preceded most domestic counter-trafficking legislation means that many states have adopted the border-focus on human trafficking not only in their rhetoric, but also in their legislation.¹²⁵ Considering the Protocol's broad definition of trafficking, borders are not necessarily the primary place where trafficking offences occur, thus border control measures' impact on combatting trafficking may be limited.

The 'prevention' sections' focus on recruitment, transport across borders and travel documents demonstrates states' concerns over national borders, rather than abusive and coercive labour conditions.¹²⁶ This focus has exacerbated the problems in some regions, as the focus on borders and resulting difficulties in crossing border (either due to more restrictive visa regimes or to stricter controls) has increased migrants' dependence on smugglers and traffickers.

The prevention of human trafficking efforts detailed in the UN Trafficking Protocol completely disregard any structural disadvantages faced by vulnerable groups, by women disadvantaged through labour and migration policies. Despite the continued focus on human trafficking for sexual exploitation, the Trafficking Protocol also does nothing to promote the alleviation of the stigma faced by sex workers. Instead, 15 years after the drafting of the UN Trafficking Protocol, the view of trafficking as a border problem has been cemented through various national laws, making it more difficult than ever to acknowledge states' participation in creating structures that further trafficking, particularly through border and immigration control.¹²⁷

¹²⁵ Kangaspunta (n11); Kathryn Baer, 'The Trafficking Protocol and the Anti-Trafficking Framework: Insufficient to Address Exploitation' (2015) 5 *Anti-Trafficking Review* 167. Also see the discussion of UK legislation and German legislation in chapters 7 and 8.

¹²⁶ Wijers (n54) 61.

¹²⁷ Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "freedom"' (2010) 10 *Global Networks* 244. Also see the discussion on state involvement in trafficking in Chapter 4.

5.5.2.3) *Victim Protection*

The second part of the Protocol deals with aspects of victim protection. Considering that the purpose of the Protocol is not only the prosecution and prevention of human trafficking, but explicitly also 'to protect and assist the victims of such trafficking, with full respect for their human rights',¹²⁸ the victim protection provisions of the UN Protocol should be strong.

Articles 6-8 contain the provision regarding victims of trafficking in persons. They include measures to protect the privacy and the identity of victims, including confidential legal proceedings, as well as measures to 'provide for the physical, psychological and social recovery of victims of trafficking' such as housing, counselling and legal information, medical, psychological and material assistance as well as opportunities for employment, education and training.

However, all these provisions are very vague. For example Article 6(1) states that the protection of the privacy and identity of victims shall be ensured by each State Party 'in appropriate cases and to the extent possible under its domestic law'.¹²⁹ There is no definition as to when it would be 'inappropriate' to protect victims' privacy. Similarly, according to the other paragraphs, State Parties 'shall take into account [...] the age, gender and special needs of victims of trafficking [...] and 'shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory'.¹³⁰ The only concrete measure under Article 6 requires domestic legal system to contain measures to 'offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered'.¹³¹ This is the only concrete measure under Article 6, as it uses the phrase 'shall ensure', unlike the other provisions' very vague and thus widely interpretable language. However, even this clause is vague, as it only calls for measures, but makes no specifications of the *kinds of measures* required or whether or not its definition of damages includes wages withheld by traffickers and employers and how victims' rights to compensation relate to a right to leave to remain if their migration status is irregular. Similarly vague, Article 7 requires

¹²⁸ UN Trafficking Protocol, Article 2(b).

¹²⁹ *ibid*, Art 6.

¹³⁰ *ibid*.

¹³¹ *ibid*, Art.6.

that as a receiving state 'each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases'.¹³² Article 8 concerns the repatriation of victims.¹³³

Ditmore and Wijers argue that the vague wording in Articles 6 to 8 means that there are no obligations for states to implement any of the provisions in these articles. They consider it a regression in international human rights law that 'undermines commitments in other international human rights instruments, because it transforms rights into privileges that can be conferred or withheld by governments for any reason.'¹³⁴ Raigrodski goes as far as to say that 'As a matter of fact, states will not be viewed as breaching their international obligations, both literally and in spirit, if they provide *no assistance what so ever* to trafficking victims.'¹³⁵ Thus, in addition to ignoring the particular vulnerabilities of women to human trafficking - or by alternatively painting them as inherently feminine traits, rather than as consequences of womanhood in patriarchal societies - the highly feminised ideal victims of the UN Trafficking Protocol receive only discretionary protections.

The focus of the Protocol on criminal law cooperation has left the victim protection measures weak and has focussed the prevention measures solely on the control of borders. The discretionary victim protections that the Protocol includes are founded in the assumption that the victims are passive throughout the process of being trafficked, as well as through their rescue and eventual repatriation. The Protocol idealises the state's protection of its borders by making claims to its protection of victims at those borders,¹³⁶ but in fact prescribes no *actual* measures to protect victims or prevent their exploitation. This approach evokes 'the image of the paternal state, watching over the welfare of a gendered victim,'¹³⁷ who is protected at the border, but it is an illusion of protection. Furthermore, the focus on a small group of idealised victims helps maintain the

¹³² *ibid*, Art 7.

¹³³ *ibid*, Art 8.

¹³⁴ Ditmore and Wijers (n23).

¹³⁵ Raigrodski (n72) 15.

¹³⁶ Bridget Anderson, 'Where's the Harm in That? Immigration Enforcement, Trafficking, and the Protection of Migrants' Rights' (2012) 56 *American Behavioral Scientist* 1241.

¹³⁷ Warren (n11) 249.

idea of the 'exceptionality' of human trafficking.¹³⁸ Although the framework – at least in theory – extends some assistance to trafficked persons, it fails to deal with the economic, social and legal conditions that create workers' vulnerability to exploitation and is therefore mostly ineffective in curbing human trafficking.¹³⁹

5.7) Collateral Damage

Not only did the limited scope of the victim protection measures do little to improve victims' situation, it also negatively affected some trafficked persons, as well as other exploited groups.

As Wijers points out:

'Examples include: detention of trafficked persons in immigration or shelter facilities; [...] prosecution of trafficked persons for status-related offences including illegal entry, illegal stay and illegal work; denial of exit or entry visas or permits to particular groups on the basis of them being 'at risk' of trafficking; raids, rescues, and 'crack downs' that do not include full consideration of and protection for the rights of involved individuals; forced repatriation of victims in danger of reprisals or re-trafficking; support and assistance that is made conditional on a trafficked person cooperating with criminal justice agencies; denial of a right to a remedy; and violations of the rights of persons suspected or convicted of involvement in trafficking and related offences, including unfair trials and inappropriate sentencing.'¹⁴⁰

Already in 2002, the UN Trafficking Principles and Guidelines had clarified that '[anti]-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum seekers.'¹⁴¹ This statement acknowledges the vulnerability of those whose exploitation does not meet the narrow category of human trafficking. Notably, sex workers are not mentioned in this statement, although they are often suffering the most severe

¹³⁸ Shamir (n87) 80.

¹³⁹ *ibid.*

¹⁴⁰ Gallagher (n29) 21.

¹⁴¹ *ibid.*

effect of trafficking legislation.¹⁴² They are the group most likely to suffer restrictions to their work, criminalisation of their labour or their clients. The equation of prostitution with trafficking makes it easy for states to claim that they are combatting trafficking, while they are further marginalising and criminalising sex workers instead of addressing the 'serious forms of sexual exploitation that the Protocol was intended to challenge.'¹⁴³

5.8) Conclusion

The UN Trafficking Protocol can be seen in ambivalent ways. It created the first definition of human trafficking and encompassed a wide array of instances of exploitation in doing so. However, it also maintained the old White Slavery definition of trafficking in the sex industry as an issue that is unique and separate from exploitation in other labour sectors. The separation of trafficking for sexual exploitation in prostitution from trafficking for labour exploitation is maintained throughout legislation in State Parties, including countries like Germany, where prostitution is considered labour. The separation detracts from sexual exploitation through employers' abuses of power and abuse of trafficked persons' particular vulnerability. In this, the vulnerability is perceived as gendered, but for the wrong reasons. The portrayed vulnerability of women in the sex industry is reliant on an idea of fragile femininity and inherent victim status for women. It assumes sexual exploitation happens because trafficked persons in the sex industry are women and therefore vulnerable by default. However, sexual exploitation of women in all sectors happens because they have a particular difficulty to access their rights as workers and as full, equal human beings. By presenting women's vulnerability as inherent, 'victim protection' becomes the only solution, whereas an acknowledgement of the external factors which affect women could lead to empowering solutions.

Additionally, while the UN Trafficking Protocol includes some victim protection measures, its criminal law focus has limited the scope for a rights-based approach to the rights afforded to victims of a crime. Such an approach ignores

¹⁴² Wijers (n54) 67.

¹⁴³ Gallagher (n29) 23.

their human rights as such, particularly their labour rights and the right to equality and non-discrimination, which are protected in the International Covenant for Civil and Political Rights, the International Covenant for Economic and Social Rights (and in the European context in the European Social Charter and the ECHR).¹⁴⁴ Furthermore, it limits the applicability of victims' rights to those who fit the narrow victim category of the idealised feminised victim, rather than challenging exploitation on a wider scale.

Nonetheless, the Trafficking Protocol provides an important first step of highlighting exploitation. Other instruments have built on it in ways that have extended the rights of trafficked persons in impressive ways, although the framing of such rights as victims' rights remains. This narrative prevents meaningful exploration of trafficked persons' human rights and their access to labour protections, as I will outline in more detail in Chapter 9.

The next chapter explores the complementary regional treaties in Europe, both in the Council of Europe and the European Union, as well as the case law of the European Court of Human Rights. I assess the way these regional instruments developed from the 2000 UN Trafficking protocol, and the problematic White Slavery legacies they carry through from it. Equally, I challenge the idea that the Council of Europe and European Union approaches have significantly moved beyond the UN approach in creating a comprehensive response to human trafficking. I argue that the regional European response, as well as its domestic implementation in the UK and Germany, continues problematic conceptualisations of human trafficking and have only improved measures of victim protection, which nonetheless build on the same flawed '3P' approach contained in the UN Trafficking Protocol.

¹⁴⁴ United Nations International Covenant on Economic, Social and Cultural Rights; United Nations International Covenant on Civil and Political Rights; Council of Europe European Social Charter (Revised); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocols Nos 11 and 14 (ECHR).

Chapter 6: Regional Implementation in Europe

6.1) Introduction

Following the analysis of the 2000 UN Trafficking Protocol, this chapter looks at the regional European instruments to combat human trafficking, which followed the UN Protocol. I take a brief look at the 2002 European Council's Framework Decision on Combating Trafficking in Human Beings,¹ and the 2004 Resident Permits Directive,² followed by a more detailed analysis of the 2005 Council of Europe Convention, the European Court of Human Rights case law, and the 2011 EU Trafficking Directive.

In analysing the Convention and the Directive, I again look at the 3P framework and how the two agreements strike the balance between criminalization and prosecution on the one hand and prevention and victim protection on the other hand. Taking into account the lack of actual rights for trafficked persons and vulnerable groups enshrined in the 2000 UN Trafficking Protocol, I will also evaluate the provisions on victims' rights in the Convention and the Directive. Furthermore, I will demonstrate the ways in which the regional treaties' definitions of human trafficking suffer from the same gendered weaknesses and legacies from White Slavery agreements as the UN approach. In addition to gender, I again address the themes of agency and consent, as well as the issue of labour rights as opposed to victims' rights in the regional context.

Whereas the Council of Europe and the European Union are separate entities, both organisations' counter-trafficking treaties build on the foundation of the 2000 UN Trafficking Protocol. Additionally, their treaties influenced each other: The 2005 Council of Europe Trafficking Convention built on some of the best practice in the EU's 2002 Framework Decision and the 2004 Resident Permits Directive.

¹ 'Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings' (2002) 45 Official Journal of the European Union 1, from here on '2002 EU Trafficking Framework Decision'.

² 'Council Directive 2004/81/EC of 29 April 2004 on the Residence Permits Issued to Third Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities' (2004) 47 Official Journal of the European Union 19, from here on '2004 Residence Permits Directive'.

In turn, the 2011 EU Trafficking Directive is built on the Council of Europe Trafficking Convention, particularly its strong victims' rights provisions. Equally, the 2011 EU Trafficking Directive is also influenced by the case law of the European Court of Human Rights, which, in its decision on *Rantsev v Cyprus and Russia*,³ rendered the definitions of human trafficking in the 2000 UN Trafficking Protocol and the 2005 Council of Europe Trafficking Convention binding on its member states.⁴

Both the 2005 Council of Europe Convention and the 2011 EU Directive reiterate the core provisions of the UN Protocol in relation to criminalisation, cooperation, prevention and victim support, while articulating relevant human rights in far greater detail, frequently incorporating concepts and language first set out in the UN Trafficking Principles and Guidelines.⁵

6.2) The 2002 European Council Framework Decision on Combating Trafficking in Human Beings

European Council Framework Decisions were measures similar to EU Directives, in that they mandated certain goals for member states in criminal justice matters, while leaving the means of achieving these goals to the member states.⁶ Framework decisions were created in the Amsterdam Treaty and were replaced by directives and regulations under the Lisbon Treaty. The 2002 EU Framework decision on Combating Trafficking in Human Beings proposed a common definition of trafficking for the EU member states (Article 1), which echoed the definition of trafficking in the UN Trafficking Protocol:

Article 1

Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation

³ *Rantsev v Cyprus and Russia* App No 25965/04 (ECtHR, 7 January 2010).

⁴ Roza Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus & Russia*' (2011) 29 Boston University International Law Journal.

⁵ Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 5 Anti-Trafficking Review 14, 18.

⁶ Carl Lebeck, 'Sliding Towards Supranationalism - The Constitutional Status of EU Framework Decisions after Pupino' (2007) 8 German Law Journal 501.

1. Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
 - (a) use is made of coercion, force or threat, including abduction, or
 - (b) use is made of deceit or fraud, or
 - (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
 - (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

2. The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used. [...] ⁷

Unlike the 2000 UN Trafficking Protocol, it did not include organ trafficking. Instead it included both trafficking for labour exploitation and trafficking for sexual exploitation within Article 1d, but separated them as different purposes of trafficking. Interestingly, it specifically mentioned pornography under 'other forms of sexual exploitation', which could be interpreted as categorizing work in the pornography industry to also not constitute labour.

Secondly, it set out the obligation to criminalise trafficking and to do so with sentences of no less than eight years in cases in which: the life of the victim was endangered, the victim was harmed, the crime was committed by organised crime or if the victim was particularly vulnerable. A particularly vulnerable victim was defined, as a minimum, as the victim being under the age of majority in a case of trafficking for sexual exploitation. The specification of the involvement of organised crime as an aggravating factor demonstrates that the EU Framework Decision already acknowledged that trafficking is not limited to an organised crime context (Article 3), unlike the 2000 UN Trafficking Protocol.

⁷ 2002 EU Trafficking Framework Decision.

The Framework Decision contained a victim protection provision: Article 7 (1) stated that 'investigations into or prosecution of offences [...] shall not be dependent on the report or accusation made by a person subjected to the offence'. This only means that the criminal proceedings against suspects should not rely solely on witnesses. As Obokata argues, this clause however implies 'the necessity for the presence of victims to give evidence and testify in order to make investigation and prosecution more effective'.⁸ Sub-clauses 7(2) and 7(3) only apply to minors. While contained under the heading of protection of and assistance to victims, Article 7 contains no further provisions for adult victims and offers no real protections of any kind.

The Framework Decision very much echoes the UN Protocol's focus on criminal justice and first and foremost ensured the greatest possible uniformity of trafficking offences in the EU Member States.⁹

6.3) The 2004 Residence Permits Directive¹⁰

Like the Framework Decision, the 2004 Residence Permits Directive did not have victim protection in mind. Whereas it regulates residence permits for trafficked persons, its purpose is not to protect victims or witnesses, its goal is to ensure the presence of key witnesses during criminal proceedings.¹¹ As the Preamble states, the residence permits are to create an incentive:

'(9) This Directive introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence

⁸ Tom Obokata, 'EU Action against Trafficking in Human Beings. Past, Present and Future' in Elspeth Guild (ed), *Immigration and Criminal Law in the European Union* (Nijhoff 2006) 392.

⁹ Anne T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 163, 167.

¹⁰ 2004 Residence Permits Directive. This Directive refers to the conditions for residence permits for potential victims of human trafficking and human smuggling.

¹¹ Commission, Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, 11.02.2002, COM (2002) 71 Final, OJ C 126E, 28 May 2002, 393–397.

permit offers a sufficient incentive to cooperate with the competent authorities while including certain conditions to safeguard against abuse.¹²

Whereas the Directive includes the obligation for Member States to inform victims of their rights (Article 5), there is no procedure for identifying victims. This could leave law enforcement unable to distinguish between trafficked persons and irregular migrants. Taking into account that law enforcement are often trained to focus on the identification of irregular migrants, this could render the Directive ineffective.

While the intention of the Residence Permits Directive was not primarily victim protection, some of its provisions offer quite far-reaching protections, which were also adopted in later treaties. For example, Article 12 states that third-country nationals concerned should be given assistance to 'recover and escape the influence of the perpetrators of the offences.' Equally, 'medical treatment to be provided to the third-country nationals covered by this Directive also includes, where appropriate, psychotherapeutical care.'¹³ Article 13 calls for renewable residence permits for at least six months and Article 15 goes as far as to encourage member states to 'consider authorising the stay on other grounds, according to their national legislation, for third-country nationals who may fall within the scope of this Directive, but who do not, or no longer, fulfil the conditions set by it, for the members of his/her family or for persons treated as members of his/her family.'¹⁴

Thus, whereas the goal of the Residence Permits Directive was increasing prosecutions by keeping witnesses present for the criminal proceedings, it nonetheless opened some avenues for greater victim protection.¹⁵ However, the Residence Permits Directive allows member states to define the length of the reflection period, the availability of psychological assistance, victims' access to

¹² 2004 Residence Permits Directive

¹³ *ibid*, Art 12.

¹⁴ *ibid*, Art 13 & Art 15.

¹⁵ Suzanna L Tiapula and Melissa Millican, 'Identifying the Victims of Human Trafficking.' (2008) Prosecutor, Journal of the National District Attorneys Association <<http://www.highbeam.com/doc/1G1-186516778.html>>.

legal aid, rules on the possibility to work, and access to education.¹⁶ As Member States are concerned about migration, border security, and the threat of crime, and ‘because migrant women’s experience as victims is conflated with their involvement in illicit activities (irregular migration and prostitution), the Directive views victims extremely suspiciously, while being eager to make use of them as a potential source of valuable information.’¹⁷ Thus, the Residence Permits Directive aims to allow for useful victims’ stay, while trying to minimise the total number of people who make use of the instrument.

6.4) The 2005 Convention on Action against Trafficking in Human Beings

Not only the EU, but also the Council of Europe developed a new counter-trafficking instrument after the 2000 Trafficking Protocol. The Council of Europe Convention on Action against Trafficking in Human Beings is often presented as the first ‘victim protection’ instrument against human trafficking. Indeed, Anne Gallagher called it a ‘watershed agreement’.¹⁸ The Convention was developed following the Council of Europe’s Parliamentary Assembly’s Recommendation to create a convention, which would ‘bring added value to other international instruments with its clear human rights and victim protection focus and the inclusion of a gender perspective.’¹⁹ It was not aimed at competing with the UN Trafficking Protocol, but instead intended to complement it and to move beyond what was seen as the international minimum standard.²⁰ Article 39 states this particular relationship and clarifies that the Convention ‘is intended to enhance the protection afforded by [the UN Protocol] and develop the standards contained therein’.²¹

¹⁶ Heli Askola, ‘Violence against Women, Trafficking, and Migration in the European Union’ (2007) 13 *European Law Journal* 204, 212.

¹⁷ *ibid.*

¹⁸ Gallagher (n9).

¹⁹ Council of Europe Parliamentary Assembly, *Recommendation on migration connected with trafficking in women and prostitution*, 25 June 2003, Recommendation No R 1610 (2003).

²⁰ Gallagher (n9) 174.

²¹ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report 2005 [CETS No. 197] (from here on CoE Trafficking Convention), Art 39.

The Convention is the first international document on trafficking, which focuses more on the protection of trafficked persons than on the prosecution of traffickers.²² In contrast to the UN Protocol, it also acknowledges that successful protection of trafficked persons is strongly linked to ensuring the successful prosecution of perpetrators.²³ The Convention's status as a human rights instrument can be seen in its explicit recognition, in the Preamble, of trafficking as a violation of human rights as well as an offence to the dignity and integrity of the human being,²⁴ which are in themselves the foundations of human rights.

The stated purposes of the Convention are: to prevent and combat trafficking; to protect the human rights of victims; to ensure effective investigation and prosecution and to promote international cooperation.

6.4.1) Gender in the 2005 Council of Europe Convention

The wording of the Convention does not reiterate the UN Protocol's focus on women and children, instead special reference is made to the importance of ensuring gender equality in relation to both prevention and protection.²⁵ While this could be interpreted as a step forward, in the sense that it could lead to preventative efforts which focus on gender inequality as a main factor in women's vulnerability, it could also just be a more nuanced reiteration of the Council of Europe's long-established focus on trafficking of women for sexual exploitation.²⁶ The explanatory report makes special note of the 'White Slave Traffic' and – uncritically – sees human trafficking as a continuation of that legacy.²⁷ Thus, it can be seen as continuing the problematic view of human trafficking as a crime against entirely passive victims who lack agency.

²² Rosa Raffaelli, 'The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian Experience' (2009) 10 *German Law Journal* 205, 212.

²³ Gallagher (n9) 165–166.

²⁴ *ibid* 175.

²⁵ *ibid*.

²⁶ *ibid*.

²⁷ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, 208-210.

In fact, the Convention is the first Council of Europe document, which officially extends the scope of human trafficking beyond sexual exploitation, as Article 4 includes both labour trafficking, trafficking for sexual exploitation and for the removal of organs.²⁸ The final definition mirrors, almost to the word, the definition of trafficking in the UN Trafficking Protocol. However, taking into account previous Council of Europe agreements against human trafficking, the Council of Europe, like the United Nations, has a history of seeing human trafficking primarily as an issue of involuntary international migration for prostitution. The continuation of this approach is particularly evident in the CoE Convention's Explanatory Report, which states:

'The development of communications and the economic imbalances in the world have made trafficking in women, mainly for sexual exploitation purposes, more international than ever. There was first the "white slave traffic", then trafficking from South to North and now there is trafficking in human beings from the more disadvantaged regions to the more prosperous regions, whatever their geographical location (but in particular to western Europe).²⁹

Furthermore, whereas this seems to acknowledge the inherent vulnerability caused by poverty and economic inequality, the Explanatory Report states further:

The main aim of Article 17 is to draw the attention to the fact that women, according to existing data, are the main target group of trafficking in human beings and to the fact that women, who are susceptible to being victims, are often marginalised even before becoming victims of trafficking and find themselves victims of poverty and unemployment more often than men. Therefore, measures to protect and promote the rights of women victims of trafficking must take into account this double marginalisation, as women and as victims [...].³⁰

Whereas the acknowledgement of women's different needs from men is positive, particularly in light of male-focussed international legal and policy norms, the way in which womanhood and victimhood are linked is nonetheless problematic. The wording 'who are susceptible to being victims' seems to imply that women are

²⁸ Gallagher (n9) 175.

²⁹ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (n 20), 209.

³⁰ *ibid*, 210.

inherently more likely to be victims, reiterating the UN Trafficking Protocol's problematic notion of 'women and children' as one passive, agency-free entity. Just like the UN Trafficking Protocol, the Council of Europe explanation implies that being 'susceptible' to victimhood is intrinsically linked to womanhood, rather than *created* by existing societal exclusions women face due to the gendered effects of policy making and legislation on labour, migration and the regulation of reproductive work, and sex work in particular. As a consequence, while the Convention suggests a gender-sensitive response to dealing with women victims of trafficking, it nonetheless ignores gender as a factor which affects all labour and migration regulations and therefore *creates* women's vulnerability. Thus, the gender-aware response is too limited in its scope to be meaningful in its effects.

6.4.2) Consent and Coercion in the Convention's Definitions

Importantly, the Convention partly reverses the UN Trafficking Protocol's distinction between innocent trafficked and complicit smuggled persons, as it defines the category of 'victim of trafficking' and in doing so acknowledges the possibility of exploitation post-migration, as well as within a country.³¹ The Explanatory Report includes a number of important clarifications on the definition of trafficking, for example that trafficking can occur even where a border was crossed legally; that abuse of a position of vulnerability includes 'any state of hardship in which a human being is impelled to accept being exploited' which encompasses 'abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot.'³² This implies a more nuanced approach to coercion than the one found in the UN Trafficking Protocol, as it acknowledges the possibility of 'force' in a wider sense than active coercion or violent force through a trafficker. However, the Convention does not offer any responses to such root causes. Similarly to the factor of gender, the Convention fails to acknowledge receiving states' complicity in maintaining vulnerabilities caused by global inequalities.³³ Nonetheless, the acknowledgement of economic

³¹ Gallagher (n9) 166.

³² Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (n 27).

³³ Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "freedom"' (2010) 10 *Global Networks* 244, see also Chapter 4 in this thesis.

disadvantage as a form of force is in itself a significant shift, as it further blurs the line between smuggling and trafficking.

Additionally, the Explanatory Report to the Convention makes an important clarification on the issue of sex work: with regard to victims of trafficking into the sex industry, the Explanatory Report states that the fact that someone is willing to engage in prostitution does not mean that they have consented to exploitation.³⁴ However, as the Explanatory Report only acts as guidance, this clarification can be ignored by State Parties. The Explanatory Report also leaves the question unanswered as to where to draw the line between sex work and possible exploitation. Clearly defined labour rights and obligations could have created greater clarity in this context, but were not included in the definition, probably due to the disagreements between State Parties as to the status of sex work as work.

The definition of a victim of trafficking is 'any natural person who is subject to trafficking in human beings as defined in this article.'³⁵ Whereas offering a definition of a victim of trafficking is generally a positive development, defining it in such terms is problematic. As the focus of the definition of trafficking is on 'the recruitment, transportation, transfer, harbouring or receipt of persons,'³⁶ the main emphasis is once again on the trafficker. Focussing on the traffickers' action additionally impacts the visibility of agency of the victims in a human trafficking situation, and, as I have discussed in Chapter 4, passive victims are not perceived as rights holders who need to be enabled to exercise such rights.

6.4.3) Criminalisation

The Council of Europe Convention is much more explicit than the UN Protocol when it comes to penalties. It calls upon its State Parties to criminalise trafficking (Article 18), to consider criminalising the use of services of a victim (Article 19), to criminalise the forging of travel documents (Article 20) and to criminalise aiding and abetting of a trafficking offence (Article 21). It also establishes corporate

³⁴ Gallagher (n9) 176.

³⁵ CoE Trafficking Convention.

