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Red Light at the Intersection: The Stigma of Sex Work and the Double Oppression Inflicted Upon Trans Sex Workers

European Master's Programme
in Human Rights and Democratisation



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FOREWORD

The *European Master's Programme in Human Rights and Democratisation* (EMA) was launched in 1997 as a joint initiative of universities in all EU Member States with support from the European Commission. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA soon came to serve as a model of inspiration for the establishment of other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. Since 2013 these are all connected and managed by the *European Inter-University Centre for Human Rights and Democratisation* (EIUC) in the framework of the *Global Campus of Human Rights*.

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Like past editions, the selected theses demonstrate the richness and diversity of the EMA programme and the outstanding quality of the work performed by its students. On behalf of the Governing Bodies of EIUC and EMA and of all participating universities, we congratulate the authors.

Prof. Manfred Nowak
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This publication includes the thesis *Red light at the intersection: the stigma of sex work and the double oppression inflicted upon trans sex workers* by Alexandre Leal de Freitas, and supervised by Prof. Csilla Kollonay-Lehoczky, Eötvös Loránd University, Budapest

BIOGRAPHY

Alexandre Leal is an LGBTI activist and lawyer from Brazil, where he has worked as a consultant for cultural change and coordinated social projects in NGOs, public organizations and the private sector. He holds a Master's Degree in Human Rights and Democratisation, with emphasis on Gender. His current research and work focuses on sexuality, gender identity and expressions, intersectionality and sex work.

ABSTRACT

Trans persons face structural barriers to access education and employment worldwide. They experience extremely adverse socioeconomic conditions, which ultimately lead to high rates of engagement in sex work as their main source of income. The majority of states around the world currently impose restrictions or criminal sanctions on at least one party involved in sex work activities in an attempt to abolish the practice, assumed to be inherently exploitative. Cisgender women are usually the target of sex work legislation and academic literature on the issue. This approach can overlook a significant group of people also suppressed by gender norms. This thesis will focus on the experiences of sex workers of any gender, with an emphasis on trans individuals. It will incorporate post-modern feminism, queer theory, and intersectionality concepts to investigate the negative impact of abolitionist sex work legislation and to demonstrate how it creates a reality of powerlessness, accentuating the marginalisation of gender-oppressed groups in society.

This thesis argues for the adoption of decriminalisation strategies, thus recognising sex work as a legitimate form of labour, and calls for the implementation of legislation and public policies primarily aimed at protecting sex workers from human rights violations and abuse.

ALEXANDRE LEAL DE FREITAS

RED LIGHT AT THE INTERSECTION:
THE STIGMA OF SEX WORK AND THE DOUBLE
OPPRESSION INFLICTED UPON TRANS SEX WORKERS

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TABLE OF ABBREVIATIONS

BDSM	Bondage and Discipline, Sadism and Masochism
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IHRL	International Human Rights Law
LGB	Lesbian, Gay, Bisexual
LGBTQI	Lesbian, Gay, Bisexual, Trans, Queer and Intersex
NGO	Non-Governmental Organisation
STDs/STIs	Sexually Transmitted Diseases/Infections
UDHR	Universal Declaration of Human Rights
UNAIDS	Joint United Nations Programme on HIV/AIDS
US	United States of America
UK	United Kingdom of Great Britain and Northern Ireland

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1.

INTRODUCTION

The oppression experienced by trans persons has increasingly grabbed the attention of human rights organisations, international bodies, and even the media. One of the biggest hindrances to their quality of life and access to basic rights is the extreme marginalisation from the labour market that trans individuals face worldwide. The severity of the exclusion is different in every country, but there is no society as of today in which trans persons enjoy the same possibilities of accessing work opportunities as non-trans individuals, nor have they a rate of unemployment remotely similar to that of the general population.¹

Possible explanations for this phenomena are found in a thorough analysis of trans persons' early lives: they don't feel welcomed in schools, hence their underperformance and high early drop-out rates; many have to leave their households after coming out, facing homelessness and starvation as a consequence.² Additionally, the labour market itself does not welcome trans employees and candidates with ease and perpetuates discriminatory attitudes, directly contributing to a scenario of extreme marginalisation of trans individuals.

Being able to work is essential for self-subsistence and accessing income capable of fulfilling some of the basic needs of human existence, e.g. food, clothing, housing, and healthcare. At the same time, a process of marginalisation so severe reverberates in different aspects of social life: it alienates trans individuals from socialising with other people in

¹ Studies in economically developed countries estimate trans persons face a rate of unemployment at least two to four times higher than that of the general population. Figures are probably higher in countries where inequality is more pronounced (See: Grant et al., 2011, pp. 3–4).

² International Committee on the Rights of Sex Workers in Europe's briefing paper: 'Underserved. Overpoliced. Invisibilised. LBGT Sex Workers do Matter', 2015, pp. 3–4.

interaction spaces, maximises their invisibility, mitigates their social and political power and might even increase the risk of exposure to exploitation and violence.

In light of the widespread rejection trans persons face when trying to enter the formal labour market and the general adverse circumstances they experience during their lives, many trans persons turn to sex work as their main form of income generation. There is very limited data available on the engagement of Lesbian, Gay, Bisexual, Trans, Queer and Intersex (LGBTQI) persons in the sex trade, given the lack of projects and research focusing on their specific situation. In Europe, an estimate of 6% of all sex workers are trans persons, although this figure is potentially even higher.³ While data on the overall size of the trans population are elusive, as most censuses do not include it as a parameter in their research, reported figures are not above the 1% mark;⁴ evidencing the fact that trans persons are over-represented in performing sex work.

This is particularly the case for trans persons who identify or express themselves closer to the feminine end of the gender spectrum.⁵ Firstly, the transgression represented by incorporating feminine elements into one's identity or expression is a profound affront to the politics of gender and male dominance.⁶ Moreover, the labour market itself disfavours women, as it is an institution highly influenced by patterns of privilege, dominated by those who fit such patterns: white heterosexual males (who are gender conforming, evidently).

Sex work has been an activity mostly performed by oppressed groups of society: not only women but also migrants, people of colour, and LGBTQI individuals.⁷ Another reason explaining why legislation has not been able to meet the needs and expectations of trans individuals is that they do not hold much political or economic power to influence lawmakers or public opinion. Despite this, sex workers have been speaking on the issues related to their line of work for a long time, but

³ Idem, p. 5.

⁴ DeCuyper, G. et al., 2007, pp. 137–141.

⁵ Despite the common belief to the contrary, transmasculine individuals do engage in sex work activities. An American study found that transmasculine respondents participated in sex work at a rate as high as 7.1%, compared to 13.1% of their transfeminine counterparts. See: Fitzgerald, 2015, p. 5.

⁶ Wilchins, 2004, p. 38.

⁷ Mac, 2016, available at www.ted.com/talks/toni_mac_the_laws_that_sex_workers_really_want/transcript.

only recently have they started to gain attention and the public support of bodies such as UNAIDS (Joint United Nations Programme on HIV/AIDS), Amnesty International, the World Health Organization, and several LGBTQI institutions.⁸

The current dominant discourse undermining the recognition of sex work as a legitimate form of labour is rooted in the conscious and acknowledged assumption that sex workers are women without-an-option. A perspective that not only fails to encompass the complexity of sex workers' life experiences but fails to acknowledge that sex work is a multi-gendered phenomenon, in which people of all genders are actively involved, and whose interests should also be considered.

Feminist thinking is essential to sex work activism, constituting the foundation of every argument to support sex workers' claims. Adding queer perspectives to the discussion is of great value because it brings another dimension of rupture: it challenges the binary gender model. Even when feminist discourses are inclusive of trans experiences, challenging binaries naturally is not their primary concern. This is yet another testament to the importance of investigating how these different elements interact. The experience of trans sex workers is fundamentally different from that of their cisgender⁹ counterparts, given that they are exposed to a different form of oppression. Although also linked to patriarchal norms and expectations, their subversion is related to the very pre-condition that allows patriarchy to exist: a binary separation of genders. Deviating from this fundamental aspect of social existence informs their life experiences in a very particular way.

In spite of the extremely high percentage of the trans population engaging in sex work, their interests are not always taken into account in discussions surrounding their rights. Because the mainstream debate about decriminalisation of sex work revolves around issues related to the position women occupy in society and their resistance to male dominance patterns, gender non-conforming sex workers have been relegated to the background.

On the other hand, sex work has also been shut out from the LGBTQI movement's agenda — even though trans sex workers played

⁸ Joint Statement, available at www.lambdalegal.org/blog/20150820_decriminalize-sex-work.

⁹ Cisgender people are those who identify with the gender assigned to them at birth, according to their predominant biological features.

a key role in their struggle for human rights, remarkably in their active participation and leadership in the Stonewall Riots, for example. In recent instances, the mainstream LGBTQI discourse has adopted an ethnic model approach, portraying its members as equals to outsiders and therefore deserving of the ‘same rights’— a tactic that has allowed a pronounced focus on the fight for marriage equality and fortunately positive results. However, on many occasions this line of argument fails to include the experiences of minorities inside the community, as is the case for sex workers, a group characterised by a strong deviation from social expectations. Sex work has become a cause many LGBTQI organisations are detached from, or even a reality they deliberately try not to be associated with.¹⁰

Ultimately, sex work activism and queer theory frequently intersect in the sense that both fight states’ excesses in meddling with people’s bodies and sexual behaviours. Any obstacle posed by the state to sex work performed with consent can be seen as an undue interference with a sex worker’s individual liberties, with their freedom to choose their own occupation and work conditions, as well as an impedance on the autonomy they should have over their own mind and body.

Incorporating queer theory into the sex work discussion is also necessary from a pragmatic point of view once sex work legislation and policies directly affect LGBTQI communities that engage in it. The discrimination and violence trans sex workers face, for example, is a direct consequence of whorephobia as much as of transphobia. In order to examine how these two distinct oppression systems interact to create a situation of extreme vulnerability that is unique for trans sex workers, this work will feature a detailed analysis of the oppression imprinted upon *sex workers of any gender*. This dimension is of seminal importance to understand thoroughly trans sex workers’ vulnerabilities.

Although discrimination against gender identity/expression is largely acknowledged as an occurrence motivated by a specific and dominating social construct (i.e. strict gender binaries), discrimination against sex workers is hardly ever recognised by states in their legislation or public policies as a consequence of structural oppression. In reality, whilst

¹⁰ The International Committee on the Rights of Sex Workers in Europe released a briefing paper urging LGBTQI organisations to be more sex-worker inclusive and presenting relevant guidelines. See: ICRSE, ‘Underserved. Overpoliced. Invisibilised. LBGT Sex Workers do Matter’, 2015, p. 17.

transphobia is a concept largely discussed in national jurisdictions and international organisations concerned with human rights as a form of discrimination and bias against a specific minority group, whorephobia is not a mainstream concept in the human rights field, hence it is rarely even addressed at all.

When multiple forms of discrimination intersect, it so often happens that one of them is overlooked. The primary aim of this study is to shed light on the obscure part of this interaction for trans sex workers, in order to guarantee that every concerned national or international actor can address their problems with solutions that are effective and actually capable of transforming their reality, and preventing their human rights from being violated.

This thesis will present in the next chapter, an overview on the marginalisation of trans people, particularly in the labour market, and the consequences it generates for this minority group. They are exposed to extremely unfavourable socio-economic circumstances that ultimately makes sex work the chosen route for many of them to provide for themselves. It will also call into question the state's contribution in creating this negative environment that might lead people into the sex trade in the first place.

In the following chapter, the third, the thesis will focus on sex work as a legitimate form of labour. It will then analyse how different models of prohibitive legislations on sex work aggravate the oppression experienced by sex workers — or rather are the main drivers for establishing it. After this, it will be possible to focus on the reality of trans sex workers and how their experiences are uniquely influenced by the interplay of both attributes.

The fourth chapter will present alternatives to tackle the main issues raised in the previous sections. Particularly, it will examine a legislation proposed by a Brazilian Deputy to the Parliament that aims to decriminalise activities linked to sex work, while bringing several important innovations to the table. This work is not meant to be a case study on Brazil or specificities regarding the situation of trans sex workers in the country, given that most of the research is focused on the universal experience of trans sex workers. Still, there is a benefit in contextualising the matter within a jurisdiction, to get a tangible sense of the applicability and relevance of the suggested proposals. Out of all countries, taking a closer look at Brazil is more than justified—the country has the highest statistics on transphobia: 40% of all trans murder

cases reported worldwide since 2008 happened in Brazil.¹¹ The chapter will also present an innovative strategy to deal with this phenomenon: a public policy adopted in a county of the United Kingdom (UK) that approaches crimes against sex workers as hate violence, in light of the stigmatisation imposed upon them.

Before proceeding to develop the arguments of this study, it is important to address certain topics, to guarantee their adequate understanding. *Sex work* is the term coined to describe financial transactions based on the exchange of voluntary sexual services. This would include diverse types of services and professionals, such as erotic masseurs and dancers, live webcam performers, actors in adult films and BDSM practitioners. Despite this possible generalisation, when legal restrictions are imposed by the state, they usually aim to outlaw or restrict the practice of *prostitution*, a practice that involves actual sexual activity—both indoors (brothels, clients' homes, sex workers' homes) and outdoors. In any case, *prostitution* is a word understood to carry a heavy stigmatising meaning, hence it is rarely used by sex workers themselves or organisations advocating for their rights. For this reason, the term *sex work* will be used hereafter to describe sexual activities performed as the object of a commercial transaction (otherwise understood as *prostitution*).

The deliberate use of the term *sex work* is also political: it carries the notion that sex work is in its essence a form of labour. More subtly, it also ascribes agency to the person who chooses to perform it (in contrast to the notion of 'prostituted women', inescapable victims). The latter aspect is, therefore, fundamental to the concept of sex work. Agency presupposes a conscious and free decision of the service provider. Consequently, whenever the term *sex work* is applied, the emphasis is on activities conducted by consenting adults, rather than a labour that is either forced or performed under inhumane conditions. Thus, exploitation is not encompassed in the definition of sex work.

States usually intervene in sex work activities in some capacity. The prohibitions and sanctions can be directed to one or multiple subjects that are involved in sex work activities: the person actively offering sexual services; the person seeking and paying for them; as well as third

¹¹ Trans Murder Monitoring Update–IDAHOT 2016, available at <http://transrespect.org/en/idahot-2016-tmm-update>

parties facilitating the pursuance of such activities. If every aspect is analysed in detail, the different combinations of prohibitions create a lengthy variety of sex work legislation models—more than a dozen.¹²

This study will make a primary division between two different stances regarding sex work. The first are the abolitionist models: legislation that criminalises at least one party involved in sex work activities, effectively aiming to abolish the practice by virtue of imposing prohibitionist law. The second is the decriminalisation model, a lighter interventionist model, adopted in its entirety only by New Zealand, the only jurisdiction that does not impose sanctions to any of the parties involved, nor does it restrict the legality of the activity to any pre-requisites or licensing process.¹³

Some countries like Germany and the Netherlands occupy a grey area in regard to sex work legislation. They do not criminalise sex work activities, but they *strictly regulate* them, imposing several conditions to the legality of selling sex. For example, usually previous permission must be granted by licensing authorities that establish requisites to be complied with, such as to where and how the business can operate, or they can determine specific health-check procedures sex workers must undergo regularly. These models are referred to as '*back-door criminalisation*' by pro-sex work activists, because many sex workers (especially the ones in most vulnerable circumstances) cannot meet such requirements and end up performing their jobs in clandestine arrangements, possibly incurring sanctions similar to those of the criminalisation models.¹⁴

In order to avoid being reductionist, it is also convenient to acknowledge important differences within the broad category of criminalisation. The *full criminalisation* model is understood as any system that punishes service providers (sex workers themselves) regardless of the fact that it might also punish the other parties involved; it is found all around the globe, from China to Russia and most of the United States. The *partial criminalisation* model does not actively punish sex workers, but it sanctions other parties involved in the activity (i.e. procuring, brothel-

¹² A detailed analysis can be done through the 'Map of Sex Work Law', available at <http://spl.ids.ac.uk/sexworklaw>.

¹³ NSWP – Global Network of Sex Work Projects, 2015, 'The Needs and Rights of Trans Sex Workers', p. 3.

¹⁴ Mac, 2016, available at https://www.ted.com/talks/toni_mac_the_laws_that_sex_workers_really_want/transcript.

owning, advertising). It is in place in several countries, including most of Latin America. The *client criminalisation model* was recently adopted by France but is best known as the *Nordic Model*, because it has been championed by Nordic countries like Norway and Sweden for more than a decade now. It actively punishes the act of buying sex, but not sex workers themselves—in theory.

The primary aim of this research is not to dissect the details of each one of the five models, nor the social contexts of the jurisdictions in which they were implemented. It aims to investigate the pertinence and the consequences of these models to fulfil the human rights of sex workers of any gender, including trans persons.

In order to accomplish the aims of this research, the main methods applied will be the discovery of the available literature, including books, articles, digitally available materials, and laws. The approach taken in writing this thesis is rather interdisciplinary. The core of the reasoning carried out here stems from sociological, legal, and political sciences. The targets of investigation are also varied: academic theories, public policies, and legal discourse will be analysed in order to collect and present the relevant literature available and eventually contribute with normative content.

This work will also rely on the secondary use of empirical research and focus on studies made on different sex work legislation that has already been implemented around the world. Because oppressed groups do not always find space in the mainstream discussions on legislation and policies that directly affect them, this work will privilege their voices. Content written by trans persons and sex workers will constitute the very foundations of this thesis, whether it comes from traditional literature sources or not.

At the intersection of queer and feminist scholarship is where the most valuable contributions to the analysis of gender and power come to light. This is why the present thesis aims to consider and integrate both perspectives—feminist and queer theories. It is not the first work to look at sex work through a queer perspective, and luckily it will not be the last. A great contribution of this study would simply be further stimulating academic discussions to examine this question from a standpoint that is inclusive of all genders, in a way that really takes queer experiences into consideration and appreciates queer lives for all they are worth.

2.

TRANS, LABOUR, AND THE STATE

*'People say I transgress gender. I don't.
It's the gender system that transgresses all over me'.*

Riki Wilchins

2.1. TRANS IDENTITY AND EXPRESSION

Trans-related debates gained substance and attention in the social sciences arena with the emergence of the queer movement and queer theory, in the early 1990s. Trans authors and activists draw from feminist assertions to situate gender as a social construct, enforcing a system of power that privileges those who conform to its constricting norms and expectations while oppressing those who do not. For the *trans* community, the specific pillar of the structure being challenged is the strict binary division of gender.

It is impossible to speak of a universal trans citizen with the same interests, needs, and conceptions about themselves. Which is why the task of devising a common denominator to describe the experiences of all gender-diverse people is complex. The modern conceptualisation of *trans* started in the mid-1990s¹⁵ as a way to distinguish people who wished to undergo body modifications (called transsexuals), from those who just presented alterations in their grooming, behaviour, or clothing (transgender). Initially, transgender was an experimental moniker to

¹⁵ The term transvestite emerged much earlier, in the 1910s, but is nowadays obsolete. Its origins are associated with concepts of informal gender expression, and it might still be used as a synonym for drag-queens and cross-dressers. Despite this, many people in the *trans* community reject it, given the acquired connotation of fetishism associated with the word.

encompass all misfits, but it later became another identity with its own boundaries. There is a reverse-hierarchy logic within the movement that favours those most transgressive, precisely because they are less privileged. Opposing the surge of a divide, many in the queer community prefer to adopt umbrella terms, such as *trans* to describe anything that strikes people as deviant from expectations of gender stereotypes.¹⁶

Words are powerful and tricky. They are also interpreted within a context, carrying out the meaning we assign to them. The term *trans* will be hereafter used to encompass all gender non-conforming individuals who *transgress* gender expectations by virtue of their gender identity, gender expression, or both. Similarly, the pronoun *they* will be adopted as a gender-neutral singular pronoun, to avoid assigning categories to those who defy them.¹⁷

Adopting the moniker *trans* as such is unconventional, but also more cohesive to gender-diverse experiences. Terms like *transsexuals* can reinforce the focus on the biological sex and the body; the term *transgender* might also be restrictively misinterpreted as relating to somebody who wants to fully live their lives in the opposite gender to that they were assigned, which does not translate the experiences of all gender-diverse persons. Pointing out the universality of such experiences, Stryker explains that ‘some people move away from their birth-assigned gender because they feel strongly that they properly belong to another gender in which it would be better for them to live, others want to strike out toward some new location, some space not yet clearly defined or concretely occupied; still others simply feel the need to get away from the conventional expectations bound up with the gender that was initially put upon them. In any case, it is *the movement across a socially imposed boundary away from an unchosen starting place* – rather than any particular destination or mode of transition’¹⁸ that is a commonality of this social group. It is rupturing the gender expectations placed upon them that will give birth to a pronounced *othering* process within a given society.

Society is, of course, an important element when analysing this matter. Being gender-diverse is not belittled in every culture, nor is it vehemently repelled with the same intensity. There are several examples

¹⁶ Wilchins, 2004, pp. 30–31.