³⁶ *ibid.*

liability to hold legal persons accountable of trafficking offences (Article 22). All offences established under the Convention are to be punishable by 'effective, proportionate and dissuasive' sanctions (Article 23) – to include deprivation of liberty giving rise to extradition. In determining penalties, a number of situations are to be considered 'aggravating circumstances', such as where the offence was committed against a child; by a public official; where it endangered the life of the victim; or where it was committed within the framework of a criminal organisation.³⁷

The most significant of these Articles is the only optional one, Article 19, in which the European Convention asks State Parties to *consider* criminalisation of those using the services of a victim of trafficking. If implemented, this provision can make exploitation in itself a crime, without the need to prove the action and means elements required for it to constitute trafficking.³⁸ However, not only the optionality will make it somewhat unlikely that exploitation will be widely criminalised in itself. The implementation of Article 19 would be difficult in practice, as successful prosecutions would require establishing both action (use of services) and knowledge that the person providing the service was trafficked.³⁹

Another troubling aspect is that the few State Parties that have implemented Article 19 have done so exclusively in the context of prostitution, rather than all forms of labour, and often with negative effects. Sweden and – more recently – Northern Ireland have criminalised prostitutes' clients, making it illegal to purchase sexual services.⁴⁰ The negative effects on sex workers are already visible in Sweden, with sex workers reporting increased levels of vulnerability towards clients.⁴¹ At the same time there is no evidence of the reduction in absolute numbers of sex workers in Sweden, despite claims from the Swedish government.⁴² Equally, in Northern Ireland, one sex worker is challenging the

³⁷ Gallagher (n9) 182–183.

³⁸ *ibid* 183.

³⁹ *ibid*.

⁴⁰ Mikael Delin, 'Sexköpslag får underkänt' *Dagens Nyheter* (2 February 2015) <<http://www.dn.se/nyheter/sverige/sexkopslag-far-underkant/>>.

⁴¹ Susanne Dodillet, 'Sexarbeit in der EU - Auswirkungen für Deutschland' (2014).

⁴² *ibid*; Susanne Dodillet and Petra Östergren, 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects' (2011).

new legislation in court, as she claims it is making sex workers less safe.⁴³

In addition to having problematic effects, the fact that the criminalisation has almost exclusively affected prostitution demonstrates the unique position of sex work and of trafficking for sexual exploitation. No other industry, which suffers from high levels of exploitation, such as agricultural or domestic work, has been considered worth banning altogether. Not even in the case of the domestic worker visa in the UK, or the artist visa in the case of Cyprus, both of which have been tied to instances of human trafficking,⁴⁴ was there serious consideration given to the possibility of rendering the use of these services, or even of the continuation of these visa regimes, illegal. This difference in approaches shows the problematic unique situation of sex work.

6.4.4) Prevention

The prevention efforts of the Trafficking Convention focus on two areas: they aim to increase the risk for traffickers to be apprehended and prosecuted, mostly through border measures (Article 7) and to decrease the vulnerability of potential victims (Article 5). This approach reiterates the one taken in the UN Protocol, with a focus on preventing traffickers from transporting people across borders (or deterring them through the prospect of prosecutions), rather than creating alternative safe migration routes and safeguards in labour sectors with high rates of human trafficking in destination countries. Many measures may have *some* indirect preventive effect, as they may decrease the vulnerability of potential victims and increase the risks to traffickers of apprehension and prosecution.⁴⁵

However, the general obligations in Article 5 on decreasing the vulnerability of victims are so broad and vague as to be almost meaningless in terms of

⁴³ Amelia Gentleman, 'Sex Worker and Activist Laura Lee: "It's Now Far More Difficult to Stay Safe"' *The Guardian* (5 February 2016) <<http://www.theguardian.com/society/2016/feb/05/sex-worker-activist-laura-lee-northern-ireland-law-challenge-interview>>; Henry McDonald 'Sex Worker Challenges Law That Will Criminalise Clients in Northern Ireland' *The Guardian* (27 May 2015) <<http://www.theguardian.com/society/2015/may/27/sex-worker-laura-lee-challenges-law-criminalises-clients-northern-ireland>>.

⁴⁴ Pati (n3); Virginia Mantouvalou, "'Am I Free Now?" Overseas Domestic Workers in Slavery' (2015) 42 *Journal of Law and Society* 329.

⁴⁵ Gallagher (n9) 184–185.

measuring compliance.⁴⁶ States are required to coordinate their preventive strategies internally, to either establish or strengthen effective policies and programmes to prevent trafficking. While implementing these policies and programmes, they also required to promote a human rights based approach, and use gender mainstreaming and a child sensitive approach.⁴⁷ They must take measures to enable migration to take place legally, and to reduce children's vulnerability to trafficking.⁴⁸ However, there is no requirement to re-evaluate gendered issues arising from supposedly neutral immigration policies, which favour men as they gloss over systematic biases that favour male-dominated employment sectors and ignore the value of unpaid (and sometimes paid) reproductive work performed by women. Thus, despite gender mainstreaming, there is no obligation to create women-friendly immigration routes or to acknowledge domestic demand for women's reproductive labour.

Additionally, as mentioned with regard to awareness-raising in the context of the UN Protocol, preventative campaigns can have the effect of stereotyping women's vulnerability as inherent. They can lead to reduced mobility for women through efforts to keep women in their country of origin, often paired with depictions of home as a (imaginary) safe haven fail to address gender as a factor in restrictions to migration and can thus be diametrically opposed to the Council of Europe's goal of ensuring gender equality.⁴⁹

6.4.5) Victim Protection

Similarly, while the victim protection measures in the Council of Europe Convention are strong, especially compared to the UN Trafficking Protocol and the 2002 EU Framework Decision, they are nonetheless not without flaws, as assistance is provided on the basis on fulfilling certain notions of victimhood, which is interpreted differently in different member states.

⁴⁶ *ibid* 184.

⁴⁷ CoE Trafficking Convention, Art 5.

⁴⁸ *ibid*, Art 5(4)-5(5).

⁴⁹ See Chapter 2 of this thesis, as well as Rutvica Andrijasevic, 'Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns' (2007) 86 *feminist review* 24; Rutvica Andrijasevic, 'Sex on the Move: Gender, Subjectivity and Differential Inclusion' (2009) 29 *Subjectivity* 389.

The Convention contains 8 provisions on victim protection. The first relevant provision concerns their identification. Under Article 10, states are, *inter alia*, required to ensure that any person for whom there is reasonable belief that he or she is a victim of human trafficking would not be removed from the state's territory until the identification process is completed.⁵⁰ This provision is based on the assumption 'that correct identification of victims is essential [...], and that failure to correctly identify a victim will likely lead to a denial of that person's rights.'⁵¹ States are also required to ensure the protection of victims' private life and identity, particularly in cases involving children.⁵² Article 12 regulates assistance to victims in their physical, psychological and social recovery, which shall at a minimum include:

- a) standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- b) access to emergency medical treatment;
- c) translation and interpretation services, when appropriate;
- d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
- e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- f) access to education for children.⁵³

Additionally, states are to provide medical and psychological assistance for victims legally residing in their territory,⁵⁴ as well as granting them access to the labour market, training and education.⁵⁵ Most importantly, states must ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.⁵⁶ The breadth of these measures makes the Trafficking Convention the first instrument that seems to take victim protection seriously.

⁵⁰ CoE Trafficking Convention, Art 10.

⁵¹ Gallagher (n9) 176.

⁵² CoE Trafficking Convention, Art 11.

⁵³ *ibid*, Art 12(1).

⁵⁴ *ibid*, Art 12(3).

⁵⁵ *ibid*, Art 12(4).

⁵⁶ *ibid*, Art 12(6).

However, while the Convention talks of the human rights of victims of trafficking,⁵⁷ it nonetheless ties these rights to victim status. It fails to acknowledge that the line between 'only' exploitation and human trafficking is often elusive and that State Parties might create arbitrary distinctions between worthy trafficking victims and criminal migrants. In particular the generous protections available to victims under Article 12 are only relevant for *legally residing* victims, which is a strong limitation on the Article's scope. Effectively, this means the protections under Article 12 are only afforded to persons who are deemed to be victims of trafficking by the receiving member states: Per Article 13, each State Party 'shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim.'⁵⁸ The interpretation of 'reasonable grounds' can vary significantly from state to state. For example in Germany the implementation of victim protection mechanisms is focussed almost exclusively on third country nationals, as the concept of internal or intra-EU trafficking is only slowly gaining recognition.⁵⁹

The recovery and reflection period is a significant achievement, as it is granted to all suspected victims of trafficking and allows victims to recover before making decisions on whether or not they wish to act as a witness. However, the application of Article 12(6) does not seem to apply to the period after the recovery and reflection period. Article 14 regulates the residence permits which can follow the short-term permit granted in the recovery and reflection period:

Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

- a) the competent authority considers that their stay is necessary owing to their personal situation;
- b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.⁶⁰

⁵⁷ *ibid*, Preamble.

⁵⁸ *ibid*, Art 13(1).

⁵⁹ See Chapter 8 of this thesis.

⁶⁰ CoE Trafficking Convention.

States are free in their interpretation of what the victim's 'personal situation' is and stronger provisions are only envisaged for child victims of trafficking, whose best interests are to be taken into account. Additionally, there is no reference made to the length of the permit, nor to any provision suggesting its possible conversion into a permanent one.⁶¹ The Council of Europe's Parliamentary Assembly had proposed a right to appeal any decision refusing to grant a person victim status and the extension of protection under the Convention to victims' families. However, there was insufficient consensus to include them in the Convention,⁶² as many States were afraid that provision of special treatment for trafficked persons would negatively affect immigration and compromise national migration regimes.⁶³ Thus, the final version of this provision effectively allows States to limit residence permits to victims whose stay is useful for the trial and to exclude those who are either unwilling to cooperate or unable to provide useful statements, even when they may be at risk of suffering further harm if repatriated.⁶⁴ Such a provision caters more to State Parties' fears of irregular immigration than to the human rights of trafficked persons. Trafficked persons are essentially granted leave to remain if they are either useful enough or seem otherwise sufficiently worthy of protection. This approach is a direct continuation of the framing of trafficked persons as recipients of charity, who generously *receive* protections as victims (if they behaved in ways that their receiving state deems appropriate), rather than as right-holders who *possess* inherent rights as human beings.

Instead, State Parties are only required to secure victims' protection throughout the repatriation process, if they do not qualify for a residence permit or wish to return home.⁶⁵ The return to their home country should be facilitated and accepted without undue or unreasonable delay, and should be with due regard for the rights, safety and dignity of the victim.⁶⁶ Countries of origin should also cooperate in return, through verification of the victim nationality or residence, and

⁶¹ Raffaelli (n21) 211.

⁶² *ibid* 210.

⁶³ Gallagher (n9) 179.

⁶⁴ Raffaelli (n21) 211.

⁶⁵ CoE Trafficking Convention, Art 16.

⁶⁶ *ibid*, Art 16(1).

issuing the necessary travel documents.⁶⁷ All States Parties have an obligation to provide victims being repatriated with information, to promote their reintegration and to work to avoid their re-victimisation.⁶⁸ The practical effect of these provisions is that victims of trafficking can indeed be returned against their will. The fact that no risk assessment is required in such cases (except for children) means that States are ultimately not accepting legal or moral authority for the safety and security of returned victims.⁶⁹

Additionally, under Article 15, victims are theoretically entitled to compensation for material and non-material damage. This is a step forward as such provisions did not exist in the UN Trafficking Protocol. According to Article 15:

- 1) Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
- 2) Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.
- 3) Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
- 4) Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23 [which regulates confiscation of assets].⁷⁰

However, there is no mention as to if and how these entitlements will be implemented if a trafficked person is not granted leave to remain after the recovery and reflection period and there is also no explicit consideration of the compensation for wages.

⁶⁷ *ibid*, Art 16(3)-16(4).

⁶⁸ *ibid*, Art 16(5).

⁶⁹ Gallagher (n9) 180.

⁷⁰ CoE Trafficking Convention, Art 15. For example the Netherlands pays victims compensation and subsequently recovers assets from traffickers or employers, whereas the UK only redistributes assets already successfully recovered from traffickers.

6.4.5) Concluding Remarks on the Council of Europe Convention

In summary the Council of Europe Convention is an important complementary Convention to the UN Trafficking Protocol, as it focuses on victim protection in concrete terms. However, the victim protection provisions are still viewed as tools to enable criminal justice authorities to secure prosecutions and convictions through the cooperation of victims.⁷¹ While this goal does not make the Convention a rights-based instrument, even though the preamble specifically defines human trafficking as a human rights issue, it has nonetheless created significant victim protection provisions. These tools would not have been made available to victims if State Parties' only focus were human rights concerns. While the dual purpose of improving victim protections to improve conviction rates may not be the most desirable reasoning from a rights-perspective, it has nonetheless increased protections for trafficked persons (if only for those who are deemed 'useful').⁷²

6.5) The European Convention on Human Rights and the ECtHR Case Law

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁷³ does not directly refer to human trafficking. However, the European Court of Human Rights (ECtHR) has expressed developed obligations under the ECHR with regard to human trafficking in three cases, the *Siliadin v France*,⁷⁴ *Rantsev v Cyprus and Russia*⁷⁵ and *CN vs the United Kingdom*.⁷⁶ In these cases, the ECtHR makes a connection between human trafficking and Article 4, which prohibits slavery, servitude, forced & compulsory labour. It provides that '4.1 No one shall be held in slavery or servitude' and '4.2 No one shall be required to perform forced or compulsory labour.'⁷⁷

⁷¹ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010).

⁷² Gallagher (n9) 182.

⁷³ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocols Nos 11 and 14 (ECHR) 1950 [ETS 5] (from here on ECHR).

⁷⁴ *Siliadin v France* App No 73316/01, (ECtHR 26 July 2010)

⁷⁵ *Rantsev v Cyprus and Russia* App No 25965/04 (ECtHR, 7 January 2010)

⁷⁶ *CN v the United Kingdom* App No 4239/08 (ECtHR 13 November 2012)

⁷⁷ ECHR Article 4.

6.5.1) The *Siliadin* case

The *Siliadin v France* case was the very first case, in which the Court mentioned trafficking in human beings, and explicitly recognised that Article 4 entails positive obligations for States.⁷⁸ The applicant, Ms Siliadin, alleged that France had not afforded her sufficient protections against ‘servitude’ or ‘forced and compulsory labour’, rendering her a domestic slave. The European Court of Human Rights considered that Ms Siliadin had been subjected to forced labour and had been held in servitude, thus Article 4 of the ECHR applied and France was found in breach of its positive obligation to protect the applicant against slavery, servitude and forced or compulsory labour. However, the Court refuted the notion that Ms Siliadin had been held in slavery in the traditional sense.⁷⁹

The judgement in *Siliadin* was criticised by some at the time, as it was seen as too broad an interpretation of the ECHR, particularly considering that at the time only one state had ratified the CoE Trafficking Convention.⁸⁰ Nonetheless, through the judgement in *Siliadin v France*, the Trafficking Convention’s provisions on criminalisation became *de facto* binding on all CoE member States under the ECHR regime.⁸¹ Interestingly, Pitea worries that this obligation placed ‘too much faith in the criminal law as the principal remedy for human rights violations, with the risk that states will ignore other obligations towards victims’.⁸² Pitea’s concerns might be justified insofar as, whereas the CoE Convention has more of a human rights focus than most other agreements to date, the *Siliadin v France* case technically only imposed on CoE member states an obligation to criminalise human trafficking, rather than to adopt the whole range of victim protection provisions, such as the ones contained in the CoE Trafficking Convention.

⁷⁸ *Siliadin v France* (n74).

⁷⁹ *ibid.*

⁸⁰ Holly Cullen, ‘Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights’ (2006) 6 Human Rights Law Review 585, 592.

⁸¹ *ibid.*

⁸² Cesare Pitea, ‘Rape as a Human Rights Violation and a Criminal Offence: The European Court’s Judgment in M.C. v. Bulgaria’ (2005) 3 Journal of International Criminal Justice 447, 447.

6.5.2) The *Rantsev* case

In the case of *Rantsev v Cyprus and Russia*,⁸³ Mr Rantsev made claims under the ECHR of violations against the right to life (Article 2), freedom from torture, inhuman and degrading treatment (Article 3), freedom from slavery, servitude, forced and compulsory labour (Article 4), and the right to liberty and security of the person (Article 5), regarding the death of his daughter, Ms Roxana Rantseva. Ms Rantseva moved from Russia to Cyprus on a 'cabaret artiste' visa, but in practice worked as a prostitute, like thousands of other women. She left her place of work after a few weeks, but was brought to the police by her employer. Her employer, Mr Athanasiou wanted her to be detained and extradited, so that he could employ someone else. As she was not illegally staying in Cyprus, the police found that they had no reason to detain her. However, they kept Ms Rantseva at the police station and informed her employer that he had to pick her up or she would be released. Mr Athanasiou came to collect Ms Rantseva and her documents, including her passport. Later that night, she tried to escape from the apartment where Mr Athanasiou was keeping her and allegedly fell off a balcony and died. Despite the circumstances of her death and the known exploitation of the artiste visa for prostitution, the local authorities never looked into the possibility of human trafficking.

According to Mr Rantsev, the Republic of Cyprus failed to sufficiently investigate the death of his daughter, Oxana Rantseva. He also claimed that the Cypriot police did not adequately protect Ms Rantseva while she was still alive. Additionally he alleged that the government of Cyprus failed to take necessary steps to bring to justice those who caused Ms Rantseva's ill-treatment and death.⁸⁴ Mr Rantsev also alleged that Russia had failed to fulfil its obligations under Articles 2 and 4 of the Convention by failing to protect her against human trafficking and insufficiently investigating her subsequent death.

The main element of this case consists in the discussion of the positive obligations of States under Article 4 of the ECHR. For the very first time, the ECtHR accepted that Article 4 applied to the case of sex trafficking, even though

⁸³ *Rantsev v. Cyprus and Russia* (n75).

⁸⁴ *Rantsev v. Cyprus and Russia* (n75).

Article 4 makes no mention of trafficking in persons. The court stated that, as it was obliged to interpret the Convention in the light of present day conditions, trafficking was implicitly covered without needing to explicitly clarify if Ms Rantseva was in a situation of slavery, servitude of forced labour. It said further that trafficking in human beings constitutes a threat to human dignity, incompatible with the values of a democratic society, and falls therefore within the scope of Article 4.⁸⁵ As a result, the Court identified four obligations for states: to put in place a legislative and administrative framework to prohibit and punish trafficking,⁸⁶ to take proportionate measures to remove an individual at risk of being trafficked or exploited from such a situation,⁸⁷ to investigate situations of potential trafficking,⁸⁸ and to cooperate with the authorities of other states in cross-border trafficking cases.⁸⁹ The reasoning of the Court has been criticised for its unclear connection between human trafficking and slavery.⁹⁰

As Allain states, by invoking Article 4 of the ECHR and reasoning that ‘trafficking is based on slavery, the Court reveals itself as not having truly engaged with the legal distinctions that exist between the two concepts’ and has thereby ‘further muddied the waters as to where legal distinction should be made regarding various types of human exploitation.’⁹¹ Indeed the reasoning conflates human trafficking, forced labour and servitude without linking the different concepts in a meaningful way and without creating any meaningful relationship or scale of the different types of exploitation.

6.5.3) CN v the United Kingdom

More recently, as can be seen for example in the 2013 case of *CN v the United Kingdom*⁹² before the ECtHR, the lack of contextualisation of human trafficking

⁸⁵ *ibid.*

⁸⁶ *ibid.*, para 284.

⁸⁷ *ibid.*, paras 285-186.

⁸⁸ *ibid.*, para 287.

⁸⁹ *ibid.*

⁹⁰ Jean Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10 Human Rights Law Review 546.

⁹¹ *ibid.* 546.

⁹² *CN v the United Kingdom* (n76).

under Art 4 in *Rantsev* leads to confusion amongst law enforcement as to what constitutes slavery, trafficking or forced labour. C.N. traveled to the UK in order to escape sexual and physical violence in her native Uganda. She received help from a relative who later took away her passport and made her work for an elderly couple. C.N. was always on-call and only had one free afternoon each month. Her relative received her wages and withheld the majority of the money from her. When C.N. was discovered, she applied for asylum, but was rejected. Her solicitor requested a police investigation, but the police unit specialised in human trafficking came to the conclusion that C.N. had not been trafficked. The applicant, CN, alleged that the UK government was in breach of their positive obligations under Article 4 of the Convention 'to have in place criminal law penalising forced labour and servitude.' The British Government argued that CN's account was not credible, and that she had not been a victim of domestic servitude or human trafficking. The Court ruled that there was a failure properly to investigate the applicant's complaints and 'that this failure was at least in part rooted in defective legislation which did not effectively criminalise treatment falling within the scope of Article 4 of the Convention.'⁹³ The UK had no charge against forced labour or servitude at the time, but criminalised forced and compulsory labour and servitude in Section 71 of the Coroner and Justice Act 2009.⁹⁴

Despite its definitional weaknesses, the case law of *Siliadin* and *Rantsev* has led to the strong obligations for State Parties to the ECHR. The *Rantsev* case states that the definitions of the 2000 UN Trafficking Protocol and of the 2005 CoE Anti-Trafficking Convention are binding on signatory states. They constitute positive obligations for state parties to protect everyone in their territory against human trafficking as defined in the 2000 UN Trafficking Protocol. Furthermore, due to the connection made between human trafficking and Article 4 in *Rantsev v Cyprus and Russia* and the reiteration of said connection in *CN v UK*, this obligation is so strong that it even applies in a state of national emergency, as Article 15 of the ECHR prohibits states from derogating from certain provisions including Article 4.⁹⁵

⁹³ *CN v the United Kingdom* (n76).

⁹⁴ UK Coroner and Justice Act 2009.

⁹⁵ *Pati* (n 3).

6.6) The 2011 EU Trafficking Directive

The 2011 EU Trafficking Directive replaced the 2002 Framework Decision and can be interpreted as a change in the EU approach to human trafficking. While criminal justice is still a primary focus and the Preamble firstly talks about Human Trafficking as ‘a serious crime, often committed within the framework of organised crime,’ it now also refers to human trafficking as ‘a gross violation of fundamental rights and explicitly prohibited by the Charter.’ Most significantly, the Directive aims to adopt an ‘integrated, holistic and human rights approach to the fight against trafficking in human beings.’⁹⁶ Considering the lack of human rights provisions in the 2002 Framework Decision and the reluctance to include any meaningful provisions in the 2004 Residence Permits Directive, this is a significant move towards a more rights-based approach.

Like the CoE Convention, the Directive abandons the ‘women and children’ formulation of the UN Trafficking Protocol, but still mentions gender-specific issues. The Preamble states:

This Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should also be gender-specific where appropriate. The ‘push’ and ‘pull’ factors may be different depending on the sectors concerned, such as trafficking in human beings into the sex industry or for labour exploitation in, for example, construction work, the agricultural sector or domestic servitude.⁹⁷

This implies that trafficking is gendered, but does not mention the root causes of gender inequality, gendered labour or selective visa regimes for the amplification of such gendered results. Instead, the EU Directive again follows the UN Protocol’s criminal law approach and its ‘3P’ set-up.

⁹⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA 2011 1 (from here on EU Trafficking Directive), Preamble.

⁹⁷ *ibid.*

6.6.1) Criminalisation and Prosecution

The EU Directive broadened the definition of human trafficking to include all types of exploitation referred to in the UN Trafficking Protocol, and the CoE Convention.⁹⁸ Focussing on the prosecution element of the 3P approach, the Directive increased the minimum sentences for human trafficking, including in cases with aggravating circumstances.⁹⁹ Article 4(2a) provides that aggravating circumstances apply when the offence ‘was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims.’¹⁰⁰ The Commission proposed to include ‘adults who were particularly vulnerable on grounds of pregnancy, health conditions or disability’ in the definition.¹⁰¹ This definition does not include the structural vulnerabilities faced by women and migrant women in particular, let alone the effect of state policies on migration and the insufficient labour protections in areas such as reproductive work on the creation of such vulnerability.

6.6.2) Prevention

Equally, the Directive imposes a binding obligation to prevent trafficking on its Member States. Member States are required to adopt measures to discourage and reduce demand, to raise awareness through information campaigns, including online, and to promote regular training for officials.¹⁰² Particularly the training of officials is a key factor in correctly identifying trafficked persons. It is however telling that this provision is contained under ‘prevention’, as this implies that the officials in question might mostly be border officials, who are to deter human trafficking in the process. For the detection of trafficked persons, better training of front-line officials such as labour inspectors, who are deployed within the Member States would be much more useful, as the majority of exploitation happens when victims of trafficking arrive at their destination, rather than while they are transiting into a destination country.

⁹⁸ *ibid*, Art 2.

⁹⁹ *ibid*, Art 4.

¹⁰⁰ *ibid*, Art 4(2)(a).

¹⁰¹ *ibid* Art 4.

¹⁰² *ibid*, Art 18.

Finally, the Directive invites the Member States to consider taking measures to establish as a criminal offence the use of services, which are the objects of exploitation, with the knowledge that the person is a victim of trafficking.¹⁰³ This provision is phrased in a way that does not limit it to clients who use sexual services from a trafficked person, but could be far-reaching to encompass those who purchase products or services from persons in situations of forced labour. The careful drafting of this provision reflects the lack of consensus between the EU Member States on the issue of sex work, but respects the CoE Anti-trafficking Convention, which uses a similar wording in its Article 19. Again, this provision is unlikely to lead to a broad criminalisation of the purchase of the fruits of exploitative labour. Instead, it will likely only be implemented by those states who want to criminalise the purchase of sexual services, contributing to the maintenance and solidification of the treatment of human trafficking for sexual exploitation and human trafficking for labour exploitation as separate issues.

6.6.3) Victim Protection

The Directive emphasises the need for victim protection and, more importantly, talks about them in a rights context, which is laudable. The Preamble states that victims need to ‘be able to exercise their rights effectively. Therefore assistance and support should be available to them before, during and for an appropriate time after criminal proceedings.’¹⁰⁴ However, this again is a reduction of trafficked persons’ rights to assistance and support in their role as victims, rather than as inalienable rights as human beings. There is a further limitation to victims’ rights, as Member States are entitled to decide what constitutes an appropriate time, particularly after criminal proceedings. In the case of most victims in most member states, assistance and support cease with the end of criminal proceedings, reducing these alleged rights to temporary protections for useful witnesses.

Positively, the Preamble also reiterates the CoE Convention with regard to the obligation of Member States to provide a trafficked person ‘with assistance and

¹⁰³ *ibid*, Art 18(4).

¹⁰⁴ *ibid*, Preamble.

support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness. In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period.¹⁰⁵ This imposes a strong obligation on Member States to support a victim 'as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.'¹⁰⁶ There is however a limitation, as assistance and support only needs to be provided unconditionally during the reflection period. If 'the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive.'¹⁰⁷ This section clearly caters to Member States' fears of an influx of migrants and having to provide assistance to too many exploited workers. Whereas the preamble continues that 'assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is on-going due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statements in those criminal proceedings',¹⁰⁸ this comes with the limitation 'when necessary'.¹⁰⁹ As there are no further specifications as to when necessity arises, it is clearly for Member States to decide when they find continued support for trafficked persons necessary.

Additionally, under Article 17, victims shall also have access to existing schemes of compensations to victims of violent crimes of intent.¹¹⁰ As with other international and regional instruments, there is no mention of compensation for unpaid wages or compensation for labour in the sex industry. This omission demonstrates that, while the EU Directive constitutes a huge leap towards protecting victims when compared with its predecessor, the 2002 Framework Decision, it is still deeply anchored in a criminal law approach and does not

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*, Art 11(2).

¹⁰⁷ *ibid.*, Preamble.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*, Art 17.

provide the comprehensive approach it claims to. While it acknowledges certain rights, it does so only in the context of trafficked person's rights as victims of a violent crime, not in terms of labour obligations or the general human rights of trafficked persons.

6.7) Conclusion

While counter-trafficking legislation in Europe has come a long way within just a decade after the implementation of the UN Protocol, it nonetheless is still firmly rooted in a criminal law approach. The limits of such an approach have been criticised,¹¹¹ as even in so-called holistic approaches the focus remains on the criminalisation of trafficking, rather than on empowering vulnerable persons. Krieg rightly defines this as a circular move in which 'social problems formerly dealt with by separated legal fields are combined into a broad understanding of trafficking in persons embedded in a criminal understanding. In a second step, after realising that this one instrument cannot deal with all aspects involved, prior separated fields are re-activated, but have to be modified towards the 'one-size-fits-all' diagnosis. Therefore, the rights of the affected persons in this setting are mainly enforced as victims' rights and witness protection.'¹¹² This attaches a victim identity to trafficked persons, while also denying them access to social and economic rights,¹¹³ particularly wages and compensation for their labour, rather than only for the harm suffered.

Thus, recent approaches of both the Council of Europe and the European Union, developed on the basis of the UN Protocol constitute a way forward in that they acknowledge that human trafficking infringes fundamental human rights, such as

¹¹¹ Elspeth Guild, 'Immigration and Criminal Law in the European Union' in E Guild and P Minderhoud (eds), *Immigration and Criminal Law in the European Union* (Martinus Nijhoff 2006); Elizabeth Bernstein, 'Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights' (2012) 41 *Theory and Society* 233; Bernadette McSherry and Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12 *The International Journal of Human Rights* 67; Erin O'Brien, Belinda Carpenter and Sharon Hayes, 'Sex Trafficking and Moral Harm: Politicised Understandings and Depictions of the Trafficked Experience' (2013) 21 *Critical Criminology* 401.

¹¹² Sarah H Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights' (2009) 15 *European Law Journal* 775, 786.

¹¹³ *ibid.*

the right to life, the right to protection against torture and inhumane and degrading treatment and the right to protection against slavery, servitude and forced labour. Nonetheless they limit the access to such rights to those which fit a criminal law approach, the rights of victims of a crime. Positive obligations and more controversial human rights, such as social and economic rights, remain almost untouched, even by the most rights-based of the three treaties, the 2005 Council of Europe Convention. Thus, it does not account for the labour rights and human rights of trafficked persons as workers and right-holders. Instead, trafficked persons' rights are continuously phrased as protections which are contingent on meeting victim categories which can be defined by individual governments. Solely the European Court of Human Rights acknowledges that state's inability to protect persons from human trafficking can in itself constitute a violation of Article 4 and again can only retroactively condemn such failures.

Such a victims' rights approach is problematic on several levels, as it ignores migrants' agency and allows states to ignore root causes of victimisation, such as gender inequality both in countries of origin and destination countries, in terms of access to resources, insufficient labour protections, particularly in highly gendered professions in the private sphere, such as sex work and domestic work, and unequal pay which disadvantages both women and migrants. Furthermore, it also ignores receiving states' restrictions on immigration, which only allow access for immigrants already at an advantage, through selective visa regimes, which only allow migration for those who have access to resources and education.

Despite the inclusion of labour trafficking in both the UN and the Council of Europe and European Union definitions of human trafficking, all instruments still contain a legacy of worrying about human trafficking in terms of a phenomenon of involuntary migration into 'white slavery' or 'modern slavery' in the sex industry, rather than a phenomenon of exploiting vulnerable workers in precarious working conditions across sectors. Thus, the legacy of 'white slavery' treaties, as discussed in Chapter 5, has trickled down into newer legislation on international and regional level.

Additionally, the ECHR case law has established a connection between trafficking and slavery that is neither clearly defined, as the criticism of *Rantsev* points out, nor necessarily helpful for trafficked persons. The notion that human trafficking is contained in the same category as slavery, servitude and forced and compulsory labour attaches additional severity to the crime of human trafficking. However, the vague definition of human trafficking in the UN Trafficking Protocol, which has carried over into the European treaties, as well as difficult standards for 'victim of trafficking' status in regional and domestic law are not necessarily ameliorated by this connection. On the contrary, blurring the lines between human trafficking and slavery per se could raise the bar for someone to be worthy of 'victim of human trafficking' status, which is particularly problematic in the light of the idealised victim category, which I discussed in Chapter 4.

Thus, while the Council of Europe and EU approaches show slight improvements in terms of victim protections in comparison to the UN Trafficking Protocol, they do not constitute a departure from the conflation of sex work and trafficking for sexual exploitation or the separation of sex trafficking and labour trafficking. Furthermore, they cement the conditionality of rights for victims of trafficking, by increasing the victim protections for worthy victims of trafficking, but providing nothing in terms of improving labour conditions for women and migrants, let alone sex workers.

The following two chapters will demonstrate how this affects domestic implementation of anti-trafficking legislation, as I will discuss the domestic counter-trafficking legislation in England and Wales and in Germany.

Chapter 7: The UK Counter-Trafficking Response

7.1) Introduction

This chapter provides an analysis of the current counter-trafficking legislation in England and Wales, which is codified in the Modern Slavery Act 2015 (from here on MSA 2015). This chapter looks at the elements of prosecution, prevention and victim protection in the MSA, as well as its implementation of international and regional norms. Additionally, I again address the issues surrounding the themes of gender and migration, prostitution and idealised victimhood and labour rights. Furthermore, I also evaluate the contents of the MSA in the light of the interviews I conducted with NGOs and sex workers' rights organisations on the topic of government policies and responses to human trafficking and prostitution in the UK.¹

Taking into account the expansion of protections available to victims of human trafficking under the Council of Europe Convention and the EU Directive, the MSA is in some ways a step back towards a criminal law approach. I demonstrate that the MSA is not the ground-breaking legislation its drafters proclaim it to be and that it is unlikely to even achieve its stated aims of improving prosecution, prevention and protection for victims,² particularly for those trafficked into the sex industry.

Whereas the MSA 2015 is a recent piece of anti-trafficking legislation, it codifies existing legislation. It came into force in March 2015, aims to increase prosecutions for human trafficking and other forms of modern slavery, as well as to provide better protection for victims. The Act is considered to be the first one of

¹ See the introduction for the methodology used for the interviews in the UK and Germany.

² As the Joint Committee on the Draft Modern Slavery Bill Committee's Draft Bill Report stated: '[The bill must] reflect that the fight against modern slavery is not simply a matter of prosecution, nor only victim protection, but in fact an indivisible combination of the four Ps: prevention, protection, prosecution and effective partnerships.' HL 166/ HC 1019 (2014)

its kind in Europe and is intended to send ‘a strong message, both domestically and internationally, that the UK is determined to put an end to modern slavery’.³

Whereas Frank Field MP, Chair of the Parliamentary Joint Select Committee on the Modern Slavery Bill,⁴ hailed the Act as ‘ground-breaking legislation’ and an influencer of ‘law and the fight against modern slavery around the globe’, the Act’s likely effects on prosecutions, prevention and victim protection are debated.

Many observers, including expert-NGOs such as Anti-Slavery International, Liberty and the Poppy Project find the Act does not go far enough,⁵ as it has merely been a ‘cut and paste’ exercise of existing offences,⁶ instead of a far-reaching Act with meaningful provisions on prevention and victim protection. Anthony Steen, chair of the Human Trafficking Foundation, advisor on the early stages of the Modern Slavery Bill and former special envoy for human trafficking, went as far as to say that ‘[the Act] is wholly and exclusively about law enforcement – but it shouldn’t be enforcement-based, it should be victim-based. We have majored on the wrong thing.’⁷

In looking at the offences defined in the Act and their likely effect on prosecutions and convictions, I argue that they provide no significant development or departure from existing international and regional documents, which, as I have shown, already offer no substantive labour rights or human rights approach to human trafficking. Secondly, I review the prevention and victim protection

³ NCA UKHTC, ‘NCA Strategic Assessment. The Nature and Scale of Human Trafficking in 2013’ (2014).

⁴ ‘Anti-Slavery Laws “Must Focus on Victims”, Say MPs’ BBC News (8 April 2014) <<http://www.bbc.co.uk/news/uk-politics-26926301>>.

⁵ See e.g. ‘Modern Slavery Bill soured by lack of protection for migrant domestic workers and business responsibility loophole say Anti-Slavery International’ Anti Slavery International <http://www.antislavery.org/english/press_and_news/news_and_press_releases_2009/modern_slavery_bill_soured_by_glaring_black_holes.aspx>; ‘Modern Slavery Bill must go further’ Liberty human rights <<http://www.liberty-human-rights.org.uk/news/blog/modern-slavery-bill-must-go-further>>; ‘What became of the Modern Slavery Bill’ Humanitarian Aid Relief Trust <<http://www.hart-uk.org/blog/what-became-of-the-modern-slavery-bill/>>; ‘Protect the victims of human trafficking’ Eaves for Women <<http://www.eavesforwomen.org.uk/news-events/news/protect-the-victims-human-trafficking>>.

⁶ ‘Queen’s Speech Features New Anti-Slavery Court Powers’ BBC News (4 June 2014) <<http://www.bbc.co.uk/news/uk-27684245>>.

⁷ S. Jones, ‘Modern Slavery Bill Needs Sweeping Changes, Says Report’ The Guardian (8 April 2014) at <<http://www.theguardian.com/global-development/2014/apr/08/modern-slavery-bill-sweeping-changes>>.

measures enshrined in the Act and their potential effectiveness as well as the Act's shortcomings to formalise victims' rights enshrined in European legislation, by which the UK is already bound.

As a result, I challenge the claim that the Act is putting concerns for victims' welfare at its centre, as its authors have suggested.⁸ Instead, it falls behind the already insufficient and victim-only international and European approaches to rights for trafficked persons. In a third step, I focus on the problematic definitions of human trafficking and slavery in the MSA and challenge the existence of separate categories for human trafficking for labour exploitation and human trafficking for sexual exploitation. The separate category of human trafficking for sexual exploitation is concerning, particularly if, as crime statistics and case law in the UK indicate, it is interpreted as 'human trafficking for prostitution' rather than encompassing all cases of gendered and sexual exploitation. It thus separates the labour exploitation in prostitution from labour exploitation in other industries and reiterates the problematic exclusion of sex work from labour protections. This exclusion is in line with the approach to prostitution as a semi-legal activity in England and Wales.

7.2) The Main Provisions of the Modern Slavery Act

The following section looks at the various provisions under the Modern Slavery Act. I evaluate the provisions related to criminal offences and prosecutions, followed by prevention and awareness-raising measures and provisions implemented to improve victim protection.

7.2.1) Offences and Prosecution

The MSA replaces previous counter-trafficking and slavery legislation, which were contained in separate pieces of legislation. The Sexual Offences Act 2003, criminalised sexual trafficking in England, Wales and Northern Ireland, while the

⁸ Modern Slavery Evidence Review, 'Establishing Britain as a world leader in the fight against Modern Slavery' 16 December 2013; HM Government, 'Modern Slavery Strategy' (2014) 59

Criminal Justice (Scotland) Act 2003 included equivalent provisions for Scotland. The offence of trafficking for labour and other exploitation was contained in section 4 of the Asylum and Immigration (Treatment of claimants, etc.) Act 2004 and was applicable to the whole Kingdom.

The main strength of the Act lies in bringing together the existing offences, clarifying the meaning of 'coercion' in the context of trafficking and increasing the maximum sentences for both trafficking and slavery. However, despite the clarity of the Act on its criminal offences, it is debatable whether the new legislation will lead to better enforcement.

Indeed, as the offences themselves have not been changed significantly, but have been merely consolidated in one Act, the likelihood of convictions has not necessarily increased from its previous rate. The impact on prosecutions will at best be through the fact that all relevant offences are now in one place. The collection of all offences in one single Act makes it more accessible to law enforcement.

However, the MSA contains nothing to lower the thresholds contained in the old legislation to secure convictions. Members of Parliament have criticised the continuing hurdles those thresholds represent. In a debate in the House of Lords Lord Tunncliffe stated:

'In 2011-12, there were 15 prosecutions for slavery but no convictions. In the same year, there were 150 prosecutions for trafficking but only eight convictions. [...] Worryingly, the threshold needed to secure convictions is very high.'⁹

Further, NGOs have criticised the lack of awareness of trafficking amongst law enforcement and social services in the first place.¹⁰ Without an increase in training and awareness-raising for police and care workers and a resulting increase in detection of trafficking cases, the effect of the Act on both prosecutions and convictions will most likely be negligible. Two of the NGOs I spoke with identified awareness-raising among law-enforcement officials as one

⁹ HL Deb 17 November 2014, vol 757 col 242.

¹⁰ L Chitty and others, 'Perspectives on Modern Slavery' (Perspectives on Modern Slavery Panel, London, 12 March 2015).

of the key issues in improving the identification and prosecution of traffickers.¹¹ Thus, even in its areas of strength, the MSA may not achieve its goals, as it is built on the problematic foundations of its international and regional predecessors.

7.2.2) Prevention and Awareness-Raising

Prevention efforts are vague under the MSA. So-called prevention orders in Part 2 of the MSA relate only to preventing potential traffickers from certain actions, including e.g. foreign travel.¹² The only other aspect of the MSA that is considered to be part of the prevention part of the 3P is introduction of the Independent Anti-Slavery Commissioner in Part 4 of the MSA. While generally received positively, the appointment of Kevin Hyland, former head of the Metropolitan Police's Human Trafficking Unit, as Commissioner, can be seen as another sign for the government's focus on law enforcement, rather than victim protection. Kevin Hyland himself has however stated that he sees his role as 'be[ing] the voice of the victims' and 'to make sure the victims and survivors are supported by all those agencies.'¹³ This approach is laudable, as the MSA itself constitutes a missed opportunity when it comes to enshrining measures to improve victim identification, particularly through law enforcement. Beyond the introduction of prevention orders and the appointment of the Anti-Slavery Commissioner, there are no further preventative measures enshrined in the MSA. The expansion of labour inspectorates or labour regulations was not included in preventative efforts. Calls to expand the remit and power of the Gangmasters Licensing Authority (GLA),¹⁴ which currently monitors the labour supply in the agriculture, shellfish and food processing and packaging sectors, were not implemented in the MSA.¹⁵ Instead, a reduction in resources for the GLA, a lack failure to enforce the national minimum wage and violations of other labour rights

¹¹ Interviews with UK Faith-Based Organisation A (London, 18 December 2014) and Faith-Based Organisation B (Phone interview, 13 August 2014)

¹² Modern Slavery Act 2015 (from here on MSA), Part 2.

¹³ 'UK Anti-Slavery Commissioner: My Job Should Not Exist' ITV News (19 November 2014) <<http://www.itv.com/news/2014-11-19/uk-anti-slavery-commissioner-my-job-should-not-exist/>>.

¹⁴ 'Modern Slavery Bill Evidence Review' (2013) 14.

¹⁵ Home Office, 'Response to the Report from the Joint Committee on the Draft Modern Slavery Bill' (Home Office 2014).

have increased the vulnerability of workers in these sectors.¹⁶ An expansion of labour controls and monitoring of labour protections under the GLA scheme would have meant an opportunity to provide meaningful prevention of human trafficking and related exploitation, at least in the work sectors which would have qualified for it, such as hospitality, construction and certain types of care work.¹⁷ The extension of the remit of the GLA would not have led to monitoring of sex work or other reproductive work in private households. Nonetheless, it constitutes a missed opportunity in terms of establishing *true* preventative efforts that do not focus on the prevention of migration.

7.2.3) Victim Protection

The victim protection provisions under the MSA are amongst the most contested aspects of the legislation. The MSA has been hailed as a victim protection Act as much as a law enforcement instrument and indeed parliamentarians and government officials alike have made claims to victim protection as their fundamental goal.¹⁸ However, victim protection is interpreted as protecting victims from prosecution for crimes they committed under the orders of their traffickers, as well as protection during trials. Protecting victims from prosecution constitutes only a very small aspect of protecting the human rights of victims with regard to their specific vulnerabilities. Thus, the Act falls short on enshrining any meaningful victim rights, let alone any labour protections or rights to compensation of wages not received.

Nonetheless, one of the provisions of the Act is significant, as it at least acknowledges the gendered lived realities of women as trafficked persons. Section 45, which provides a defence for victims of slavery or trafficking who were compelled to commit an offence due to 'slavery or to relevant exploitation' (Sect 45(1c)), if a 'reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act' (Sect 45(1d)).

¹⁶ Migration Advisory Committee, 'Migrants in Low-Skilled Work: The Growth of EU and Non-EU Labour in Low-Skilled Jobs and Its Impact on the UK. Full Report.' (2014) 151, 159, 179 <<https://www.gov.uk/government/publications/migrants-in-low-skilled-work>>.

¹⁷ HC Deb 7 August 2014, vol 584, cols 184 & 210.

¹⁸ HC Deb 17 November 2014, vol 588, col 2.

Relevant characteristics are defined as ‘age, sex and any physical or mental illness or disability’ (Sect 45(5)). Section 45(2) states further: ‘A person may be compelled to do something by another person or by the person’s circumstances.’¹⁹ It is notable that the definition of ‘compulsion’ includes circumstance, as well as the fact that the ‘reasonable person’ is defined as someone of the same age and sex. In this the legislator moves away from the standard male norm of the ‘reasonable person’, which is particularly important as the crime of human trafficking affects women in different ways from men, and adult victims of trafficking for sexual exploitation are almost exclusively female.²⁰ Equally, the vulnerabilities of trafficked persons are different dependent on gender. Women are more vulnerable to trafficking in their migratory projects as such, as structural gender inequalities in countries of origin affect their ability to migrate into regulated industries.²¹ Equally, pregnancy or motherhood could constitute personal circumstances, which compel someone to certain actions, as parenthood affects women differently from men. This makes it the only section of the Act, which considers the gendered nature of human trafficking.

The next two sections of the victim protection section deal with special measures in court and civil legal aid for victims of slavery.²² Special measures apply to witnesses in court proceedings who are trafficked persons or victims of slavery, servitude and forced and compulsory labour. Victim witnesses are eligible for special measures such as screening from the accused, giving evidence by live link, giving evidence in private, etc.²³ Whereas such measures already applied to trafficking victims before - the MSA only extends their application to victims of

¹⁹ MSA 2015.

²⁰ Nadedja Marinova and Patrick James, ‘Social Norms and Policies on Prostitution and Trafficking’ in Lyn Boyd-Judson (ed), *Women’s Global Health: Norms and State Policies* (Lexington Books 2013); Christine Catarino and Mirjana Morokvasic, ‘Women, Gender, Transnational Migrations and Mobility : Focus on Research in France’ in Laura Oso and Natalia Ribas-Mateos (eds), *The International Handbook on Gender, Migration and Transnationalism* (Edward Elgar 2013); Kim Anh Doung, ‘Human Trafficking in a Globalized World: Gender Aspects of the Issue and Anti-Trafficking Politics’ (2012) 2 *Journal of Research in Gender Studies* 48.

²¹ Jacqui True, *The Political Economy of Violence against Women* (OUP 2012) 54; Olga Zhyvytsya and Karin Keil, ‘The Female Face Of Migration’ (Caritas Internationalis 2012); Janie Chuang, ‘Beyond a Snapshot: Preventing Human Trafficking in the Global Economy’ (2006) 13 *Indiana Journal of Global Legal Studies* 137

²² MSA 2015, Sections 46 and 47.

²³ *ibid*, Section 46.

slavery²⁴ - these measures are nonetheless laudable as they acknowledge the trauma trafficked persons may experience. The fact that the first three 'victim protection' sections deal exclusively with criminal proceedings, demonstrate the criminal law focus of the Act. It also shows that victims are mostly perceived as potential witnesses in criminal proceedings, rather than as right-holding subjects of the law.

Section 49 provides guidance about identifying and supporting victims, making it the first section of the MSA that offers any level of protection or aid to victims of trafficking in pre-trial situations. Whereas some of the previous sections are grouped under the victim protection heading, this is the first section that actually introduces new measures. Sub-section 49(1) states:

'The Secretary of State must issue guidance to such public authorities and other persons as the Secretary of State considers appropriate about—

- (a) the sorts of things which indicate that a person may be a victim of slavery or human trafficking;
- (b) arrangements for providing assistance and support to persons who there are reasonable grounds to believe may be victims of slavery or human trafficking;
- (c) arrangements for determining whether there are reasonable grounds to believe that a person may be a victim of slavery or human trafficking.'²⁵

However the wording is exceptionally non-committal, stating a need for the Secretary of State to issue guidance about 'the sorts of things which indicate that a person may be a victim of slavery or human trafficking' (Sec 49 1(a)) without defining what such 'sorts of things' are. This leaves the provisions for victim protection incredibly vague and gives the Secretary of State significant power to interpret this provision as he or she sees fit. Similarly, arrangements for providing assistance for victims of trafficking (Sec 49 1(b)), and determining whether someone is to be treated as a victim of trafficking or slavery (Sec 49 1(c)) equally lack definition, leaving it to the Secretary of State to give meaning to

²⁴ Equally, trafficking victims already had access to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Article 32, Schedule 1, which Section 47 of the MSA now also extends to victims of slavery.

²⁵ MSA 2015, Sec 49(1).

the entire Section 49. The meaning of the provisions in this section will be inserted by the Secretary of State, instead of through deliberations in parliament or other measures involving public scrutiny. Therefore important questions such as indicators for a person being a victim of slavery or human trafficking, arrangements for determining whether or not someone is a victim of trafficking and support provisions are not enshrined in the Act. This lack of reference means these contested issues will be decided without public debate.²⁶

Considering the disagreements surrounding the issues of who qualifies as a victim of trafficking and how to identify them, as well as criticism from NGOs regarding the lack of victim services, the Act is clearly aiming to prevent putting the Secretary of State in a situation where he/she has to make concessions in any of these areas. Furthermore, acknowledging particulars in the legislation would also mean developing financing solutions for them.

Section 50 provides scope for the Secretary of State to introduce regulations regarding support for victims of trafficking. As Sub-section 50(1) states, 'the Secretary of State may make regulations providing for assistance and support to be provided to persons— (a) who there are reasonable grounds to believe may be victims of slavery or human trafficking; (b) who are victims of slavery or human trafficking.'²⁷ Thus, under the current MSA assistance and support for victims remains on an administrative, non-statutory basis.²⁸ As with Section 49, introducing a statutory right for victim support is at the Secretary of State's discretion. However, according to Sub-Section 58(4)(g), in order to introduce a statutory victim protection mechanism, the Secretary of State requires approval from both Houses of Parliament.²⁹ Attempts to include statutory victim rights were thwarted,³⁰ partly because the National Referral Mechanism was under review at the time of the drafting of the Modern Slavery Bill. The National Referral Mechanism (NRM) is a framework for identifying potential victims of human trafficking. In the UK, first responders identify potential victims and refer them to

²⁶ So far the current Home Secretary Theresa May has not introduced any such measures.

²⁷ MSA 2015.

²⁸ Again, such regulations have not been introduced.

²⁹ MSA 2015.

³⁰ HL Deb 4 March 2015, vol 760, col 223.

one of the two 'Competent Authorities' – the Human Trafficking Centre of the National Crime Agency for UK and EEA victims and the Home Office for third country nationals, for a 'reasonable grounds' decision. In a 'reasonable grounds' decision, a case officer grants leave to remain for the 45-day 'recovery and reflection' period on the basis of 'from the information available so far I believe but cannot prove' that the individual is a potential victim of trafficking.³¹ The separation of assumed victims who are UK and EEA citizens, from those who are third country nationals has been particularly contested, as third country nationals seem to be less likely to receive positive 'reasonable grounds' decisions.³² The representative of one of the faith-based organisations stated:

It is noticeable from the UK figures [that] potential victims from the European Community are more likely to get positive, conclusive grounds decisions than people from outside the European community. Which has of course its concerns because, you know, a victim's story stands alone in respect to where they come from. And so it does not make sense that there should be a variation in the proportion of people receiving conclusive grounds decisions.³³

Another interviewee agrees:

There have been a lot of questions asked about the decision making process and how EU citizens tend to get much more beneficial decisions than non-EU citizens.³⁴

Three of the organisations I interviewed criticised the system and provided anecdotal evidence that third country nationals who are women of colour get treated particularly unfavourably. One stated:

I think people are extremely sceptical and less sympathetic towards people from certain West African countries. They like to see them as people who are more inclined to lie. [...] There are certain underlying racial stereotypes [...] particularly amongst immigration officials.³⁵

³¹ NCA <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>>.

³² Interview with UK Faith-Based Organisation A (London, 18 December 2014).

³³ *ibid.*

³⁴ Interview with UK Faith-Based Organisation B (Phone interview, 13 August 2014).

³⁵ *ibid.*

The experience of women supported by sex workers' rights organisations is even worse. Their spokesperson reports:

Black women from Africa get treated much worse. They get treated as, you know, bogus asylum seekers. [...] They get put in detention and their whole report of trafficking is rarely taken seriously in our view. *We* have always had to fight for that to be taken seriously.³⁶

She also noted that Thai women and Eastern European women without an existing right to remain rarely get treated well, but that the prejudices against Black African women are most severe.³⁷

Issues of less favourable treatment for asylum-seeking trafficked persons have been discussed with regard to proposed changes to the National Referral Mechanism, but they have not been enshrined in the law. This is worrying, particularly in the light of race discrimination against some groups of victims described by the NGOs I interviewed. Thus, the MSA's failure to enshrine definitions of who may qualify as a victim of trafficking makes it fall short of even the (problematic) victims' rights approaches in the regional European agreements.

7.3) Implementation of European Treaty Standards

While at the core of victim protection, not only the role of the National Referral Mechanism in establishing victim status, but also the 'recovery and reflection period' enshrined in the CoE Trafficking Convention and the EU Trafficking Directive have been completely excluded from the Act.³⁸ There has been criticism from various sides that the Act should contain a clear statement of the minimum provisions available to victims, if it is to have any claim to serve victims as well as increasing levels of prosecution.³⁹ The focus of the Act on victim protection within court proceedings, combined with a complete lack of measures on broader victim protection issues, can hardly call itself victim centred. As

³⁶ Interview with UK Sex Workers Rights Organisation (London, 29 April 2015)

³⁷ *ibid.*

³⁸ CoE Convention, Art 13.

³⁹ HL Deb 17 November 2014, vol 757, col 248.

human rights barrister and UN trafficking expert Parosha Chandran has criticised: 'to have a modern slavery bill that does not have at its core the recognition of the fundamental need for victim identification is a fatal flaw.'⁴⁰

The following section demonstrates that, in addition to the lack of progressive victim protection measures, the MSA also includes problematic definitions of trafficking and slavery, which will not only fail to help identify victims or increase convictions, but may even hinder international cooperation on prosecutions.

7.4) Problematic Definitions of Trafficking

The UK definition of human trafficking has always been an anomaly in comparison to international definitions of human trafficking. The definition in the UN Trafficking Protocol is threefold: it includes an act, a means and a purpose. It defines trafficking as the recruitment, transport or receipt of a person by the means of e.g. use of force, deception or coercion and a purpose, the exploitation of the trafficked person.⁴¹ This threefold definition has also been adopted almost word by word in the CoE Convention and the EU Directive, as well as by most EU member states.

In contrast, the definition in the MSA focuses mainly on the act, particularly on the element of travel, with the purpose and the means taking a secondary role. Just like the three previous Acts, which contained provisions on human trafficking, the main focus of the MSA is punishment of the physical transfer of the trafficked person.

While the wording in Section 2 of the MSA is heavily modelled on the UN Trafficking Protocol and the subsequent Council of Europe and EU definitions, it nonetheless focuses on the act of transport, which is phrased as travel. According to Section 2(1) 'A person commits an offence if the person arranges or

⁴⁰ Amelia Gentleman, 'Modern Slavery Bill Is "lost Opportunity", Says Human Trafficking Adviser' *The Guardian* (3 November 2014) at <<http://www.theguardian.com/law/2014/nov/03/modern-slavery-bill-lost-opportunity-human-trafficking-adviser>>.