¹⁷ About the legitimacy of the use of ‘they’ as a singular pronoun, see Tejada III, 2016, p. 4.

¹⁸ Stryker, 2008, p. 1.

in different sets of specific cultures that live up to the numerous possibilities of gender identities possible, like the *bijras* in India or the *warias* in Indonesia. Gender-diverse people have also been largely known for being treated by certain communities as oracles and shamans. One identity that is particularly relevant to the South American context and very illustrative of Stryker's definition is the figure of *travestis*.

Travestis (not to be confused with transvestites) were closely investigated by many anthropologists, who observed the particular traits that define their identity. They are assigned male at birth and usually change aspects of their body and behaviour to resemble feminine features: they adopt female names, clothing, hairstyles, and permanent body modifications (administering hormones and even opting for prosthetic silicone implants), but most *travestis* do not fully identify as women or *transgender*. They are gender-deviant individuals who transgress binary expectations of gender, often denying the intention to undergo sex reassignment surgery, but still opting for permanent alterations that are mostly related to secondary biological attributes. Some make it clear their desire to hold on to the male aspect of their subjectivity and even identify as homosexuals. Nonetheless, many claim they want to *feel like a woman*.¹⁹

These constructions defy the common assumptions of *trans* as the identity of a person who 'is not comfortable in their own skin' or 'wants to live their lives as the opposite sex'. While that might be true for some, *travestis* and many others are neither of these. They do not necessarily identify with 'the opposite gender', but maybe with a different one, which might not exist in textbooks, but originated after their unique experience and perception of the world.

Some of the previous observations raise an important aspect of gender: it is not only related to a deeply felt, internal sense of self (identity), but it is also constructed through the repetition of *external* manifestations and behaviours associated with one gender or the other.²⁰ Especially when discussing trans identity in relation to labour, it is important to address this later concept of gender expression, because expectations about somebody's appearance and behaviour often hinge on exterior

¹⁹ This specific definition was first made popular by Kulick, in 1998, pp. 87–91.

²⁰ The concept of *performativity* (external repetition of patterns and behaviours) as a way of exerting discursive power and constructing one's gender identity is developed by author Judith Butler in 'Gender Trouble: Feminism and the Subversion of Identity', 1990.

aspects of their personality. Therefore, discrimination of trans persons primarily happens in the ambit of gender expression, rather than gender identity.

‘Passing’ is a common expression used by trans persons who fit into binary categories of gender (i.e. identifying themselves as either male or female). It usually refers to the credibility with which they communicate their chosen gender identity and how unaware other people would be of their gender transgression in relation to what was assigned to them at birth.²¹ Of course, successfully ‘passing’ is a goal of many trans persons who project themselves in binary categories of gender because it would deflect attention from their perceived deviance and avoid constant questionings and challenges about their true selves.

One could argue that after completing a full gender transition, leaving no perceivable traces of their gender assigned at birth, neither physical or legal (i.e. with their personal documents reflecting their self-identified gender), that person might not face any of the problems that their trans counterparts would. They would perfectly fit into the binary expectations of the labour market and employers, who would not discriminate on the basis of their gender expression—their gender identity would not even come into question. Of course, as will be later explored, this scenario is unlikely to materialise given the current laws and policies around the globe, most of which do not recognise one’s autonomy to determine their own gender identity.

Ultimately, rather than trying to analyse gender through theoretical differences between identity and expression, it is more productive to acknowledge gender as a combination and interaction between these two aspects.²² Discrimination on the basis of gender-deviance can arise because someone’s gender identity does not match the one assigned to them; but even when they do match, it can exist simply because someone’s gender expression does not fit society’s expectations.

²¹ Garfinkel, 1967, p. 137.

²² Tejada III, 2016, p. 4.

2.2. DISCRIMINATION AGAINST TRANS INDIVIDUALS: THE LABOUR MARKET

Many would say that an act of crossing boundaries and defying paradigms is what keeps a society moving and humankind evolving. Being the one who gets the job done, however, usually does not sit too well with the others in the herd. And when the transgression at hand touches upon something so deeply entrenched in our identities such as gender, it is rarely rewarded; on the contrary, it is denied, repressed, and punished.

Movements pushing for the rights of women and LGBTQI people have underlined the influence of hegemonic norms of male and heteronormative supremacy in our society. The resistance to trans individuals comes from a place that is even anterior to these aspects of dominance. The binary notion of gender is the fundamental ground upon which one's citizenship is built. Identity is inseparable from gender and gender is understood as either one or the other, complete opposites; there are no in-betweens, no transitions.

One of the precursors of queer theory, Butler, observed that, in order to be acceptable, any given gender identity must maintain coherence among sex, gender identity, gender expression, and desire.²³ Someone born with female biological characteristics must present themselves as a woman, reproduce gestures and behaviours considered feminine, and be romantically attracted to males.²⁴ A breach in any of these links disturbs social norms, while the more variations one individual exhibits the more unintelligible their identity is and the harder it is for that identity to be assimilated.

Although the bulk of trans identities are extremely diverse, as are their needs and demands, all trans individuals experience structural oppression for not complying with this pre-established identity scheme. As a result, they are discriminated in several aspects of their lives, particularly healthcare and education systems, as well as the labour market, the prominent focus of this study.

In fact, some would argue that the 'sexual division of labour plays a key role in constructing gender identity—masculinity and femininity, manhood and womanhood—because preparation for and involvement

²³ Butler, 1990, pp. 9–11.

²⁴ Wilchins, p. 130.

in different and complementary work activities makes the sexes into different and complementary genders',²⁵ hence reinforcing the conception of genders as diametrical opposites. Gender-diverse people might be primarily repelled by employers because of the disturbance they elicit, but the fact that the market is still highly informed by a gendered division of labour makes it even harder to sort out where they belong in it.

Nowadays, trans persons are overwhelmingly ostracised from the formal labour market in virtually every western culture. In the European Union, 37% of trans persons responding a survey felt discriminated against because of their gender identity/expression when looking for a job and 27% felt the same while in the workplace.²⁶ When separately surveyed, trans people inexorably report higher rates of discrimination and harassment in the labour market compared to other gender-oppressed social groups, like women and Lesbian, Gay and Bisexual (LGB) respondents. Several of these studies show that large proportions of the trans population are unemployed or have incomes far below national averages. In the United States, '78% of respondents to the largest survey of transgender people to date reported experiencing at least one form of harassment or mistreatment at work because of their gender identity; more specifically, 47% had been discriminated against in hiring, promotion, or job retention'.²⁷ Another research focusing solely on the city of New York showed that 49% of interviewees had never been offered a formal job position when they presented themselves openly as trans persons.²⁸

Consistent data reporting on the numerical figures of trans exclusion from the labour market is mostly generated in the European Union, thanks largely to the work of European Union agencies and in the United States, a country with several LGBTQI civil society organisations with resources, making a substantial impact in research and advocacy. The situation seems to be even more worrisome in countries with lower levels of social and economic development. A survey in Mexico City identified that only 25% of the trans respondents have ever been formally

²⁵ Matthaei, 1997, pp. 135–164.

²⁶ European Union Agency for Fundamental Rights, 2014, 'Being trans in the EU', p. 21.

²⁷ Sears and Mallory, 2011, p. 2.

²⁸ Make the Road New York, 2010, p. 4.

employed.²⁹ While in a large non-capital city of Brazil, Uberlândia, only 5% of all trans individuals living in the city had a formal job with a permanent source of income.³⁰

For all minority groups, hiring seems to be particularly vulnerable to bias. Firstly, because hiring decisions are frequently based on first impressions, as there is limited available information for employers to decide upon, naturally enhancing the stereotypical generalisations about candidates. Research also shows that employment exclusion might be cyclical; candidates that share traits with the hiring decision-maker possess an advantage because employers tend to disparage those who do not belong to their social groups, consciously or unconsciously.³¹

In addition, even where there are anti-discrimination laws, very few trans persons come forward with judicial complaints, for fear of being outed and put in danger, or for a general mistrust in authorities and the justice system. This scenario leads trans people to attempt to hide their gender identity or expression from potential employers or completely abandon the formal labour market, turning to other sources of income.

Many of the problems related to trans unemployment and sub-employment are not solely linked to an exclusionary market logic. They surge from deeper roots and are built up from a young age. Limited access to work is often highlighted as the end of a cycle of oppression, which begins much earlier. The demand to fit into a designated gender begins at birth, according to one's perceived biological sex. Expectations of conformity to that gender role are imprinted upon an infant in their household, and they are intensified when socialisation begins beyond family walls.

Experiences of bullying and violence in school are usually associated with homophobia, even if children at a very young age are not yet engaging in romantic or sexual relationships. The common origin of stigmatisation is rather gender expression, as deviant attitudes and mannerisms of infants already stand out and draw attention, given that schools are already highly gendered environments: divisions based on gender are constantly made, especially during the introduction phases

²⁹ Suárez, 2009, available at http://www.notiese.org/notiese.php?ctn_id=3195.

³⁰ The population of Uberlândia and its proximities nears the mark of 1 million inhabitants. Data were collected by the NGO Triângulo Trans. News story reported by Nádia Lapa, available in Portuguese at <http://www.cartacapital.com.br/blogs/feminismo-pra-que-o-preconceito-contra-transsexuais-no-mercado-de-trabalho-2970.html>.

³¹ Bendick Jr. & Nunes, 2012, pp. 242–243.

of education; many schools have dress codes and are not prone to allowing alterations, even when parents are in favour; certain spaces are reserved for people of a certain gender, particularly bathrooms; bullying and harassment motivated by gender stereotyping are often tolerated; and sometimes discriminatory acts are perpetrated by staff and teachers themselves.

The lack of representation of trans identities in school and the trans-exclusionary sexual education content in classes, as well as the normalisation of harassment, contribute to corroborate a feeling of inferiority and inadequateness. This is aggravated when trans people are maturing and reaching puberty or begin their coming-out process, resulting in a quasi-universal feeling of not being safe at school. This scenario produces extreme negative consequences for gender non-conforming children, according to UNESCO; it manufactures reduced school attendance, poorer academic performances, or in extreme cases, early drop-outs. Trans students in Argentina ‘reported that they stopped studying, either because of bullying by other learners or because they are denied entry by school authorities. Of those surveyed, 45% dropped out of secondary school’.³²

In this context, the lack of family support is also a factor producing extreme adverse living conditions. Trans persons are more likely to experience homelessness and starvation from a young age. In Latin America, up to 70% of trans feminine individuals have ‘felt the need to leave home or were thrown out of their homes’.³³ The collective adversities experienced by trans persons from an early age directly undermine their ability to be fully integrated into the formal labour market as a social group.

2.2.1. The Domino Effect of Labour Market Marginalisation

Acute unemployment and sub-employment are a reality for trans communities in thriving economies like the United States or underdeveloped countries in Latin America. Trans people are disadvantaged not only because they fail to meet expectations about their identity and behaviour, but because many of them are underpaid

³² For detailed statistics on educational problems related to gender non-conformity, see the report ‘Unesco: Education Sector Responses to Homophobic Bullying’, 2012.

³³ UNAIDS, The Gap Report, 2014, p. 5.

or do not have formal jobs and have little prospects of ever getting one. This aggravates a scenario of social exclusion, pushing them further to the margins of society. Structural labour marginalisation has a domino effect that negatively impacts minorities in different aspects of their lives.

For one, they become more vulnerable to exploitation. Without legal alternative forms of income, they are more likely to engage in occupations that are illegal,³⁴ risking themselves in the process. The irregularity of these jobs also means owners of such businesses are generally not supervised and cannot have any legislation enforced upon them, precisely because of a lack of regulation that would protect the rights of employees. Thus, people in vulnerable conditions are exposed to their dictated terms, which usually are unfavourable to the weakest link in the arrangement. Recently, economic hardship for any social group is also a push factor for irregular migration, which opens up a whole new range of possibilities for exploitation, whether through smuggling systems or undocumented and underpaid jobs in the country of destination. In the United States, the estimated number of trans persons amongst all undocumented migrants is between 6% and 19%.³⁵

Marginalisation from the labour market, in particular, can also hinder access to basic social services and reverberate in many areas of life. A survey carried out in Brazil identified that 40% of trans respondents did not have a personal bank account, primarily because they did not earn enough money to justify saving money in a bank. The majority had never been able to apply for bank loans (65%); either because they could not meet the bureaucratic requisites or they were unable to plan repayments, due to job and income instability.³⁶

In several countries, healthcare coverage is nowadays mostly provided through work benefits. People without employment contracts have to either pay for private healthcare assistance—which proves to be difficult without regular income—or are relegated to public services when available. Healthcare is a particularly delicate issue for trans persons, as some of them might demand special medical care if they choose to undergo sex reassignment surgery procedures or even

³⁴ For specific data, see: Grant et al., 2011, p. 3.

³⁵ Data provided by the National Center for Transgender Equality, available at www.transequality.org/issues/immigration.

³⁶ Itaborahy, 2014, p. 9.

psychological attention, to cope with the distress of transitioning. Besides this, several countries have social security mechanisms strictly related to work benefits, such as public-controlled retirement funds.

The limited representation of trans persons in the formal labour market and their overrepresentation in the irregular economies create a marginalisation that is also social and symbolic. They rarely share the same public spaces as most of the population, contributing to a feeling of detachment from society. They are not seen by others in the society they live in, compromising their ability to fully and equally be a part of it. The continuous lack of representation of trans identities in schools, the labour market, and the media contributes to the stigmatisation and invisibility of their experiences.

There is also a political dimension to the marginalisation and invisibility of gender identity minorities. In a world driven by market logics and monetary interests, a social group without substantial economic representation is a social group without power. Their claims are not a priority because they will not produce relevant repercussions for the economic elite or those occupying power positions in politics. Despite notable advances in certain LGBTQI rights lately, namely same-sex civil unions/marriages and civil rights stemming from them, issues related to gender identity and expression are still neglected in several countries where progressive legislation towards sexual orientation minorities has been adopted.³⁷ Sexual orientation minorities are in a much more favourable bargaining position than trans persons to fight for their rights since they are more visibly integrated into society and hold a significantly higher purchasing power.

In contrast, trans persons are not politically represented; they are hardly ever a topic of discussion; and if they are, they do not have a voice in the decision-making processes that will affect them. As a result, their basic human rights are not properly guaranteed worldwide. Their powerlessness is most evident in the fact that they are not able to be recognised in the gender they live in by most states without being forced to undergo forced sterilisation procedures or judicial battles.

Systemic socioeconomic marginalisation can also lead to extreme developments for trans individuals, as it affects their self-perception and

³⁷ Among many others, countries like Brazil, Canada, the United States, France, Belgium, Norway, and Finland recognise same-sex civil partnerships, but still require compulsory sterilisation to grant trans persons their right to legal gender recognition.

sense of worth. Reports show trans persons suffer from physical and mental health problems at a much higher proportion than the general population. The level of distress caused by social marginalisation is directly associated with exclusion from the labour market. A national survey conducted in the United States found that 41% of trans respondents had attempted suicide, in comparison to 1.6% of the general population. Rates were the highest among those who had lost employment due to bias (55%), had a low household income (61%), or had been the victims of assault (64%).³⁸

For all the implications it elicits, labour must be regarded as a fundamental aspect of someone's adult life, as is often said, a gateway to the enjoyment of several other human rights. The lack of access to work and labour rights are detrimental to the fruition of other socioeconomic rights, but when it is enacted at a structural level, it also affects trans persons' social stances, which certainly does not help their fight for civil rights. Labour market marginalisation leads to social and symbolic exclusion, which accentuates the distance between trans people and the rest of society (that conforms to binary gender norms) as if they lived in parallel universes. This invisibility perpetuates political powerlessness, making the society and the state oblivious to trans persons' claims and needs.

2.3. THE ROLE OF THE STATE

Labour rights have been a matter of international concern even before the first Human Rights Treaties were signed in 1919, creating the International Labour Organization (ILO). They have since been included in foundational documents such as the Universal Declaration of Human Rights (1948) and the International Covenant on Economic and Social Rights (1966). A historic landmark for the rise of a human rights discourse is the Four Freedoms Speech,³⁹ which presented socioeconomic rights as indivisible to civil and political rights, particularly through the concept of 'freedom from want'. A democratic state is one in which citizens are free, while there can be no freedom

³⁸ Grant et al., 2011, p. 2.

³⁹ Speech given by Franklin D. Roosevelt, President of the U.S.A. to the Congress on the State of the Union, 1941.

without minimum standards of living. Guaranteeing ‘jobs for those who can work’ is also a key part of accomplishing that vision. In fact, the ILO still refers to labour rights as ‘tools for those who seek to pursue the vision of a world where the humanity and dignity of each person are fully respected’.⁴⁰

The right to work can be viewed as a basis for independence, provided that sufficient income could be obtained from it.⁴¹ Working is the main route through which a person can earn a living and provide for themselves; it reverberates on food and nutrition rights, housing, clothing, and healthcare. It would be hypocritical to conceptually discuss human rights without acknowledging that the realisation of basic human needs depends on access to a minimum level of income.

In this sense, the inability of a particular social group to access work is one of the main pillars of their continuous social exclusion. The lack of income generation opportunities drastically limits the enjoyment of essential socioeconomic human rights, as well as the actual fruition of civil and political rights. Thus, the indivisible and interrelated character of the human rights framework; how can somebody going through chronic dehydration or starvation be truly free or be an engaged political actor? Structural barriers for oppressed groups to access employment constitute an irrefutable failure of the state to accomplish its main goals: that its citizens are free and able to lead a life with dignity.⁴²

Still, the vast majority of enforceable decisions of Human Rights Bodies are primarily based on violations of civil rights in a strict sense. The human rights framework was created to deal with violations arising from a state’s misuse of power and it still operates within a logic of limiting the abusive actions of states, rather than encouraging them to take positive measures against inequalities that would provide an adequate and healthy environment for people to thrive on their own terms.

In practice, individual cases of labour discrimination can be addressed from a different perspective. Non-discrimination is a principle enshrined in the Universal Declaration of Human Rights (UDHR) and

⁴⁰ International Labour Organization, 1998, p. 127.

⁴¹ Eide, 2001, p. 21.

⁴² An interesting analysis on the correlation of true freedom and money is made by G.A. Cohen in his essay ‘Freedom and Money’, 2001. The main argument reiterates the idea that ‘money, and its lack, imply social relations of freedom and unfreedom’, p. 22.

the International Covenant on Civil and Political Rights (1966), both fundamental pillars of International Human Rights Law (IHRL). Most national laws, though, still do not mention gender identity and expression as specific grounds for discriminatory acts. Among the few countries that have established gender identity/expression as an attribute explicitly protected against discrimination are Australia and nine member states of the Council of Europe.⁴³ The lack of specific laws explicitly addressing discrimination against gender identity/expression and the limited concept and understanding of gender identity, directly hinder the proposition and adjudication of discrimination complaints on such grounds.

While it is vital to ensure the possibility of addressing unreasonable discrimination against trans individuals through legal mechanisms, there is much more that states should do in order to reverse the scenario. Anti-discrimination provisions, though judicially enforceable, are unable to single-handedly tackle a systemic problem like the one trans persons currently face regarding employment. It is the duty of states to take positive action capable of inhibiting the unjust discrimination that hinders the access of specific groups to essential elements of life, such as labour and education.⁴⁴ At the same time, it is necessary to eliminate current legislation and state practices burdening trans persons, including their ability to be integrated into the formal labour market.

2.3.1. The Failure to Respect, Protect and Fulfil Trans Persons' Rights to Work

Although socioeconomic rights primarily entail the notion of positive duties of the state to progressively guarantee adequate standards of living to its citizens (i.e. within its expenditure possibilities), there can also be undue interferences in people's abilities to fulfil their basic human rights for themselves. States bear the responsibility to *respect* and *protect* citizens when they pursue the job opportunity of their preference in order to satisfy their own needs.

⁴³ Council of Europe Commissioner for Fundamental Rights, 2011, p. 119. Despite this, the United Nations Committee on Economic, Cultural and Social Rights listed gender identity as a prohibited ground for discrimination in its General Comment N. 20. It is expected that countries that are party to this treaty start adapting their national legislations to mirror this recommendation.

⁴⁴ UN Committee of Economic, Social and Cultural Rights, General Comment No. 18 of 24 November 2005, Article 6, paragraph 19.

As previously discussed, the binary gender model is deeply entrenched in our society down to its institutions and laws. Every official document has a gender marker to confirm or validate a person's identity. This turns into a problem when states refuse to recognise the gender a person lives in. The incongruence between a person's official marker and their gender expression may hamper their ability to perform trivial daily tasks such as opening a bank account or collecting correspondence. It can also impede their access to basic needs and services such as healthcare, entering into a registered civil partnership and, ultimately, accessing, and maintaining employment.⁴⁵

Specific difficulties related to the job market are felt when trans persons apply for jobs, as they can be deprecated for presenting a gender expression or behaviour not concurrent to their official documents. Another problematic practice enacted by potential employers is to demand medical examinations as a pre-condition to admission, or the request for full disclosure of previous medical records in recruitment processes.⁴⁶ All of these practices endanger trans persons' safety and privacy, so when confronted with the possibility of being outed, humiliated or bashed, many might simply give up on the coveted job position.