⁴¹ 2000 UN Trafficking Protocol; 2011 EU Trafficking Directive.

facilitates the travel of another person (“V”) with a view to V being exploited.⁴² Section 2(3) mirrors the wording of the UN Trafficking Protocol and the EU Trafficking Directive, however, the focus still remains on travel: 2(3) ‘A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V’, where the EU Directive focuses on the ‘threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability [...]’⁴³ There is an element of movement, but travel, particularly transnational travel is not a defining feature in the UN Protocol. Instead, it and subsequent regional conventions emphasise exploitation with a broadly defined element of coercion, which includes inherent vulnerabilities of trafficked persons. In contrast to the UN Trafficking Protocol and the EU Directive, the MSA does not mention coercion at all.

While sub-section 2(5) clarifies that travel can include travel within a country, the focus on movement is problematic, as is the focus on the intention to exploit the victim during travel. Even where there is an element of movement, for example a crossing of one or more borders, the movement often occurs *before* any exploitation happens and without directly impacting whether or not a person is going to be trafficked at a later point. Further, the movement across a border may not evidence the vulnerability but rather lead subsequently to it, for example due to a person’s irregular migrant status. A study among migrant sex workers in the UK revealed that immigration status was perceived as the most limiting factor in their lives, to a degree that many of them considered indoor sex work to be their only ‘safe choice’ as it decreased their likelihood of arrest and deportation.⁴⁴ As this example shows the travel element is not the defining feature of vulnerability or exploitation. Not only does the Act’s aim to intercept the trafficking process at the point of travel give undue focus on the act in priority over the means and the purpose of the offence, it will not necessarily increase the numbers of convictions for human trafficking. Instead, this focus on travel can lead to greater conflation of trafficking and smuggling, two concepts that are

⁴² MSA 2015, Sec 2.

⁴³ 2011 EU Trafficking Directive.

⁴⁴ Nicola Mai, ‘Between Minor and Errant Mobility: The Relation Between Psychological Dynamics and Migration Patterns of Young Men Selling Sex in the EU’ (2009) 4 *Mobilities* 349.

already often entangled. Interceptions of trafficking at the border are considered to lead to more convictions as traffickers are apprehended in the process. However, this focus misperceives the wrong of trafficking; its exploitation usually only commences once the victims have reached their destination. As the exploitation often has not yet happened on arrival at the border, it would be difficult to prosecute, let alone convict, those involved in the transport of people across the border for human trafficking. Most likely they would instead be charged with human smuggling due to a lack of evidence to support a trafficking case.

In theory there is a neat distinction between trafficking and smuggling, as 'trafficking can be summarised as a migratory process in which people are transported involuntarily within or across national borders for the purpose of subsequent exploitation, while smuggling is about facilitation, for profit, of illegal entry with consent of individuals.'⁴⁵ In reality smuggling and trafficking are difficult to differentiate, as migrants may consent to be smuggled, but face exploitation on their journey or find themselves in forced labour or prostitution once they arrive at their final destination.⁴⁶ Empirical research indicates that migratory processes often involve active participation of migrants as well as their coercion and exploitation.⁴⁷ Thus, trafficking and smuggling are particularly difficult to tell apart in situations of transit where movement may still be largely voluntary. Focussing on travel indicates the Act's blurring of issues of exploitation of trafficked people with issues of border control, which fit in with a tough stance on migration.⁴⁸ Aiming for stronger border controls also helps to identify migrants as smuggled rather than trafficked as the exploitation often has not yet occurred. As smuggled migrants enjoy significantly fewer rights than trafficked persons, this is particularly appealing for border authorities with regard to third country nationals.⁴⁹

⁴⁵ Tom Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2012) 54 *International and Comparative Law Quarterly* 445, 448.

⁴⁶ For a more detailed discussion, see Chapter 2 of this thesis.

⁴⁷ Sarah H Krieg, 'Neue Gender-Perspektive im deutschen Strafrecht? : die Reform der Menschenhandelstatbestände' 76; Smriti Rao and Christina Presenti, 'Understanding Human Trafficking Origin: A Cross-Country Empirical Analysis' (2012) 18 *Feminist Economics* 231.

⁴⁸ Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013).

⁴⁹ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 'Note by the Office of the United Nations High Commissioner for

This approach is unlikely to yield results for trafficked people, as a significant number of trafficked persons are internally trafficked, EU nationals or entering the UK legally, for example using tourist visas.⁵⁰ Focussing the definition of trafficking in legislation on travel and on intercepting migratory flows at the border does nothing to aid these victims of trafficking and may instead obscure perceptions of what trafficking is.

Section 2(2) of the MSA states '[it] is irrelevant whether V consent to the travel', whereas 2(4) of the EU Directive states that the 'consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant' when he or she has been a victim of coercion.⁵¹

If the focus is on exploitation rather than travel, it can be argued that migrant status alone creates a level of vulnerability vis-à-vis an employer that makes labour exploitation and human trafficking possible. Taking this vulnerability into account, human trafficking is not only likely to happen within national borders, but is significantly more likely to happen to irregular migrants than to other groups, due to their heightened vulnerabilities caused by their immigration status.⁵² However, focussing on an element of travel in trafficking, especially on an element of international travel, can make it hard to detect internally trafficked persons and those who became victims of trafficking post-migration.

The MSA does include a section on exploitation, Section 3, but its purpose is to clarify the meaning of exploitation in Sections 1 and 2, not to define exploitation as a separate offence, as it is stated in sub-section 3(1) 'For the purposes of section 2 a person is exploited only if one or more of the following subsections apply in relation to the person [...]', with sub-sections 3(2) to 3(6) setting out the different types of exploitation.⁵³

Human Rights, the United Nations Children's Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons'.

⁵⁰ NCA UKHTC (n3).

⁵¹ 2011 EU Trafficking Directive.

⁵² Bridget Anderson and Rutvica Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 2008 *Soundings* 135.

⁵³ MSA 2015

In addition to focussing on travel rather than exploitation the MSA is also at odds with internationally accepted definitions of trafficking enshrined in the UN Trafficking Protocol, the CoE Convention and the EU Trafficking Directive. This discrepancy could lead to difficulties in multi-national counter-trafficking operations, as most other countries define human trafficking in line with the definitions in these international agreements.⁵⁴

Beyond its problematic definition of human trafficking, the MSA uses 'Modern Slavery' as an umbrella term for both human trafficking and slavery and slave-like conditions, with both charges relating to each other in conflicting ways. The term 'modern slavery' scandalises human trafficking by evoking imagery of shackle slavery, while at the same time impeding the identification of victims who do not neatly fit into that category because they are, for example, not locked up. Particularly in the context of trafficking into prostitution, this imagery of shackle slavery goes hand in hand with an idealised victim category, which builds on the idea of the 'madonna', a young, innocent, sexually inexperienced girl (ideally a virgin), often originally from a rural area, who has been kidnapped or at least tricked into a life in forced prostitution.⁵⁵

The representative of a faith-based organisation explains their experience working with women who do not meet this ideal:

The problem is people tend to have a stereotypical image of what a victim should be like and what they should have been through and the experience they have had and how they should act. The closer the victim is to that stereotype they hold, the more sympathetic they are. When individual cases veer away from that and they are not quite what people are expecting to see then they are sometimes less sympathetic and more sceptical.⁵⁶

⁵⁴ Klara Skrivankova, 'Next Steps for Legislation - Sentencing, Prevention Orders and Consolidating the Legal Framework' (Westminster Legal Policy Forum, London, 2 December 2014).

⁵⁵ Gretchen Soderlund, 'The Rhetoric of Revelation: Sex Trafficking and the Journalistic Exposé' (2011) 2 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 193; Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35 *Politics & Society* 447; Rutvica Andrijasevic, 'Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns' (2007) 86 *feminist review* 24.

⁵⁶ Interview with UK Faith-Based Organisation B (n34)

Women with previous experience in the sex industry, those who had plans to migrate or those who knew they were going into work in the sex industry, but not under which conditions, do not fit the requirements of the 'ideal victim' and are often overlooked by law enforcement, or worse, imprisoned or deported.⁵⁷ The organisations I interviewed agreed that there are negative sentiments towards women who were aware of or willing to engage in sex work in the UK prior to leaving their country. As the representative of a faith-based organisation states:

It is kind of anecdotal, but I think there is a difference between the way people are treated if there is a perception that they chose to work in the sex industry and they have been exploited.⁵⁸

Such an approach by law enforcement and the agencies that determine victim of trafficking status is extremely problematic and fails to acknowledge the reality of exploitation in human trafficking. The interviewee from the second faith-based organisation agrees:

Whether they knew that they were going to engage in sex work in the UK is completely and utterly immaterial to whether they've been trafficked or not. [...] It's immaterial, you know, whether you knew you were going to work in sex work or not, you know, whether you were before. But what we do notice is that people immediately begin to turn against those women, and they tend to not see those women as victims.⁵⁹

The representative from the sex workers rights organisation agrees that women who have previously engaged in sex work are often disbelieved:

Other women who have had experience with trafficking have found the authorities have refused to document them as a victim of trafficking. Once you are documented as a victim of trafficking you're supposed to be

⁵⁷ Carolyn Hoyle, Mary Bosworth and Michelle Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 *Social & Legal Studies* 313; Amelia Gentleman, "I Came to the UK and I Was Turned into a Prostitute" – Trafficked Women Share Their Horrific Stories' *The Guardian* (3 November 2014) <<http://www.theguardian.com/global-development/2014/nov/03/trafficked-women-horrific-stories-came-to-uk-turned-into-prostitute>>; E.L. Jeanes, 'The Doing and Undoing of Gender: The Importance of Being a Credible Female Victim' (2007) 14 *Gender, Work & Organization* 552.

⁵⁸ Interview with UK Faith-Based Organisation A (n32)

⁵⁹ Interview with UK Faith-Based Organisation B (n34)

entitled to certain processes and certain resources. The authorities basically just disbelieve them and said “We don’t think you are a victim of human trafficking and therefore you’re not entitled, we are just going to treat you like an illegal immigrant.”⁶⁰

She further points out that it should really be a matter of consent:

The crucial thing is consent. [...] The question is at the point when prostitution was the option [...] Are you being forced or coerced into doing it? So it is actually consent that is the distinguishing factor.⁶¹

The inflationary use of ‘Modern Slavery’ and the lack of clarity of the categories of slavery and human trafficking in the MSA are unlikely to improve the situation, neither for victims of trafficking who are disbelieved and treated as irregular immigrants, as well as for migrant sex workers who may be identified as victims of trafficking against their will.

7.4.1) Human Trafficking for Sexual Exploitation

In the light of the lack of labour protection for sex workers, it could be seen as a positive development that the MSA’s human trafficking section (Section 2) unifies existing offences under the Sexual Offences Act 2003 and the Asylum and Immigration Act 2004. However, while the Act seemingly brings together sex trafficking and labour trafficking, it still maintains their separation as different issues. It does not treat sex trafficking as a gendered subset of labour trafficking. This is in line with the UK approach to prostitution as a transaction of sorts, but not as work. Whereas prostitution is not illegal as such (only certain aspects such as soliciting are),⁶² it is also not recognised as a form of work and sex workers are thus excluded from *any* workers’ rights.

The separation of trafficking for sexual exploitation and trafficking for labour can be demonstrated in the section defining exploitation, Section 3. Sub-section 3(3)(a)(ii) defines acts under the Sexual Offences Act 2003 as exploitation in the context of human trafficking, which is interesting in several respects. Firstly, it

⁶⁰ Interview with UK Sex Workers Rights Organisation (n36)

⁶¹ *ibid.*

⁶² Policing and Crime Act 2009; Sexual Offences Act 2003.

treats a range of offences, ranging from sexual violence to prostitution-related offences as equal in terms of causing 'exploitation' in the sense of Section 2.

However, sexual violence is often portrayed as a symptom or indicator of an abusive situation in the context of human trafficking, for example in cases of sexual abuse of domestic workers through their employers or sexual violence against sex workers through their traffickers or pimps. The focus on 'trafficking for sexual exploitation' as a crime in its own right affects only prostitution- it does not consider sexual violence in any other trafficking context. The NCA's report perfectly illustrate this fact: according to the NCA questionnaire, there are the following categories of sexual exploitation in the context of human trafficking: 'on-street', 'brothel', 'private residence', 'internal trafficking', 'multiple types, e.g. brothel and on-street' and 'sexual exploitation – other'.⁶³ These categories of trafficking for sexual exploitation demonstrate that while rape and sexual assault are theoretically covered under the trafficking for sexual exploitation section,⁶⁴ in application the focus is solely on prostitution.

Additionally, the NCA report also mentions rape and sexual assault in the context of labour exploitation, but describes it as an issue of aggravating circumstances, rather than a case of multiple exploitations. Interestingly, it does mention multiple exploitations in the context of labour exploitation and benefit fraud.⁶⁵ Thus, in practice human trafficking for sexual exploitation is understood to mean human trafficking into prostitution, following the tradition of White Slavery legislation. At the same time other types of sexual exploitation, such as sexual harassment or sexual violence towards trafficked persons by their employers or traffickers, are dealt with as 'collateral damage' in the context of human trafficking. Thus the MSA still follows the equation of human trafficking for sexual exploitation as being one and the same as human trafficking into the sex industry.

As one of my interviewees points out:

We think it is very unhelpful when people completely conflate the two issues and say prostitution is trafficking or trafficking is an issue around

⁶³ NCA UKHTC (n3).

⁶⁴ MSA 2015.

⁶⁵ NCA UKHTC (n3).

prostitution. [...] Particularly on the Nordic model, you know, there is a lot of conflicting evidence now, whether it does good or harm.⁶⁶

Nonetheless, the MSA follows the international conflation between prostitution and trafficking, which I discussed in Chapters 4 and 5. The parliamentary debates leading up to the MSA even included the proposal for a ‘Swedish model’ to criminalise buyers of prostitution, regardless of whether or not the prostitution was exploitative. The proposed clause, brought forward by Fiona Mactaggart read:

Procuring sex for payment

- (1) A person commits an offence under this section if he or she procures sexual intercourse or any other sexual act, whether for himself or for another person, in return for payment.
- (2) A “payment” includes –
 - (a) payment that is promised or is given or promised by another person; and
 - (b) provision of non-financial benefits, including, but not limited to, drugs or alcohol.”⁶⁷

The proposal, which would have criminalised the clients of all sex workers, not only those in exploitative working relationships, was rejected, partly due to the sex workers’ rights lobby and partly due to concerns raised about sex workers’ stigmatisation and safety. Nonetheless, already with the current provisions, sex workers often feel more prosecuted by counter-trafficking legislation than supported. The representative of the sex workers rights organisation describes how their members and women supported by them experience counter-trafficking legislation in the UK:

Fundamentally it’s really just used as a cover for prosecution and targeting of immigrant sex workers. The number of raids on premises has gone up massively, all in the name of clamping down on trafficking, and no traffickers have been found. It’s all just a question of a crackdown on prostitution.⁶⁸

Thus, current counter-trafficking measures do very little to improve the situation of sex workers, whether they are victims of trafficking or not. Instead, women

⁶⁶ Interview with UK Faith-Based Organisation B (n34)

⁶⁷ HC Deb 4 November 2014, vol 587, col 751.

⁶⁸ Interview with UK Sex Workers Rights Organisation (n36).

affected by exploitative prostitution (regardless of whether it amounts to human trafficking or not) require very basic assistance, which is linked with greater issues of women's empowerment and equality. According to the sex workers rights organisation, women looking for alternatives to prostitution:

[...] are very practical. They say housing, affordable housing. They say affordable childcare, or pay equity, benefits you can live on and raise your children.⁶⁹

Also two faith-based organisations, both of which deal with victims of trafficking for sexual exploitation in their role as first responders argue that women need viable options, rather than criminalisation. One of them states:

In terms of policy there is more need for the government to finance NGOs to engage with sex workers, prostitutes, to offer people choices with exit routes if they want them, you know, or, if they don't, then advice on how to practice in a safe manner.⁷⁰

While the other faith-based organisation has a more critical view of prostitution due to their ethos, they also agree that offering alternatives is key:

Better identification where somebody does end up in a situation they are not expecting. And better pathways out. You know, if I could wave a magic wand, if I could do one thing for women in the sex industry would be to provide good exit pathways should women choose to leave. The stories often contain the element of "What else could I do, where else could I earn this money?" So if we could do something like that, [...] present options - that would be my dream.⁷¹

Thus, the current exclusion of meaningful victim protection measures under the MSA is particularly problematic for women in the sex industry. The interviews demonstrate that human trafficking should be addressed in the context of wider anti-discrimination legislation and efforts to improve gender equality.

⁶⁹ *ibid.*

⁷⁰ Interview with UK Faith-Based Organisation B (n34)

⁷¹ Interview with UK Faith-Based Organisation A (n32)

7.5) Victims' Rights as Human Rights and Labour Rights

In addition to weak victim protection measures after criminal proceedings, the Act fails to incorporate any human or labour rights provisions, but instead offers 'victim protection' measures following the tradition of seeing victims of trafficking primarily as victims of a criminal offense, rather than as right holders. The effects of such a 'victim protection' rather than a clear labour rights- and human rights-focused approach and its interplay with the problem of an idealised victim are well-illustrated in the case of the UK Modern Slavery legislation. Much of the non-committal language of victim-protection measures, as well as the complete lack of even so-called 'victims' rights' provisions in the Act can be attributed to the drafters' fears about public confusion about victims of trafficking and irregular immigrants.⁷²

With regard to the UK, the NCA's own statistics demonstrate that the majority of victims of trafficking enter the country legally from within the European Union, with Romania (11per cent), and Poland (9 per cent), being the two most prevalent countries of origin for victims of trafficking in the UK. The third likeliest country of origin is actually the UK itself, with 7 per cent of potential victims of trafficking in the UK being of UK origin. For labour exploitation, 78 per cent are EEA nationals who are legally working in the UK. These numbers indicate that irregular immigration status is not the only factor deterring victims of trafficking and other precarious workers from exiting exploitative employment relationships. Considering the situation of these workers, strengthened labour rights and measures to increase precarious workers' awareness of such rights would likely help to combat human trafficking for labour exploitation in the UK.

However, the lack of labour rights measures in the MSA does not come as a surprise. The UK had the opportunity to enshrine labour rights for those exploited by their employers through the EU Directive on Sanctions Against Employers of Illegally Staying Third-Country Nationals (Employer Sanctions Directive 2009), but chose to opt out.⁷³

⁷² Gentleman (n38).

⁷³ 'Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures against Employers of Illegally Staying Third-Country Nationals' [2009] Official Journal of the European Union.

In his statement on the reasons to remain non-party to the Directive, then-Minister of State for Immigration, Damian Green stated:

The directive also guaranteed additional rights to illegally-staying employees, including provision of back payments where an employee has earned less than the minimum national wage, which would be difficult to administer and would send the wrong message by rewarding breaches of immigration legislation.⁷⁴

Considering this view, it is not surprising that Section 9 of the MSA, 'Effect of slavery and trafficking reparation orders', is worded as follows:

'(1) A slavery and trafficking reparation order is an order requiring the person against whom it is made to pay compensation to the victim of a relevant offence for any harm resulting from that offence.'⁷⁵

Trafficked persons are compensated as victims, for harm resulting from trafficking, rather than as rights-holders having an entitlement for remuneration for wages not received. Section 1(2) states that all circumstances must be considered, and Section 1(4) adds the example of a person's personal circumstances, including but not limited to mental illness. This wording could indicate a broad definition of harm, which may go beyond simply physical harm.

While compensation for unpaid wages may theoretically be possible under the compensation for harm section, there is no case law pointing towards such an interpretation. Taking together the lack of cases in which unpaid wages have been compensated, the refusal of the government to join the EU Employer Sanction Directive and the reluctance to see certain work sectors, such as sex work and domestic work as labour worthy of labour rights, compensation for unpaid wages for trafficked persons is unlikely. While the case *Hounga v. Allen* established the possibility of discrimination claims for victims of trafficking under certain circumstances, and left scope for the possibility of wage claims on a theoretical level, the decisions of lower courts, which dismissed the contract claims on grounds of illegality, were upheld.⁷⁶ Furthermore, Lord Wilson's reasoning for upholding the discrimination claims was based on public policy

⁷⁴ HC Deb 24 May 2011, vol 528, col 44.

⁷⁵ MSA 2015, Sec 1.

⁷⁶ *Hounga v Allen & Another* [2014] UKSC 47.

concerns in cases of human trafficking.⁷⁷ Such reasoning demonstrates that discrimination claims despite the victim's illegality were based on treating human trafficking as an exception, rather than viewing it as an issue of human rights or labour rights as such. Such an approach fails to acknowledge the labour rights dimension of human trafficking. This is particularly problematic in areas where already existing labour and employment legislation against unacceptable working conditions does not reach workers. Domestic work and sex work are two such areas, in which the UK, like many other countries, exempts employees from protective labour legislation.⁷⁸

The approach taken in the MSA tries to address human trafficking from a criminal law point of view, specifically in the final phase of a criminal law procedure, at the point of prosecution. By focussing on victims as witnesses, they are only ever seen as the already exploited. A human rights approach makes them visible as persons whose likelihood of exploitation could have been prevented through decreasing their vulnerability and through strengthening their rights,⁷⁹ particularly their rights as workers.

7.6) Conclusion

The MSA falls short of being the significant counter trafficking instrument combining improved prosecutions, ensuring victim protection and prevention of trafficking it was proclaimed to be. Victim protection is dealt with as a means to an end for convictions, rather than as a way to guarantee rights. The criminal law approach to human trafficking remains completely unchallenged and is not supplemented by any meaningful victim protection measures, let alone human rights provisions.

⁷⁷ Alan Bogg and Sarah Green, 'Rights Are Not Just for the Virtuous: What Houna Means for the Illegality Defence in the Discrimination Torts' (2015) 44 *Industrial Law Journal* 101, 110.

⁷⁸ Hila Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76, 118.

⁷⁹ Vanessa E Munro, 'Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking' (2008) 35 *Journal of Law and Society* 240; Vanessa E Munro and Jane Scouler, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 *Feminist Legal Studies* 189.

Even in its areas of strength, namely the sections on prosecution, the Act has some significant flaws in the definition of trafficking and the separation of slavery and trafficking. Particularly with regard to trafficking for sexual exploitation the Act's definitions fall short of international conventions. The new legislation could have been an opportunity to treat labour exploitation in sex work as exploitation of sex workers in a work environment, while treating sexual exploitation of all trafficked persons as exploitation of a particularly severe gendered power dynamic, which can affect all victims of trafficking, but is most likely to happen in the private sphere, thus affecting women trafficked for domestic work, care work and sex work disproportionately. This opportunity was unfortunately missed.

Additionally, the Act does little in improving enforcement, as it merely combines existing charges in one Act, without simplifying them or placing them on a scale. Equally, the victim protection measures are weak and focus mostly on criminal proceedings, demonstrating the still remaining focus on prosecutions, rather than victims' needs in their own right. Victims' rights, even in the limited definitions of existing European legislation, are not articulated at all in the Act. This is in line with previous government remarks of an unwillingness to make previously discretionary rights statutory.⁸⁰ Had the legislator wanted to make the MSA the pioneering legislation it is proclaimed to be, it is surprising that these victims' rights were not included in the victim protection section. Furthermore, in order to create meaningful change for victims, presumptions about migrants in general, and about who is worthy of protection as a victim of trafficking in particular, would have to be challenged.

With regard to broader victims' rights, particularly a reconceptualization that would include labour rights for migrants and labour rights for sex workers and other workers in the reproductive labour sphere, the Act was always unlikely to create change. In a political climate of decreasing acceptance of migrants per se, mixed with an unwillingness to increase labour rights for non-nationals and a resurfacing of old anti-prostitution movements, the debate surrounding the MSA was not going to create a shift in the legislators' or public opinion on these issues. However, to achieve the aim of the Act, the eradication of human trafficking and modern slavery, a focus on labour rights is imperative.

⁸⁰ HL Deb 3 April 2015, vol 760, cols 226-228.

Chapter 8: Human Trafficking and Prostitution in German Law

8.1) Introduction

This chapter explores the German approach to human trafficking with some comparison to the English approach. As with the English chapter, this chapter looks at the implementation of international and European counter-trafficking instruments in German law and practice and how they affect the rights of sex workers and women trafficked for sexual exploitation.

The German situation is different from the UK's in a number of ways:

Germany has a tradition of strong workers' rights, and, unlike the UK, Germany has signed and implemented the 2009 EU Employer Sanctions' Directive, granting irregular migrant workers certain rights to compensation.

Equally, German policy on migration has generally been more open than the UK's in recent years, ranging from European freedom of movement to the acceptance of refugees. Unsurprisingly, this is also reflected in German responses to human trafficking – unlike in the UK, protections for victims of trafficking are primarily directed at third country nationals.

In the context of sex work, Germany has a long tradition of tolerating prostitution, including in brothels, as a 'necessary evil', in contrast to the British notion of prostitution as a threat to society.¹ Since 2001 prostitution is legal in Germany, which should lead to a treatment of human trafficking for sexual exploitation as part of human trafficking for labour exploitation. As this chapter demonstrates, this is not necessarily the case.

¹ On historical differences, see e.g. Rebecca Pates, 'Liberal laws Juxtaposed with Rigid Control: an Analysis of the Logics of Governing Sex Work in Germany' (2012) 9 *Sex Res Soc Policy* 212; Ilya Hartmann, *Prostitution, Kuppelei, Zuhälterei: Reformdiskussion und Gesetzgebung seit 1870* (Berliner Wissenschaftsverlag, 2006); for historical and contemporary reasons for the different developments in Germany in comparison with other European countries, see e.g. Eva-Maria Euchner *Prostitutionspolitik in Deutschland* (Springer, 2015).

Even though the German approach to prostitution leads to access to some labour rights and labour protections for sex workers in Germany, which ultimately also benefits women exploited in human trafficking for sexual exploitation, German legislation and policymaking nonetheless still conflates human trafficking and prostitution in ways similar to the UK approach. Similar to the recent changes in legislation in the United Kingdom, German law is currently undergoing changes in order to improve the situation of victims of trafficking and to implement its obligations under the Council of Europe Convention and the EU Directive, both for sexual exploitation and with regard to labour exploitation. Additionally, the so-called 'Prostitute Protection' draft bill calls for new ways to regulate sex work in Germany, some of which are based on fears of exploitability under the current system.

The first part of this chapter provides an overview of German counter-trafficking provisions over the last three decades. As the first human trafficking provisions in German law were established in the 1990s, prior to the 2000 UN Trafficking Protocol, German law has a slightly different definition of human trafficking. The focus in the German definition of human trafficking is on exploitation, the effect of which I will explore in my analysis of the human trafficking paragraphs in the German criminal code.

Unlike the recent development in English law through the Modern Slavery Act 2015, German legislation does not have one single Act on human trafficking. Instead, human trafficking is dealt with under different laws, with the human trafficking offences covered in the Criminal Code (Strafgesetzbuch, StGB) and provisions for civil protections under different legislation, mainly the Residence Act (Aufenthaltsgesetz, AufenthG), the Victim Compensation Act (Opferentschädigungsgesetz, OEG), The Act to Combat Illegal Employment (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG).

The second part of this chapter analyses the German legislation on prostitution and its unique interplay with human trafficking legislation. Since 2001, German law has formally acknowledged sex work as work through the Prostitution Act (Prostitutionsgesetz, ProstG) and should therefore make no distinction between exploitation in sex work and other forms of labour exploitation. As the analysis of

the existing legislation shows, this implementation has worked well in some areas, but is patchy in others. The 2001 Prostitution Act also has caused controversy over the legalisation of prostitution as a factor in increased human trafficking. As a result, there is currently a debate over a draft bill entitled the 'Bill for the Regulation of the Sex Industry and the Protection of Persons engaged in Prostitution,'² which aims to improve the situation of exploited sex workers and victims of human trafficking. However, its narrow focus on sex workers and brothel owners singles out women in the sex industry as potential victims of human trafficking, and does so in a manner which has received criticism from sex workers, outreach workers and academics.

In a third and final step, this chapter analyses victims' rights in the context of these laws, as well as in the light of the suggested changes to the existing legislation through the government's proposed changes to the trafficking paragraphs, the government's 'draft bill to reorder the right to remain and the end of stays' and the 'Prostitute Protection bill.'

8.2) The German Counter-Trafficking Legislation

German criminal law has had a paragraph prohibiting human trafficking since 1973 (§181 StGB), long before the UN Trafficking Protocol. In 1992, this paragraph was changed into two separate offences, human trafficking (§180b StGB) and severe human trafficking (§181 StGB). Like in most other countries' legislation, these versions of the human trafficking paragraphs focussed on trafficking into prostitution, which corresponded with the international definition of human trafficking for sexual exploitation existent at the time.³ The limits of this definition are also evident in the classification of the original version of the human trafficking paragraphs within the criminal code: both paragraphs were contained in the 13th section of the German criminal code, which deals with crimes against sexual self-determination. Furthermore, both paragraph §181 and §180b StGB,

² Manuela Schwesig, Entwurf eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen (ProstSchG) 2015 (from here on '2015 Prostitute Protection Draft Bill').

³ Deutsches Strafgesetzbuch (StGB) Version 1973-1992; StGB Version 1992-2005.

especially §180b have to be seen in connection with §180a, the only remaining provision. Said paragraph criminalises the exploitation of prostitution and states ‘Someone who professionally owns or manages a business, in which persons engage in prostitution and in which these persons are in personal or economic dependency, will be punished with imprisonment of up to three years or a fine.’

The 1992 changes to the original human trafficking legislation happened in a context of increased border control and a reduction of options to legalise irregular immigrant status in the 1990s. While the importance of border security increased, so did the public awareness of human trafficking and smuggling. Public and government perception of human smuggling and human trafficking mirrored the general definitions of smuggling as a crime of migrants and smugglers against the state and trafficking as a crime against the trafficked persons as well as against the state. Whereas such an approach to the differences between smuggling and trafficking constitutes a – possibly dangerous – simplification, in the case of Germany it allowed for pragmatic collaborations between NGOs/outreach centres on the one side and border control agencies and law enforcement on the other.⁴

Following the shift in definition, or rather the clarification of what human trafficking entails, in the 2000 UN Trafficking Protocol and the subsequent European Union’s 2002 Council Framework Decision on combating trafficking in human beings, Germany changed its definition of human trafficking. The current paragraphs on human trafficking were formulated in the 37th amendment to the German Criminal Code (StGB) in 2005 and now include trafficking for labour exploitation. Some provisions against labour exploitation were already codified in German law, albeit in different legislation and outside the Criminal Code.⁵ According to the amended Criminal Code, the three main provisions are §232 StGB Human Trafficking for the purpose of Sexual Exploitation, §233 StGB Human Trafficking for the purpose of Labour Exploitation and §233a StGB Support and Encouragement of Human trafficking.

⁴ Norbert Cyrus and Dita Vogel, ‘Social Working of Criminal Law on Trafficking and Smuggling in Human Beings in Germany’ in Elspeth Guild and Paul Minderhoud (eds), *Immigration and Criminal Law in the European Union* (Martinus Nijhoff 2006) 119.

⁵ Katja S Ziegler, ‘The Legal Framework of Trafficking and Smuggling in Germany: Victim Protection Emerging from Witness Protection?’ in Elspeth Guild and Paul Minderhoud (eds), *Immigration and Criminal Law in the European Union* (Martinus Nijhoff 2006) 70.

Paragraph 232 essentially defines human trafficking for sexual exploitation, all requiring the exploitation of a person's predicament, including the particular vulnerability of being in a foreign country,

- I. Inducing someone to engage in or continue to engage in prostitution,
- II. Engage in exploitative sexual activity with or in the presence of the offender or a third person
- III. To suffer sexual acts on one's person by the offender or a third person
- IV. For persons under the age of twenty-one the predicament factor is irrelevant, making it particularly easy to charge traffickers for leading under twenty-one year olds into prostitution

The focus of the offense is on the aim of the perpetrator to force the victim to *take up or continue prostitution*, whereas the result is irrelevant. Paragraph 232.2 is intended to cover other types of economic exploitation, such as in the production of pornography, peepshows and forced marriages. However, the case law indicates that the offence is very difficult to prove, as 'it cannot be proven with sufficient probability that the victim did not voluntarily pursue prostitution, especially when the woman was already a prostitute. Often, the perpetrator is instead tried for pimping, the exploitation of prostitutes, or human smuggling.'⁶

The trafficking paragraph §232 StGB is insufficient for the effective combatting of the problem, as it is phrased in a manner that is too complex. The requirements to fulfil the elements of the offense do not reflect the reality of the phenomenon. For example, the element of compulsion is hard to prove, even in situations of severe exploitation.⁷ The focus on intent creates a problem when traffickers recruit women in order to provide brothel keepers with the intent of receiving a commission fee. Their intent focuses on the commission and they may be indifferent to the women working as prostitutes, dancers or waitresses. Thus, they lack the required intent to force the women into *exploitative sexual acts*. As negligence alone does not constitute a trafficking offence, often the traffickers cannot be tried and the final exploiters are instead tried for pimping or exploitation of prostitutes.⁸

⁶ *ibid* 93–94.

⁷ Heike Rabe, 'Stellungnahme Umsetzung Der EU-Menschenhandelsrichtlinie' (Deutsches Institut für Menschenrechte 2012) 3.

⁸ Ziegler (n 4) 96.

Trafficking for sexual exploitation is punished with a mandatory prison sentence of a minimum of six months up to ten year. The minimum sanction is on the same level as for pimping.⁹ Harsher penalties apply in case of the use of force (§232(3.2) StGB, §232(4.1) StGB), serious harm or deception §232(4.1) StGB, as well as in cases when the victim is a child (§232(3.1) StGB) or the crime is committed by organised crime (§232(4.2) StGB).

Paragraph 232(1.2) StGB contains a special provision for under 21 year olds. Someone, who brings a person younger than 21 into prostitution or encourages her to continue working in prostitution or to perform sexual acts, is punishable regardless of their vulnerability or financial straits.¹⁰ This is in accordance with international agreements, but stands in opposition to the status of prostitution in Germany. The age of majority in Germany is 18 and, as prostitution is legal in Germany, a person who has reached the age of majority should generally be free to engage in prostitution. However, if the person is induced or encouraged to take up or continue work as a prostitute or commit any other act described in §232(1.1) StGB, then §232(1.2) StGB shall apply and such an act will be considered human trafficking.¹¹ This discrepancy echoes other types of patriarchal legislation, which banned women from certain occupations or working conditions, e.g. from night work, claiming to protect them from harm by limiting their choices.¹² Such legislation has been revoked in most other areas, as it is against the equality principle. The effects of such unequal treatment are particularly harshly felt by young migrant women who have very little other employment opportunities. The existence of §232(1.2) may effectively prevent them from migrating or from being able to seek assistance to engage in prostitution upon their arrival in Germany.

As a positive effect of the 2005 amendment, in addition to the introduction of the crime of trafficking for labour exploitation, the definition of human trafficking as

⁹ *ibid* 95.

¹⁰ Dorothea Czarniecki and others, 'Prostitution in Deutschland - Fachliche Beratung Komplexer Herausforderungen' (KOK 2014),13.

¹¹ StGB Version 1992-2005 (n2); Regina Kalthegener, 'Legal Basis of the Phenomenon Trafficking in Women for Sexual Exploitation', *Trafficking in women in Germany* (KOK 2008) 35.

¹² Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd Revised edition, Duke UP 2012) 431.

such experienced a shift. The new paragraphs on human trafficking are no longer contained within the 13th section of the StGB, crimes against sexual autonomy, but instead are placed in the 18th section, offences against personal liberty. This change is not only significant because it means a move away from the focus on prostitution and an inclusion of (other) types of labour exploitation in the definition, in line with international standards. Additionally, it demonstrates a shift in what is considered worth protecting from human trafficking, namely not only the personal and sexual integrity of the person, but also their health, their general agency and their income/wealth. However, the separation between the trafficking for sexual exploitation and the trafficking for labour exploitation clauses creates unnecessary parallel structures, which also signifies a contradiction of the legislator's decision to regulate prostitution as work. Such regulation should mean that exploitation in the sex industry also constitutes labour exploitation, making the distinction unnecessary.¹³

The current German legislation is in at odds with the UN Trafficking Protocol, as Article 3 of the UN Protocol mentions all forms of human trafficking in one clause. Furthermore the crimes of human trafficking for sexual exploitation in §232 and for labour exploitation in §233 are also separated from the support for or encouragement of human trafficking (§233a), whereas international law subsumes all stages of the trafficking process, including the encouragement, as human trafficking.

The German government proposed alterations to the human trafficking paragraphs in April 2015, in order to comply with their obligations under the EU Trafficking Directive.¹⁴ However, these changes are minimal – the draft legislation mainly aims to include human trafficking for begging and for committing crimes, such as theft or fraud, as well as human trafficking for organ trade. Additionally, it increases the maximum penalties under §232, §233 and §233a StGB in cases with victims under the age of 18, as well as in cases where the victim's life was risked through culpable negligence.

¹³ Rabe (n6) 4.

¹⁴ Bundesregierung Deutschland, Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2011/36/EU des Europäischen Parlaments und des Rates vom 5. April 2011 zur Verhütung und Bekämpfung des Menschenhandels und zum Schutz seiner Opfer sowie zur Ersetzung des Rahmenbeschlusses 2002/629/JI des Rates, Drucksache 18/4613 2015.

Under the proposed bill, human trafficking for begging and fraud, as well as human trafficking for organ trade are subsumed under the trafficking for labour exploitation clause, whereas human trafficking for sexual exploitation is still dealt with under a separate clause. This separation maintains the separation of human trafficking for sexual exploitation and all other forms of human trafficking. Considering that sex work is legal in Germany and can be both a form of employment and of self-employment, this discrepancy is not explicable. Indeed, the bill has been criticised by experts, including the KOK (the German umbrella organization of advice centres and NGOs against trafficking) and the Juristinnenbund (the German federation of female lawyers) for failing to clarify the situation and for maintaining double structures.¹⁵

The bill has been proposed in order to comply with the EU Trafficking Directive and therefore only fixes issues that would risk Germany's non-compliance. As the deadline for implementation of the Directive has already passed on 6th April 2013, this can be seen as a minimum fix. Even the draft law itself states that this bill only forms a first step for a wide-reaching reform of human trafficking legislation in Germany. The government plans a reconceptualization of the §§232ff StGB, together with 'further penal and non-penal changes to improve the situation of victims of trafficking. This reconceptualization will also take the upcoming changes to legislation on prostitution into account.'¹⁶ The government's approach has been criticised for only meeting the EU Directive's minimum standards, rather than creating important change in anti-trafficking legislation. This approach is partly due to the fact that the government coalition has established a strong link between the changes in counter-trafficking legislation and changes in prostitution-related legislation. This link is not only disputable as such, but has also effectively blocked progress on trafficking legislation, as the coalition parties disagree on aspects of the prostitution legislation.¹⁷

¹⁵ KOK - Bundesweiter Koordinierungskreis gegen Menschenhandel e.V., 'Stellungnahme zum Referentenentwurf des Bundesministeriums für Justiz und Verbraucherschutz: Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2011/36/EU des Europäischen Parlaments' (KOK, 11 November 2014); 'Deutscher Juristinnenbund e.V. - Stellungnahme 14-16 / Zur Reform Der Strafvorschriften Des Menschenhandels, Der Verbesserung Des Schutzes Der Opfer von Menschenhandel Und Zur Regulierung Der Prostitution' <<http://www.djb.de/st-pm/st/st14-16/>>

¹⁶ Bundesregierung Deutschland (n13) 6.

¹⁷ Simone Schmollack, 'Kommentar Zwangstest Für Prostituierte: Sex, Lügen Und Idiotentests' *die tageszeitung* (6 2015) <<http://taz.de/Kommentar-Zwangstest-fuer->

8.2.1) The Definition of Trafficking in German Law

The German definition of human trafficking is interesting in that it, like the UK definition, has a slightly different focus than the international definition. The definition in the UN Trafficking Protocol is threefold: it includes an act, such as the recruitment, transport or receipt of a person by the means of e.g. use of force, deception or coercion and a purpose, the exploitation of the trafficked person. The UK definition focuses on the act, particularly on the element of travel, with the purpose and the means taking a secondary role.

Meanwhile, the German definition focuses on the purpose of exploitation, under consideration of the means, and with a lesser focus on the act. Such an approach can be interpreted as positive, as it focuses on vulnerability to exploitation, rather than on movement and therefore includes a vulnerability that exists post-arrival, it can also be problematic as it ignores the effect of structures in the country of destination in creating such vulnerability.

However, one of the two categories for vulnerability for exploitation is the *vulnerability resulting from being in a foreign country*, a situation of helplessness which includes the fear of expulsion and deportation for those who are irregularly residing in the country, as well as the fear of being ostracised upon the return to the home country.¹⁸ The latter is particularly relevant for trafficked persons from countries with very traditional family structures, in which having been trafficked into the sex industry can mean a loss of honour. The category is a *situation of predicament*, which includes 'situations of severe economic need, or personal emergency situations like, lack of accommodation, illness, unemployment or divorce, all of which lower the victim's resistance to attacks against sexual self-determination.'¹⁹ However, as Ziegler states, there have been cases in which a woman was considered not to be helpless, if she had 'worked as a prostitute outside Germany or when she has worked outside prostitution within Germany,

Prostituierte!¹⁵203237/>; Sabine Menkens, "Idiotentest" Für Prostituierte Ist Vom Tisch' *Welt Online* (26 November 2015) <<http://www.welt.de/politik/deutschland/article149324203/Idiotentest-fuer-Prostituierte-ist-vom-Tisch.html>>; 'Prostituierte: Schutz und Pflicht' *sueddeutsche.de* (26 November 2015) <<http://www.sueddeutsche.de/politik/prostituierte-schutz-und-pflicht-1.2756192>>.

¹⁸ Ziegler (n4) 91–92.

¹⁹ *ibid.*

even though she was in 'dire straits' financially'.²⁰ This clearly shows the effect of the idealised victim category in perceptions of human trafficking which ignores the potential for victimization of those who have voluntarily engaged in prostitution at any point in their lives and which ignores the lived realities of sex workers, particularly migrant sex workers. As the representative from the German Sex Workers Rights Organisation states:

If you meet the police's idea of what a victim of trafficking looks like, then you get all the help and services. But if you don't, if for example the situation is that you are treated badly and the brothel owner keeps too much money, they don't know what to do with it.²¹

Equally, the representative from one of the feminist advisory centres argues:

It is not our opinion that you can only become a victim of human trafficking if you did not know what work you were going to do. We do have cases of women who worked as prostitutes in their country of origin and came to Germany voluntarily and still ended up in a situation of human trafficking.²²

Furthermore, Germany, like the UK, has a trafficking narrative which assumes a sequence of illegal entry and subsequent trafficking, with little evidence for this assumption.²³ Such an approach makes it easy to call for stronger border control to protect people from their likely fate, without acknowledging the link between strong borders and the likelihood for smuggling and trafficking. A trafficking narrative that involves voluntary, irregular border crossings can also reduce empathy for the victims and thus create a problematic victim category, which allows only for very passive victims to be worthy of rescue.

The German media presentation plays into this victim category: The portrayal of the women trafficked into the sex industry is usually one of a passive victim, with the traffickers as the active party and law enforcement as their equally active counterparts, making it a struggle between criminals and public authorities.²⁴

²⁰ *ibid* 92.

²¹ Interview with German Sex Workers Rights Organisation (Berlin, 5 May 2014)

²² Interview with German Feminist Organisation A (Berlin, 6 May 2014)

²³ Cyrus and Vogel (n3) 129.

²⁴ *ibid*.

The representative from a faith-based organisation says the following about the difficulty of reconciling the ideal of the passive victim with the women she meets:

The victim category is extremely difficult. [...] The women we work with are incredibly strong women. Some of them went through extremely difficult situations. Some of them were trafficked through the desert in Africa and experienced so much abuse and violence and yet they are here. They are survivors. They are not just passive victims. They are active human beings. We find it problematic when they are portrayed as those women with a black eye in a basement somewhere.²⁵

Nonetheless, in the dominant narrative both active parties are perceived as male, with the passive party being female. Additionally, the trafficked person in this narrative only remains good, and thus worthy of protection, as long as she stays in her category of passive victimhood.²⁶ As soon as she asserts agency over her migratory project or her choice of profession, her status changes from victim to accomplice. However, even if she fits the narrative of the passive victim, the hyper-feminization of this category may also render her untrustworthy as a witness in criminal proceedings.²⁷

Victims of human trafficking for labour exploitation are also affected by distrust regarding their witness statements, particularly if their immigration status is irregular. However, their credibility is not linked to the perceived immorality of their work and to whether or not they were aware of the industry they were going to be exploited in. The concept that someone becomes a questionable character by working in a specific industry is reserved for sex workers.

²⁵ Interview with German Faith-Based Organisation (Berlin, 6 May 2014)

²⁶ Diana Tietjens Meyers, 'Two Victim Paradigms and the Problem of "Impure" Victims' (2011) 2 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 255.

²⁷ See also the discussion of migratory agency in Chapter 2 and the idealized victim category in Chapter 4.

8.3) Victims' Rights and Victim Protection

Like in most European jurisdictions, the German calls for changes in trafficking legislation and, as I will discuss later, prostitution legislation, are based on a desire to better protect victims. Both law enforcement and NGOs working with victims of trafficking see a need to improve the victim protection services. First, the majority of trafficked persons' rights are tied to their official victim status, which is usually granted through law enforcement authorities.²⁸ This approach is not predetermined through legislation, but is the established practice in most federal states. According to §59 Sect.7 AufenthG the Border Agency determines whether there are concrete indicators for human trafficking and, upon a positive decision, grants leave to remain for at least 3 months, which is in line with the recovery and reflection period in the CoE Convention and the EU Directive. In practice this only happens following recommendations from police or prosecution.²⁹ At the same time, there is a significant number of victims who only disclose their situation to advisory centres and are therefore excluded from certain rights and services, which fails to meet the requirements of Art.10(2) of the CoE Convention, which states:

Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. [...] ³⁰

While the national referral mechanism in the UK has been criticised for the conflict of interest of the border agencies involved, German NGOs see it as a good alternative to the current German system, as it involves NGOs as 'first responders'. In the UK, first responders refer potential victims of trafficking to the relevant government agencies, which have to determine whether or not a person is a probable victim of trafficking.³¹ If the decision is positive, the person is granted the reflection and recovery period. According to NGOs, the determination of 'victim status' needs to be possible through agencies separate from law enforcement. According to the KOK and the German Human Rights

²⁸ Heike Rabe and Naile Tanis, *Menschenhandel Als Menschenrechtsverletzung. Strategien Und Maßnahmen Zur Stärkung Der Betroffenenrechte* (Schwabendruck 2013) 9.

²⁹ *ibid* 20.

³⁰ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report 2005 [CETS No. 197], ratified by Germany on 19 December 2012.

³¹ Rabe and Tanis (n27) 21.

Institute, advisory centres, which have cooperation agreement with the law enforcement authorities, should become first responders, with the Border Agency granting the reflection and recovery period on the basis of the centres' suggestion.³² Additionally, some states lack the relevant institutions and law enforcement are insufficiently informed about the existence of specialist advice centres, which has led to only a partial implementation of the reflection and recovery period.³³ Positively, there has been improved cooperation between police and the Border Agency (Ausländerbehörde), ensuring that identified victims of human trafficking can enjoy their recovery and reflection period instead of being subjected to returns to their countries of origin.³⁴ The issue of border agency involvement and their conflicts of interest with regard to victims of trafficking have also been raised in the UK, however it has not yet been resolved.³⁵

8.3.1) Leave to Remain

After the reflection and recovery period, the legal status of victims of trafficking is unclear, as trafficked persons *may* be exempted from removal from the territory. However, this regulation is discretionary and thus leaves victims in a situation of uncertainty, as they cannot know whether or not law enforcement will grant the discretionary leave to remain.³⁶ Similar to the situation in the UK, discretionary leave to remain is usually tied to witness status, for which trafficked persons do not only need to be willing to testify, but also have to be able to do so - and their testimony needs to be useful to the prosecution. Trafficked persons who are unwilling or unable to testify, or whose testimony is irrelevant to the authorities, have to leave the country, unless they can make claims on the basis of exceptional personal circumstances.

German residence law is in accordance with the EU Directive's requirements.

³² *ibid* 25.

³³ Cyrus and Vogel (n3) 131.

³⁴ Bundesregierung Deutschland, 'Elfter Bericht Der Bundesregierung über Ihre Menschenrechtspolitik' (Deutscher Bundestag 2014) Government report 18/3494 36–37.

³⁵ UK Home Office, 'Review of the National Referral Mechanism for Victims of Human Trafficking' (2014).

³⁶ Cyrus and Vogel (n3) 132.

However, there are still human rights needs to be met, as the German law gives leave to remain only for cooperation in criminal proceedings, not due to their personal situation (the 'Italian model', which I discuss in greater detail below).³⁷ NGOs and outreach centres criticise that leave to remain is not tied to status as a trafficked person, but instead to co-operative behaviour in prosecution and trials, and the quality of testimonies. At the same time government agencies are worried that extended rights to residency lead to abuse.³⁸ Already the victim-witness category currently in place is seen as an opportunity for abuse, as the victims often do not come forward as witnesses after having been cared for by advice centres or specialised shelters. Countering this view, advice centres state that victims are unable to come forward as witnesses, as they do not want their community to know about their involvement in sex work and have no definitive perspectives to stay in Germany. Additionally, they are afraid of their families being the victims of revenge by the perpetrators in their home country.³⁹

While the current debate shows the government's fears of influx of irregular immigrants claiming to be victims of trafficking, a 10-year old report from the Federal Crime Agency (BKA) states:

The greater part of the victims of traffickers entered the country legally. Therefore, border-focussed controls as a rule do not have much effect. In particular the victims from the countries that recently accessed the European Union and from countries associated with the European Union predominantly enter to the greater part legally.⁴⁰

Thus, the worry regarding the abuse of victim status has only ever been about a small percentage of trafficked persons (at least since the EU enlargements), making the focus on border control and irregular migrants a relatively futile attempt to approach the problem.

Nonetheless, victim protection is still mostly linked to public interest and immigration is not seen to be in the interest of the public unless it serves the purpose of prosecuting perpetrators who are linked to organised crime. As such

³⁷ Rabe (n6) 14.

³⁸ Rabe and Tanis (n27) 10.

³⁹ Cyrus and Vogel (n3) 131.

⁴⁰ Bundeskriminalamt (BKA), 'BKA Bundeslagebild Menschenhandel 2004'.

public interest ceases when a case ends, victim protection is usually short-term witness protection, rather than long-term residence permits. Due to this situation, there is often no sufficient incentive for women to cooperate with the police and public prosecutors.⁴¹ Under current German law, the duration of a tolerance permit is normally limited to one year, being renewable when criminal proceedings against the perpetrator persist or if the trafficked person is at risk in their country of origin, which is often hard to prove. As a rule, the public interest ceases with the termination of criminal proceedings against the traffickers.⁴²

Such short residence permits decrease trafficked persons' wish to act as witnesses, as they have very little hope to build a permanent life in Germany. Whereas witnesses waiting for a trial are theoretically allowed to work, they are often unable to do so. The short-term residence permits make employment very unlikely, as it is very difficult to find someone willing to employ them under these uncertain conditions.⁴³ The uncertainty of residence permits that are prolonged for 6-months or 1-year periods does not allow for a sense of perspective for victims.⁴⁴ Particularly if they are unable to find work, waiting for criminal proceedings, which can often take up to two years to start, means they are essentially losing two or three years of their lives, as they cannot create a new life in Germany without the perspective of being allowed to stay. This situation often makes it undesirable for victims to become witnesses.

An example of improving the situation for victims, and as a result, improving the prosecutions, which is one of the foremost interests of governments regarding human trafficking, is the Italian case. In Italy, a trafficked person needs to provide law enforcement with simple information to let them verify that they were trafficked, similar to the procedures for the recovery and reflection period. If successful, victims of trafficking obtain a right of residence for initially 6 months, which can be renewed if the trafficked person shows a willingness to integrate

⁴¹ Ziegler (n4) 110.

⁴² *ibid* 102.

⁴³ Nivedita Prasad, 'Trafficking in Human Beings for the Purpose of Sexual Exploitation', *Trafficking in women in Germany* (KOK 2008) 71.

⁴⁴ Rabe and Tanis (n27) 30.

herself into society. The permit can become permanent if the trafficked person has a steady job.⁴⁵

This not only helps victims' willingness to act as witnesses, as they have a chance to build a life there, but it would also pre-empt some of the problems currently experienced in German court proceedings. The accused often claim that witnesses are only testifying to gain a residence permit. If all trafficked persons had a residence permit regardless of whether or not they want to act as witnesses, defence attorneys would be unable to use this line of argument.⁴⁶ This is particularly relevant for victims of trafficking for sexual exploitation, as, similar to rape victims, their credibility is often challenged.⁴⁷

Even under current circumstances, the claim that trafficked persons would make false claims in order to gain a residence permit is unfounded, as there are few opportunities for trafficked persons to achieve residency. There is a possibility for an extension of leave to remain, according to Section 25 § 4, Sentence 2 of the Residence Act, if 'departure from the federal territory would constitute exceptional hardship for the foreigner due to special circumstances pertaining to the individual case concerned', but this does not yet include individual physical or psychological suffering caused by the victimization experienced as a trafficked person. Instead, extension is usually only granted if trafficked persons are at risk due to having given a witness statement or if they have to fear severe stigmatization in the country of origin due to having engaged in prostitution.⁴⁸ Such direct endangerment is difficult to prove, as advisory centres and the police have no concrete evidence for potential risk, whereas the Federal Office for Migration and Refugees (BAMF) requires such concrete evidence for its decisions. The situation of trafficked persons is at odds with the normal human rights considerations, which apply for example to asylum seekers. Trafficked persons are not usually victims of state violence, the only claim they can make is that governments fail to protect them from threats from individuals. If such a claim is successful, their risk is reassessed annually, until, after eight years, the

⁴⁵ Prasad (n42) 73.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ Rabe (n6) 18.

trafficked person becomes entitled to permanent residence.⁴⁹

A recent alteration of the Residence Act changes the provision to grant leave to remain for victims of trafficking after criminal proceedings from a 'can be' provision to a 'should be' provision.⁵⁰ This means that long-term leave to remain post-trial will become the norm, rather than the exception for victims of trafficking. Leave to remain will be granted for humanitarian or personal reasons or for reasons of public interest.⁵¹

While this is generally seen as a positive step, opposition parties and NGOs question whether or not this change suffices.⁵² Opposition parties propose to instead change the provision into a 'is to' norm, which would mean that leave is automatically granted post- criminal proceedings. Additionally, both NGOs and the opposition have lobbied to tie leave to remain to victim status, rather than ability or willingness to be a witness in prosecution.