Trans persons can feel compelled to hide their true gender identity/expression from their employers in order to be congruent with their official documents, and to leave the coming-out process for a later opportunity when they are already employed and feel their employment won't be jeopardised. In fact, the coming-out might not even happen at all—which can affect their performance and workplace relationships.⁴⁷ Even when a person might have managed to adjust their gender marker, they still might face difficulties when presenting their education or work history in documents such as job contracts and diplomas if they still display their previous names or gender markers. If no laws guarantee the right to reissue official documents after legal gender transition, then it is up to the good will of private institutions to do so. In such cases, open-ended provisions regarding anti-discriminatory behaviour might not suffice to guarantee that recruitment processes will not largely disfavour trans persons.

⁴⁵ Agius and Tobler, C. European Commission Report, 2012, pp. 17–19.

⁴⁶ Council of Europe Commissioner for Fundamental Rights, 2011, p. 126.

⁴⁷ *Idem*, p. 118.

Restrictions on legal gender recognition are still a major setback for trans individuals to access the labour market. Few countries allow for the change of names and gender markers without surgery or judicial permission.⁴⁸ These states are mostly in the European Union (approximately 14 states) and more recently, South America (5 states). The majority of countries in Asia, Africa, and many in Latin America are silent about this possibility, effectively denying this right to trans people altogether. Several countries (e.g. Belgium, Brazil, Canada, Chile, France, Finland, Norway, US, to name a few) still require compulsory sterilisation, divorce, or judicial authorisation to grant legal gender recognition.

Requirements attached to the granting of recognition tend to be prolonged, intrusive, and pathological. Examples include: ‘intention to live permanently in the opposite gender; meet the real-life test requirements; obtain multidisciplinary opinions indicating that they suffer from gender identity disorder; undergo irreversible genital surgery; be sterilised; be single or obtain a divorce from their spouse’.⁴⁹ The European Commission considers such laws reflective of ‘society’s primary interest to enforce the binary gender system. The trans person’s well-being comes second. Sterilisation [or full gender reassignment treatment] is required to ensure that the biological role of the sexes is not challenged.’⁵⁰

The lack of appropriate gender recognition laws directly violates human rights such as privacy, physical integrity (especially when sterilisation is required), autonomy, and self-determination. It is also a determinant in affecting the enjoyment of socioeconomic rights, linked to healthcare, labour, and social security, mainly due to the incoherence between official documents and gender expression. Therefore, when a state fails to establish laws and mechanisms allowing someone to have adequate official records for the gender they live in, it creates yet another obstacle for social inclusion and access to employment opportunities.

The failure to implement necessary positive measures, such as appropriate gender recognition legislation, means that states are not only passive spectators to the labour market marginalisation of trans

⁴⁸ According to data provided by ILGA-Europe and ILGA-World official websites: <http://ilga.org/>.

⁴⁹ Agius and Tobler, 2012, p. 19.

⁵⁰ *Ibidem*.

persons but also one of the main actors contributing to it. States take on the oppressor role by denying trans persons the possibility of legally inhabiting their true gender, effectively establishing the foundations for discrimination and perpetuating a cycle of exclusion.

2.3.2. Legal Restrictions to Sex Work

The decision to impose restrictions on the voluntary practice of sex work is another direct interference currently carried out by the vast majority of states, which undermines the human right to work. This kind of legislation is detrimental to sex workers of all genders but is significantly important to the social groups whose members substantially engage in the activity. This is the case for the trans community since several trans individuals nowadays rely on sex work as their main form of income as a consequence of structural barriers to education and employment opportunities. In countries like India, El Salvador, and Brazil, more than half of the trans population is involved in the sex trade.⁵¹

Restrictive laws on sex work impair sex workers' labour rights and effectively push these people to the 'informal economy', while also imprinting a mark of clandestinity on them, for deeming their occupations illegal or irregular/unrecognised. Not recognising sex work as a legitimate form of labour jeopardises the ability of sex workers to enjoy socioeconomic rights and benefits stemming from the occupation they chose to engage in. It also reverberates in several other aspects of their life (as will be further explored), exposing them to even more dangerous, life-threatening situations as they try to circumvent the legal demands imposed upon their day-to-day work practice. Ultimately, it distances them from the rest of society, that perceives them as second-class citizens engaging in activities disapproved of by the state, intensifying invisibility and stigma towards trans sex workers.

The human rights framework can also be regarded as a starting point and legal basis for this analysis. Article 23 of the UDHR states that 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against

⁵¹ UNAIDS, *The GAP Report*, 2014, p. 3.

unemployment’.⁵² The International Covenant on Economic, Social and Cultural Rights (ICESCR) is even clearer as it recognises that the right to work includes ‘the right of everyone to the opportunity to gain his (*sic*) living by work which he (*sic*) freely chooses or accepts’, demanding that state parties ‘take appropriate steps to safeguard this right’.⁵³

The logical consequence implied by the main documents of IHRL is that if a state does not respect an individual’s free will to engage in their job of preference, they are effectively violating that individual’s human right to work. And if sex work is regarded as a form of labour, then criminalising one’s deliberate involvement in the sex trade or denying sex workers their labour rights is also a direct infringement of the human right to work.

The possible explanation for imposing legal hindrances to the practice of sex work is the assumption that sex work is not a valid form of labour. This misguided *rationale* will be contested in the course of this thesis. It is primarily grounded on a logic that positions (cisgender) women as the party offering sexual services and presumes that they are unable to freely consent to perform them, once they occupy an inferior power position in the agreement. It also entails the argument that sex work is a practice that perpetuates patriarchal structures—a critique also made about several other institutions in society, including heterosexual marriage, a practice no state is vying to abolish.

Characterising sex work as a phenomenon that victimises women is not only ill-conceived but also short-sighted. It fails to consider a lot of other people also subdued by patriarchy and heteronormativity, while it also overlooks the fact that women and other gender minorities engage in a number of other labour activities primarily associated with their sex/gender attributes but are not restricted to perform them for this reason (e.g. elementary school teachers, beauty professionals, nurses). In fact, the objection to sex work as a form of labour is heavily based on moral condemnations of sexual behaviours; a personal and intimate prerogative that states have repeatedly tried to interfere with in the past and nowadays, e.g. in regard to LGBTQI persons, when outlawing same-sex sexual activities.

Another reasoning defending the legitimacy of restrictive legislations

⁵² Universal Declaration of Human Rights, 1948, Article 23.

⁵³ International Covenant on Economic Social and Cultural Rights, 1966, Article 6-(1).

about sex work is based on the idea that states are effectively protecting sex workers from danger and harm—meaning that the state is trying to protect them from their own unfortunate life choices. In practice, what happens is rather the opposite. Laws that aim to abolish sex work or eradicate the demand for sex work have not proved successful in decreasing violence towards sex workers or in eliminating forced sex work, often referred to as trafficking. This hypothesis will also be discussed in-depth later in this thesis.

Positioning the issue under IHRL, whenever states prevent people from engaging in sex work as their main form of income generation, they are effectively infringing their negative *duty to respect* the rights of sex workers to work and earn their living by a work they have freely chosen and accepted given their circumstances. When states do not put in place laws that guarantee sex workers' labour rights or do not offer legal avenues to seek redress for abuses related to their occupations, they are *failing to protect* sex workers' rights to work. When state agents take advantage of prohibitive laws to abuse and be violent towards sex workers, the state is failing to comply with its *duty to respect* and *to protect* sex workers' rights to work. All of the above reasons make the human rights framework an adequate starting point to analyse the issue of the duty of states to establish adequate sex work legislation in their jurisdictions.

3.

SEX WORK, CITIZENSHIP, AND OPPRESSION

*'I am retired, but I always say I am a puta. A man once told me:
'Don't say that, dear. You were a prostitute. Now, you're a respectable
woman!'*

He was trying to protect me from myself.'

Gabriela Leite.

This chapter will focus on the politics of sex work: the normative grounds for its conception as a form of labour rather than a form of exploitation in its essence. In order to do this, it will first draw on the feminist theories regarding sex work, which have been fundamental for offering a solid foundation where this analysis can be conducted. It will also acknowledge the contributions queer theory can offer to the debate, given that LGBTQI people are a minority substantially affected by the outcome of sex work legislation.

Later, this study will dive into how prohibitive legislation on sex work negatively impacts sex workers, of any and all genders, in different aspects of their social existence. To carry out this investigation, it will use a comprehensive framework that is applicable to any oppressed social group. Lastly, it will dive into the specific situation of trans sex workers and how two distinct set of oppressions (i.e. transphobia and whorephobia) overlap and intersect to influence their life experiences.

3.1. SEX WORK AS LABOUR

Considering sex work as yet another form of labour is a claim of an increasing proportion of feminist groups and has been the main demand of sex work activists since they started organising. Feminist politics are

where this on-going debate has started and evolved, before it recently became a mainstream topic of concern for Human Rights Organisations around the world. The reason is not only that female individuals are the majority of the population offering sexual services, but also because they are the first ones to be stigmatised when they choose to do so. Prohibitive laws imposed by the state—whether they criminalise sex workers, clients or third parties—are all targeting a model of transaction in which the female is the service provider. Therefore, any analysis on the legitimacy of sex work as a form of labour should place feminist theory at its starting point.

The current discourse in society still splits the female identity into the good and the bad, depending on their life choices. One of the female's life aspects under heavy scrutiny is sex: sexual behaviour, desire, and body autonomy. These elements exist under a double moral standard dictating that women are supposed to carry out a chaste behaviour, while men are expected to—and even rewarded—for doing the exact opposite. Modernity, through a process of *othering*, has produced the other of the other. Sex workers are the materialisation of the behaviour women are not supposed to enact, hence 'the prostitute is the other within the categorical other *woman*'.⁵⁴

In the 1970s, opposing views on selling sex started being consolidated in feminist discourse. Radical feminists like McKinnon and Dworkin condemned prostitution as a vicious source of women's oppression, calling for the abolition of any form of sex work. In response, other feminist groups argued on behalf of consensual sex work; identifying as 'sex-positive' groups, they believed sex workers were not victims, but subverting the patriarchy.⁵⁵

Post-modern feminism was the first movement to recognise 'prostitutes' as political subjects, as beings who are plural rather than unitary and have an active voice in the debates about their own struggles.⁵⁶ Until then, the dominant feminist discourse itself could 'oppress women of difference through the appropriation or occlusion of their spaces and

⁵⁴ Bell, 1994, p. 2. It is opportune to underline that trans persons are also subjected to multiple *othering* processes, although different in nature, as their gender identity/expression is, in itself, reprehensible according to social patterns.

⁵⁵ Bazelon, 2016, 'Should prostitution be considered a crime?', available at http://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html?_r=0.

⁵⁶ Bell, 1994, p. 99.

the silencing of their voices'.⁵⁷ Then, a 'prostitute' was the embodiment of marginal and transgressive women, who were expected to conceal their sexuality, desires, and pleasures. Still nowadays, feminist groups and authors are nowhere near a consensus on how to tackle the issue and the role of the state in it. At the core of the debate, there are some apparent polarisations: empowerment versus victimisation, force versus choice.

Nussbaum proposes a debate about the morality and legality of sex work starting from 'a broader analysis of our beliefs and practices with regard to taking pay for the use of the body'.⁵⁸ The renowned feminist compares the occupation of 'prostitutes' with other types of bodily services to extract similarities and differences amongst them and identify what is deemed problematic about sex work. She finds that the biggest difference consists solely in the fact that 'prostitution' is a stigmatised profession, in regard to mainly two aspects: immorality and the connection to gender hierarchy.

Nowadays the morality reservations are somewhat inconsistent and harder to defend within a feminist logic: rights to reproductive and sexual autonomy were at the forefront of feminist politics already in the 1970s.⁵⁹ A collection written by sex workers during the late 1980s stated that 'women have the right to determine, for themselves, how they will use their bodies, whether the issue is prostitution, abortion, lesbian rights, or the right to be celibate'.⁶⁰ The solidification of women's sexual autonomy at the heart of feminist thought has shifted the reasoning behind sex work abolitionist views to the gender hierarchy argument, which currently still finds resonance amongst some feminist scholars and activists.

Those who oppose sex work as a legitimate form of labour argue that instead of allowing women to exert choice and agency, sex work embodies coercion,⁶¹ because 'first, sex work is inherently harmful to prostitutes; second, prostitution inexorably embodies patriarchy and male subordination over women; and finally, in the majority of cases, prostitution is a very limited *choice*'.⁶²

⁵⁷ Idem, p. 73.

⁵⁸ Nussbaum, 1998, pp. 276–298.

⁵⁹ Day, 2007, p. 101.

⁶⁰ Delacoste & Alexander, 1987, p. 17.

⁶¹ Jeffreys, 2009, p. 319.

⁶² Gore, 2014,, 'Is sex work an expression of women's choice and agency?', available at

Accepting sex work as a legitimate form of labour is not denying the feminist statement that women are constrained by social, political and economic inequality—it is about challenging the understanding that women who work in the sex industry are inherently more oppressed because they are sex workers. Ultimately, despite being apparently unrelated, ‘the argument that women cannot consent to commercial sexual interactions coincides all too easily with anti-feminist ideas about female sexuality, and particularly with that of the threat of women’s sexual autonomy’.⁶³

The thought that every decision about engaging in sex work is inherently forced, given that we live in a patriarchal society, is a flawed logic that undermines women’s abilities to take ownership of their decisions in the face of hardship. It might also be a cover-up of arguments motivated by a sense of the ‘saviour complex’ experienced by people who cannot picture themselves in a similar situation, and want to free women from a presumed miserable life they would not have agreed to live under different circumstances. Yet, instead of challenging these circumstances as their main course of critique, some choose to invalidate these women’s decisions on how to make their own living.

The concept that every sexual trade activity, regardless of consent, is an attack on a woman’s dignity cannot take sole shelter in a gender inequality analysis since it is heavily charged with a sense of moral judgement and an imposition of values about what women should consider decent or dignified. No feminist scholar or activist is entitled to speak of dignity on behalf of all women, especially when some of these women clearly oppose such concepts of freedom and dignity.

In always portraying the woman as a victim of sex work arrangements, this rationale supports a neo-abolitionist trend that targets sex work clients and facilitators, framing them as the ones who allegedly take advantage of their privileged position to exert male dominance and perpetuate a cycle of exploitation of female individuals. As if consent was not an individual prerogative, but an act always determined by the structural conditions of society—and in a patriarchal one, consent over sex work given by women is bound to be defective.⁶⁴

<http://www.e-ir.info/2014/03/14/is-sex-work-an-expression-of-womens-choice-and-agency/>.

⁶³ Doezema, 2002, p. 21.

⁶⁴ Consent analysis is indispensable to sex work discussions, otherwise a number of actors (clients, third parties, state authorities) can behave under false assumptions, such as a) sex workers can never refuse sex; b) sex workers should always consent to sex with anyone and under any circumstance, as long as it is paid; c) sex workers can never consent to commercial

To argue for the abolition of sex work because it is always exploitative is to use an oppression so incurred in society, like female subjugation, to justify imposing yet another limitation to a woman's agency and power to choose. The imposition of the victim status upon all sex workers completely deprives them of autonomy and effectively creates another imprint of oppression that they have to fight; sex workers have made a choice that the state considers was not theirs to make. The justification being that society itself is too unequal for them to have that kind of power to choose—so the state makes this particular choice for them. Categorically and unconditionally disregarding an individual's capacity to consent to sex work activities becomes yet another vector for the state to undermine the ability of gender minorities and women to decide on their own bodies, own sexual behaviours, and own choice of occupation and income earning.

It is important to point out that none of the three abolitionist models considers sex work to be labour. The first one is the full criminalisation model, which clearly opposes this view by punishing those who opt for offering sexual services in exchange for material compensation. The second one, the partial criminalisation model, chooses to restrict the ways in which sex work can be performed, all of which would normally be accepted in other kinds of labour (i.e. it specifically bans the association of third parties with mutual interests and benefits). The last one, the client criminalisation model, presupposes that no one who has other available employment options would opt for offering sexual services in exchange for money; therefore, the one who makes or accepts a sex work offer is taking advantage of someone in dire need or desperation, and thus should be reprehended and punished. This system aims at extinguishing sex work by ending the demand for it: sex work cannot be considered labour because it is inserted in a logic of exploitation of women.

sex. All of these, reinforce rape culture and are consequently detrimental to sex workers' human rights. See 'Amnesty International Policy on State's obligations to respect, protect and fulfil the human rights of sex workers', 2016, p. 15, available at <https://www.amnesty.org/en/documents/pol30/4062/2016/en/>.

3.1.1. *Choice, Circumstance, and Coercion*

The advent of post-feminist theory is important because it questions the state's legitimacy to prohibit voluntary sex work. The movement garnered traction and started showing some results when international AIDS conferences involved the participation of sex workers in a context outside the fight against trafficking. Due to pressure from consultation groups participating in conferences in the 1990s, the first implicit distinctions between forced and voluntary sex work started to appear in conference memos and recommendations.⁶⁵

Anti-sex work advocates use the dichotomy between forced and voluntary sex work to argue that pro-sex work activists focus on a minority of workers that is in fact completely free to choose their occupation. The bulk of sex workers, they argue, perform this occupation in light of the socioeconomic difficulties imposed on women due to patriarchy that leaves them no better alternative. Therefore, economic hardship is framed as a force that drives them into sex work.

In response to this argument, Murray states that 'feminism which fails to overcome binary oppositions ends up supporting the *status quo*, impoverishing women and aligning with right-wing fundamentalism'.⁶⁶ No activist pushing for the decriminalisation of sex work denies the perversity of patriarchy, but they still recognise the capability of women to take action, even under a system of male dominance that disproportionately affects them politically and financially.

The 'poverty as a force' reasoning is used by sex work detractors to diminish the legitimacy of choices made by disadvantaged minorities; as if adverse conditions would suffice to impair their judgement, invalidating experiences only they had to live. At the same time, this reasoning also reinforces the moral stigma attached to sex work, giving way to morally criticising those who are not going through adverse life conditions but nonetheless choose to engage in sex work.

Although acknowledging the importance of distinguishing trafficking from voluntary sex work, Doezema speaks of the perils of this dichotomy when she concludes that it creates a false division among sex workers. One side is the capable and informed affluent sex worker

⁶⁵ Kempadoo, 2002, pp. 1–28.

⁶⁶ Murray, 1998, p. 52.

from developed countries; the other is the person without-an-option, i.e. vulnerable, poor, passive, naïve, and helpless. She explains that ‘a rigid distinction between voluntary and forced prostitutes not only results in the unilateral stigmatization of the former and the victimization of the latter but fails to capture the complicated dynamics and power relationships that pervade the working life of a prostitute’.⁶⁷

In order to build a scenario closer to the intricate dynamics of real life, a framework that infuses this complex issue with nuance has to be utilised. Boyd proposes a spectrum that has choice and coercion at extreme ends, introducing circumstance in between.⁶⁸ She argues that circumstance itself can also be treated as a spectrum. On the end closest to choice, you have individuals who believe that they should have the right to make use of whatever is theirs for financial gain.⁶⁹ Those who, despite having other viable opportunities to increase their earnings, choose sex work—whether because the financial outcome is better, the job is more flexible or pleasurable, or because it gives them a better sense of independence. The involvement of most sex workers in the sex trade, she believes, has more to do with challenging economic issues: they are individuals who have very few options other than sex work or see it as the best available option to face poverty or financial hardship. This might be due to their lower education level, the economic situation of the country, or the widespread discrimination they face in the formal labour market. Circumstance starts to get closer to coercion when the situation approaches desperation: the imminence of facing hunger or homelessness might lead sex workers to accept poor terms of agreement.

All in all, the circumstances under which a person decides to engage in sex work are posed by the society they live in. They are a reality given by social and economic policies of the state. Adults who join the sex trade voluntarily have made a conscious calculation and decided that the benefits outweigh the hazards. Therefore, ‘collapsing choice,

⁶⁷ Doezema, 1998, pp. 41–42.

⁶⁸ Boyd, 2012, ‘What Anti-Trafficking Advocates Can Learn From Sex Workers: The Dynamics of Choice, Circumstance, and Coercion’, available at http://www.huffingtonpost.com/danah-boyd/what-anti-trafficking-advocates-can-learn-from-sex-workers_b_1784382.html.

⁶⁹ Here, it is important to make a distinction from activities related to the organ trade. Sex workers refute comparisons that involve the selling and buying of one’s organs, as they understand sex work is based on the exchange of a service, rather than a product. That is, no client is entitled to a sex worker’s body or body parts, but only the sexual services that that sex worker has agreed to and is willing to provide.

circumstance, and coercion into one category of sex work or trafficking erodes the nuances that explain people's engagement with sex for money and obfuscates the dynamics that configure people's practices. If we want to intervene in a meaningful way, we need to draw out these nuances and build a more complex intervention model: one that helps to address the structural and social conditions that shape desperation, abuse, and exploitation'.⁷⁰

In other words, a decision about performing sex work is as free as the structural conditions we offer as a society. Whoever strives to abolish sex work because of existent gender imbalance will not be successful as long as these power imbalances exist. Treating all commercial sex as coercive because of adverse circumstances, be it poverty or patriarchy, does little to address the underlying social conditions that produce the sex work phenomenon. It is an approach that focuses on outlawing the result of an oppression cycle instead of attacking the root causes that feed it.

Overruling the dispute revolving consensual commercial sex being framed as voluntary or coerced would also put more focus on the working conditions and rights of sex workers. Focusing on the reasons that underlie sex workers' consent, pulls sex work away from being considered as a form of labour, as it reflects a moral double standard of society. Nobody investigates whether a woman has consented to perform other bodily services as a labour activity or not, even if they are jobs mostly performed by women because of gender features.

A final and important reason why this dichotomy is dangerous and misleading is that voluntary sex workers can also be subjected to conditions of forced labour, as will be explored later under the topic of exploitation (Section 3.2.1).

3.1.2. *Survival Sex*

Elaborating a framework that separates circumstance from coercion does not mean these situations are categorically distinguishable. There is a grey area in which conditions revolving around the exchanges are ambiguous. In particular, LGBTQI youth have been reported to engage in forms of the sex trade that lie in a murky area, referred to as 'survival

⁷⁰ Boyd, 2012.

sex'. These are very young people⁷¹ who have to take decisions under severer circumstances than they should experience, namely starvation and homelessness.

While estimates assume that 5–7% of the youth population is LGBTQI, a recent study conducted in the United States verified that up to 40% of homeless youth is LGBTQI.⁷² In the same research, a third of homeless interviewees reported having received warm beds, clothing, or food as payment, instead of cash. The usual pre-narrative is that young people are forced out of their homes because of their parents' unwillingness to accept their gender identity or sexual orientation. Another study targeting the same groups and locations found that, overall, LGBTQI youth was seven times more likely to have traded sex for a place to stay than their heterosexual cisgender counterparts.⁷³

Positioning survival sex on the framework of choice, circumstance, and coercion is not an easy task. Precisely because the element informing the distinctions in this framework, i.e. agency, is harder to be assessed in this context. First, the level of desperation afflicting someone increasingly affects their freedom to choose, even though it does not eliminate it. Besides this, being compensated 'in kind' rather than in cash is another potential problem, because it can result in a cycle of dependence. In any case, instead of externally evaluating whether someone was coerced or not, it is important to listen to their narratives and lived experiences, in order to understand where they see themselves on the spectrum.⁷⁴

3.1.3. *Queering Sex Work*

The identities of *queer* people and sex workers are both marginal to pre-established rules of morality imposed by a society for materialising behaviours that are sexually reprehended by the dominant discourse. Queer and post-modern feminism are concomitant movements that were fortified and constructed in the post-AIDS world of the 1980s

⁷¹ It is important to point out that pro-sex-work groups also consider it exploitation when minors are involved in the sex trade, given their lack of agency to consent or make informed decisions about the issue.

⁷² Dank et al., 2015, p. 13.

⁷³ *Idem*, p. 6.

⁷⁴ Boyd, 2012.

when everything associated with promiscuity was a menace to public health. Back then, both *queer* people and sex workers became a particular target of the state.⁷⁵

The legacy of queer rights and sexual liberation is also evident in the ways some sex-work-positive organisations position themselves politically: ‘We are opposed to and don’t tolerate any form of oppression, including but not limited to: stigmatization, stereotyping, homophobia, racism, ageism, sizeism, transphobia, sexism, and patriarchy.’⁷⁶ The fight for labour rights and human rights spearheaded by sex workers focuses on the relationship of sexuality and power. More specifically, many of these arguments revolve around a discussion of topics like state power, marginality, and normativity,⁷⁷ very similarly to the arguments of *queer* theory.

Sexual liberation is an issue that remarkably reverberates to minorities: racial minorities, class minorities, and sexual and gender minorities. Their bodies ‘have been regulated by the state, starting with slavery and forced sterilization, to the scare tactics around HIV and STDs and sex work’,⁷⁸ when they have not used their bodies in the way the state constrains them to, they have been marginalised, ostracised, and discriminated against. Still today, minorities are usually the groups that tend to engage in sex work the most, precisely because of the circumstances they face.

Despite being an occupation several minorities have relied on to make a living, sex work is usually framed under a heteronormative point of view. Queer experiences are vital to the discussion because they challenge heteronormativity (i.e. the assumption that heterosexual relations are the natural constituent of all human relations), by challenging the stability of gender and sexuality in itself:

an erasure of non-normative identities, performances and embodiments in debates about the sex industry not only restricts the potentialities of the political agency of queer and trans sex workers but also reinforces the very gender dualisms that many feminist and queer scholars would wish to challenge, by reproducing heteronormative assumptions that there is a ‘natural’ gender order

⁷⁵ Shah, 2012, p. 1.

⁷⁶ Sex Workers Outreach Project—New York City Website: <http://www.swopusa.org/about-us/chapters/>.

⁷⁷ Shah, 2012, p. 4.

⁷⁸ Idem, p. 3.

in which women are sexual objects and men are sexual subjects. A queer focus, going beyond the heterocentric gender norm, is important for developing fresh insights into how gender, sex, power, crime, work, migration, space/place, health and intimacy are conceptualised and theorised in the context of commercial sexual encounters.⁷⁹

Queering sex work is, first and foremost, welcoming the voices of *queer* people into the political debate about sex work.⁸⁰ More than this, it is opening up a space to rethink assumptions about men and women in sexual relations, to challenge heteronormativity as the dominant discourse and to contest the view of the sex worker as the powerless party in commercial interactions with their clients. Upholding a discourse that aims to save women and girls from a cycle of male dominance perpetuates the very heteronormative gender logics that need to be challenged.⁸¹ Relegating women to an inexorably disadvantaged position in commercial sexual interactions is a self-fulfilling prophecy.

Ultimately, recognising the legitimacy of sex work is recognising the right ‘to privacy and freedom from undue state control over sex and sexual expression... Like state controls over reproductive rights and sexual acts between consenting adults, criminal laws prohibiting sex work attempt to legislate morality with scant regard for bodily autonomy.’⁸²

3.2. SEX WORKERS’ CITIZENSHIP

The concept of social citizenship was introduced by Marshall,⁸³ according to whom citizenship can be interpreted as the status enjoyed by persons who are full members of a community. After this, different models of citizenship started being developed: feminist citizenship, sexual citizenship, and intimate citizenship. According to Plummer,⁸⁴

⁷⁹ Smith et. al., 2015, pp. 1–7.

⁸⁰ It is important to note that not everybody in the LGBTIQI movement is supportive of the decriminalisation point of view, despite the profound similarities pro-sex-work arguments have with queer politics. *Queer* people are as diverse of a group as are women and feminists. Naturally, some LGBTIQI persons might concur with abolitionist views.

⁸¹ Smith et. al., 2015, pp. 11–17.

⁸² Open Society Foundations, 2015, p. 7, available at https://www.opensocietyfoundations.org/sites/default/files/10-reasons-decriminalize-sex-work-20150410_0.pdf.

⁸³ See: Marshall, 1950,

⁸⁴ See Plummer, 1995.

these expansions on citizenship theory made it clear that many groups were deprived of full community membership, as they did not live up to society's prerequisites to exert the monopoly of power, concentrated in the hands of a very specific subject: the hegemonic figure of the white heterosexual male.

Citizenship is a way of approaching the issue of social exclusion through a multidimensional lens; it understands that the inability of individuals belonging to certain groups to participate in mainstream society as equals represents a violation of their human rights, and it places upon the state the responsibility to ensure their integration and participation as full members of society. It evidences that marginalised groups cannot bear the burden for their own exclusion.⁸⁵ Furthermore, it is important to acknowledge that one has to be recognised as a full citizen 'not in spite of [their] unusual or minority characteristics, but with those characteristics understood as part of a valid possibility for the conduct of life'.⁸⁶

At length, it is possible to draw a parallel from citizenship models centred on different oppressed groups to analyse the citizenship of sex workers, and later on, that of trans sex workers. This framework can be used as an instrument to understand how the social exclusion mechanisms preclude these individuals from enjoying civil, political, and socioeconomic rights.

In most traditional studies, social groups are analysed taking into consideration the permanent features they share or characteristics that pertain to a person's identity, such as ethnicity, sex, gender identity, or sexual orientation. This study aims to discuss how the same ramifications of oppression are applicable to sex workers. For this, it will draw from basic concepts developed for the analysis of traditional minorities and transpose them to a new reality.

It is true that all occupations might create a sense of self-identity pertaining to a specific group of professionals, but currently no other kind of labour originates a group that shares experiences of extreme stigmatisation and social isolation as a consequence of their occupation. When the sex worker role is consolidated, this fact negatively informs their every interaction with society.

⁸⁵ Takács, 2009, p. 128.

⁸⁶ Phelan, 2001, p. 15.

The uniqueness of sex workers as a group is that they are not recognisable at first sight, for they are not naturally marked by their bodies (i.e. skin colour or biological sex features). That is also true for certain members of the LGBTQI community, who are now largely accepted as a minority group but are not necessarily immediately recognised at first hand (i.e. many manage to ‘pass’ as non-deviants socially). Another commonality between both groups is the fact that their sexuality is deemed deviant and challenges the ‘natural order of things’, i.e. sexual relations within long-term stable heterosexual relationships.

Also both groups relate to the broader concept of *intimate citizenship*, that is centred on ‘rights, obligations, recognition and respect around those most intimate spheres of life – who to live with, how to raise children, how to handle one’s body, how to relate as a gendered being, how to be an erotic person’.⁸⁷

When discussing female citizenship, Young asserts that a social group is not primarily defined by a set of shared external attributes, but by a sense of identity, ‘It is identification with a certain social status, the common history that social status produces, and self-identification that define the group as a group.’⁸⁸ On the other hand, she believes that such classifications cannot rely on characteristics that are accidental to their identities. Therefore, should sex workers be considered a social group? Young herself and other authors could decide upon this philosophical question either way. Regardless of that arbitrary outcome, the intention of this study is not to discuss whether sex workers should be regarded as a social group or not, but to focus on their shared experiences of oppression based on the sole fact that they perform a specific job that is stigmatised and not legitimately recognised by the vast majority of legal systems worldwide.

Similarly, it would be unfruitful to compare the intensity of the persecution or subjection imposed on sex workers with any other social group. Although it is relevant to demonstrate that even attributes that are not rigid or innate to a person’s identity might have an effect on their quality of life and their enjoyment of basic human rights.

In order to carry out this analysis, the next sub-chapters focus on

⁸⁷ Plummer, 2001, p. 238.

⁸⁸ Young, 1990, p. 44.

a comprehensive set of categories that reflect the complexity of the subjection experienced by different social groups: they shed light on a number of factors that are interrelated and mutually influence each other to create an oppression that is structural. Young articulates these elements into the ‘five faces of oppression’⁸⁹: exploitation, marginalisation, powerlessness, cultural imperialism, and violence—all of which sex workers experience.

The subject of the following analysis is a non-traditional social group: sex workers. Thus, the following analysis extrapolates the rationale developed in the original study, to interpret the five faces of oppression in new contexts and, at times, to unveil different perceptions of them. This comprehensive framework will also allow a sectional scrutiny of criminalisation models and their pragmatic consequences for sex workers.

3.2.1. *Exploitation*

The Marxist concept of labour exploitation concentrates on the relationship between the capitalist and the worker. According to it, everyone who is a wage worker suffers from exploitation, since a portion of the value their labour produces is seized by another actor (i.e. a company or a business owner). Young expands this rhetoric when analysing gender oppression to conclude that social groups are exploited when there is a transfer of energy from one group to another in a way that produces unequal distributions of goods or power, reflected in society’s structural relations.⁹⁰ Therefore, women are exploited to the extent that their labour is uncompensated or underpaid. She points at a specific form of gender exploitation in women’s domestic labour, which goes unnoticed and unacknowledged,⁹¹ and at a macro-level creates an unequal distribution of benefits that harms women’s position in society.

Transposing this logic to sex work, it is possible to assert that it is not inherently an exploitative practice, as long as it is satisfactorily compensated and does not undermine a sex worker’s social standing. Many would be quick to accurately argue that sex workers’ social positions are nowadays significantly impaired in almost every society:

⁸⁹ *Idem*, p. 42.

⁹⁰ *Idem*, p. 53.

⁹¹ *Idem*, p. 51.

this is *exactly* the point. The social exclusion imposed upon sex workers is a direct consequence of sex work not being recognised as labour: it is repelled, vilified, and portrayed as a practice that subdues women.

The politics of the client criminalisation model are the dominant discourse among feminists who are abolitionists and oppose any form of sex work, even consensual. They believe that while sex work is legal there will be demand for it, therefore trafficking will not stop. This is why erasing the legal distinction between forced and consensual ‘prostitution’ would be beneficial to women and why every form of selling sex should be considered trafficking. Still, they oppose sanctioning women because they are always the victim in commercial transactions based on sex.

The core argument of pro-sex work advocates is that exploitation is not inherent to sex work, however they acknowledge that sex work can happen in a context of exploitation: when women are forced to work, do not receive compensation for their services, or are exposed to inhumane conditions of labour/existence. This distinction is important, for example, when addressing the global problem of human trafficking—a concern that motivates many anti-sex work advocates to defend abolishing prostitution as the best way to fight trafficking.

Pro-sex worker groups recognise that women (and therefore other vulnerable groups) can be victims of trafficking, but evidently, not everyone who migrates and enters the sex trade is being forced into it; many consciously decide to migrate and engage in sex work in another continent with better economic prospects to make a living. They defend that ‘trafficking people for the sex industry’ is only condemnable when someone is trafficked and forced into prostitution against their will.⁹²

Sex-work-positive groups believe the first step to fighting sexual exploitation would be for legal systems to treat voluntary sex work differently from sexual exploitation. First, because those who want to offer sexual services in exchange of money should be able to do so with no constraints. And ultimately, because it would make fighting ‘forced trafficking’ much more effective. When legislation fails to establish a clear difference between voluntary and forced sex work (as in most abolitionist laws), it collapses very different situations into one, making it harder to fight actual exploitation and intensifying the oppression voluntary sex workers face.

⁹² Outshoorn, 2004, p. 9.

Although the figures of the trafficking industry are alarming, estimates suggest that the majority of trafficking victims are forced into agricultural, construction, or domestic work.⁹³ Similarly, debt-bondage, a specific form of forced labour, commonly occurs in brick manufacturing and carpet weaving trades. Despite this, there are not advocates arguing for an end to agriculture or manufacturing altogether. Nor are there, for example, existing laws and conventions that outlaw domestic services and manual labour. On the contrary, while these sorts of abuse continue to exist, the existence of specific provisions forbidding forced labour and slavery is precisely what can pressure governments to enact them in national law and put in place effective public policies to suppress exploitation.⁹⁴

In this sense, feminists like Doezema believe that victimising women is an artefact used to ‘cover up moral objections to sex work’.⁹⁵ They argue that for all other occupations, it is never contested that force is the element that defines traffic or transnational labour exploitation. Only for sex work, force is overruled—the mere nature of the labour to be performed is enough to characterise an infraction.⁹⁶

Slavery is not inherent to the sex trade. Recognising this fact is also important to establish that sex work as an occupation is also susceptible, like many others, to exploitative practices. This is particularly important given the current global migration movement: if all ‘prostitution’ is violence against women, it seems that any migration of sex workers can become trafficking.⁹⁷

In jurisdictions where the consensual sex trade is not fully decriminalised and is not considered labour, sex workers cannot legally obtain visas or permits to stay in a state, on the basis of their occupation. Thus, they are more likely to subject themselves to irregular permanence, exploitative contracts, and precarious working conditions. Such impediments make them easier targets that attract organised crime. Abolitionists focus on ending the demand for ‘prostitution’ by targeting clients with punitive laws, instead of addressing the conditions and arrangements that are used as ammunition for the operation of

⁹³ Bazelon, 2016.

⁹⁴ Bindman, 1998, pp. 65–68.

⁹⁵ Doezema, 1998, pp. 34–50.

⁹⁶ Murray, 2002, pp. 51–64.

⁹⁷ *Ibidem*.

trafficking networks. People who wish to engage in sex work voluntarily become a deep pool of potential victims to trafficking.

In some states, trafficking sanctions can be reduced in cases when deceit was used on ‘a person who is not far from being a prostitute’ and investigations into trafficking complaints are usually ignored when they are filed by women who have continued to engage in sex work after being free of their exploiters;⁹⁸ in fact, previous victims of trafficking might fear coming forward with criminal complaints even after exploitation ceases to occur, because they are afraid of being retaliated against by a state which directly criminalises them. They might also fear that making a complaint might backfire on their personal lives, e.g. having civil rights revoked or getting deported, in the case of migrants.

Pro-sex-work advocates argue that a clear distinction would allow states to focus their efforts on sex trade activities that are actually unlawful and performed without consent. Trafficking must be fought with laws against trafficking, not sex work. Essentially because they are completely different occurrences and neglecting this fact creates material circumstances that enhance vulnerability to exploitation.

Moreover, sex workers themselves can become important allies to fight against trafficking if they are not targeted by the law, as they have access to the same social spaces as victims and are able to refer them to proper aid services, and encourage the reporting of abuse.⁹⁹ New Zealand decriminalised consensual sex work activity more than ten years ago, and there is no sign of an increase in the number of voluntary sex workers. It was also considered as one of the countries doing the most effective work in fighting human trafficking.¹⁰⁰ Under abolitionist models, sex workers might not feel safe enough to report exploitation incidents or act in co-operation with any authority, given that they might be negatively affected in the process.¹⁰¹

⁹⁸ Doezema, 2002, p. 45.

⁹⁹ Boyd, 2015.

¹⁰⁰ United States Department of State, Trafficking in Persons Report, 2014, available at www.state.gov/j/tip/rls/tiprpt/2014/index.htm.

¹⁰¹ In many countries, including the ones implementing the Nordic Model, sex workers are subject to eviction from their homes, deportation from a country, and losing custody of their children on the basis of their occupation. See Global Network of Sex Work Projects, 2015, p. (7)1.

3.2.2. *Marginalisation*

The marginalisation/social exclusion of a specific group of people is already implied in the general analysis of oppression of (racial, class, gender, sex) minorities. It is characterised by an essential failure of the liberal philosophy in which the human rights discourse prospered: the right of all rational autonomous agents to equal citizenship. Young's definition of marginalisation in the dissecting five faces of oppression is specifically based on the labour market: marginals would be people the system of labour cannot or will not use.¹⁰² Sex workers are outside of the formal labour market, even if they do have an occupation and source of income, as it is not recognised as a legitimate or morally acceptable one.

Further analysing the dynamics of labour in society, even when material deprivation is not the immediate problem (e.g. when mitigated by social welfare or when avoided with informal or illegal sources of income), marginalisation is still oppressive because it blocks the opportunities for individuals to exercise capacities in socially defined and recognised ways.¹⁰³ This is the intangible value of labour, one of the spheres in which someone can pursue the development and fulfilment of their personality and it is believed to be a source of dignity and importance, directly associated with a person's sense of self-worth and the way they are perceived by and are integrated in society.

Sex work abolitionist laws effectively marginalise a specific form of labour and workers engaging in it are precluded from useful participation in social life. As Young explains, the majority of society's productive and recognised activities are held in environments of organised social co-operation, therefore social structures that disproportionately shut out certain groups are not only economically unjust, but they also affect people's participation in processes of social co-operation. She later concludes that 'while marginalisation definitely entails serious issues of distributive justice, it also involves the deprivation of cultural, practical and institutionalised conditions for exercising capacities in a context of recognition and interaction'.¹⁰⁴

Beyond the intangible aspects, the marginalisation of sex workers can be also observed in practical examples. Unfavourable circumstances

¹⁰² Young, 1990, p. 53.

¹⁰³ Idem, p. 54.

¹⁰⁴ Idem, p. 55.

are a significant aspect that many people factor in when deciding to engage in sex work. Historically, minorities and oppressed social groups have been using sex work as a survival strategy, and currently, they still constitute the vast majority of sex workers.¹⁰⁵ Thus, many sex workers already experience labour market marginalisation even before entering the sex trade. When adopting sex work as means to escape material deprivation, they continue to face a form of marginalisation despite being economically active, because their occupation is not recognised as labour.