8.3.2) Compensation for Harm – a Victim's Right

Theoretically, victims of human trafficking 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 prison sentence, or for people whose removal has been halted for de jure or de facto reasons (§60a 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

⁴⁹ Prasad (n42) 71.

⁵⁰ Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) 2015, §25(4a).

⁵¹ *ibid.*

⁵² Heike Rabe, 'Stellungnahme Zu Den Geplanten Änderungen in §25 Abs. 4a, § 29 Aufenthaltsgesetz' (Deutsches Institut für Menschenrechte 2014).

only have access to limited compensation, such as a basic pension and medical costs.⁵³

Victims of trafficking are explicitly included in the scope of the Victim Compensation Act, via a Guideline of 5 March 2001.⁵⁴ However, in practice the Act is rarely applied to trafficked persons, for a number of reasons. Firstly, the legislation only applies to cases of direct violence against the victim, which has to be proven in criminal proceedings against the perpetrator.⁵⁵ The power of disposition gained by the perpetrators often happens through the means of violence, deception and threat, but these are either difficult to prove or irrelevant for the applicability of the Victim Compensation Act.⁵⁶ Furthermore, 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 regularised beyond the recovery & reflection period if they are needed as witnesses for criminal law proceedings.⁵⁷ 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 compensation for similar violence, for example in rape cases.

Courts' decisions about compensation for human trafficking for sexual exploitation are usually decided in criminal law cases, whereas compensation payments for rape are usually made in civil proceedings. It is significant that the compensatory sums in human trafficking cases are usually lower than the sums in comparable rape cases, even though the levels of compensation in rape cases are also generally considered too low.⁵⁸ This is interesting and worrying on several levels. If the deciding factor in separating trafficking for sexual exploitation from trafficking for labour exploitation is the violation of sexual self-determination, this should result in compensatory sums that are comparable to rape cases, as in both situations the sexual self-determination of the victim is affected.

⁵³ Katrin Inga Kirstein, 'Entschädigung nach dem Opferentschädigungsgesetz und der gesetzlichen Unfallversicherung' (Deutsches Institut für Menschenrechte 2013) 27–28.

⁵⁴ Ziegler (n4) 109.

⁵⁵ Rabe (n6) 6.

⁵⁶ Rabe and Tanis (n27) 42.

⁵⁷ Rabe (n6) 7.

⁵⁸ Rabe and Tanis (n27) 39–40.

Considering that sexual violence at the hands of the trafficker is often not only not compensated for, but is neglected in human trafficking cases, the problem with the violation of sexual self-determination seems to lie instead in its commercial exploitation through prostitution. However, such a differentiation of exploitation on a personal or commercial level only makes sense if the real crime is the public sexual availability of the trafficked person, not the impact on her sexual self-determination. Thus, the lower compensation payments for victims of human trafficking could indicate both that they are deemed to fall into the 'unrapeable prostitute' category and that the trafficking for sexual exploitation category is more an expression of a worry about commercialised sex than of worry about sexual self-determination. Indeed migrant sex workers make exactly the claim that their sexual self-determination is constantly challenged when they are told that they are not sex workers with agency, but victims of trafficking.

8.3.3) Compensation for Wages Not Received - a Labour Right

Compensation for wages is even rarer than compensation for harms suffered, even though there is an impressive body of legislation on the 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 compensation for wages between victims of trafficking for labour exploitation and victims of trafficking for sexual exploitation. Human trafficking is not understood as part of a greater phenomenon of exploitation, in which exploitation happens to different degrees, depending on the vulnerability of the worker. With regard to human trafficking for labour exploitation, German law also includes wage usury under §291 StGB and the employment of migrants under unfavourable conditions (§10 Sec1, §11 Arbeitnehmerüberlassungsgesetz) as alternative crimes. These paragraphs only apply to irregular migrants, who, through their status, are under unique pressures and are particularly vulnerable to exploitation. However, the exclusion of German citizens and legally employed migrants, who have to prove compulsion or helplessness under either §233 or §291 StGB instead, creates unequal treatment for similar levels of exploitation.⁵⁹

⁵⁹ Rabe and Tanis (n27), 17–20.

Foreign victims of wage usury can also make compensation claims under the Residence Act, whereas women in exploitative working conditions in the sex industry can only claim exploitative prostitution, which normally leads to compensation for harm rather than for unpaid wages. With the implementation of the 2009 EU Sanctions Directive, wage compensation claims have been simplified under German law and penalties for employers have increased.⁶⁰ 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 work relationship lasted (at least) three months. It is further assumed that the remuneration is in line with customary remuneration, unless the employer had agreed lower or higher remuneration of a permissible level (§98a(2) AufenthG). As a general rule, a 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 charities often help with exploited workers wage claims and civil law court cases or out of court settlements.⁶¹ This obviously does not apply to industries that are not unionised, which includes sex work. Setting a benchmark for a normal 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, given the lack of witnesses and their credibility being routinely challenged. If it were assumed that they were employed for at least three months, serving an average amount of clients at an average fee, they could at least receive some compensation for their labour. Additionally, the exclusion of sex workers from wage usury legislation seems unjustifiable in a country in which prostitution is a legally recognised form of labour.⁶²

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.

⁶⁰ Rabe (n6).

⁶¹ Rabe and Tanis (n27), 35.

⁶² *ibid* 18.

BGB).⁶³ Again, this has not been applied to sex workers even though the possibility for a dependent employee relationship in prostitution exists in German law.⁶⁴

Thus, the German criminal code on exploitative labour conditions is incoherent and fails to adequately protect victims' rights.⁶⁵ The separation of the sexual exploitation and labour exploitation paragraphs creates parallel structures and contradicts the 2001 legislation which regulated prostitution as an occupation, with the possibility to pursue prostitution as a form of dependent employment, which makes prostitution labour.⁶⁶

In addition to the different standards of labour rights for trafficked persons in the sex industry as opposed to trafficked persons in other industries, 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 monies, as there are no assets recovered from the perpetrators.⁶⁷ Whereas exploited workers and victims of human trafficking for labour exploitation can receive compensation under §98a Sect.4 AufenthG, the same compensatory liability does not exist for sexual exploitation.⁶⁸ Worse, according to a Federal Crime Agency (BKA) report, only two to seven per cent of prosecutions from 2002 to 2011 for human trafficking for sexual exploitation led to a recovery of assets from the perpetrators.⁶⁹ 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, under forfeiture paragraphs §§73, 73a and 73d StGB.⁷⁰

⁶³ Andrea Würdinger, 'Legal Basis of the Phenomenon Trafficking in Women for the Purpose of Exploitation of Labour', *Trafficking in women in Germany* (KOK 2008) 56.

⁶⁴ Rabe and Tanis (n27).

⁶⁵ *ibid.*

⁶⁶ Rabe (n6) 3–4.

⁶⁷ Kalthegener (n10).

⁶⁸ Rabe and Tanis (n27) 36.

⁶⁹ *ibid* 29.

⁷⁰ *ibid* 44; Kalthegener (n10).

8.4) The German Prostitution Law and Victims of Trafficking for Sexual Exploitation

As in other countries, the human trafficking debate in Germany is closely linked to the debate on prostitution. Working conditions in the sex industry and the exploitability of women in sex work are often cited as the cause for human trafficking, a scrutiny other occupations that have high numbers of trafficking victims, such as domestic work or construction work, do not have to deal with.

In Germany the debate is unique to the degree that prostitution was never illegal and since the 2002 Prostitution Act (Prostitutionsgesetz, ProstG) it is no longer considered an offense against good morals. However, recently there has been a backlash against the Prostitution Act and there are attempts to further regulate the sex industry through a 'Prostitution Protection Bill', which is currently still a draft bill.

In the following I will evaluate the effects of the 2002 Prostitution Act on women in the sex industry, particularly on migrant women and other groups vulnerable to exploitation, followed by an overview of the proposed Prostitute Protection Bill.

The 2002 Prostitution Act was passed with the main goal of improving the situation of sex workers by abolishing the applicability of the indecency paragraph of the Bundesgesetzbuch (BGB), which states '(1) A transaction which violates the norms of decency, is void'⁷¹ to prostitution. Prior to the passing of the Act, prostitution was legal, but the 'encouragement of prostitution' in bars and brothels was illegal (formerly §180a StGB), which 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 who provided superior accommodation were at an increased risk of being prosecuted under §180a StGB, whereas brothels with relatively bad conditions were usually safe from such accusations. Furthermore, as prostitution was considered indecent under §138(1) BGB, sex workers had no possibility to claim their wages from non-paying clients, as an indecent transaction mean an invalid transaction.

⁷¹ Deutsches Bundesgesetzbuch (BGB), §138, Section 1

The main intention of the 2002 Prostitution Act was thus to strengthen sex workers' rights vis-à-vis their employers and customers and to improve their working conditions. The law followed 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. Their lobbying work resulted in challenges to the indecency assumption and whether or not it was out-dated.

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.⁷² Equally, a constitutional state valuing personal freedom cannot confront the risks, disadvantages and problems linked to prostitution by pushing it into a grey zone through repressive measures. [...] At the same time it is the duty of all societal institutions to evaluate the effect of the commercialisation of sex and its potentially problematic results on gender equality. Particularly boys and men need to be sensitised for a value-based discussion regarding their responsibility in this context.⁷³

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 law was to improve the situation of sex workers, there has been harsh criticism that the law may have benefited former pimps more than sex workers.⁷⁴ Indeed, keepers of non-exploitative brothels may be the main benefactors of the Prostitution Act, as they no longer face prosecution for brothel keeping. As a result there has been a significant increase in the number of large brothels and sauna clubs since 2002.⁷⁵

⁷² Bundesregierung Deutschland, 'Bericht Der Bundesregierung Zu Den Auswirkungen Des Gesetzes Zur Regelung Der Rechtsverhältnisse Der Prostituierten (Prostitutionsgesetz - ProstG)', 21 January 2007, 9.

⁷³ The German concept „freiheitlicher Rechtsstaat“ has to be understood in the context of German history, with a high moral and societal value placed on personal freedom and the constitutional state serving its citizens' unhindered access to such freedom first and foremost.

⁷⁴ Bundesregierung Deutschland (n70) 9, Interview with German Faith-Based Organisation (n24).

⁷⁵ *ibid* 10.

8.4.1) Effects of the Prostitution Law on Sex Workers

Sex workers have gained some labour rights in that they can theoretically be either self-employed or in dependent employment with a limited right of direction for the employer. In this, brothel owners must not determine the type and amount of transactional sex. Employed sex workers have to have the right to quit their job at any time, the right to refuse certain sex practices and must not be bound by the employer's right to give instructions in a way that makes her accept certain customers against her will.⁷⁶ Despite this legal possibility of employment, sex workers, advisory centres and brothel owners all state that most sex workers are officially self-employed, but are effectively 'subcontractors with the duties of employees'.⁷⁷

A small number of sex workers would prefer to be employees, for about 30 per cent it would depend on the labour conditions set out in the contract and about 60 per cent were more or less against contracted work.⁷⁸ Even in brothels most sex workers are, at least pro forma, working as self-employed.⁷⁹ This means that brothel owners have the benefits of legality without having to take on the burdens of sick pay, pregnancy pay, parental leave, etc. Meanwhile sex workers continue to be excluded from labour protections and labour rights which are only granted to employees, maintaining their position as precarious workers.

Even when employee status is offered to sex workers (which is rare), sex workers are reluctant to become employees, because they are insufficiently informed about the limitations on the employer's right of direction. Additionally, sex workers fear the greater risk of public exposure of their type of employment if they enter an employer-employee relationship. As there is still significant stigma against sex workers, despite their new legal status, this is a risk many women are unwilling to take. Others simply enjoy the independence of being self-employed.

In terms of protecting sex workers' labour rights it would be useful to crack down on cases of bogus self-employment, as it is the norm in other industries. Such a

⁷⁶ Karl Lackner and Kristian Kühl, *Strafgesetzbuch Kommentar* (27th ed, Verlag CH Beck 2011).

⁷⁷ Bundesregierung Deutschland (n70).

⁷⁸ Bundesregierung Deutschland (n70), 16.

⁷⁹ *ibid.*

move would benefit women and men who are in de-facto employed sex work, as they would have entitlements to sick pay, maternity leave, and so on. If employed sex work were more common, it may also start a (industry-specific) minimum wage debate in the sex industry,⁸⁰ which could in turn help those who escape exploitative labour situations.

While the change in legislation was intended to improve the situation of sex workers, little thought was given to the labour rights and labour situations of sex workers, other than the restricted right of direction and the ability to sue for payment. The Prostitution Law includes no positive changes regarding labour conditions, it focuses solely on the removal of criminal law barriers and the end of the classification of prostitution as violation of good morals. This reclassification would theoretically make other legislation applicable to prostitution, such as regulations for the hotel and hospitality industry as well as trade regulations.⁸¹ In practice, this has not really happened, which is one of the reasons of criticism against the legislation. The current government has taken the lack of application of these regulations as a reason to introduce new legislation, rather than to push for their implementation. However, it is not quite clear why existing regulation is not applied consistently to the sex industry, not only in terms of industry regulations, but also in terms of employment law.

Equally, there was originally little concern about the effects of the legislation on migrants and other vulnerable groups, as the legal and social situation of migrants without valid residency, the situation of minors in prostitution and the prostitution of drug-addicts was not the focus of the ProstG. It was assumed that if voluntary prostitution was legal, the focus of prosecution would shift towards 'real crimes' and would thus reduce the amount of violent and inhumane forms of prostitution, including human trafficking, prostitution of minors, as well as the exploitation of prostitutes and prostitution-related violent crime.⁸² Therefore, the working conditions of migrants without legal residency status, like working

⁸⁰ There is a general minimum wage in Germany, however sex workers would obviously need a significantly higher industry-specific minimum wage.

⁸¹ Bundesregierung Deutschland (n70), 62.

⁸² *ibid* 8.

conditions in the sex industry in general, are rarely considered an issue, unless law enforcement discovers exploitative pimping or human trafficking.⁸³

Since its introduction, the Prostitution Act has received harsh criticism and has been blamed for increasing sex trafficking or making it more difficult to prosecute it, as well as increasing the levels of prostitution in Germany overall. Some of this criticism is justified insofar as it has become harder for the police to conduct random checks on brothels without an indication for human trafficking and sexual exploitation. However, a study conducted on behalf of the German government could not establish any direct links between the changes in legislation and the increasing numbers of victims of sex trafficking.⁸⁴ Additionally, it seems inconceivable that voluntary sex workers should be criminalised to make it easier to create indicators for crimes. As the 2007 government report on the effects of the ProstG rightly summarises:

It is not convincing for a constitutional state to re-criminalise a non-impeachable behaviour in order to be able to find indicators for crimes like forced prostitution or human trafficking. Criminal law is supposed to protect legal interests, not to create opportunities for intervention to avert dangers.⁸⁵

Tellingly, alternative possibilities such as labour controls or health and safety controls have never been considered as a way of monitoring the working conditions in the sex industry.

Furthermore, the government report finds that there is significant conflation of correlation and causation when it comes to the Prostitution Act and increases in exploitative prostitution and trafficking into the sex industry.⁸⁶ Additional factors that have shaped the changes in levels of prostitution, as well as the levels of both German and migrant sex workers involved in exploitative forms of prostitution. The economic crisis has made more women turn to prostitution due to exclusion from other job markets and difficulty to find work in other fields. One of my interview partners also gave anecdotal evidence that 'older girls (35+) are

⁸³ *ibid* 63.

⁸⁴ Bundesregierung Deutschland (n70).

⁸⁵ *ibid* 53.

⁸⁶ *ibid*.

entering the industry'.⁸⁷ The reasons for this are mostly unknown, but she speculates that changes in family law that reduce the likelihood of alimony post-divorce, while many German families adhere to traditional gender roles during marriage, may force divorced mothers back into the workforce and, as they are often unable to find work in other areas, they try out prostitution and some of them stay.⁸⁸

For migrant sex workers specifically, the increase in those seeking employment in the sex industry in Germany is partly caused by the restrictions on movement for migrants from certain EU member states, such as Romania and Bulgaria. Migrants from Bulgaria and Romania could not apply for jobs as employees in other EU member states until 2014, but could be self-employed in any EU member state.⁸⁹ As Germany is one of the few countries in the EU where any EU citizen can work as a self-employed sex worker, the restriction on other types of employment made Romanian and Bulgarian women who wanted to work in Germany significantly more likely to enter sex work. The fact that this was one of very few options increased their likelihood to be exploited. Particularly if they led a double life due to stigma, they became easy victims of blackmail and can be forced to continue to work as prostitutes under involuntary conditions.⁹⁰

However, constructing the migration of Bulgarian and Romanian women, who work as sex workers in Germany, as an indicator that the ProstG increases inner-European trafficking, is a misleading conflation.⁹¹ It proposes the legality of prostitution as the reason for women's exploitation, whereas the restriction on women's migration into other lines of work and the stigma in prostitution play a much more significant role in restricting women's choices and rendering them vulnerable.

In the public discourse the vulnerability of poor migrant sex workers is often constructed as 'forced prostitution', which is then considered the same as

⁸⁷ Interview with German Sex Workers Rights Organisation (n20). These views were echoed in my interview with the representative from the UK Sex Workers Organisation.

⁸⁸ *ibid.*

⁸⁹ Czarnecki and others (n9) 10.

⁹⁰ Beshid Najafi, 'Current Situation and Problem Description', *Trafficking in women in Germany* (KOK 2008) 27.

⁹¹ Czarnecki and others (n9) 25–26.

trafficking for sexual exploitation. Such an assumption denies the realities of many trafficked persons in the sex industry. Many, if not most, of them are not victims of being forced into prostitution, but of bad working conditions in prostitution.⁹² This problem is not unique to sex work, but like in the UK, sex work is the only industry for which banning or restricting the industry is considered 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 [...].⁹³

Nonetheless, public debate and the media often do not differentiate between prostitution and trafficking in women, even though this would be so important for a fundamental change in paradigms. According to Ulrike Gatzke, many counselling centres experience the following situation: 'A journalist asks for a "typical" victim" that was kidnapped at home and subsequently forced into prostitution. The journalist ignores the explanation that many women freely chose to migrate, maybe even to work as prostitutes. A common quote: "I cannot explain that to my viewers/readers/listeners."' ⁹⁴ While anecdotal, such experiences nonetheless demonstrate the pervasiveness of the idealised victim category in human trafficking and its exclusionary effects on those who do not fit such narratives. The government coalition also conflates human trafficking and prostitution.⁹⁵ Dr Volker Ullrich(CDU/CSU) stated during parliamentary debates:

'if you talk to victim protection organisations, with people who work with the effects of human trafficking, you are unanimously told that the prostitution law from 2002 made it possible in the first place that hundreds of thousands of young women are 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 [...].'⁹⁶

⁹² Prasad (n42) 65.

⁹³ *ibid* 66.

⁹⁴ Ulrike Gatzke, 'From Illegal Prostitution to Trafficking in Human Beings: The History of Trafficking in Women and the Development and Professionalisation of Specialised Counselling Centres in Germany', *Trafficking in women in Germany* (KOK 2008) 20.

⁹⁵ Deutscher Bundestag, 'Deutscher Bundestag Stenografischer Bericht 74. Sitzung Plenarprotokoll 18/74' 7131.

⁹⁶ *ibid*.

This is in stark contrast to the comments from NGOs and advice centres I interviewed for this research, who have strong opinions on the difference between sex work and exploitation. As the representative of the German sex workers' rights organisation states:

Our political demand is the separation between prostitution and human trafficking. Prostitution should only be performed freely. [...] For us, freely also includes the woman who says: "I am broke and I have four kids at home and I have to see how to survive. So what do I do? I work the streets."⁹⁷

Similarly, Jörn Blicke, head of the organised 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 the legal situation.⁹⁸

The Federal Crime Agency (BKA) cites a slow decline in numbers of trafficking victims since the change in legislation. Critics of the Prostitution Act claim that this decrease is due to an increasing difficulty to investigate in brothels. However, there is no proof that such allegations are true.⁹⁹ Additional claims that exploitative prostitution and human trafficking are on the rise are also unsubstantiated by any numbers. However, the increase of migrant prostitution and the resulting increase in the supply of sex work increases all women's likelihood to engage in precarious types of prostitution to secure their livelihoods, which is yet another reason to open up alternative possibilities for those currently barred from taking up alternative employment. As my interviewee from an advisory service for migrant women explains:

I am sure that many women, who live in Germany without a right to remain would choose other areas of work, if they had the opportunity. It is difficult to make statements about third country nationals, as they cannot legally work in official brothels either, as those places of work are monitored.

⁹⁷ Interview with German Sex Workers Rights Organisation (n20)

⁹⁸ Jörn Blicke, 'Polizeirecht Im Bereich Sexarbeit' (Sexarbeitskongress, Berlin, Germany, 25 September 2014).

⁹⁹ Bundesregierung Deutschland (n70).

But certainly for Romanians and Bulgarians who came to Germany since 2007 to work as prostitutes, as it was one of the few possibilities for them to work legally. Many of them would have taken up other work had they had the chance. There are many women who want to exit prostitution now, since it is now possible for Romanians and Bulgarians to work as employees in the EU. However, the stigma of having worked in prostitution for some years creates problems for them.¹⁰⁰

Contrary to these statements, the German government's proposed 'Bill for the Regulation of the sex industry, as well as for the protection of persons working in Prostitution' (the 'Prostitute Protection Bill', ProstSchG) instead heavily conflates human trafficking and prostitution and bases its 'prostitute-protection' clauses on a need to curb human trafficking.

8.5) The 'Bill for the Regulation of the Sex Industry and the Protection of Persons Engaged in Prostitution'¹⁰¹

The goal of the Prostitute Protection Bill is to create minimum standards for the sex industry, to increase protections for sex workers and to reduce violence against and exploitation of sex workers.¹⁰² Additionally, the bill is also supposed to create a more unified legal situation with regard to the regulation of brothels, the registration of sex workers, and so on.¹⁰³ Currently different German states, and even different cities within the same state, regulate sex work in a number of different ways and with varying demands on sex workers. Overall, these are honourable goals for a draft bill on sex work, however the measures proposed to achieve them are questionable.

The seemingly least controversial provisions of the Prostitute Protection Bill exclude persons who have been convicted of certain crimes from running a brothel, a licensing requirement for 'prostitution businesses' and minimum

¹⁰⁰ Interview with German Non-Categorised Organisation B (Phone Interview, 30 Sep 2014)

¹⁰¹ 2015 Prostitute Protection Draft Bill.

¹⁰² *ibid*, Section A.

¹⁰³ *ibid*, Section B.

building standards for brothels of all sizes, such as requirements for sanitary facilities and emergency buttons.¹⁰⁴

However, even these measures cause fears amongst sex workers. The list of crimes that precludes someone from running a brothel include violations of the Residence Act,¹⁰⁵ a provision that might make it harder for migrant sex workers to run their own brothels, even as a collective. Thus, one of the groups most vulnerable to exploitation is excluded from running independent sex work businesses, if they were ever in violation of the Residence Act.

Equally, the licensing requirement might be used to ban brothels from entire areas, as is already the case in cities like Munich. This might eventually restrict sex workers to the big brothels outside of city borders, which tend to be controlled by large-scale brothel owners, rather than collectives of sex workers.¹⁰⁶

Additionally, the licensing requirement and the minimum standard requirements also apply to so-called 'apartment brothels', which sometimes are both the homes and the work places of a few sex workers living and working together. According to the new 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. Additionally, the use of the 'prostitution business' as a place to sleep or live is generally prohibited – making exceptions to this rule is at the discretion of the local authority.¹⁰⁷ Particularly an unwillingness to provide exceptions to this rule may force poorer and more vulnerable sex workers to work in large-scale brothels in which they have less autonomy, as they may not be able to maintain the costs of two apartments. Thus, this protective measure may have negative effects on vulnerable sex workers.

In addition to these measures, which only seem problematic if scrutinised more closely, there are also some highly controversial ones. The most contested one is

¹⁰⁴ *ibid*, §11, §14, §17.

¹⁰⁵ *ibid*, §14d.

¹⁰⁶ Ine Vanwesenbeeck, 'Sex Workers' Rights and Health: The Case of the Netherlands' in Rochelle L Dalla and Lynda M Baker (eds), *Global Perspectives on Prostitution and Sex Trafficking* (Lexington Books 2011).

¹⁰⁷ 2015 Prostitute Protection Draft Bill, §17(3).

the requirement for sex workers to register with the local authorities and to carry a 'Prostitute ID.'¹⁰⁸ The whole registration process is controversial in itself, however to make matters worse, §4(3) demands 'proof of a health check performed within the last three months prior to registration' in order to register.¹⁰⁹ This seems like a return to Victorian venereal disease laws.¹¹⁰ Such mandatory health checks are strongly opposed by NGOs, health services, the German Federation of Female Lawyers and the sex workers' rights lobby.¹¹¹

Furthermore, the newest version of the draft bill also contains a provision that the relevant authority *must not* register a sex worker 'who is pregnant at the time of registration.'¹¹² This provision demonstrates clearly that the German government does not view sex workers as normal workers. Normally pregnant female workers enjoy protections, which enable them to continue their work and prevent them from being fired on grounds of their pregnancy. By making sex work the only type of labour which pregnant women categorically must not perform, the legislator creates a stark separation of sex work from other work and clearly symbolises that sex workers are *not* equal before the law.

Local authorities also must not register sex workers who lack the required documentation of the performed health check, a passport, in case of migrant sex workers documentation of a right to work, passport size pictures, a valid place of residence and a tax id.¹¹³ Equally, the registration must be denied to sex workers

¹⁰⁸ *ibid*, §3 - §5.

¹⁰⁹ *ibid*, §4(3).

¹¹⁰ Judith R Walkowitz, *City of Dreadful Delight. Narratives of Sexual Danger in Late-Victorian London* (1992); Judith R Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (CUP 1982).

¹¹¹ Ramona Pisal and others, 'Stellungnahme Des Juristinnenbundes Zum Referentenentwurf Des Bundesministeriums Für Familie, Senioren, Frauen Und Jugend Eines Gesetzes Zur Regulierung Des Prostitutionsgewerbes Sowie Zum Schutz von in Der Prostitution Tätigen Personen (ProstSchG)' (Deutscher Juristinnenbund 2015); Klee, Stephanie, 'Stellungnahme Des BesD Zum Referentenentwurf Eines „Prostituiertenschutzgesetzes“' (Berufsverband Sexuelle Dienstleistungen eV 2015) <<http://berufsverband-sexarbeit.de/stellungnahme-des-besd-zum-referentenentwurf-eines-prostituiertenschutzgesetzes/>>; Deutsche Aidshilfe e.V, 'Prostituiertenschutzgesetz: Neue Gefahren Statt Schutz' (21 September 2015) <<http://www.aidshilfe.de/de/aktuelles/meldungen/prostituiertenschutzgesetz-neue-gefahren-statt-schutz>>.

¹¹² 2015 Prostitute Protection Draft Bill, §5(1)3.