In extreme cases, where states fully criminalise the activity, sex workers are criminally prosecuted and convicted because of the work they performed; this is a practice that harms their ability to find future jobs, as criminal records might permanently label them as former sex workers. Most states that have partial bans on sex work (i.e. against third parties or clients) do not allow workers to organise into labour unions to address their demands, such as to fight for better work conditions, report and dismantle exploitation networks or practices, or collectively negotiate their compensation agreements with associates, administrators, or brothel owners. Sex workers who advocate for decriminalisation also envision the fruition of labour rights such as parental or family leave, compensation for when they are injured, health benefits, and protection against wrongful dismissals or unjust discrimination at work.¹⁰⁶

The lack of formal labour recognition might also indirectly affect other parts of their lives. For example, in most countries it hinders their access to social security services, including pensions and retirement funds. Additionally, it is not possible for sex workers to provide a regular proof of legal income and without a recognised record of earnings they lack access to credit and cannot contract long-term loans or mortgages; even renting an apartment (a place to live or a place where they can perform their activities with increased security) becomes a problem.¹⁰⁷ Finally, as mentioned before, when sex work is not recognised as labour, migrant sex workers cannot be granted a legal permit to stay based on their occupation and are then further pushed into irregular permanence.

¹⁰⁵ Mac, 2016.

¹⁰⁶ Mensah & Brucket, 2012, pp. 3–4.

¹⁰⁷ *Idem*, p. 5.

3.2.3. *Powerlessness*

An important angle to understand the toll that oppression takes on the lives of minority groups of society is to analyse their (lack of) power. In a democratic society, it is true that most people do not directly partake in decision-making processes, as they delegate their powers to political agents. Despite this, power is exerted on different levels and in contexts other than the political one; it reverberates to social, economic, and cultural aspects of life.

After the advent of social movements, the term *oppression* started being used to describe injustices and disadvantages often imposed by a society that is self-proclaimed democratic and aims to be just and equal. It is understood to be a structural force that exists because of a few people's choices and policies, those few who occupy privileged positions and have the power to create 'unquestionable norms, habits and symbols in the assumptions underlying institutional rules and the collective consequences of [not] following these rules'.¹⁰⁸

Power is somewhat dispersed in society through many agents who enact their decisions and mediate the decisions of others, even in private relationships. For Young, 'the powerless are those who lack authority or power even in the mediated sense, those over whom power is exercised without them exercising it'.¹⁰⁹

This sort of oppression tends to extend to other aspects of the lives of oppressed groups. As a result of not being acknowledged or respected as social actors, they are not listened to, lacking authority or influence: they tend to be ignored even from discussions that relate to their own experiences and determine their rights and statuses. Clear examples of this would be restrictions on women's reproductive rights, trans persons' rights to legal gender recognition, and sex workers' rights to freely perform their jobs on their own terms.

Members of these groups are underrepresented politically (when represented at all), and most of them are not consulted by lawmakers about their views on issues that directly affect them, hence the adoption of the motto 'nothing about us without us' by social movements, including sex workers. It carries the message that if they had the power

¹⁰⁸ Young, 1990, p. 41.

¹⁰⁹ Young, 1990, p. 56.

to influence political decisions, they would be opposed to the current configuration of most legal systems, which are clearly unfavourable to them.

Sex workers' powerlessness emerges as a direct consequence of their lack of recognition as workers and the illegality of their occupation. Criminalisation laws are a robust hindrance to access to justice. As previously mentioned, sex workers fear prosecution and retaliation even from police authorities, who are not seen as allies—often because they do not behave as such.¹¹⁰

Criminalisation entails animosity between sex workers and the police and a relationship of mutual distrust. Sex workers' claims are constantly dismissed or not taken seriously; they lack credibility because of the nature of the work they perform and its prohibitions under current legal systems. In fact, authorities themselves are in many cases the perpetrators of violence (as will be later explored). Thus sex workers fear that reporting crimes might expose them to further abuse. In practice, they are under-protected, but over-policed.¹¹¹ Their inability to seek redress for crimes committed against them leads to a cycle of powerlessness. Since most of these cases are not reported or pursued, their vulnerability is unnoticed and ignored.

The neo-abolitionist approach tries to address the vulnerability of sex workers by punishing the clients. The fact of the matter is that such laws are not powerful enough to overturn the power relationship existing between a sex worker and their client. If the sex worker is the most vulnerable party in a transaction, they are so because of a number of reasons: their inferiority is also economic and social, not only legal. Besides this, punishing only one party of the exchange is futile. A party who is willing to pay for services is a prerequisite to the voluntary sexual exchange: there is no buying without selling, it is a single act. A law that criminalises clients is a law that criminalises the whole financial arrangement, laying an imprint of illegality over commercial sex itself.

Sex worker groups have criticised the so-called Nordic model, affirming that its primary intent is to extinguish their jobs and, in practice, it exposes them to dangerous situations. In countries that have adopted the model, like Sweden and Northern Ireland, sex workers

¹¹⁰ Decker et al., 2014, pp. 60–73.

¹¹¹ Mensah & Brucket, 2012, p. 2.

reported raising the severity thresholds for reporting crimes committed against them.¹¹² They also reported that clients started refusing to undergo online checks and screenings prior to the sexual encounter or give detailed information about themselves that could be traceable in case of abuse. Under this model, sex workers feel less protected, as they do not have enough time to interact with clients and decide if they are trustworthy.¹¹³

Under the Nordic model, the power imbalance existing among a sex worker and their client might become even more pronounced: in order to avoid clients being caught up by the police, sex workers tend to submit to unfavourable terms of agreement dictated to them by the client. Their ability to negotiate conditions under which sex work will be performed is also impaired, resulting in feeble terms regarding, for example the use of condoms, the exact services they will provide, or where the sexual activities will take place.¹¹⁴ Consequently, they are more exposed to practising unsafe sex, agreeing to perform services they are not prepared for or wish to do, and following their clients to places where they feel unsafe and are at risk.

Therefore, such laws lead to a discrepancy of power not only regarding the sex worker and the state but also in relationships that they establish with individuals, in the private realm of their jobs. Granting legitimacy to a consensual agreement is the only way the aggrieved party can bring to justice the person who breaks the agreed terms. If the agreement is not legally recognised, the injured party has no grounds or incentive to reclaim their rights.

Decriminalisation strategies would empower sex workers to rightfully address violence or abuse committed against them; coming forward to register complaints against clients, third parties, or police authorities who act unlawfully. Thus they would have the possibility to bring offenders to justice without fear of negative consequences for their own lives.¹¹⁵

¹¹² Open Society Foundations, 2015, p. 3.

¹¹³ Gentleman, Amelia: 'Sex worker and activist Laura Lee: It's now far more difficult to stay safe', available at www.theguardian.com/society/2016/feb/05/sex-worker-activist-laura-lee-northern-ireland-law-challenge-interview

¹¹⁴ Amnesty International, 2016, pp. 61–69.

³ Open Society Foundations, 2015, p. 4. The negative consequences are not restricted to criminal sanctions, but also refer to civil retaliations, as mentioned before, like deportation and eviction.

It is opportune to underline that stating that sex workers are a powerless group in society is not contradictory with recognising their agency to perform sex work. They are conclusions resulting from two different angles: a collective one and an individual one. Sex workers as a group are deprived of power to have an impact on their interests and their status in society. That does not imply that sex workers are unable to make healthy conscious judgements at a personal level, no matter how much their self-determination is informed by a perverse environment that subjugates them. Ignoring their capability to take decisions about their own lives, on account of the structural oppression they experience, reproduces the very patterns creating and intensifying their subjection.

3.2.4. *Cultural Imperialism*

One of the faces of oppression that Young gives extensive attention to is *cultural imperialism*, which she defines as ‘the universalisation of a dominant group’s experience and culture and its establishment as the norm’.¹¹⁶ It addresses the fact that the privileged citizens—who concentrate social, economic, and political power—are the ones who dictate patterns of interpretation and communication in society. The dominant groups project their own experiences as representative of citizenship as a whole; meaning personal values and goals or social events and elements are as legitimate as they are in line with the universal standard.¹¹⁷ This process is referred to as *othering*. In order to reinforce its superior position, the dominant group constructs a discourse in which differences are lesser attributes. In relation to sex workers, this phenomenon is referred to as ‘whore stigma’; a term coined by themselves to describe the process of *othering* that they experience. In fact, this process emerges as a consequence of the good/bad dichotomy of the female identity, and it affects all women who defy or are perceived to defy, the standard of ‘compulsory virtue’, although to different proportions.¹¹⁸

Femaleness is illegitimate or illicit when it deviates from an expected behaviour associated with a specific and constricted sexuality (i.e. heterosexual relations, inside marriage, for reproductive reasons rather

¹¹⁶ Young, 1990, p. 59.

¹¹⁷ *Ibidem*.

¹¹⁸ Grant, 2014, pp. 75–76.

than pleasure, definitely not connected to a financial transaction). It is important to notice how the concept of discursive power developed by Foucault affects people under cultural imperialism: universality does not only specify a set of behaviours one has to comply with, but it also produces a system of social control that punishes and stigmatises those who challenge it.¹¹⁹

Slut shaming is a manifestation of oppression that reaches every woman who breaks their ‘compulsory virtue’, and it serves to draw a line and distinguish the outlaws from abiders. In its most extreme representation, this stigma materialises as whorephobia, reserved for those who break the ultimate rule of chasteness.

One noticeable aspect of cultural imperialism is that persons of a given minority are marked by stereotypes that are incontestable and assumed to be true for all those who belong to a certain group. A subtle aspect of this oppression is stamping the deviant element of a person’s identity as their essence, the most important trait of their personality, thus, erasing their individuality: every sex worker is believed to be in the sex trade because they had no other choice and are victims of a patriarchal system. Consequently, they are defined from the outside and ‘by a network of dominant meanings they experience as arising from elsewhere, from those with whom they do not identify and do not identify with them’.¹²⁰ The oppressed group is invisibilised: their perspective, originated from their lived experiences, is ignored; their interpretation of social life is disregarded in favour of the values and culture imposed by the dominant group, reinforcing their powerlessness.

In this context, an inescapable problem of criminalisation strategies is that they uphold the notion that sex work is a negative practice, condemned by law, that should be avoided and combated. As a consequence, they perpetuate stigma against sex workers—or might even enhance it in jurisdictions where the activity was not criminalised before. Stigma is the true source of human rights violations perpetrated against sex workers. When states fuel stigma instead of fighting it, they foster an environment where abuse, discrimination, and violence are likely to thrive.

The logic behind the Nordic model, which criminalises clients but

¹¹⁹ *Idem*, p. 77.

¹²⁰ Young, 1990, p. 59.

not sex workers, also contributes to a process of *othering* sex workers. The Swedish Government, for example, believes that sex workers who oppose their legislation are the ones still being ‘exploited’ (everyone who did not opt out of sex work), while ‘those who have left prostitution say the criminalisation of the buyer’s actions has made them stronger’, clearly dismissing the experiences of the deviant beings who still refuse to comply with their morality rules. Later, in the same document, the Government states that sex workers’ claims of increased human rights violations are *an acceptable form of deterrence*, hence the ‘negative effects of the ban that [sex workers] describe must be viewed as positive from the perspective that the purpose of the law is indeed to combat prostitution’.¹²¹ It becomes clear that the strategy of criminalising clients does not intend to protect those who offer sexual services as long as they continue to do so—it aims to dissuade them from being sex workers in the first place.

Studies conducted in Sweden and Norway have shown that public attitude towards sex workers has become more punitive as a result of introducing laws criminalising the purchase of sex. Swedish women surveyed in 2008 supported the idea that selling sex should also be criminalised, by a margin of 66% compared to 41% in 1996.¹²² Likewise, the adoption of abolitionist legislation in Canada resulted in an increase of people’s intolerance and bigotry towards sex workers.¹²³ It is, thus, unlikely that selectively penalising one side of the sex work transaction will not also stigmatise the other group involved. The way the law and state institutions approach sex work has a direct impact on the social stigma directed at those who choose to perform it.

France recently adopted a similar version of the Nordic model in April 2016, motivated by similar beliefs: according to the author of the Bill, one of its goals is to ‘change mentalities’.¹²⁴ In fact, Article 7 of Law 444/2016, creates a state fund to support any initiative that will alert the general population about the dangers of prostitution, especially those matters related to health, and those that prevent people from entering prostitution through raising awareness of its negative effects.¹²⁵ Instead

¹²¹ Swedish Institute, 2010, p. 34.

¹²² Amnesty International, 2016, pp. 88–89.

¹²³ See: Krüsi, et al., 2014.

¹²⁴ Bazelon, 2016.

¹²⁵ ‘LOI n° 2016-444 du 13 avril 2016, visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées’, available at www.legifrance.gouv.

of putting in place legislation and public policies that empower sex workers to deal with the problems they might face, this law adopts a blanket ban on the sexual activity and reinforces the cultural assumption that sex work is hazardous by its very nature. The whore stigma is then fostered, because public health is not being treated as a matter of safe sex, but paid sex.

Article 18, likewise determines the inclusion of prostitution under the sexual education subject, in the mandatory curriculum of secondary schools: ‘information must be given about the reality of prostitution and the dangers of the commodification of the body’.¹²⁶ The provision does not suggest an open discussion about sex work—which could be a constructive and fruitful debate—but mandates the reproduction of a discourse that represents sex work as immoral and reprehensible.

3.2.5. Violence

The last face of oppression discussed by Young is in many ways a direct consequence of the ones she previously addresses. All of them are intertwined and reach their most tangible and extreme representation when they erupt in violent acts. It is important to understand violence in this context, as a consequence of social injustice: it is not a causality that sex workers are subjected to more harassment, discrimination, and physical abuses such as rape—it is a consequence of the systemic oppression they experience.

Even when perpetrated by individual agents, such acts of violence are rooted in institutionalised social standards that create an environment where they are more likely to happen or be tolerated. In reality, their occurrence might even become somewhat unsurprising, given their frequency and the general feeling of detachment from the victims, sustained by a process of *othering*, led by the dominating power-holders.¹²⁷

Violence perpetrated against oppressed groups occurs as a social practice: black people can expect more vigorous reprimands from the police, gay men have reason to fear being beaten up on the streets by

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ocument=JORFDOLE000028255216&type=general&legislature=14.

¹²⁶ Ibidem.

¹²⁷ Young, 1990, pp. 61–62.

strangers, women are usually the ones who get physically/emotionally abused in a romantic relationship, and sex workers are more likely to be raped than anyone who has another job as their main occupation.¹²⁸ The above-mentioned individuals are more subject to violence, precisely because of a shared element that positions themselves as members of that certain group and they live every day knowing they are liable to abuse, which is in itself a violation of their freedom and dignity.¹²⁹ When violence assumes this systemic character, it becomes a form of social oppression that should be addressed by the state in a way that takes into consideration its structural origin. Presently, the majority of legal systems address structural violence as hate crimes.

Besides sexual violence, sex workers are also constantly the target of physical violence (i.e. use of force that causes injuries, harm, and in extreme cases death), as well as emotional, and psychological violence (e.g. being insulted, humiliated, threatened with harm, and being induced to fear), as a consequence of their stigmatised presence in society. It is important to note that perpetrators are not confined to their workplace (managers, co-workers, or clients), but are observed in a variety of roles, evidencing that the violence that sex workers experience is not constricted to performing their work activities, but to their perceived social status. They suffer from violence, related to their sex worker identity, from intimate partners or family members (due to an imbalance of power in the relationship and the opportunity for the other party to exert control over them), from individual perpetrators, or organised groups not linked to the state (militias, extortion groups, or extremists targeting them to uphold moral standards or use them as scapegoats for problems like HIV), and state violence (any agent exerting their mandate given by the state, who takes advantage of criminalisation or punitive laws to intimidate, abuse, extort, or blackmail sex workers).¹³⁰

Sex workers become particularly vulnerable to state violence when legislation criminalises aspects of their occupation.¹³¹ Authorities wield

¹²⁸ 'Sex workers experience high levels of sexual violence. Globally, sex workers have a 45 to 75% chance of experiencing sexual violence at some point in their careers and a 32 to 55% chance of experiencing sexual violence in a given year', according to study documented in Deering et al., 2014, p. 1.

¹²⁹ Young, 1990, p. 62.

¹³⁰ World Health Organisation, 2013, pp. 23–24.

¹³¹ A literature review on the correlation between restrictive sex work laws and violence found 'consistent evidence of an independent link between policing practices (e.g., arrest, violence, coercion) and elevated rates of physical or sexual violence against sex workers'.

more power to the extent that laws are more restrictive to sex work. When full criminalisation is in place, police officers are able to threaten victims of violence with arrest, or even physically/sexually assault victims more easily.¹³²

Similarly, the criminalisation of clients can also increase violence against sex workers. After introducing the Nordic model in 2007, Scotland saw a two-fold increase in rape and sexual assault cases. Reportedly, the Nordic model might elicit ‘displacement of street-based sex workers to more dangerous areas and make it more difficult for sex workers to access outreach services, resulting in sex workers working in isolation to avoid detection or ‘rushing’ conversations with clients to evade [their] arrest, ultimately jeopardizing safety’.¹³³

This model also enables state agents to wield power over sex workers in contexts other than criminal sanctions: a detailed study conducted in Norway¹³⁴ showed that the police had used sex workers’ reports of violence to track the sex workers themselves and facilitate their eviction or deportation processes; they also perform constant identity checks and impose fines on those refusing to provide addresses or other requested information. Understandably, sex workers might be reticent to reach out and report crimes committed against them to the authorities.

As previously asserted, decriminalisation encourages sex workers to report violence with less fear of retaliation. More than this, it is the only way to even the playing field and allow them to confront violence perpetrated by state authorities, who are otherwise shielded by the law itself. Additionally, it allows street-based professionals to operate in safer areas as well as to organise and collaborate to fend off threats of aggression. Analyses conducted in New Zealand,¹³⁵ a jurisdiction where sex work is no longer outlawed, have shown an increase in the quality of the relationship and willingness to co-operate between sex workers

Deering et al., 2014, op. cit.

¹³² In places where sex work is fully criminalised, ‘a high proportion of sex workers report being sexually assault by police—with rates as high as 90 percent in Kyrgyzstan. In Bangladesh, between 52% and 60% of street-based sex workers reported being raped by men in uniform....Approximately 20% of other acts of sexual violence reported by study participants were committed by the police. In Bolivia, police regularly arrest sex workers and either extort money or force them to engage in coercive sex’, Koster, 2015, ‘17 facts about sexual violence and sex work’, available at www.huffingtonpost.com/katherine-koster/16-facts-about-sexual-ass_b_8711720.html

¹³³ Koster, 2015.

¹³⁴ Amnesty International, 2016, pp. 44–49.

¹³⁵ New Zealand Government, 2008, p. 58.

and police forces. The New Zealand Prostitutes' Collective pointed at several instances in which sex workers have actively sought help from the authorities.¹³⁶

The bottom line is that sex work is not in itself a form of sexual violence, physical aggression, or psychological control. Despite this, sex workers are especially vulnerable to physical, sexual, and emotional abuse. Approaching sex work as an absolute, inescapable form of violence overshadows the true acts of violence to which they are exposed. It also instils social stigma and alienates sex workers from the public services that should protect them, such as police assistance and social services.¹³⁷ As a result, violence against sex workers goes underreported and concealed, which leads to the impunity of perpetrators and feeds a cycle of abuse and subjugation that is otherwise impossible to break.

3.3. INTERSECTING OPPRESSIONS

The extensive analysis of the adversities sex workers face is important to understand the complexity of their stigmatisation and to position them as a group that is targeted and abused precisely because of the job they perform. It is undeniable that they are subdued *as members of such a group* and experience a distinct system of oppression, for not complying with a strong set of rules and values imposed upon them by the dominant actors in society.

Even when a group is situated under a distinct structure of oppression, Young cautions against an analysis that exclusively takes into consideration a single aspect of their being. Sex workers are also women, men, or gender-diverse persons; they also have different ages and ethnic backgrounds. All these aspects influence their social status, hence, not every member of a social group is the same. One cannot disregard the similarities and overlaps among the oppression systems of different groups, that will directly affect their experiences.¹³⁸

The concept of intersecting oppressions was introduced by black feminist scholars. They state that the experience of a black woman cannot be understood in terms of being black or being a woman

¹³⁶ Bazelon, 2016.

¹³⁷ Koster, 2015.

¹³⁸ Young, 1990, p. 64.

separately because the oppression this intersectionality inflicts is more powerful than the sum of the discrimination against their race and sex alone since they frequently reinforce and intensify each other.¹³⁹

In this sense, Collins conceptualises a ‘matrix of domination,’ that emphasises the connections and interdependencies among inequality structures.¹⁴⁰ This development is important to understand how social categories are related and mutually constituted. For sex workers, for example, several aspects can enhance their structural vulnerability, like their race/ethnicity, age, and nationality, or migrant status. These different combinations are determinant to a person’s experience with social oppression, and one of the most influential ones for sex workers is their (deviant) gender identity/expression.

There is a complex realm of disadvantages faced by this particular group which amount to the safe conclusion that the experiences of trans sex workers are substantially different from those of cisgender female sex workers—the group usually involved in discussions on sex trade laws. Assuming one group is more oppressed than the other is also simplistic and one dimensional. Different types of oppression come into play when discussing the perspective of different social groups that engage in sex work. That is precisely why all different experiences must be taken into account when discussing the matter.