¹¹³ *ibid*, §4-§5.

under 18 years of age (§5(2)), and those under 21 years of age who may be pressured by others to engage in sex work (§5(4)).¹¹⁴

The local authorities are required to provide information and advice during the registration process (§6), in a language that the sex worker is able to understand. They can do so with the help of local advisory service NGOs for sex workers (§7). If the local authority suspects a sex worker to be under 21 and coerced (§8(2)2) or a victim of trafficking (§8(2)3), they are to 'immediately implement the measures required to ensure the protection of this person' (§8(2)). Worryingly, this call for action also applies to 'a person who do not have the insight required for their own self-protection' (§8(2)1), which gives the local authorities the ability to determine who they see fit to engage in sex work and for whom they feel the need for 'protection.' This is of course a variation of the theme that women cannot make their own decisions and are not to be trusted, and that sex workers must therefore be protected from themselves.

The current draft bill risks jeopardising the trust built between advisory services, health services and sex workers and is unlikely to provide any improvements for victims of trafficking. The most vulnerable groups will not register with the local authorities. Third country nationals who do not hold residence permits will not be able to register as they would be denied registration and possibly prosecuted for violating immigration rules. Young sex workers and sex workers who are vulnerable due to addiction or being perceived as 'needing protection from themselves' might be denied registration or might avoid trying to register altogether. Thus, the most vulnerable sex workers would be forced to work in illegal brothels or, if working independently, to accept those clients willing to use the services of an unregistered sex worker. Ironically, the bill has no provisions to criminalise clients' use of services from an unregistered sex worker. Thus, the burden of registration has no consequences whatsoever for the clients, making it a risk-free situation for them.

Unsurprisingly, sex workers' organisations and NGOs working with sex workers and with victims of trafficking have heavily criticised the draft bill. The German association of female lawyers considers the bill to be in violation of the Basic

¹¹⁴ *ibid.*

Constitutional Law (Grundgesetz), particularly the freedom to choose an occupation (Art 12(1) Grundgesetz) and the right to informational self-determination (Art 2(1) in combination with Art 1(1) Grundgesetz).¹¹⁵

Sex workers' rights organisations and advisory services and NGOs instead lobby for better information about the modalities of sex work, rather than outright banning or restriction of sex work or punishment of sex workers or their clients.¹¹⁶ This can be illustrated by my interviewees' responses to the question which measures would actually improve sex workers' circumstances and reduce their likelihood to become victims of trafficking.

The call for better information is the common theme amongst all organisations, from the faith-based organisation whose representative stated

We want women, with whom we work, to be informed about their rights, get access to education and an opportunity to exit prostitution. That they have the opportunity to get free legal aid and a residence permit regardless of their willingness to testify¹¹⁷

to the interviewee from the sex workers rights organisation, who defined migrant sex workers' needs as

education and awareness of possibilities. Firstly, women who know the language can get better payment for their services. Secondly, they need to know the working and living conditions in Germany, so they know the alternatives to their current workplace, whether or not they want to stay in sex work, etc. It's about strengthening the position of women, so that they have the possibility to shape their lives.¹¹⁸

¹¹⁵ Pisal and others (n110).

¹¹⁶ Interview with German Non-Categorised Organisation A (Berlin, 5 May 2014); Interview with German Feminist Organisation A (n21)

¹¹⁷ Interview with German Faith-Based Organisation (n24)

¹¹⁸ Interview with German Sex Workers Rights Organisation (n20)

8.6) Conclusion

Similar to the UK, the German government's approach to human trafficking has focussed on improving prosecutions rather than victim protections. Nonetheless, there are also notable differences: Whereas services for victims of trafficking as well as victim of trafficking status are directed towards EU citizens in the UK context, German authorities tend to view third country nationals as the true victims of trafficking. As a result, services are sometimes easier to access for non-EU citizens. This reflects differences in German and UK attitudes towards immigration, which are also reflected other areas, e.g. in different approaches to asylum seekers.

Overall, Germany has stronger worker protections than the UK, including for irregular workers, which translate to more provisions – at least on paper – for exploited workers to make claims against their employers and to receive wage compensation.

Despite the legality of sex work in Germany, sex workers continue to be in a disadvantaged position, when it comes to protecting their rights as workers.¹¹⁹ Whereas a number of sex workers are in types of self-employment which amount to employee-like conditions, they do not enjoy the same employee rights as workers in other industries.¹²⁰ Additionally, as the current debate about stricter rules on prostitution shows, there is still a conflation of human trafficking for sexual exploitation and sex work, which is influenced by moral preconceptions. If the provisions of the Prostitute Protection Law are implemented, even the hypothetical workers' rights of sex workers are under threat and sex work in Germany will continue to be a 'separate category', despite its conceptualisation as work.¹²¹ Fundamental changes to put prostitution on an equal footing with

¹¹⁹ Czarnecki and others (n 9).

¹²⁰ Bundesregierung Deutschland (n70).

¹²¹ 'Deutscher Juristinnenbund e.V. - Stellungnahme 14-16 / Zur Reform Der Strafvorschriften Des Menschenhandels, Der Verbesserung Des Schutzes Der Opfer von Menschenhandel Und Zur Regulierung Der Prostitution' <<http://www.djb.de/st-pm/st/st14-16/>>; Deutsche Aidshilfe e.V., 'Prostituiertenschutzgesetz: Neue Gefahren Statt Schutz' (21 September 2015) <<http://www.aidshilfe.de/de/aktuelles/meldungen/prostituiertenschutzgesetz-neue-gefahren-statt-schutz>>.

other labour sectors are necessary to elevate the German legislation beyond a theoretical acceptance of sex work as work.

The current government's approach to sex work conflates the effects of the Prostitution Law (ProstG) on human trafficking with unsubstantiated claims in order to prohibit prostitution and to punish punters. Instead, the ProstG could provide an opportunity for the improved working conditions for sex workers and help their access to support structures.¹²² However, considering the developments of the Prostitute Protection Bill (ProstSchG), this seems an unlikely outcome. Instead, the German government seems to want to protect sex workers from themselves.

Treating women like children and conflating sex work and human trafficking puts the current legal developments into their historic context. Considering the legacy of White Slavery legislation and the 1949 Trafficking Convention, as well as the historic separation of productive and reproductive labour, it is not surprising that human trafficking for prostitution has so far been dealt with solely under the sexual exploitation clause, despite Germany's half-hearted claim that sex work is indeed work. Whereas other reproductive labour, such as domestic work and care work is now considered work (while still receiving worse working conditions than other industries), the shift for the sex industry seems to be particularly difficult, possibly because it is the ultimate frontier of work women should be doing for free.

As long as victims of trafficking cannot enforce demands against the traffickers, they will neither attempt adhesive procedures, nor civil action to claim for damages/missed wages.¹²³ Experts from the KOK and the German Institute for Human Rights therefore suggest a duty for government agencies and independent advisory centres to inform migrants of their labour rights as employees.¹²⁴ However, as long as employee rights are only a theoretical possibility for victims of trafficking for sexual exploitation, this will only improve

¹²² Czarnecki and others (n9) 26.

¹²³ Rabe and Tanis (n27) 29.

¹²⁴ *ibid* 11.

the situation of persons trafficked for labour exploitation, despite sex work being classified as work in Germany.

Bad working conditions in parts of the sex industry are an undeniable fact, however they also exist in other industries. Migrant workers are more likely to experience exploitation due to their migrant-specific vulnerabilities, such as a lack of knowledge of the language and of their rights, as well as their isolation in a foreign country, and, if they are irregular migrants, their immigration status.

Thus, the German example demonstrates that removing the applicability of the indecency paragraph constituted a first step, which empowers sex workers vis-à-vis their clients, as their transactions are now binding contracts. Equally, the possibility of getting access to compensation for wages not received, in addition to compensation for harm, could be empowering for sex workers who find themselves in exploitative work situations. However, as this chapter has shown, sex workers need further steps to be able to access existing labour rights on an equal footing with other workers.

Additionally, the positive effect of treating sex work as work is almost completely removed through the on-going conflation of sex work and human trafficking for sexual exploitation. Furthermore, the idealised victim category, which excludes many sex workers' experiences and enables paternalistic approaches to safeguarding sex workers, prevents meaningful rights-based empowerment for sex workers.

Thus, the German example has both moved beyond the 'prostitution is not work' approach of the UK and implemented better protections and access to rights for *all* irregular workers who find themselves in exploitative conditions. However, the German approach still falls short of truly protecting vulnerable sex workers as right-holders, as it applies labour protections inconsistently and fails to acknowledge the vulnerabilities of sex workers as an effect of stigma and a lack of access to labour protections as sex workers find themselves in sham contracts.

Chapter 9: Human Trafficking and Exploitation – an Intersectional Labour Law Response?

9.1) Introduction

The previous chapters outlined the effects of the dominant criminal law approach, which is sometimes wrongly referred to as a ‘human rights approach’,¹ despite its conditionality of ‘rights’ on victim status and its problematic victim category, which further restricts access to rights.

In this final chapter I advocate an alternative approach to human trafficking based on labour rights and labour protections, and take into account the multiple vulnerabilities also created by sex and migrant status, which could lead to a truly rights-based approach to human trafficking. Building on the work of Shamir, Costello, Schultz, Fredman, Fudge and Vosko,² I develop an approach which I call the ‘intersectional feminist reproductive labour law paradigm’. It returns to labour law as both a root cause and the possible solution to human trafficking and related exploitation.

My approach incorporates wider issues of gender equality within a labour law response to human trafficking. It challenges the notion that the accommodation of reproductive labour is possible in the existing conceptualisation and interpretation of labour rights and points towards the problematic notion of reproductive labour as ‘naturally’ female-dominated as one of the root causes of gendered labour exploitation.

¹ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006); Hila Shamir, ‘A Labor Paradigm for Human Trafficking’ (2012) 60 *UCLA Law Review* 76.

² Shamir (n 1); Cathryn Costello, ‘Migrants and Forced Labour: A Labour Law Response’ in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015); Vicki Schultz, ‘Sex and Work’ (2006) 18 *Yale Journal of Law and Feminism* 223; Sandra Fredman, *Women and the Law* (OUP 1998); Sandra Fredman and Judy Fudge, ‘The Contract of Employment and Gendered Work’ in Mark Freedland (ed), *The Contract of Employment* (OUP 2016); Judy Fudge, ‘Women Workers: Is Equality Enough?’ (2012) 2 *feminists@law* <<http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/63>>; Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP 2009).

Instead of simply being extended to the private sphere, labour regulations that are able to reach trafficked persons have to include remedies for the marginalisation of women and non-citizens, and the particular marginalisation experienced by female sex workers. Cases of human trafficking for sexual exploitation sit at the extreme end of this gendered intersectional vulnerability, which remains un-addressed within existing labour discourses. The final section of this chapter shows how my proposed approach offers an alternative to existing trafficking narratives by focussing on root causes in labour legislation and issues of gender inequality in destination countries, rather than on relying on idealised victimhood and paternalistic responses to women's migration.

In order to do so, I first explore existing approaches to human trafficking and exploitation, which are also built on labour rights (in contrast to the criminal law approach and its subset of 'victims' rights' or misnamed 'human rights' approaches). I briefly critique these approaches before moving on to my own approach, which combines some of the strengths of the labour rights-focussed anti-trafficking and exploitation discourse with existing feminist labour law theory in order to arrive at a meaningful response to the intersectional dimension of human trafficking into the sex industry.

9.2) Labour Law Alternatives to the Criminal Law Approach to Human Trafficking

One of the opponents of the current criminal law approach is Hila Shamir, who has heavily criticised what she calls the human rights approach to human trafficking.³ Shamir argues that the current approach has failed to take into account root causes, both in supply and in demand, of human trafficking. She proposes that instead a labour approach is the only strategy to address 'structural labor market conditions and practices that shape workers' vulnerability and inferior bargaining power in the workplace.'⁴

³ Shamir (n1).

⁴ *ibid* 99.

Shamir identifies four core problems in human trafficking that a labour approach illuminates better than the existing paradigm which she calls a human rights approach, but which I consider a paternalistic criminal law approach which only offers victim protections to 'worthy' victims. First, human trafficking is a form of exploitation, and this is not a new phenomenon. Second, this exploitation happens on a continuum. Understanding trafficking on a spectrum of labour – ranging from safe, secure employment settings, where rights and safety are ensured, to sites where trafficking and other severe forms of exploitation occur and rights are nullified – helps counter the notion that either an individual is a victim or he or she made a choice and therefore can never be a victim.⁵ Thirdly, human trafficking is a feature of a capitalist market, in which supply and demand affect labour relations and traffickers are primarily pursuing financial gain. If labour regulations are weak, both employers and traffickers will opt for work contracts that make exploitative working conditions more likely for employees.⁶ Fourthly, she argues, a labour law approach brings labour trafficking to the forefront, while existing approaches have favoured focussing on human trafficking for sexual exploitation.⁷

Shamir proposes the following five measures to address human trafficking through a labour paradigm:

[E]nsure that vulnerable workers have access to the justice system without fear of deportation or criminalisation, ensure that the applicable visa regime does not formally or effectively bind workers to one specific employer, regulate against work contracts structured around insurmountable debt, extend the application of protective employment law to sectors susceptible to trafficking [...]⁸

She also suggests that a labour paradigm helps to shift the focus away from trafficking for sexual exploitation and onto trafficking for labour exploitation. However, this ignores both the historical development of human trafficking legislation, as well as the similarities between human trafficking for sexual exploitation and for labour exploitation. Shamir argues for a rights-based

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

approach that focuses on exploited workers claiming rights through collective action. However, for sex workers and other workers in the private sphere, assertion of rights through such mechanisms is difficult at best.

Cathryn Costello rightly points out the greater likelihood of people in casual and under-regulated types of labour relations to end up in and to be unable to escape exploitative working conditions, up to and including situations that qualify as human trafficking. She acknowledges migrant status as a factor of increased vulnerability, as I also pointed out in Chapter 2 of this thesis. She continues:

[...] forced labour persists even amongst migrant workers with a relatively secure right to live and work in the UK, such as EU citizens.⁹ [Structures] are now in place in the UK to make even migrants with a right to reside and work vulnerable to forced labour. A combination of low wages, proliferation of agents and agency working, and social exclusion seem to foster forced labour, in some cases, irrespective of secure migration status. [This can lead] to conditions of dependency and insecurity, similar to those experienced by other immigrants.¹⁰

Costello also mentions the exploitation of sham self-employment, the practice of claiming that someone is self-employed, but in which the worker is not actually independent. Such situations are beneficial for the 'contracting authority', which escapes the obligations of an employer, while reaping the benefits of having a worker who de facto acts as an employee. As Costello describes, immigration law makes this practice more common under certain circumstances:

Sometimes immigration law places barriers on the right to work as an employee, but permits self-employment. [...] In the UK, the general rate of self-employment is about 14%. For workers from Bulgaria and Romania, for whom self-employment is legally more accessible than employment, over 50% were self-employed in 2013. [...] Workers took on roles that would normally have been subject to an employment relationship, but on a self-employed basis. The spectre of sham self-employment comes to mind also. Under these conditions, it appears that employers may be constructing sham arrangements in order to avoid the immigration restrictions.¹¹

⁹ Costello (n2) 213.

¹⁰ *ibid* 214.

¹¹ *ibid*.

As I described in the German context, this is also true in the case of sex workers. Migrant women from Bulgaria and Romania, whose status prevented them from employment, but not self-employment, worked as (bogus) self-employed sex workers. Sham contracts are rife in the German sex industry and migrant sex workers are particularly vulnerable to exploitative forms of third-party controlled prostitution. Thus, being a migrant can in itself be a deterrent from better working conditions, as well as create situations in which workers feel unable to quit their jobs, despite theoretically having other options available. In this it can be seen that de jure rights to certain legal remedies do not necessarily translate into de facto enjoyment of those rights. This practical barrier is not only a problem for migrants, but also for other disadvantaged groups, such as women and minorities, even though Costello does not mention gender or race as factors in her analysis.

Additionally, despite a focus on precarious work and migration status as an issue within this context, the precariousness of reproductive work (which is dominated by migrant women) in general, and sex work in particular, are absent from her discussion of these issues. However, these issues also affect sex workers, as sham self-employment is prevalent in the sex industry in countries where prostitution is legal.¹²

Thus, whereas Cathryn Costello points out that lifting the restrictions of migration legislation on labour rights would ameliorate the situation of workers,¹³ she pays insufficient attention to the gendered exclusions enshrined in labour law, which fail to grant sufficient rights to some of the most vulnerable workers. She also underestimates the role of societal structures,¹⁴ which exclude women from less precarious types of work and, like Shamir, disregards sex work as a category of precarious work.

¹² Claire Adams, 'Sham Contracting Rife in Sex Industry' (2014) Green Left Weekly 11.

¹³ Costello (n2); Bundesregierung Deutschland 'Bericht Der Bundesregierung Zu Den Auswirkungen Des Gesetzes Zur Regelung Der Rechtsverhältnisse Der Prostituierten (Prostitutionsgesetz - ProstG)' (2007).

¹⁴ Fredman and Fudge (n2).

9.3) Why Existing Labour Law is not Enough: the Case for an Intersectional Feminist Labour Law Approach

As I discussed earlier,¹⁵ the current criminal law approach to human trafficking problematically treats sexual and labour exploitation as separate issues, and labour lawyers' critiques of the human trafficking narrative seem unwilling to fully challenge this separation. Leaving human trafficking for sexual exploitation out of their approaches certainly makes it easier to argue for a labour rights approach for 'normal' precarious workers. It removes the additional layer of having to cast reproductive labour in general, and sex work in particular, as labour. However, by doing so, it fails to see gender as an additional layer of exclusion and misses out on the parallels between the marginalisation experienced by migrants in labour law and the marginalisation experienced by women workers, and reproductive workers in particular.

Existing labour protections, which are still based on the standard employment contract, do not suffice in taking into account women's and migrants' lived realities. Due to their additional vulnerabilities, women who have been trafficked - or are exploited in sex work in some other way - can only access labour rights if these rights can be re-defined to encompass women's disadvantaged position under existing labour laws and provide remedies to it.

Traditional labour protections, which rely on a two-party relationship between employer and employee, ignore not only the employer-functions often performed by customers in all service jobs,¹⁶ but also the unavailability of comparable workers for non-discrimination purposes within solitary work such as domestic work and sex work in private households, as well as the lack of access to mechanisms of unionising and collective bargaining for fragmented work in the private sphere. As feminist labour lawyers, such as Fudge and Fredman argue, women, like migrants, are disproportionately found in these jobs at the 'non-standard' end of the labour market.¹⁷ In such non-standard jobs, particularly in

¹⁵ See Chapter 4, as well as the contextual discussions in Chapters 5, 7 & 8.

¹⁶ Einat Albin, 'Labour Law in a Service World' (2010) 73 *The Modern Law Review* 959.

¹⁷ Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95; Fredman and Fudge (n2).

the isolation of the private sphere, labour rights such as maximum hours and minimum wages are often unenforced, while issues such as equal pay and equal chances for promotion are often entirely unenforceable due to lack of comparators.

Nonetheless women's and minorities' claims to improved labour conditions have usually been made on the basis of equal treatment and non-discrimination.¹⁸ Equal treatment in turn is still based on the male citizen worker and the standard employment contract, and thus on a male norm, which acts as the comparator for the granting of rights to those who are considered disadvantaged due to their 'otherness'.¹⁹ This norm may prove useless in certain situations: particularly in areas of work that are female-dominated, there is often no male full-time worker who enjoys better pay or better working conditions to compare oneself to.²⁰

Furthermore, women face particular challenges that are part of a gendered experience. As I have illustrated in Chapter 4, even when men do engage in sex work, which they rarely do, a significant portion of the exclusions and risks women face in sex work are different from those of men. Thus, a meaningful reconceptualization of a labour rights approach that applies to human trafficking does not only need to take into account the incomparability of exploited women workers in the sex industry to a 'free' male worker in the public sphere. It may be equally problematic to compare women to men within the same area of work. Whereas male sex workers certainly face prejudice, the gendered expectations on female sexuality and the portrayal of female sex workers as deviant creates significantly higher stigma for women sex workers.

Additionally, the more intersectional vulnerabilities a group of people faces, the less likely they are to be able to access the rights theoretically available to them on the basis of the male citizen worker norm. The German example shows that exploited migrant workers across all industries are often unaware of their right to make claims for payment of wages not received.²¹ Whereas the literature is silent

¹⁸ Fredman and Fudge (n2); Fredman (n2).

¹⁹ Vosko (n2).

²⁰ Fredman and Fudge (n2).

²¹ Heike Rabe and Naile Tanis, *Menschenhandel Als Menschenrechtsverletzung. Strategien Und Maßnahmen Zur Stärkung Der Betroffenenrechte* (Schwabendruck 2013).

on sex workers in this context, it can be assumed that the unclear legal situation regarding the ability of sex workers to sue for wages not received, as well as the potential stigma of being 'outed' as a sex worker in the process, makes sex workers even more reluctant than other exploited workers to apply for such remedies. Thus, legal remedies which are unattainable for workers due to stigma, lack of resources – such as legal aid or competent advice through NGOs or charities, or other barriers – are insufficient in addressing vulnerable groups' powerlessness vis-à-vis employers or customers.

Furthermore, sex work, like domestic work and other areas of reproductive labour, lacks access to core labour law mechanisms, such as collective bargaining and even formal contracts of employment with clear sets of duties and entitlements. Additionally, building on the erroneous notion that the private sphere constitutes a safe space for women, there are also insufficient legal bases for the monitoring of working conditions of women in reproductive labour in private households. Due to these factors, women workers in sectors which have been traditionally female-dominated continue to suffer from lesser access to labour rights, despite non-discrimination legislation.²² This has led some feminist labour law theorists, such as Leah Vosko, Judy Fudge and Sandra Fredman, to argue for fundamental minimum labour standards instead.²³

There clearly is a need for the extension of labour protections, which have so far only been granted to citizen men – or those women who comply with a male norm of 'productive labour' within the standard employment contract – to all workers.

Thus, an intersectional labour rights paradigm that would be useful to all workers, including highly precarious migrant workers in the sex industry needs to not only acknowledge the problematic aspects of the existing labour rights regime and its foundation in full-time employment from which women have been routinely excluded, both historically and presently. It also needs to shift the way we view all

²² Louisa Blackwell, 'Occupational Sex Segregation and Part-Time Work in Modern Britain' (2001) 8 *Gender, Work & Organization* 146; N Busby, 'The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000" Righting a Wrong or Out of Proportion?' (2001) *Journal of Business Law* 344.

²³ Vosko (n2); Fredman and Fudge (n2).

reproductive labour, paid and unpaid, and acknowledge this work as labour. Building on Fredman and Fudge's approach to changing the focus away from a contractual basis in labour law,²⁴ we need to question whether there should be unalienable labour rights, which are detached from demands in relationship to an employer or customer, but instead exist as minimum standards regardless of the working relationship. Such an approach needs to take into account the feminist critique of the artificial separation of the public and private sphere and question the idea that the work which women perform for their partners, children and wider families (and often also the wider community) does not count as 'work' because it is presumed to be performed 'out of love'.

This notion of female 'labour of love,' which does not qualify for labour protections, applies to all areas of reproductive labour. In fact, there is a perceived connection between reproductive labour and womanhood as such. As Fredman and Fudge have illustrated, the development of the standard employment contract and the commodification of male or productive labour in that context, has also contributed to the 'un-commodifiability' of reproductive labour in the private sphere.²⁵

Also, as I demonstrated in Chapter 1, the skills needed in reproductive labour are so closely tied to embodied female personhood that we perceive them as 'natural' and pre-existing in women, to a degree that these skills are not even considered skills.

Whereas 'productive' work has developed in ways in which the labour rights movement has imposed restrictions on maximum work hours and minimum rest times, as well as minimum wages, holiday entitlements, etc., the realm of reproductive work has not. In fact, the disconnection of reproductive work from 'real' labour has prevented a similar reform in the reproductive labour sectors.

Instead, as Fredman and Fudge,²⁶ as well as Vosko have shown,²⁷ the simultaneous disconnection of reproductive work and 'real work' and the forcing

²⁴ Fredman and Fudge (n2) 249.

²⁵ Fredman and Fudge (n2).

²⁶ *ibid.*

of women of all social classes into reproductive labour as wives occurred parallel to the improvement of working conditions in the 'productive' labour sphere and reached its height in the 1950s.²⁸

9.4.) The Problem of 'Unfree' Labour

In the context of exploitation, Cathryn Costello rightfully challenges the binary of free and unfree labour, with human trafficking at the extreme end of unfree labour. Costello argues that while slavery and human trafficking are certainly forms of unfree labour, due to the power imbalance between employers and employees 'free' labour is not the opposite of unfree labour, as it, too, is never fully free.²⁹

This critique of the free/unfree binary is certainly illuminating, which leads me to suggest a different approach: to think about labour exploitation as a scale between commodified labour and commodified persons instead. In this context, I do not mean commodification in the sense of the Marxist notion of commodification as a precondition of alienation, the exchange of labour for wages as a cause of estrangement.³⁰ Indeed, I argue that such a concept of commodification as alienation in the workplace, which includes a notion of the home as 'ideologically demarcated as the safe haven of emotional intimacy, a place where one recovers from the alienation of the marketplace,'³¹ is as patriarchal a notion as the standard employment contract and offers little to women, particularly those working in the private sphere. Instead, I approach commodification of labour as an ability to capitalise one's labour, to treat one's

²⁷ Vosko (n2).

²⁸ Jane Lewis, *Women in England, 1870-1950: Sexual Divisions and Social Change* (Prentice-Hall 1984) 146; Fredman and Fudge (n2) 233.

²⁹ Costello (n2) 198.

³⁰ Karl Marx 'Economic and Philosophical Manuscripts' in L Colletti *Early Writings* (Penguin, 1975), Hugh Collins 'Is there a Human Right to Work?' in V Mantouvalou *The Right to Work. Legal and Philosophical Perspectives* (Hart, 2015).

³¹ Holly Wardlow 'All's fair when love is war: Romantic passion and companionate marriage among the Huli of Papua New Guinea.' in JS Hirsch & H Wardlow *Modern Loves: The Anthropology of Romantic Courtship and Companionate Marriage* (University of Michigan Press, 2006) 74.

labour - or the service one is trying to sell - as a 'product' and to attach monetary value to it.

In contrast, in cases of human trafficking and slavery, people themselves become commodities that are treated like things. They are commodified persons, who are unable to decide whether or not to sell their labour. They are considered to be a commodity themselves. Meanwhile, 'free' workers may not have full control over all or many aspects of their commodified labour, but they have control over other aspects of their personhood. Exploitative labour can thus be described as labour relations in which the commodification of the labour encroaches on the person in ways that renders part or all of the person herself a commodity.

From this starting point, the perceived uncommodifiability of reproductive labour becomes explicable – as does an intersectional feminist call to challenge this uncommodifiability: Until historically very recently women have been a commodity themselves. This is why women's work is so embodied – and potentially also why current labour law fails to categorise reproductive labour in meaningful ways – the demands of constant availability placed on women as mothers and caretakers may exceed what we consider 'demandable' in the normal work context. However, it is work that has always been demanded from women, and has been demanded from working class, migrant and women of colour disproportionately throughout history.³² Thus, in varying degrees, women have always had labour infringe upon their personhood.