An important consideration is that one’s ‘social nearness or distance to another changes as the matrix of domination shifts, depending on which scheme is salient at any given moment’. In other words, two sex workers are subject to the same general elements of oppression as a result of their occupation, but their personal experiences might be different in substance and intensity because their social nearness will definitely be affected when factoring in their class, race/ethnicity, migrant status, and their deviant gender identity/expression.¹⁴¹

To paraphrase black feminist authors, the subjugation experienced by trans sex workers is different from the one lived by trans persons who do not perform sex work, and from what is experienced by cisgender sex workers, given the fact that they are subjected to two distinct and

¹³⁹ Crenshaw, 1989, p. 140.

¹⁴⁰ Collins, 2000, pp. 127–129.

¹⁴¹ The same is true for trans persons themselves: their experiences differ considerably according to their race/ethnicity, social class, and sexual practices or the type of labour they perform.

powerful sets of structural domination that interact to influence and exacerbate each other.

Given the adverse circumstances trans persons experience in life, they engage in sex work at rates far higher than the average. Studies present different figures, although always high numbers, and they might even be underestimated given the difficulty of obtaining data in places where sex work is fully or partially criminalised. Amnesty International cites studies estimating that around 43% of the global transgender population has had experience in sex work and notes that even though ‘the majority of the world’s sex workers are cisgender women, when examined on a *per capita* basis a larger proportion of the transgender community is involved in sex work compared to the proportion of the population of cisgender women who are sex workers’.¹⁴² Another report estimated that trans people engage in sex work ‘at a rate of 10 times that of cisgender women’.¹⁴³

This is a consequence of the chronic marginalisation trans persons experience in society, as discussed in the first chapter of this thesis. They suffer from structural oppression and lack access to education, which compromises their employment options and livelihood possibilities. Trans persons also experience severe discrimination in the labour market from employers, which increases their chances of turning to alternative sources of income. A study conducted in parts of Latin America, for example, found 84% of trans respondents declared earning a living through sex work. In this study, 73% of trans sex workers had not completed basic level education; 39% had abandoned their studies out of fear of discrimination and 30% declared to have stopped attending because of lack of money.¹⁴⁴

Another disadvantage for trans persons are the barriers to adopting their preferred names and adequate gender in legal identification documents (i.e. birth certificates, ID cards, passports). Therefore, even in countries where sex work is allowed under strict regulations requiring prior registration, trans persons can find difficulties to work legally under their corresponding gender, thus being forced into clandestinity. Many trans people also desire to undergo gender reassignment methods (e.g. hormone therapies, psychological accompaniment, reassignment

¹⁴² Amnesty International, 2016, p. 5.

¹⁴³ Ibidem.

¹⁴⁴ Balzer & Hutta et al., 2012, p. 47.

surgeries), which are generally long and costly processes, seldom covered by the state—sometimes not even allowed by the state. Given the fact that they are ostracised from the formal labour market and usually do not have access to health insurance coverage, sex work is regarded as a means to acquire the finances to cover the costs of the reassignment processes or to afford travel to other countries where this service is available.¹⁴⁵

When trying to access homeless shelters, trans people in the sex trade were twice as likely to experience mistreatment than their counterparts who were not sex workers (they were either denied access or expelled, harassed, or physically or sexually assaulted by staff). Similarly, trans sex workers reported higher levels of interaction with the police (79.1% compared to 51.6% of non-sex worker trans respondents). Numbers were even higher among black and multiracial sex workers, who reported the highest levels of negative police interaction (87.3%).¹⁴⁶ These statistics demonstrate that, for trans people, the sole fact of being a sex worker is an element that increases the likelihood of abuse, harassment, and acute social exclusion.

It is important to note that the oppression endured by trans sex workers also intersects and is significantly influenced by distinct elements such as class, race/ethnicity, and migrant status. A detailed analysis of these intersections was conducted by the United States Red Umbrella Project, based on discrimination surveys conducted with trans persons.¹⁴⁷ Some of the key findings show that black or multiracial gender-deviant respondents had the highest rate of sex trade participation overall (39.9%), followed by those who identified as Hispanic or Latino/a (33.2%). The ones identifying as ‘white only’ participated at a rate of 6.3%. Furthermore, 43.4% of people of colour that reported engaging in sex work had a household income below the level of poverty, compared to only 16.3% of white respondents.

An important factor is the heightened exposure to jeopardy faced by trans sex workers. For a variety of reasons, they frequently work outdoors (as opposed to many cisgender sex workers, who have traditionally occupied indoor sex work premises with more ease). Therefore, they might be more susceptible to violent acts, a situation that is mitigated

¹⁴⁵ NSWP–Global Network of Sex Work Projects, 2015, p. 4.

¹⁴⁶ *Ibidem*.

¹⁴⁷ See: Fitzgerald et. al., 2015.

when they work indoors with security measures.¹⁴⁸ Once they are more visible and exposed, they can become targets of hate crimes motivated by any deviant aspect, whether it is their profession or their gender identity/expression. The above mentioned Latin American study found that more than 90% of trans sex workers had experienced some form of violence, of which 74.2% had happened on the streets.¹⁴⁹

Transphobic violence and hate crimes reach alarmingly high numbers, especially in Asian countries, Turkey, and Latin America.¹⁵⁰ According to research and data collection conducted worldwide by the Trans Murder Monitoring Project,¹⁵¹ between January 2008 and April 2016, 78% of reported murders of trans persons occurred in the regions of Central and South America. The situation is particularly serious in countries like Honduras (that has an extremely high number of murders *per capita*) and Brazil, the country with the highest absolute number of reported cases: 845, more than three times as much as the second worst country, Mexico. In fact, the most recent data shows that 42% of the worldwide trans murder cases reported in 2016 so far happened in Brazil.¹⁵² It is also important to underline that most countries do not collect information on murdered trans or gender diverse people systemically, therefore such numbers are also probably underestimated.

The same report by the Trans Murdering Project released in 2015 showed that amongst murdered trans people in the world *whose profession was known*, 65% were sex workers.¹⁵³ Numbers this high must not be considered a causality. Even if one could argue that a large number of trans persons engage in sex work, the clandestine nature of sex work means that there are usually no official registers or work contracts that would unquestionably link a person to the sex trade; thus, it is harder to identify the murder victims as sex workers. Though in reality, these murders usually happen in circumstances that are directly

¹⁴⁸ NSW, 2015, p. 5.

¹⁴⁹ Furthermore, 64.5% of the total respondents experienced physical aggression and 41.5%, sexual abuse. See Balzer & Hutta et al., 2012, p. 47.

¹⁵⁰ Ibidem.

¹⁵¹ Trans Murder Monitoring Project, available at <http://tgeu.org/tmm-idahot-update-2015/>

¹⁵² Trans Murder Monitoring Update-IDAHO 2016, available at <http://transrespect.org/en/idahot-2016-tmm-update>

¹⁵³ Trans Murder Monitoring Project, available at <http://tgeu.org/tmm-idahot-update-2015/>

related to this form of labour—meaning the job they perform is not an incidental element to the hate crime but a fundamental part of it.

Trans sex workers are being targeted not only because of their identity/expression but also because of the specific job they perform. Sex work is, in itself, a source of stigma and the motivation behind acts of violence, heightening the risks for some trans individuals. At the same time, violence against trans sex workers differs from what is experienced by cisgender sex workers,¹⁵⁴ as it can also be used as a vessel for manifesting bigotry against individuals who do not conform to binary gender norms regarding identity/expression. In this sense, transphobia and whorephobia are closely intertwined. The interplay among the otherness imprinted upon trans persons and the otherness imprinted upon sex workers is a decisive element in building the social dynamic that results in extreme negative outcomes for trans sex workers, ultimately represented by appalling murder rates. Thus, discussing transphobic motivations or attitudes and, more importantly, devising solutions for this staggering issue must include sex work as part of the equation.

Another issue of concern is the prevalence of HIV infection rates among trans individuals. Trans women particularly are heavily affected; currently, 19% of them are estimated to have acquired the virus, according to UNAIDS.¹⁵⁵ In fact, they are around 50 times more likely to be HIV-positive than all adults of reproductive age. Unfortunately, the same data regarding trans men is not yet conclusive. The risk of HIV contraction is also higher amongst sex workers, another target group of international strategies against the spreading of the virus. As a result, transgender women who engage in sex work are even more vulnerable in this scenario: there is ‘an overall crude HIV prevalence of 27.3% among transgender women who engage in sex work’, a rate that surpasses the 30% mark in Latin American countries. Infection rates go down to 14.7% for trans subjects reporting to not having engaged in sex work. On the other hand, reports suggest that ‘HIV prevalence for trans sex workers is on average nine times higher than for female sex

¹⁵⁴ Although precise statistics about murders of cisgender women sex workers in Latin America were not available for comparison, the occurrence of murders among trans sex workers is incontestably alarming, considering it affects a significant number of people within a limited population.

¹⁵⁵ Data and analysis mentioned in this paragraph are all presented in ‘The Gap Report’, 2014 of UNAIDS, the Joint United Nations Program on HIV/AIDS, pp. 2–4.

workers and three times higher than for male sex workers', evidencing the perverse effect multiple oppressions elicit on minority groups.

The way that states respond to sex work has a decisive impact on each of those factors, intensifying the oppression sex workers face or creating possibilities for them to fight it. Addressing sex work legislation is seminal to tackle the current pandemic of transphobic murders and reduce the HIV infection rate amongst trans individuals. As discussed at length earlier in this chapter, legislation that is prohibitive or restrictive of consensual sex work has a detrimental effect on sex workers' health and security. The next chapter examines decriminalisation proposals and protection strategies that are more likely to be successful in addressing such vulnerabilities.

4.

RESPECT, PROTECT, AND DECRIMINALISE

*Joga pedra na Geni!
Joga pedra na Geni!
Ela é feita pra apanhar,
Ela é boa de cuspir!
Ela dá pra qualquer um,
Maldita Geni!’
Geni e o Zepelim¹⁵⁶*

This chapter focuses on alternatives to address the current situation of sex workers of any gender—either through legislation or public policies—in order to respect their right to work, protect them from violence and abuse, and fulfil their human rights.

The first piece to be analysed is an example of legislation decriminalising any activities related to sex work, a common point of advocacy among sex workers’ groups, but with limited adherence from states worldwide. In favour of an intersectional approach, the chosen state for this analysis is Brazil, given the large involvement of trans persons with sex work in Brazilian society, as well as statistics pointing at high rates of transphobic violence and HIV infection in the country, factors evidencing the burden intersectionality represents for Brazilian trans individuals. Besides this, it is important to address how a country less developed than New Zealand regarding socioeconomic standards envisions the implementation of decriminalisation strategies.

¹⁵⁶ Brazilian song ‘Geni e o Zepelim’, recorded by Chico Buarque in 1979. Its authorship is contested. The popular song describes the stigmatisation and bashing of a *travesti*: ‘*Throw stones at Geni! Throw stones at Geni! She was made to be beaten; she is good to spit on; she will fuck anyone. Damned Geni!*’

Similar to most of Latin American states, Brazilian law tolerates sex work; it does not directly punish those who offer sexual services in exchange for financial benefits, but it criminalises any third party associated with sex work activity and neglects sex worker's labour rights.¹⁵⁷ Two different bills were recently presented for discussion in the Legislative Houses: one aims at penalising customers of sex work,¹⁵⁸ following the so-called Nordic model; the other¹⁵⁹ aims at decriminalising sex work-related activities that are currently outlawed, such as brothel-owning and procuring, among other things, which would result in a model similar to the one implemented in the New Zealand Reform of 2003. Not surprisingly, the Brazilian Parliament has not yet found the political will to even put either of these bills up for voting discussions.

Although this section does not aim to be a case study, but rather an investigation of the promising strategies to address the issues faced by sex workers, it is important to consider the reality of the state whose proposed legislation is under scrutiny, so as to offer a pragmatic and contextualised approach. Brazil is already a country with many liabilities concerning the safety of trans persons who are sex workers. Neither sexual orientation or gender identity/expression are protected attributes in the national legislation regarding hate crimes. The Bill that criminalises hate crimes based on sexual orientation and gender identity (PL 122/2006)¹⁶⁰ was shelved in 2015 because it was not officially voted upon within eight years following its proposal.

As in almost all other countries in the world, whorephobia is also not addressed as a motivation for hate crimes in Brazil or Latin America, despite the overwhelming amount of abuse sex workers experience there. This chapter will analyse the exception of Merseyside, a county of the UK that adopted a strategy for dealing with violence and abuse

¹⁵⁷ There are notable exceptions, for example Bolivia, where police forces regularly arrest sex workers and either extort money or force them to engage in coercive sex. See: Koster, 2015.

¹⁵⁸ The Bill 377/2011 does not exempt third parties from criminal sanctions, it merely amends the previous Law to also include clients as perpetrators of sexual exploitation crimes (those who purchase, try to purchase, or accept offers of paid sexual services). The proposal establishes a minimum detention period of one month and a maximum of six months for clients in Article 1, the only provision in the Bill. Full text available in Portuguese at www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=839127&filename=PL+377/2011

¹⁵⁹ A translation from Portuguese to English of the *Bill Gabriela Leite-PL 4211/2012* was made by the author of this study and is annexed at the end of the thesis, followed by its original version in Portuguese.

¹⁶⁰ PL 122/2006. Full text available in Portuguese at www.senado.gov.br/noticias/opiniaopublica/pdf/PLC122.pdf

committed against sex workers in the context of hate crimes, making use of similar existing mechanisms designed to alleviate and combat biased attacks against other social groups. This strategy has garnered positive results and is capable of addressing violence against sex workers, not as individual occurrences but as a systematic issue.

4.1. BRASILEIRAS, TRAVESTIS, PUTAS

The widespread transphobia observed nowadays in Brazil is intimately related to the country's last dictatorship, a regime that lasted from 1964 to 1985, and from which—if the recent political situation in 2016 and 2017 is any indication—the country is still trying to recover from in many aspects. The military dictatorship openly persecuted and punished *queer* people based on what was called 'national values' and 'traditional family morals', on behalf of national security and the best interests of society. The list of human rights violations is long, but the preferred targets of violence were trans sex workers, who were indicted under the criminal provisions of vagrancy and public disorder.¹⁶¹

Before the *coup d'état*, trans persons were mainly involved in the entertainment industry, but they soon faced censorship and were banned from TV shows, theatre and other cultural media. This resulted in a mass exodus of the trans community to European countries and arguably led to an increase in sex work activities as an alternative for those who did not emigrate.¹⁶² Trans sex workers then became known targets of military repression and public enemies of the state. In the mid-1970s, a systematic hunt for trans sex workers was initiated, leading to the arrest of 2,000 of them in that period; later, during the year of 1981 alone, a specific military operation led to the arrest of 1,500 trans sex workers in a single week.¹⁶³

Even when the dictatorship ended, the stigma and violence inflicted upon trans sex workers did not ease. In the late 1980s and early 1990s, military forces were not ruling but still held on to a lot of power. They continued persecuting trans sex workers, now with the support of

¹⁶¹ Green & Quinalha, 2014, pp. 251–252.

¹⁶² Balzer & Hutta, 2012, p. 52.

¹⁶³ Ibidem.

organised death squads and vigilante groups.¹⁶⁴ Hate crimes against trans people were treated with pronounced lenience. This history is not in the past but is a reality that still resonates currently. *Travestis* (the local popular word to refer to transfeminine individuals) are still directly associated with sex work, crime, drugs, and public health problems. Reports and data on trans murders show that violence against trans persons—and trans sex workers, particularly—continues to increase.¹⁶⁵

The heritage of military dictatorships is mirrored throughout Central and South American countries, as many of them went through similar political regimes in the twentieth century, and their influence on the compounded negative effect experienced by trans persons in this continent should not be overlooked. Trans women are estimated to engage in sex work as their main form of income generation at particularly high rates in countries like Venezuela (68%), Argentina (84%), Colombia, and Brazil (more than 90%).¹⁶⁶

Participation of trans women in sex trade activities can be so evident and extensive, that in most Latin American countries, popular belief and imagery directly associates the transfeminine identity with sex work, whether they perform it or not.¹⁶⁷ This is yet another testament to the importance of investigating how these different elements interact: bigotry against sex workers might ultimately affect the perception society has of trans individuals as a group. Their identities, bodies, and experiences are often presumed to be connected with the sex trade in some social contexts, enhancing their overall vulnerability. The assumption that trans women are inevitably sex workers feeds a vicious circle of marginalisation, as they are typically regarded prejudicially, which drastically undermines their chances of getting formal jobs.

¹⁶⁴ Some of these groups are still operating in countries like Brazil, Guyana, and Peru. See: Balzer & Hutta, 2012, p. 53.

¹⁶⁵ Balzer & Hutta, 2012, p. 52.

¹⁶⁶ Information provided by the Project 'TransRespect Versus Transphobia Worldwide', and their publications from 2012 through 2016; as well as Brazilian trans organisation ANTRA–Articulação Nacional de Travestis e Transexuais.

¹⁶⁷ Balzer & Hutta, 2012, p. 48.

4.2. THE PROJECT FOR DECRIMINALISING SEX WORK IN BRAZIL.
BILL 4211/2012

In 2002, the Executive branch of Government made an effort to legitimise the occupation performed by sex workers. The Brazilian Ministry of Labour and Employment included sex work in the roster of recognised occupations of the country. Despite this, the criminal provisions restricting their practice and the penalising of involved parties continue to be detrimental to sex workers' liberties and enjoyment of their right to work. Most activities related to the occupation are outlawed, such as any third-party involvement (e.g. procuring, advertising, offering security) and brothel-owning (under this vague prohibition, even people cohabiting or renting their properties to sex workers are liable to penal sanctions).¹⁶⁸ These conditions essentially push sex workers to work independently and outdoors, where most abusive incidents reported by them tend to happen.

Moreover, these limitations are also detrimental to their status as workers: anecdotal evidence suggests sex workers cannot be legally registered as such by public institutions even when they try.¹⁶⁹ In fact, many sex workers practice their occupation irregularly, as their work settings do not comply with the constraining legislation. In fact, the Criminal Code makes no distinction between sex work and sexual exploitation or human trafficking;¹⁷⁰ they are handled equally, in complete contradiction to the administrative determination of the Ministry of Labour and Employment—which proves to be essentially innocuous.

In order to actually conceive sex work as a legitimate form of labour, legislation must be coherent and not constrain sex workers to situations that undermine their agency, safety, and well-being. Aiming to bridge that gap, a bill was drafted and submitted to the Legislative Chambers for analysis. The 'Gabriela Leite' Bill (PL 4211/2012)¹⁷¹ decriminalises

¹⁶⁸ Crimes defined by Articles 227–230 of the Brazilian Criminal Code (DL 2848/1940), available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm

¹⁶⁹ News story in Portuguese available at <http://espaco-vital.jusbrasil.com.br/noticias/2629880/a-regularizacao-da-prostituicao>

¹⁷⁰ Articles 231 and 231-A (DL 2848/1940).

¹⁷¹ The project is commonly referred to as Bill 'Gabriela Leite', in reference to the precursor of sex work activism in Brazil. The Bill was built with the input of sex workers organisations in Brazil, highly influenced by Leite. They prefer the term 'prostitution' over

sex work-related activities and offers a framework for potential advancements regarding the issue.

4.2.1. Defining Sex Work and Sexual Exploitation (Articles 1 and 2)

The proposed law begins with a fundamental conceptual outline regarding who can be considered a sex worker (Article 1), therefore differentiating sex work from sexual exploitation (Article 2). It touches upon the element of consent, limiting the understanding of sex work to only those services that are voluntarily offered by sex workers. In doing so, sexual exploitation is more clearly defined; the conditions that would amount to this violation are delineated and the crime becomes arguably more enforceable.

Sexual exploitation (or forced sexual labour) is thus qualified by Article 2 when: a) one forces a person to engage in sex work against their will; b) one fails to respect an agreement made with a sex worker and/or fails to adequately compensate them for providing sexual services; and c) one or more third parties retain more than 50% of the payment given in exchange for the sexual services. This provision is valuable because it defines force as the element that imputes exploitation, and at the same time it allows voluntary sex workers to seek redress when they are exploited, such as not being adequately compensated for their work (either by a client who denies payment or by third parties who take more than 50% of their work's value).¹⁷² It mitigates the danger of simplistic categorisations of trafficking victims and voluntary sex workers by empowering sex workers to legally fight abuses.

A clear distinction between sex work and sexual exploitation allows the state to focus its efforts on sex work that is actually unlawful and performed without consent. This clarification would also prevent authorities from abusing their power, for example, taking sex workers into custody against their will under the pretext that they need help or that they must be questioned as they could be associated with a trafficking network, as often happens in light of the current grey area. In spite of the absence of laws criminalising sex workers in Brazil,

sex worker, for the latter is considered too general and imprecise. Therefore, this is how the activity is referred to under the Bill. See: Annex.

¹⁷² The Bill explicitly stipulates that an agreement to provide sexual services in exchange for financial compensation is judicially callable. (Art. 1, § 1º). See: Annex.

an evident imbalance of power and a tangible mutual distrust in the relationship between police and sex workers persist.

As mentioned before, sex workers themselves can become important allies to fight against trafficking as they have access to the same social spaces as victims and can refer them to proper aid services, e.g. for reporting abuse cases. This has been the situation in states that adopted similar rules to those of Brazilian Bill 4211/2012, like New Zealand, where sex workers reported a significant increase in their trust and reliance on law-enforcement authorities.¹⁷³

Finally, the first article also establishes a minimum age to perform sex work: 18 years old. Before this age, a person is not able to consent to sexual activities in exchange for financial compensation (in contrast to the age of consent for any sexual activities, currently set at 14 years old in Brazil).¹⁷⁴ It is also coherent with the adult age when civil law concedes full legal capacity and ownership of one's actions, acknowledging that performing sex work requires agency. Under the text of this project, third parties and clients alike commit the crime of sexual exploitation when they involve minors in the sex trade, incurring in the penalties already imposed by the Criminal Code.

This provision is indispensable in a country where young girls are forced by their own parents and legal guardians to engage in sex work.¹⁷⁵ On the other hand, it also presents a limitation: the stories of young trans persons might be somewhat different, as they often are expelled from their family homes and experience homelessness, starvation, and other hardships before turning to sex work at an early age. Young people of any gender facing extreme adversities might prematurely engage in sex work to prevail through unfavourable circumstances. Punishing clients and third parties who take advantage of minors is certainly desirable. At the same time, is establishing such punishment enough to effectively help these minors? Should the rights and guarantees reserved for voluntary (adult) sex workers be extended to them? This Bill stops short of addressing this controversial issue, which might deserve dedicated research attention and further contemplation in the future.

¹⁷³ New Zealand Government, 2008, p. 58.

¹⁷⁴ Articles 217–218 of the above mentioned Brazilian Criminal Code (DL 2848/1940).

¹⁷⁵ There is an enormous disparity of estimates, varying between 100,000 and 500,000 children involved in sexual exploitation in the country, as reported by Mr. Juan Miguel Petit, UN Special Rapporteur on the sale of children, child prostitution, and child pornography. See: Petit, 2003, p. 26.

4.2.2. *Organising Sex Work (Article 3)*

Article 3 touches upon an important matter: the ability to perform sex work independently, or in association with other sex workers, therefore allowing them to organise collectively in a given property with or without a person to administrate the establishment. The latter can be translated as brothel-owning or managing, while the former model would be called a ‘co-operative’, a specific arrangement guaranteed by law in which service providers associate as equals and enjoy multiple benefits of performing their jobs, mainly autonomy and self-management prerogatives.

In implementing the Bill, sex workers would be able to organise themselves into labour unions, in order to enhance their bargaining power when voicing their demands. This would empower them to fight for better work conditions and collectively negotiate their compensation agreements with associates or third parties. The possibility of unionising is also a labour right enshrined in the UDHR, Art. 23 (4), being fundamental for the protection of the interests of workers. Acquiring this right would bring sex work even closer to exist as a legitimate form of labour.

Recognising a group of sex workers as an association is important because it represents the reality of their work experiences; for example, many of them choose to work together so as to enhance their safety and share expenses. This provision allows them to perform their work under the circumstances that best suits their preferences, without depending on business managers or licensing authorities (as is often the case with countries that strictly regulate sex work, like the Netherlands, Uruguay, Chile, and Peru).

Current legislation in Brazil explicitly prohibits these arrangements, punishing the organisers as if they were exploiters. Not only that, but this imprecise law has worst practical effects: sex workers encounter problems to rent properties because owners can face criminal charges for sexual exploitation. Many sex workers (particularly trans persons) in Brazil face a situation of economic duress, and so they do not have the initial capital to rent their own flats, let alone start-up their own individual business—not to mention being denied a lease contract even when they can afford it. Allowing brothels to operate (while establishing ground rules for third parties not to exploit sex workers, as this Bill does in Article 2) would give sex workers the possibility to work under

more favourable conditions of hygiene and safety. Currently, outdoor soliciting is a common practice amongst trans sex workers in Brazil (presenting themselves in places known for being pick-up areas, sometimes leading to sex work being performed in alleys or customers' vehicles). This situation leaves sex workers even more exposed to danger and is yet another factor that increases the risk of violence being committed against them.

In reality, there are already many brothels in activity now, but under the current regulatory framework, they usually operate through corruption schemes, as police authorities demand bribes in exchange for overlooking their existence.¹⁷⁶ Additionally, regulating the existence and functioning of such places allows for periodic supervision and inspections by authorities, that would be able to identify establishments maintained for purposes of sexual exploitation rather than consensual sex work.

This would also be a way to reach out to sex workers and implement health programs, raising awareness and amplifying the access to condoms, thus reducing their risk of contracting HIV and other sexually transmitted diseases. Besides this, encouraging sex workers to organise as they wish grants them more autonomy and power, increasing their sense of safety and potentially improving their ability to negotiate the terms of contracts with clients, such as the use of condoms.

According to the World Health Organization, safety and health are indeed intimately related. Their studies indicate that:

a reduction of approximately 25% in HIV infections among sex workers may be achieved when physical or sexual violence is reduced. More HIV prevention programmes are implementing strategies to address violence against sex workers and protect their human rights as an integral part of HIV prevention, treatment and care. Addressing violence can make it easier for sex workers to access services and make their own choices about their long-term health and welfare.¹⁷⁷

¹⁷⁶ 'Justificativa' - PL 4211/2012. (*Justifications provided in the text of the "Bill Gabriela Leite"*).

¹⁷⁷ World Health Organisation, 2013, p. 22.

4.2.3. *The Engagement of Third Parties (Article 4)*

Article 4 decriminalises the participation of third parties in activities linked to sex work.¹⁷⁸ Usually, the practice of procuring or advertising sex work is referred to as *pimping*, but it does not reflect the range of third party relationships sex workers establish in order to perform their jobs.¹⁷⁹ The current wording of the legislation might also hinder the participation of anyone who receives material compensation for their work when it is linked to ‘prostitution’, which would include receptionists, drivers, bookers, business managers, and security personnel, all of whom might contribute to more convenient and safer working conditions for sex workers.

Imposing a blanket ban on the participation of third parties assumes their involvement is always exploitative and forces sex workers to work in isolation or in outdoor locations, which once again might not be desirable for them, as they become more exposed to attacks as well as stigmatisation and social condemnation. Even those who choose to work at outdoor locations would not be able to take measures to guarantee their safety if it would require them to pay someone for it (e.g. specialised security personnel or even a friend to record vehicle license plate numbers).¹⁸⁰

Sex workers can definitely be subjected to exploitation from third parties, financially, physically, and emotionally. There seems to be no better way to empower them other than decriminalisation; it would allow sex workers to push for third party respect of workplace, and health and safety standards, and empower them to resolve labour conflicts legally, such as protracted payments, mistreatment, and moral harassment and discrimination at work. In the criminalisation scenario, sex workers might avoid coming forward with civil or labour complaints because it would likely result in the third parties being criminally charged with trafficking-related offences.¹⁸¹ In practice, this situation can be used by third parties to exert emotional influence over them and escape punishment for damaging behaviour.

¹⁷⁸ This provision simply modifies articles 228 to 231-A of the Brazilian Criminal Code (DL 2848/1940) to clarify that third party involvement is only punishable when related to sexual exploitation or sexual forced labour, not to consensual sex work.

¹⁷⁹ Canadian Alliance for Sex Work Law Reform, 2014, p. 1.

¹⁸⁰ *Idem*, p. 2.

¹⁸¹ *Ibidem*.

4.2.4. *Labour Rights and Related Welfare (Article 5)*

A shortcoming of the presently discussed Bill is related to labour and civil matters. It is likely that the decriminalisation of activities related to sex work and the establishment of clear criteria to differentiate sex work from sexual exploitation would help dissolve the clandestine nature of the profession. Nevertheless, the bill does not establish sufficient guidelines to handle their position as workers with pragmatism, avoiding controversial issues such as taxation. Currently, sex workers are not encouraged to declare their earnings because the rules applied to them are not favourable: the taxation system used is equivalent to that for legal entities and without the typical work-related benefits.

Eligibility for public retirement pensions, however, is addressed in Article 5, which proposes special retirement for sex workers (a benefit granted to occupations considered hazardous or strenuous). The main advantage of special retirement is being eligible to receive full public pension payments after 25 years of work (i.e. 5 years earlier than usual compared to women and 10 years earlier compared to men in regular professions).¹⁸² Other relevant welfare benefits to which they are currently not entitled are, for example, the Reclusion Aid (provided for families of workers who are incarcerated) and the Paid Maternal Leave (which is a guarantee to every working mother, according to Brazilian Labour Law). In summary, even if they chose to contribute to revenue collection, they would still not be able to enjoy some perks of being economically active.

The present Bill acknowledges that the current criminalisation laws create a reality incompatible with the recognition of sex work as a legitimate profession by the Ministry of Labour and Employment. Although its content aims at bridging that gap, it is yet not entirely clear the way some changes would turn out, especially in the labour field. Just as important as adopting an adequate law is the implementation of public policies to accomplish the improvements warranted by this legislation. This connection works both ways, as the state administration can also capitalise on the framework provided by this bill to address issues

¹⁸² Under the Justification section of Bill 4211/2012, the legislator mentions that sex workers are more exposed to premature ageing and the possibility of personal harm due to their occupation.

such as authority abuse and police brutality against sex workers—a phenomenon that disproportionately affects trans sex workers.

4.3. POLICIES FOR THE PROTECTION OF SEX WORKERS

In order to protect a particular group of people facing an elevated risk of experiencing human rights violations, it is necessary to address their vulnerabilities through laws that truly protect them and are primarily concerned with their welfare. It is also crucial that states pro-actively respond to the issues at hand, implementing public policies to tackle the root causes of the problem.

In Latin America and many other parts of the world, public institutions not only fail to provide services to trans people and sex workers, but they also take on the role of the aggressor when abusing their position of authority. The police authorities have been reported as one of the main offenders and perpetrators of acts of violence against trans people generally, and against trans sex workers especially, ‘In various cases either the aggressors were identified as members of the police or the weapons used were those used by police....Research in Brazil published in 2003 and 2007 found that both police and private security represented significant groups among the perpetrators of physical violence against gender-variant/trans people.’¹⁸³ A Brazilian policeman was identified as a serial-killer who specifically targeted trans sex workers: his reported killings occurred in the period 1993–2011, in the metropolitan region of São Paulo.¹⁸⁴ In 1999, a *travesti* movement active in the country protested with the chant ‘The police kill more than AIDS’.¹⁸⁵ While in other states like Peru, around 75% of all aggressors who committed violence against trans sex workers were members of the police or municipal units. In Argentina, 83.3% of trans sex workers reported having suffered abuse by members of the police in the form of illegal arrests, physical and sexual violence, and even torture.¹⁸⁶

Victims, witnesses and activists state that trans sex workers facing

¹⁸³ Balzer & Hutta, 2012, p. 51.

¹⁸⁴ News story ‘O matador de travestis’ available in Portuguese: <http://epoca.globo.com/tempo/noticia/2015/02/o-matador-de-btravestisb.html>.

¹⁸⁵ Balzer & Hutta, 2012, p. 51.

¹⁸⁶ Ibidem.

abuse suffer multiple aggressions, in succession. Reports show that not only are they severely attacked, but they are also subsequently denied crucial treatment in hospitals and are underserved by public authorities. Some of the complaints are that the police force does not answer to emergency calls involving trans sex workers in a timely manner and that in general authorities do not investigate such crimes seriously and are indulgent to the identified perpetrators.¹⁸⁷

In light of the situation, the Inter-American Commission on Human Rights (IACHR) released a statement¹⁸⁸ declaring that the recurrent problems in the states' handling of homophobic and transphobic crimes were in part due to a failure to investigate the reasons that led the perpetrators to commit them. Although the declaration only refers to the victims' gender identity or sexual orientation (characteristics that certainly influence the occurrence of hate crimes), it appears any investigation would remain incomplete if it did not look into sex work as a potential factor also motivating these crimes.

In 2006, the Merseyside Police (a region in the UK) were the first institutional force to treat crimes against sex workers as hate crimes. Studies conducted in the region had shown that sex workers, particularly the ones working outdoors, were recurrent victims of attacks, although in general, harassment and crime were significantly underreported to the Police (while 79% reported experiencing abuse, only 34% of the victims came forward to the authorities).¹⁸⁹

Similar to other hate crimes, the reasons for avoiding formal complaints included fear of public identification, lack of trust in the police, and a belief that the authorities would not treat crimes seriously or convey judgemental attitudes that could ultimately harm the victims themselves—especially in the case of migrant sex workers. Even if in the UK 'prostitution' is not considered a crime, related activities such as soliciting in public and third party engagement are outlawed—evidencing that even partial criminalisation models are detrimental to the safety of sex workers and their relationship with law enforcement authorities.

¹⁸⁷ These cases respectively mirror the experiences described by Brazilian victims Simone Santos Rodrigues, Shayara Soares Santana Pereira and Luana de Oliveira Moreira. See: Balzer & Hutta, 2012, p. 50.

¹⁸⁸ IACHR, 2012.

¹⁸⁹ Campbell, 2014, p. 56.

Indeed, as elaborated before, the violence directed at sex workers is a result of structural oppression entrenched in society and is, therefore, congruent to established definitions of hate crimes, even though performing their job is not a protected attribute in any given legislation.¹⁹⁰ In addition to a process of *othering*, their perceived vulnerability is another contributing factor that enhances their exposure to danger, especially when perpetrators, aware of sex workers' reluctance to seek redress, feel they can easily commit such crimes without fear of being punished.¹⁹¹

It is important to point out yet again that criminalisation strategies are one of the main factors that contribute to sex workers' social exclusion and vulnerability. Legislation targeting an end to sex work, by means of punishing any actor involved in the activity, perpetuate a scenario where sex workers are undesirable, cementing their status as *others* and sustaining the cultural imperialism that punishes those who deviate from standard sexual behaviours. In other words 'the interplay between *othering*, marginalisation and criminalisation contribute to a lack of social and legal protections creating conditions in which sex worker hate victimisation can flourish'¹⁹² and be continuously dismissed by authorities.

Even when hate crime legislation is not a viable alternative or a practical, timely solution, it is still vital to address the problematic relationship between police forces and sex workers/trans persons. A review study has shown that structural policy changes regarding police and sex workers engagement are able to help reduce violence experienced by sex workers in different environments. Taking a different route than law-enforcement strategies, an example is a community-led intervention made in India, focusing on sensitive police training and community empowerment. With the support of police stakeholders, the capacity of sex workers to report abuse was reportedly enhanced, as was their ability to safely engage in sex work.¹⁹³

¹⁹⁰ Their inclusion as a group liable to hate crimes in Merseyside was not established by law, but the result of a public policy independently adopted by the County. See: Campbell, 2014.

¹⁹¹ Similar to other forms of hate crimes, many victims are subjected to cruelty before being murdered, while 'offenders often display repeat and escalating offending patterns'. See: Campbell, 2014, p. 56. For trans persons, 'apart from shooting and stabbing, the most frequent forms of murder involved beating, stoning and strangling. Several victims' bodies were found mutilated, decapitated, burned and tortured'. See: Balzer & Hutta, 2012, p. 49.

¹⁹² Campbell, 2014, p. 58.

¹⁹³ See: Deering et. al., 2014.

In Merseyside, the outcome of the hate crime policy was positive, even if it was implemented in a hostile environment, that still does not fully decriminalise sex work. After 2006, a specific team was appointed to deal with coordinating, monitoring, and investigating crimes against sex workers, allowing its members to build a relationship of trust with the sex workers. Counter hate crime strategies were more prominent across the police force, which led to an enhanced general perception that reports of these crimes should be taken seriously and responded to professionally. Effectively, there was an increase in the proportion of formal reporting by sex workers to the police and the conviction rate for crimes committed against them presented to the court was significantly above the national average.¹⁹⁴

Furthermore, acknowledging when a crime is motivated by bias is not only important to punish perpetrators (who might have their sentences increased when the discriminatory motivation is recognised), but also to gather and analyse data accordingly, to allow an understanding of the extent of the issue and to create a picture that is representative of the institutionalised prejudice certain groups face. Only when violence against trans persons and sex workers starts being regarded as systemic and political, rather than personal, can solutions to address this problem be devised.

Addressing systemic violence against oppressed groups is essential to protect them from pending danger and remedy their vulnerability vis-à-vis the system, empowering them to change their future. Some theorists even argue that the hate crime framework should be conceptual and not limited to specifically protected attributes, so as to enable other groups to share in the support afforded by hate crime policies, in an effort to recognise and reduce the oppression inflicted upon them.¹⁹⁵

It is clear that immediate action has to be taken to address the extreme wave of hate violence to which the discussed groups are exposed. This topic is as pertinent to sex work as it is to transphobia, which in several countries is not yet considered a motivation for hate crimes, including most of Latin America where the situation is calamitous. Including transphobia and whorephobia in the list of protected attributes under hate crime legislation can be an important first step to address the

¹⁹⁴ For detailed statistics, see Campbell, 2014, pp. 60–61.

¹⁹⁵ See: Garland & Chakraborti, 2009.

issue. Regardless of the chosen route, it is urgent that states create and implement strategies to tackle the real, imminent problems trans sex workers face, preferably by focusing on adopting legislation that decriminalises sex work activities and by implementing public policies that promote a shift in the attitudes of state agents and authorities towards sex workers. Instead of (over)policing sex workers, states should put in place public policies that protect them and work in their favour.

5.

CONCLUSION

The discussion about sex work is particularly important to the trans community because gender diverse people deal with a specific set of oppressive social circumstances that contributes to their engagement in the activity at substantial rates. Their access to the labour market as well as to educational and healthcare systems is significantly impaired, resulting in extremely adverse conditions of living. The contribution of states in creating this scenario is a determinant, since they are responsible for sustaining highly engendered institutions that subjugate people who do not conform to binary gender norms, while also denying them mechanisms to take actions that would allow them to navigate gender systems more smoothly (such as gender recognition laws without preconditions or loopholes).

When a group is subjected to multiple forms of subjugation, none of these forms can be overlooked. Otherwise, human rights violations they suffer will often be neglected, while their needs and claims become invisible. Trans sex workers face double moral condemnation over their citizenship, producing a unique condition of being exposed to intense stigma and hatred. Their experiences differ from those of cisgender sex workers and of trans persons who do not perform sex work.

Without awareness of the fact that their status is created by the interaction of two very powerful and distinct systems of oppression, it is impossible to paint a clear and complete picture capable of addressing the root causes of their problems—particularly the rising wave of physical violence that too often culminates in the murder of trans sex workers and a high incidence of HIV infection amongst them.

Sex work has been a survival strategy adopted by many minority groups. When states criminalise activities related to sex work they are mostly punishing individuals who have not been able to thrive due to

structural oppression. If they are victims, they are victims of a state that fails at building an environment that allows reasonable means of human existence for any person, regardless of their attributes. The sole act of choosing to perform sex work does not turn anyone into a victim.

The worn parable that sex work victimises women, thus it needs to be abolished, is both unfounded and myopic given that it overlooks other groups engaged in the trade. Neo-abolitionists claim sex workers should not be reprehended, but encouraged out of the trade, defending abolition because sex work occurs under the auspices of patriarchy. Nonetheless, it is this very moral double standard of chastity for women and only women from which they derive their objections. For them, sex workers need saving from themselves. Ultimately, the embargo on sex work is not only condescending but a reductive conceptualisation of individual agency under structurally oppressive contexts which negates a person's ability to ascribe meanings of self-empowerment according to personal experience and individual perception of reality.

This study focuses on deconstructing such characterisations because the current status quo needs to be challenged. Legislation criminalising sex work and dismissing it as a form of labour has so far not helped sex workers of any gender to enjoy human rights and fulfil their basic needs but has rather continuously denied them of their citizenship. As a society worried about the dignity of every citizen, we must acknowledge that the sex work strategies adopted so far are not working.

Furthermore, overcoming the current abolitionist discourse is essential because if sex work cannot be refuted as a legitimate form of labour, as this thesis contends, then it is an activity protected under important provisions of IHRL, namely the UDHR (Art. 23) and the ICESCR (Arts. 6 to 9), and a state's interference with the intent or ability to perform sex work amounts to a violation of the human right to work.

Anti-sex work groups might ground their arguments in the social inequalities that drive people into the sex trade. This reality is undisputed. What has to be taken into account, nonetheless, is that the vulnerabilities experienced by several people (particularly the ones belonging to minority groups) go beyond circumstantial economic duress and have started producing negative impact long before their decision to engage in sex work. A legislation coercively enforcing the end of sex work is not addressing the root cause of their complex realm of disadvantages, but only restricting their abilities to make decisions in the face of hardship. It is a topical solution that does little to eliminate

or attenuate the discrimination factors that play a direct role in their social status, stopping at the surface of the problem, and failing to tackle deep structures of power imbalance in society.