Therefore, instead of accepting the notion that work in the private sphere is inherently different from other labour and therefore 'uncommodifiable', I propose to utilise Laura Agustin's conceptualisation of work, which offers a simple base line to put an end to the exclusion of women's work from the category of labour. She argues that

[if another] person could be paid to do the unpaid activity of a household member, then it is 'work'; so clearly cooking, child care, laundry, cleaning and gardening are all work, as a household servant could be hired to perform these activities. On the other hand, it would not be sensible to hire someone to watch a movie, play tennis, read a book, or eat a meal

³² Fredman and Fudge (n2).

for you, as the benefits of the activity would accrue to the servant, the third person, not the hirer.³³

On the basis of this definition a number of working relationships, which currently enjoy little or no labour rights, should be considered ‘work’ and indeed work worth protecting. It also follows that *all* such work is commodifiable. The case of sex work may seem slightly more complicated than other areas of reproductive work, but, as I will demonstrate in the following section, certainly not impossible.

9.5) Achieving Personhood through the Commodification of Reproductive Labour

The unease to commodify sex work is due to the connection of sex and wifhood, which is even stronger than for other types of reproductive work. The selling of sexual services is then perceived as a deviation of what ‘rightfully’ belongs to men as husbands. Attempts by women to commodify their sex work have historically been and continue to be frowned upon and have resulted in women being perceived as ‘public property’, as I have illustrated in Chapter 3.

Even feminist discourses struggle to detach the work in sex work from the person, seeing sex work either as a commodification of all women by proxy (the radical feminist approach) or portray sex work as a ‘personal calling’ and necessarily fulfilling work (the ‘happy hooker’ narrative). The narrative that women do not sell a service, but instead sell *themselves* runs throughout depictions of sex work. Furthermore, as I discussed in Chapter 3, the notion of ‘selling themselves’ also upholds the idea that sex workers *are* prostitutes, rather than work as prostitutes, thus the stigma of ‘being a prostitute’ is eternal. In the case of human trafficking and (labour) exploitation in the sex industry, women who have migrated for sex work and trafficked persons who want to access the ‘victim of trafficking’ category have to deny ‘being a prostitute’ to access services.³⁴ However, ironically, the ‘victim of trafficking’ category seems to be as

³³ Laura Maria Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books 2007) 54.

³⁴ See Chapter 4.

absolute and eternal as the 'prostitute' category. Additionally, the notion that women in sex work sell themselves, rather than selling a service, interacts in pervasive ways with the notion that people can be bought and sold in the context of human trafficking for sexual exploitation.

Thus, the uncommodifiability of sex work reinforces the notion of women themselves as a commodity. As their work is *not* perceived to be work, there are no labour rights attached to it. Thus, in order to have any rights, they need to be deserving of those rights and have to navigate the complex victim category of the ideal victim of trafficking. Shifting the definition of sex work to be considered actual work and applying labour protections could free women of this unattainable victim category and protect them as right-holders whose rights have been violated, rather than as victims who *may* be deserving of charity.

The definition of sex work as women selling *themselves*, rather than selling a *service*, also requires consent that is akin to enthusiastic consent between romantic partners rather than consent in a work context. However, if sex work is commodified as a sexual service, we can untangle the consent required in sex work from the requirements of enthusiastic consent in a context in which sex or intimacy themselves are the goals for both parties.³⁵

If sex occurs between two parties not because of mutual desire, but as an exchange of sex for money, the type of consent required differs from the enthusiastic consent sex-positive feminists strive for in a sexual relationship context, as mutual sexual 'fulfilment' is not what both parties intend to get out of the transaction. In a consideration of sex work as work (as I discussed in Chapter 4), a consensual transaction can then involve sex. However, it is not enthusiastically consensual sex, but transactional sex.

This differentiation makes it possible to also consider cases in which partners within romantic or other intimate relationships perform sex as sex work, whenever there is a transaction of sex for anything other than sex or intimacy itself. There is no reason to assume that there are no situations in which people

³⁵ For a discussion of enthusiastic consent, see the edited volume Jaclyn Friedman and Jessica Valenti, *Yes Means Yes: Visions of Female Sexual Power and A World Without Rape* (Seal Press 2008).

are willing to perform such work for free. In fact the reasons people do perform any *other* work for free are often precisely out of love or friendship.

The notion that sex within marriage can be work may be an uneasy concept for some, however there is little reason for sex to be the 'final frontier' of intimacy that could be commodified or outsourced and is therefore work. The commodifiability of love and care for children or elderly, the possibility to outsource the search for 'tokens of love' such as a birthday present or flowers, or even the commodification of providing support with intimate feelings through therapists, all point towards the possibility of intimate reproductive labour as work. There is no logical reason for sex work to be different.

More importantly, without the notion that sex work and other forms of reproductive work are *labour* - and not embodiments of femininity and 'the natural role of women' as such – there is no way of lifting these types of work into the sphere of work and to demand that labour laws reflect the lived realities and power imbalances of reproductive workers, rather than just idealised employer-employee relationships.

My intersectional feminist labour law response aims to detach the commodification of labour from the commodification of the person precisely because it acknowledges the habitual commodification of the personhoods of women, non-citizens and people of colour. The acknowledgement of female- and migrant-dominated reproductive work as *work* serves as a way of acknowledging both the paid and the unpaid work performed by women as well as an acknowledgment of the embodied experiences of migrant women in these areas of work.

For migrant sex workers and victims of human trafficking, such a shift to acknowledge reproductive labour as labour would open up the possibility to view exploitation they experience as a violation of their labour rights and human rights. This could lead to an alternative response to human trafficking which focuses on the violation of workers' rights, rather than viewing them as passive victims in need of protections or so-called victims' rights.

A sex work as work approach could thus help sex workers to access key labour rights enshrined in the European Social Charter. Currently, in the UK even the freedom to choose one's work (Art 1, ESC) is not applicable to sex workers as sex work is not considered work. If sex work were classified as work, several important ESC rights would be accessible, including the right to just working conditions (Art 2), the right to health and safety at work (Art 3) and sufficient pay for a decent standard of living for themselves and their families (Art 4).

Particularly for migrant sex workers and women at risk of human trafficking, the extension of the right to work in other CoE Member States (Article 18) and the right of migrant workers and their families to protection and assistance (Art 19) to sex work and other reproductive labour would certainly improve their bargaining position vis-à-vis employers.

Equally, the classification of sex work as work would give both current and former sex workers access to 'the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex' (Art 20). The applicability of Article 20 would enable sex workers to address stigma faced as sex workers and former sex workers.

However, current labour rights do not fully encompass the reality of sex workers, even if they accept sex work as work, as we have seen in the German example. Therefore, details of existing labour rights, such as 'reasonable daily and weekly working hours' (Article 2.1), 'safety and health regulations' (Art 3.2) and maternity leave (Article 8) would have to be adjusted to the sex industry by consulting with sex workers on their needs.

Equally, some core labour rights such as the right to freedom of association (Art 5) and collective bargaining (Art 6) have limited applicability to sex workers and other reproductive workers, as they often work in private household. Thus, labour law may need to devise alternative mechanisms to protect the collective interests of these workers.

Despite the potential gains for migrant workers already engaged in sex work, there are further issues that need to be addressed for migrant workers more broadly.

Whereas my intersectional feminist labour law approach could create the possibility for improved access to labour rights for existing migrants, it can only serve to improve migrants' situation in the migratory process, those moving back and forth between countries and for those still to embark on their migratory journey under certain circumstances: Governments in destination countries would not only have to acknowledge reproductive labour, including sex work, as work and as work that has meaningful and implementable labour rights attached to it, but they would also have to acknowledge the demand for this labour in their communities. Consequently they would have to create migration regimes in order to satisfy such a demand. In the current political climate and with ever-increasing immigration restrictions, such an approach seems highly unlikely, and, even if implemented, would possibly still exclude those particularly vulnerable to exploitation.

9.6) Conclusions

An intersectional labour rights approach, which encompasses the need for access to labour rights for all workers and sets minimum standards, including for women in prostitution, is the only way to truly address the issues of exploitative labour which currently fall under the category of human trafficking. Accepting traditional women's labour, including prostitution, as true labour is a prerequisite for creating access to labour rights in ways which apply to all workers, as well as to create the possibility for structured and safe migration into these fields of work.

In the context of trafficking for sexual exploitation, the effects of patriarchal societal structures thus require a minimum threshold that not only validates sex work as work and enshrines labour protections for sex workers, but also takes into account the particular vulnerabilities of sex workers and the societal conditions that maintain these vulnerabilities. Thus, reconceptualising sex work as work and working towards the applicability of existing labour protections is an important step, but there is need for rethinking the validity and applicability of the existing labour rights paradigm for not only the most vulnerable groups of workers, but all women workers.

Chapter 9: An Intersectional Labour Law Response

A labour paradigm that adequately protects reproductive workers would thus not only have to overcome the 'sacredness' of the private sphere, but also take into account that existing societal structures continue to consider the undue burdens placed on women in the form of unpaid reproductive labour to be 'natural'. These burdens exist in women's unpaid roles as caregivers, homemakers, at-home sex workers and emotional labourers, which are perceived as 'normal'.

In paid reproductive work, the working levels of unpaid women caring for their families then become 'demandable' from paid workers. Thus, a shift towards the appreciation, validation and regulation of both unpaid and paid reproductive work is necessary and would benefit not only the worst exploited, but women workers over all.

Arbitrary categories of acceptable and unacceptable amounts of labour exploitation, combined with labour regulations that systematically exclude women from rights-based protections, instead create exactly the vulnerabilities which anti-trafficking legislation subsequently half-heartedly and unsuccessfully attempts to remedy. However, both rendering feminised labour valuable and thereby detaching women from their historical role as property, as well as creating access to labour rights and migrants' rights, particularly for 'deviant' women, may just not be in the interest of legislators and policy makers. The acknowledgment of such rights would render these 'deviant' women full persons, which would certainly constitute a paradigm shift. However, particularly in the light of increasing migration controls, such a shift would most likely benefit only those already working in exploitative conditions in so-called destination countries.

Conclusion

1) Aims and Findings of the Research

For this thesis I approached human trafficking into the sex industry as an intersectional problem, which is affected by gender, migration and labour status, rather than as a unique problem in international criminal law. My hypothesis was that human trafficking into the sex industry is the result of a vulnerability vis-à-vis the traffickers, which is caused by multi-level gendered exclusions of persons who do not fit the ideal of a full rights-holder in respect of human rights and labour rights. This vulnerability has its foundation in gendered assumptions about productive and reproductive labour and excludes those who do not meet the ideal of a male, white, full-time, unionised, 'productive' (as opposed to reproductive) worker, who enjoys full citizenship and employee rights.

This ideal has negatively influenced multiple areas: labour regulations and labour rights have always assumed the male, white, full citizen. Similarly, migration regimes have always assumed the male migrant. Migration is gendered both in immigration and emigration and in concepts of citizenship and belonging, tied in with acceptable notions of 'womanhood,' which affect women in ways that do not apply to men.

Sex workers, and particularly migrant sex workers, are excluded from this full personhood on multiple levels: some of the stigma in sex work is created through patriarchal notions of acceptable sexual conduct for men and women, and is further amplified by assumptions about race and class. Additionally, the current feminist debate about prostitution is conducted within the 'violence against women' vs. 'sex work as fully self-determined work' dichotomy, which leaves little room for the realities of limited, yet enacted choice most sex workers experience. As my interviewees pointed out, these nuances are often lost in the public debates, to the detriment of sex workers and trafficked women.

Conclusion

In my critique of the current criminal law approach I revealed additional problematic binaries such as active male vs. passive female sexuality, innocent and passive victims vs. autonomous guilty migrants and finally slavery vs. freedom. I conclude that the approach that can best protect the women concerned is not ideological, but pragmatic and, just like the problem of trafficking and exploitation itself, relies on the way we regulate labour (or fail to do so).

My approach is a feminist reproductive labour paradigm, which acknowledges real, lived conditions including the intersection of conditions in which women migrate, work and have sex. It reveals and then challenges the gendered assumptions that create boundaries around migrants' struggles, women's struggles, sex workers struggles and all workers' struggles. By highlighting the struggles of those who are normally silenced in the debates, those women whose lived realities do not meet the precast moulds of happy hookers or exploited prostitutes, of transgressing migrants or exploited victims of trafficking, it is feminist.

By critiquing the gendered assumptions made in migration, criminal and labour law and policy I have also exposed the victims' 'rights' approach within the criminal law framework to critique, as it too relies upon unrealistic and gendered binaries. These binaries include the supposed passivity of trafficking victims vs. the transgressing activity of migrants, the responsibility of exploited migrants for their own plight vs. the absolution for victims of trafficking and the absolute innocence of victims of trafficking vs. the absolute guilt of both traffickers and irregular migrants. Building on this, I demonstrated that the criminal law approach is problematic not only because it requires a false binary of trafficker and victim that leaves states out of the equation. It also artificially creates boundaries between migrants' struggles, women's struggles and sex workers' struggles for labour equality and labour rights and consequently requires ideal victims of an 'exceptional crime'.

I illustrated that women (and other non- 'full citizen' workers) are unable to access the full range of existing labour rights and labour protections, unless they adopt male working patterns. Those engaged in part-time, short-term or other irregular work patterns are often unable to enjoy the full labour rights granted only

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to full-time employees, whereas women's ability to work full-time is often barred through child-care duties and the 'second shift' at home. 'Reproductive labour', particularly care work, domestic work and sex work, does not even enjoy the status of 'real work'.

I also demonstrated that migrants, through their actual and perceived restrictions to certain job sectors and – in some cases – individual employers, experience exclusions from human rights and labour rights. Particularly migrants with tied visas, and irregular migrants' with limited options to change employers or complain about working conditions, are left vulnerable to exploitation. This vulnerability is exacerbated for female migrants through more limited options to legally migrate, lower regulation of female-dominated work sectors and gendered expectations. Notions of citizenship, combined with ideas of female purity, further restrict women's ability to migrate and render them vulnerable to exploitative third parties.

Further I showed that, whereas prostitution is often described as the 'world's oldest trade', sex work is not considered work for a variety of reasons. Such reasons range from perceptions of prostitution being immoral and therefore not qualifying as work, to being exploitative and therefore not possibly constituting work. Sex workers, who are predominantly women, and include a large number of migrant workers, experience sexism, nationalist prejudice and reproductive workers' exclusions from labour rights.

Negative perceptions of sex work are founded in double standards of appropriate sexual conduct for men and women and idealisations of female 'purity'. This obsession with female purity categorises women in the *Madonna versus whore* dichotomy, in which all 'good' women are pure and all 'impure' women are evil. Thus, all sex workers experience stigma due to belonging to the 'whore' category. This dichotomy significantly shapes the category of ideal victims of trafficking.

Ideal victims of human trafficking, particularly of human trafficking for sexual exploitation, have to display a 'purity' of such greatness, that they no longer belong to the 'whore' category, despite having engaged in sex work. This victim

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category is almost impossible to attain. Additionally, ideal victims of human trafficking are also completely helpless and display no level of agency, and can be 'saved' by governments as absolute victims. This categorisation creates artificial borders between 'acceptable' exploitation and unacceptable exploitation. Credible victims, particularly credible female victims in sex work, have to reject any agency in their migratory projects and present themselves as completely helpless victims. My interviewees confirmed that such idealised victim categories hurt actual trafficked persons, who may be unable to meet the expectations of what a true victim of trafficking looks like. As the organisations I interviewed agreed, sex workers and third country nationals, particularly women of colour, experience multiple and intersectional vulnerabilities, not only vis-à-vis traffickers and employers, but also when they are 'rescued' and 'supported' as victims.

Such displays of idealised victimhood also render paternalistic, 'protective' responses to human trafficking legitimate, as I showed in the context of international and regional agreements, as well as in domestic legislation. Such an approach enables governments to 'save' victims of trafficking while maintaining the idea of trafficking as primarily an issue of transnational organised crime and a threat to national security. By focussing on the international crime aspect and the rescuing of 'ideal' victims, governments can continue exclusive and restrictive immigration policies and silence criticism of restrictive immigration regimes. Such policies contribute to the perpetuation of conditions in which human trafficking and other types of exploitation of migrants thrive.

The UK example demonstrated that, while the drafters of the Modern Slavery Act claimed to have victims at the heart of their concerns, the legislation at best creates a selective victim category. At worst, as confirmed by my interviewees, it creates hierarchies of victims, with those already subject to racist bias and exclusions as third country nationals at the bottom of the hierarchy. Above all, the MSA does not protect trafficked persons as workers.

Equally, as both the interviewees from sex workers' rights organisations in Germany and the UK confirmed, the existing human trafficking narrative is also used by governments to justify surveillance of (potential) migrant sex workers. In Germany, where prostitution is legal, the trafficking narrative is also used to

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argue for the implementation of legislation, which subjects sex workers to increased controls, invades their privacy and continues their exclusion from the status of 'normal workers.'

Interviewees across both countries and ranging from faith-based to sex workers' rights organisations mentioned the discrepancies between the lived experiences of trafficked persons and their portrayal in public discourse. Equally, another key theme was the existence of women who do not want to be rescued, but want better working conditions within the sex industry, or viable alternatives to it.

A labour rights approach, which focuses on trafficked persons not as victims of a crime who need to be rescued, but as rights holders, whose rights have been violated, could create meaningful change and remove arbitrary conditions of 'acceptable' and unacceptable exploitation, as well as good and 'bad' victims. Such a labour rights approach, which encompasses rights for all workers and sets minimum standards, including for women in prostitution, address the issues, which currently fall under the category of human trafficking, as well as issues of exploitative migrant labour, which are outside the scope of the trafficking narrative.

By considering reproductive work as work, key labour rights enshrined in the European Social Charter, such as the right to just working conditions (Art 2), health and safety (Art 3), fair pay (Art 4) and maternity leave (Art 8) become available to sex workers. Equally, it opens up the right to protection and assistance for migrant workers (Art 19) and to non-discrimination on the basis of sex (Art 20). Considering the stigma and exclusions migrant sex workers and trafficked women face, access to these rights is crucial.

In order to approach human trafficking from a labour rights perspective, traditional women's labour, including prostitution, needs to be acknowledged as real work. The acceptance of human trafficking as mainly a labour rights problem is needed to create labour protections for *all* workers, as well as options for structured and safe migration into these fields of work. Arbitrary categories of acceptable and unacceptable amounts of labour exploitation, combined with labour regulations that seem to be based on a neutral norm, but exclude women

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and “irregular” workers from rights-based protections, instead render people vulnerable to human trafficking.

In the context of trafficking for sexual exploitation, ameliorating the effects of patriarchal societal structures requires a minimum threshold that not only validates sex work as work and enshrines labour protections for sex workers. It must also adopt an intersectional feminist approach to labour regulation that takes into account the particular vulnerabilities of sex workers and the societal conditions including migration status that maintain these vulnerabilities. As the German example showed, even when sex work is considered work, the interplay of migration restrictions and the existing victim-focussed human trafficking narrative still hurts migrant sex workers, whose work is still criminalised through their difference in immigration status and driven further underground by those who want to rescue, rather than empower them.

Identifying sex work as commodifiable work and working towards the applicability of existing labour protections is an important step to empower migrant sex workers to commodify their own labour on their terms. However, I challenge the applicability of the existing labour law paradigm for not only the most vulnerable groups of workers, such as sex workers, but for all women workers. I argued that the existing framework excludes all women workers, whose reproductive labour is simply expected, and by extension all workers who do not (and cannot) fit the mould of the male full-time employee who is free of any unpaid work responsibilities, to varying degrees. Challenging the structures that enable human trafficking into sex work thus also means challenging the structures that devalue all reproductive work at the same time as it channels poor migrant women into it. Reclassifying all reproductive as work instead opens up the possibility to access crucial labour rights including fair compensation, health and safety standards, maximum working hours and rest days, as well as paid vacation and parental leave. Most importantly, it enshrines the right to dignity at work for those whose work has previously not been considered to be labour.

2) Areas for Future Research

As I already mentioned in the introduction, this thesis does not include any case law in Germany and the UK, as the focus of this thesis lies on the expression of policy through legislation, rather than its implementation. Further research could build on my analysis of the policy and legislative approaches in the two countries and analyse their implementation of the emerging case law.

Additionally, one interesting aspect of ECHR case law, which I discussed in chapter 6, is the establishment of a strong connection between trafficking and slavery. This connection is neither clearly defined, nor necessarily helpful for trafficked persons. The notion that human trafficking is contained in the same category as slavery, servitude and forced and compulsory labour attaches additional severity to the crime of human trafficking. If cases of similar severity to *Rantsev* came before the domestic courts, they may offer a clarification of the issue in domestic law. Particularly in light of the conflation of human trafficking and modern slavery in the UK legislation, this would lend itself to further research.

With regard to the conflation of human trafficking with prostitution, other countries, which may provide interesting insights, as well as alternative legislative models for the regulation or decriminalisation of sex work could be added to this analysis. The Swedish model has been discussed briefly, but a comparative analysis of regulatory models like the German or Dutch one and the Swedish one could offer insights into best practice. In particular, such a study could take into account the different countries' migratory patterns, as well as the levels of gender equality, previous prevalence of sex work and levels of social exclusion of sex workers, rather than only the numbers for migrant and exploitative migrant sex work. An additional model, which has not found any mention in this thesis, but has gained popularity with sex workers all over the world, is New Zealand's approach on the decriminalisation of sex work. I have excluded the approach in the context of this thesis, as not only do the regional instruments not apply to New Zealand, but also because its isolated geographical location does not render it a primary destination for human trafficking. However, the popularity of the New Zealand model with sex workers makes it a relevant policy to consider. Future

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research could look into the compatibility of this decriminalisation model with a labour rights approach to sex work and human trafficking in the sex industry.

I also did not include an analysis of existing international law, such as international humanitarian law, that may be applicable to victims of human trafficking, as this has been done by other authors, such as Anne Gallagher.¹ However, building on my approach to human trafficking as an intersectional problem, future research could identify how meaningful connections between different treaties on human rights, labour rights and women's rights could be made to tackle the issues of sexual violence and on labour offenses against vulnerable workers in a cohesive manner.

Whereas this thesis has alluded to the possibility of exploring the category of 'human trafficking for sexual exploitation' as a particularly problematic aspect of human trafficking, the issue of sexual violence against trafficked persons in all labour sectors needs to be explored in more detail. All precarious migrant workers, but particularly female workers in the private sphere, are vulnerable to sexual exploitation and may be selected for certain jobs due to the gendered power dynamic and the potential for exploitation that these entail. I would like to explore further whether or not it would make sense to redefine human trafficking for sexual exploitation in these terms, while working within the existing legal framework of counter-trafficking legislation. The feasibility of this approach could be contrasted with attempts to challenge the category of 'human trafficking' altogether, which seem logical, but unrealistic in light of the sheer size of anti-trafficking legislation and policy and the number of counter-trafficking organisations.

¹ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010).

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1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (226 UNTS 3)

1957 Convention Concerning the Abolition of Forced Labour (320 UNTS 291/ ILO No. 105)

1961 European Social Charter (529 UNTS 89; ETS 35)

1966 International Covenant on Civil and Political Rights (999 UNTS 171)

1966 International Covenant on Economic, Social and Cultural Rights (993 UNTS 3)

1979 Convention on the Elimination of All Forms of Discrimination Against Women (1249 UNTS 13)

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Interview with German Feminist Organisation B (Phone, 30/10/2014)

Interview with German Faith-Based Organisation (Berlin, 6/5/2014)

Interview with German Non-Categorised Organisation A (Berlin, 5/5/2014)

Interview with German Non-Categorised Organisation B (Phone, 30/9/ 2014)

Appendix A – Interview Topic Guide

【Working Research Title】

Are there sufficient provisions to combat human trafficking for sexual exploitation in national and international legislation? Is their implementation hindered by prejudices against women, migrants and sex workers?

A Comparative Study of the UK and Germany

Opening Rubric

- + Thank you for accepting the interview
- + Introduce the research project (research questions, methodology, etc.)
- + Consent for recording
- + Any questions before we start?
- + May stop or ask for clarification at any time

No	Theme	Overarching Questions	Subsidiary Questions	Prompts
1.	Icebreaker/ Back ground	1. Could you please briefly introduce what kinds of services your organisation provides to trafficked persons and your role within the organisation?		Different services: Advice, Advocacy, Legal advice, Shelter, etc.
2.	Treatment by other agencies/ society	2. If you work directly with trafficked persons: How many of the trafficked persons you work with are trafficked for sexual exploitation? If the organization does mostly advocacy work: do you work solely on the issue of sex trafficking? What other areas do you cover? 3. In your experience, how do officials/ legal professionals/ government agencies view the experiences of trafficked persons you work with? 4. Is there a difference in attitude towards or treatment of trafficked persons from different regions?	(1) Do they constitute the majority or the minority? (2) What percentage of them is female? (1) Are there differences btw public statements & individual views? (2) Do their views differ for victims of sex trafficking compared to those for labour exploitation? (1) Are EU nationals more likely to access services?	
3.	Views on prostitution	5. How does your organization view prostitution? What is your personal view?	(1) Would you consider it - Violence against Women - A job like any other - Immoral	

Appendix A

No	Theme	Overarching Questions	Subsidiary Questions	Prompts
		<p>6. What policy improvements could be made in the realm of prostitution in regards to safeguarding trafficked persons?</p> <p>7. In your opinion, are all irregular migrants who are involved in sex work victims of one form or another of human trafficking?</p> <p>8. Is it relevant whether or not they knew they were going to work in prostitution?</p> <p>9. How are trafficked women, who were aware that they were going to enter the sex industry treated by officials?</p>	<p>(1) Is there any country that would provide a good example?</p> <p>(1) Why / Why not? (2) Do you think there are distinctions to be made? Are some forms worse than others? Explain.</p> <p>(1) Why / Why not?</p> <p>(1) Are they more likely to be treated differently if they have previously involved in sex work in their home country?</p> <p>(2) What if they would express an interest in continuing sex work after leaving their working conditions as trafficked persons?</p>	<p>NL/DE – regulate SE/IL – criminalise punters USA – ban NZ – decriminalize</p>
4.	Views on migration	<p>10. What would be the best steps to safeguard migrant women who enter the UK/Germany to work in the sex industry?</p> <p>11. Do you think migrant women would enter the sex industry if they had other options?</p>		<p>Awareness campaigns at home/ legal entry possibilities for sex work/ ability to enter without work</p>

Closing Rubric

✚ Thank you for your time and opinion.

✚ Would you like to make any additional comments or ask any questions?

Appendix B – Consent Form

LONDON'S GLOBAL UNIVERSITY



Consent to Participate in Research

Interviews with NGOs on human trafficking, prostitution & female migration

Thank you for your interest in taking part in this research. Before you agree to take part, the person organising the research must explain the project to you.

If you have any questions arising from the information already given to you, please ask the researcher before you to decide whether to join in. You will be given a copy of this Consent Form to keep and refer to at any time.

Procedure

If you agree to participate in my research, I will conduct an interview with you at a time and location of your choice. The interview will involve questions about Human Trafficking, Migration and Prostitution.

The interview should last up to 60 minutes. With your permission, I will audiotape and take notes during the interview. If you agree to being audiotaped but feel uncomfortable at any time during the interview, I can turn off the recorder at your request.

Participant's Statement

I agree that:

- I understand that if I decide at any time that I no longer wish to take part in this project, I can notify the researchers involved and withdraw immediately.
- I understand that my participation will be taped and I consent to use of this material as part of the project (for transcription purposes).
- I agree that my name, job title and place of work may be identified in the final report, and waive the right to anonymity for the purposes of this research.
- I understand that such information will be treated as strictly confidential and handled in accordance with the provisions of the Data Protection Act 1998.
- I agree that the research project named above has been explained to me to my satisfaction and I agree to take part in this study.

Name: _____ Organisation: _____

Signature: _____ Date: _____

You will receive a copy of this consent form for your records

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