The concern about the uneven gender structure under which sex work occurs is legitimate, and is also shared by pro-sex-work advocates: there are very few alternatives for some oppressed groups to make a living, and trans persons are a categorical example of that situation. Yet, sex-work-positive groups take a radically different approach when addressing the issue. It is not the kind of labour they resort to in order to guarantee their subsistence that must be dealt with or fought against, but rather the material circumstances which make their decision to engage in sex work less spontaneous in the first place. As long as extremely uneven circumstances continue to exist, criminalising any conduct related to sex work is unlikely to extinguish the practice, but rather push sex workers further into marginality: exposing them to live and work in environments that jeopardise their safety, their health, their social status, and their dignified existence.

Fighting the pre-existing perverse circumstances that fuel someone's voluntary participation in the sex trade is arguably the most effective way to guarantee that other avenues of income generation are just as accessible to them. Currently, instead of working towards eliminating or at least mitigating the adversities that subjugate members of oppressed groups in society who then might choose to perform sex work, the majority of states prefer to limit the autonomy of individuals to freely choose their occupation, disrespecting their human right to work and effectively creating a completely new system of oppression that will harm and endanger them. Thus, many sex workers are subjugated by the state before entering the sex trade and, sequentially, are oppressed yet again after their decision to enter it.

After a thorough analysis of the consequences of criminalisation laws on sex workers, it is possible to understand how they negatively affect every facet of oppression experienced by them. We must consider new alternatives to handle the issue: alternatives that are capable of addressing the disadvantages to which they are exposed and that are primarily and specifically designed to protect them from human rights violation and abuse. As this study has discussed, none of this can be accomplished with the adoption of abolitionist strategies.

Of course, the abuse and human rights violations to which sex workers of any gender are subjected are not a result of criminalisation

legislation exclusively, although it is certainly one of the main factors that contributes to it. As previously noted, countries that have implemented restrictive laws punishing the involvement of *any* party in sex work activities have demonstrated an increase in people's intolerance and bigotry specifically towards sex workers. Decriminalisation legislation would likely have a positive impact on the public's perception of sex work, and potentially decrease the incidence and severity of hate crimes committed against sex workers and social groups that are particularly associated with it.

Decriminalisation strategies are an important step in pursuing sex workers' rights, but there is more to be done in regard to the stigmatisation and discrimination to which sex workers are exposed. Some of the issues that need to be addressed are rather urgent and require immediate action. An important step is acknowledging that people who perform sex work are more exposed to violence and abuse precisely because of the job they perform and their sex worker status. Therefore, such violations must be framed in a social and political dimension, that takes into consideration the motivations underpinning attacks perpetrated against sex workers by groups or individuals.

As of now, there are no records of states including *sex worker status* as a protected attribute in hate crime legislation, but research has shown that the implementation of public policies handling crimes against sex workers as biased violence was beneficial to sex workers. Unfortunately, this strategy was only implemented within a legal setting that partially criminalises sex work, which is still detrimental to their full protection and empowerment. Whether through administrative acts or hate crime legislation, it is imperative that states implement measures encouraging sex workers to report abuse to the authorities, and give guarantees that violations against them will be investigated thoroughly.

At the same time, states must start implementing measures that aim for long-term results, like public education and awareness raising, in order to transform the social and cultural attitudes that create social inequalities and stigmatise trans persons and sex workers. It is within the state's obligations to fight every sort of unjust discrimination, in order to achieve substantive equality for oppressed groups of people in society.

Trans persons and sex workers are both subjected by a system that is grounded in a bipolar approach to gender and gender stereotypes, dictating rules about sexuality, identity and expression, and punishing

those who deviate from these rigid expectations. A profound transformation has to be accomplished by way of challenging the current gender system that favours a very limited group of people (i.e. cisgender heterosexual males) and limits everyone else's right to autonomy and self-determination.

Patriarchy depicts sex workers as worthless whores and trans persons as aberrations. States have to direct their institutions and mechanisms to counter these perceptions, starting by promoting a shift in its own attitude towards gender-oppressed groups. In this particular case, states must start by changing discriminatory and harmful legislation towards trans persons and sex workers as well as implementing policies focused on their immediate protection. Continuously, states should create long-term strategies to dismantle patriarchal constructs and alleviate the toll of structural oppression, fostering an environment where trans persons and sex workers are able to fulfil their basic needs and have a shot at true social inclusion and citizenship.

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ANNEX

PROPOSAL 4211/2012
BILL GABRIELA LEITE
PROJETO DE LEI 4211/2012
LEI GABRIELA LEITE

Jean Wyllys
Deputado Federal PSOL/RJ
Proposal n° 4211/ 2012
(Dep. Jean Wyllys)
Regulates the Activity of Sex Workers.

GABRIELA LEITE LAW

The National Congress decrees:

Art. 1° - It is considered a sex worker every person over 18 years of age who is absolutely capable of voluntarily agreeing to provide sexual services in exchange for material compensation.

§ 1° The payment for the provision of sexual services is judicially demandable/collectable from those who hire it.

§ 2° The obligation to provide sexual services is strictly personal and not transferable.

Art. 2° – It is forbidden to conduct sexual exploitation.

First clause: Forms of sexual exploitation, besides what is already stipulated in specific legislation, are:

- I – third-party withholding of at least or more than 50% of the income given in payment for the provision of sexual services;
- II – failing to pay the sexual services as agreed;
- III – forcing someone to provide sexual services under violence or the threat thereof.

Art. 3° – The sex worker can provide their services:

- I – autonomously/independently;
- II – as a member of a group or labour cooperative.

First Clause. Brothel-owning is allowed, as long as no sexual exploitation is conducted on its premises.

Art. 4º - Chapter V of Law 2.848/40, the Criminal Code, enters into force with the following modifications:

Facilitating sexual exploitation.

Art. 228. Inducing or luring someone into forced sexual labour, or hampering/impeding their exit from it or from voluntary prostitution.

[Illicit] Brothel-owning

Art. 229. Sustaining, on their own or through third-parties, premises where sexual exploitation or forced sexual labour is conducted, regardless of profiting from it or not.

[Illicit] Pimping/procuring

Art. 230. Taking advantage of sexual exploitation directly or profiting from it, thus being fully or partially supported by someone who is being sexually exploited.

International Trafficking for Sexual Exploitation

Art. 231. Smuggling someone into or out of the country, with the purpose of conducting sexual exploitation on their own or through third parties.

International Trafficking for Sexual Exploitation

Art. 231-A. Facilitating movement inside the country with the purpose of conducting sexual exploitation on their own or through third parties.

Art. 5º. Sex workers are entitled to the special regime of retirement after 25 years of work, according to article 57 of the Law 8.213/1991.

Art. 6º. This Law shall come into force on the date it is published.

Brasília, 2012.

Jean Wyllys

Deputado Federal PSOL/RJ

PROJETO DE LEI Nº 4211/ 2012

(Dep. Jean Wyllys)

Regulamenta a atividade dos profissionais do sexo.

LEI GABRIELA LEITE

O Congresso Nacional Decreta:

Art. 1º - Considera-se profissional do sexo toda pessoa maior de dezoito anos e absolutamente capaz que voluntariamente presta serviços sexuais mediante remuneração.

§ 1º É juridicamente exigível o pagamento pela prestação de serviços de natureza sexual a quem os contrata.

§ 2º A obrigação de prestação de serviço sexual é pessoal e intransferível.

Art. 2º - É vedada a prática de exploração sexual.

Parágrafo único: São espécies de exploração sexual, além de outras estipuladas em legislação específica:

- I - apropriação total ou maior que 50% do rendimento de prestação de serviço sexual por terceiro;
- II - o não pagamento pelo serviço sexual contratado;
- III - forçar alguém a praticar prostituição mediante grave ameaça ou violência.

Art. 3º - A/O profissional do sexo pode prestar serviços:

- I - como trabalhador/a autônomo/a;
- II - coletivamente em cooperativa.

Parágrafo único. A casa de prostituição é permitida desde que nela não se exerça qualquer tipo de exploração sexual.

Art. 4º - O Capítulo V da Parte Especial do Decreto-Lei no 2.848, de 7 de dezembro de 1940, Código Penal, passa a vigorar com as seguintes alterações:

“Favorecimento da prostituição ou da exploração sexual.

Art. 228. Induzir ou atrair alguém à exploração sexual, ou impedir ou dificultar que alguém abandone a exploração sexual ou a prostituição:

Casa de exploração sexual

Art. 229. Manter, por conta própria ou de terceiro, estabelecimento em que ocorra exploração sexual, haja, ou não, intuito de lucro ou mediação direta do proprietário ou gerente:

Rufianismo

“Art. 230. Tirar proveito de exploração sexual participando diretamente de seus lucros ou fazendo-se sustentar, no todo ou em parte, por quem a exerça:

Tráfico internacional de pessoa para fim de exploração sexual

“Art. 231. Promover a entrada, no território nacional, de alguém que nele venha a ser submetido à exploração sexual, ou a saída de alguém que vá exercê-la no estrangeiro.

Tráfico interno de pessoa para fim de exploração sexual

“Art. 231-A. Promover ou facilitar o deslocamento de alguém dentro do território nacional para ser submetido à exploração sexual:

Art. 5º. O Profissional do sexo terá direito a aposentadoria especial de 25 anos, nos termos do artigo 57 da Lei 8.213, de 24 de julho de 1991.

Art. 6º. Esta Lei entra em vigor na data da sua publicação.

Brasília, de julho de 2012

Jean Wyllys
Deputado Federal PSOL/RJ
JUSTIFICATIVA

A prostituição é atividade cujo exercício remonta à antiguidade e que, apesar de sofrer exclusão normativa e ser condenada do ponto de vista moral ou dos “bons costumes”, ainda perdura. É de um moralismo superficial causador de injustiças a negação de direitos aos profissionais cuja existência nunca deixou de ser fomentada pela própria sociedade que a condena. Trata-se de contradição causadora de marginalização de segmento numeroso da sociedade.

O projeto de lei ora apresentado dialoga com a Lei alemã que regulamenta as relações jurídicas das prostitutas (*Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten - Prostitutionsgesetz - ProstG*); com o Projeto de Lei 98/2003 do ex-Deputado Federal Fernando Gabeira, que foi arquivado; com o PL 4244/2004, do ex-Deputado Eduardo Valverde, que saiu de tramitação a pedido do autor; e com reivindicações dos movimentos sociais que lutam por direitos dos profissionais do sexo.

O escopo da presente proposição não é estimular o crescimento de profissionais do sexo. Muito pelo contrário, aqui se pretende a redução dos riscos danosos de tal atividade. A proposta caminha no sentido da efetivação da dignidade humana para acabar com uma hipocrisia que priva pessoas de direitos elementares, a exemplo das questões previdenciárias e do acesso à Justiça para garantir o recebimento do pagamento.

Dentre os objetivos fundamentais da República Federativa do Brasil figuram o da erradicação da marginalização (art. 3º inciso III da CRFB) e o da promoção do bem de todos (art. 3º, inciso IV). Além disso, são invioláveis, pelo artigo 5º da Carta Magna, a liberdade, a igualdade e a segurança. O atual estágio normativo - que não reconhece os trabalhadores do sexo como profissionais - padece de inconstitucionalidade, pois gera exclusão social e marginalização de um setor da sociedade que sofre preconceito e é considerado culpado de qualquer violência contra si, além de não ser destinatário de políticas públicas da saúde.

O objetivo principal do presente Projeto de Lei não é só desmarginalizar a profissão e, com isso, permitir, aos profissionais do sexo, o acesso à saúde, ao Direito do Trabalho, à segurança pública e, principalmente, à dignidade humana. Mais que isso, a regularização da profissão do sexo constitui instrumento eficaz ao combate à exploração sexual, pois possibilitará a fiscalização em casas de prostituição e o controle do Estado sobre o serviço.

Impor a marginalização do segmento da sociedade que lida com o comércio do sexo é permitir que a exploração sexual aconteça, pois atualmente não há distinção entre a prostituição e a exploração sexual, sendo ambos marginalizados e não fiscalizados pelas autoridades competentes. Enfrentar esse mal significa regulamentar a prática de prostituição e tipificar a exploração sexual para que esta sim seja punida e prevenida.

Importante frisar que a profissão do sexo difere da exploração sexual conforme texto legal ora apresentado.

A exploração sexual se conceitua (1) pela apropriação total ou maior que 50% do rendimento da atividade sexual por terceiro(s); (2) pelo não pagamento do serviço sexual prestado voluntariamente; ou (3) por forçar alguém a se prostituir mediante grave ameaça ou violência. Neste sentido, a exploração sexual é crime e se tipifica independente da maioridade ou da capacidade civil da vítima.

Evidente que tal crime será penalizado mais severamente no caso da vítima de exploração sexual ser menor de dezoito anos, absolutamente ou relativamente incapaz, ou ter relação de parentesco com o criminoso. Importante lembrar que o conceito de exploração sexual quando a vítima é menor de dezoito anos é tipificado como crime hediondo tanto pelo Código Penal, nos artigos 214 e 218, quanto pelo Estatuto da Criança e do Adolescente, dos artigos 240 ao 241-E.

Em contrapartida, o exercício da atividade do profissional do sexo deve ser *voluntário e diretamente remunerado*, podendo ser exercido somente por absolutamente capazes, ou seja, maiores de idade com plenas capacidades mentais. O profissional do sexo é o único que pode se beneficiar dos rendimentos do seu trabalho. Conseqüentemente, o serviço sexual poderá ser prestado apenas de forma autônoma ou cooperada, ou seja, formas em que os próprios profissionais auferem o lucro da atividade.

Como demonstrado, não existe prostituição de crianças e adolescentes. Muito pelo contrário, essa prática se configura como abuso ou exploração sexual de crianças e adolescentes e se tipifica como crime severamente punido pelo Código Penal.

Atualmente os trabalhadores do sexo sujeitam-se a condições de trabalho aviltantes, sofrem com o envelhecimento precoce e com a falta de oportunidades da carreira, que cedo termina. Daí a necessidade do direito à Aposentadoria Especial, consoante o artigo 57 da Lei 8.213/1991, com redação dada pela Lei nº 9.032/1995.

Para existir coerência com a presente proposição, é necessário que a redação atual do Código Penal, dada pela Lei nº 12.015/2009, seja modificada em alguns de seus artigos.

Os artigos 228 e 231 do Código Penal utilizam a expressão “prostituição ou outra forma de exploração sexual” equiparando a prostituição a uma forma de exploração sexual. O projeto de lei em questão visa justamente distinguir esses dois institutos visto o caráter diferenciado entre ambos; o primeiro sendo atividade não criminosa e profissional, e o segundo sendo crime contra dignidade sexual da pessoa. Por isso, nos institutos legais, propõe-se a alteração da expressão por “prostituição ou exploração sexual”.

Redação atual:

“Art. 228. Induzir ou atrair alguém à prostituição ou outra forma de exploração sexual, facilitá-la, impedir ou dificultar que alguém a abandone:”

“Art. 231. Promover ou facilitar a entrada, no território nacional, de alguém que nele venha a exercer a prostituição ou outra forma de exploração sexual, ou a saída de alguém que vá exercê-la no estrangeiro:”

Redação conforme a proposta:

“Art. 228. Induzir ou atrair alguém à exploração sexual, ou impedir ou dificultar que alguém abandone a exploração sexual ou a prostituição:”

“Art. 231. Promover a entrada, no território nacional, de alguém que nele venha a ser submetido à exploração sexual, ou a saída de alguém que vá exercê-la no estrangeiro:”

O artigo 229 se refere a crime de “casa de prostituição”. No entanto, o tipo penal menciona a expressão “exploração sexual” e não prostituição. A alteração aqui proposta só alcança o título do artigo, visto que (1) prostituição não é exploração sexual; (2) o crime de “casa de exploração sexual” se tipifica pelo próprio *caput* atual do artigo 229; e (3) a casa de prostituição não é mais crime tipificado uma vez que a prostituição se torna profissão regulamentada e poderá ser exercida de forma autônoma ou cooperada.

Redação atual:

“Casa de prostituição

Art. 229. Manter, por conta própria ou de terceiro, estabelecimento em que ocorra exploração sexual, haja, ou não, intuito de lucro ou mediação direta do proprietário ou gerente:”

Redação conforme a proposta:

“Casa de exploração sexual

Art. 229. Manter, por conta própria ou de terceiro, estabelecimento em que ocorra exploração sexual, haja, ou não, intuito de lucro ou mediação direta do proprietário ou gerente:”

Este Projeto de Lei é mais um instrumento de combate à exploração sexual tendo em vista o caráter punitivo da prática. As casas de prostituição, onde há prestação de serviço e condições de trabalhos dignas, não são mais punidas, ao contrário das casas de exploração sexual, onde pessoas são obrigadas a prestar serviços sexuais sem remuneração e são tidas não como prestadoras de serviço, logo, sujeitos de direitos, mas como objeto de comércio sexual; essas casas, sim, serão punidas.

Além disso, a descriminalização das casas de prostituição (1) obriga a fiscalização, impedindo a corrupção de policiais, que cobram propina em troca de silêncio e de garantia do funcionamento da casa no vácuo da legalidade; e (2) promove melhores condições de trabalho, higiene e segurança.

A vedação a casas de prostituição existente no texto legal atual facilita a exploração sexual, a corrupção de agentes da lei e, muitas vezes, faz com que essas casas não se caracterizem como locais de trabalho digno. As casas funcionam de forma clandestina a partir da omissão do Estado, impedindo assim uma rotina de fiscalização, recolhimento de impostos e vigilância sanitária.

Por isso, somente deve ser criminalizada a conduta daquele que mantém local de exploração sexual de menores ou não e de pessoas que, por enfermidade ou deficiência, não tenham o necessário discernimento para a prática do ato.

O termo “exploração sexual” foi colocado no lugar de “prostituição alheia” no artigo 230 porque o proveito do rendimento de serviços sexuais por terceiro é justamente a essência da exploração sexual. Ao contrário, a prostituição é sempre serviço remunerado diretamente ao prestador.

Redação atual:

“Art. 230. Tirar proveito da prostituição alheia, participando diretamente de seus lucros ou fazendo-se sustentar, no todo ou em parte, por quem a exerça.”

Redação conforme a proposta:

“Art. 230. Tirar proveito de exploração sexual, participando diretamente de seus lucros ou fazendo-se sustentar, no todo ou em parte, por quem a exerça.”

A “facilitação” da entrada no território nacional ou do deslocamento interno de alguém que nele venha a ser submetido à exploração sexual deve ser criminalizada conforme proposta dos artigos 231 e 231-A. Optou-se pela retirada da expressão “prostituição” porque a facilitação do deslocamento de profissionais do sexo, por si só, não pode ser crime. Muitas vezes a facilitação apresenta-se como auxílio de pessoa que está sujeita, por pressões econômicas e sociais, à prostituição. Nos contextos em que o deslocamento não serve à exploração sexual, a facilitação é ajuda, expressão de solidariedade; sem a qual, a vida de pessoas profissionais do sexo seria ainda pior. Não se pode criminalizar a solidariedade. Por outro lado, não se pode aceitar qualquer facilitação em casos de pessoas sujeitas à exploração sexual, principalmente se há vulnerabilidades especiais expostas nos incisos abaixo transcritos.

Redação atual:

“Art. 231-A. Promover ou facilitar o deslocamento de alguém dentro do território nacional para o exercício da prostituição ou outra forma de exploração sexual.”

Redação conforme a proposta:

“Art. 231-A. Promover ou facilitar o deslocamento de alguém dentro do território nacional para ser submetido à exploração sexual.”

A regulamentação da profissão do sexo e as alterações do Código Penal aqui apresentadas refletem também a preocupação eminente com o tráfico de pessoas, a exploração sexual e o turismo sexual. O Brasil ocupa posição de crescimento econômico e vai sediar dois grandes eventos esportivos que atraem milhões de turistas. A regulamentação da profissão do sexo permitirá alto grau de fiscalização pelas autoridades competentes, além de possibilitar e

até mesmo incentivar o Poder Executivo a direcionar políticas públicas para esse segmento da sociedade (como a distribuição de preservativos, mutirões de exames médicos, etc).

Todas as modificações apresentadas na propositura em destaque tem os objetivos precisos de: (1) tirar os profissionais do sexo do submundo, trazendo-os para o campo da licitude e garantindo-lhes a dignidade inerente a todos os serem humanos; e (2) tipificar exploração sexual diferindo-a do instituto da prostituição, afim de combater o crime, principalmente contra crianças e adolescentes.

O Programa Conjunto das Nações Unidas para o HIV/Aids (UNAIDS) foi convocado pelo PNUD no intuito de elaborar pesquisas sobre as causas da contaminação da AIDS. A Comissão Internacional sobre HIV e a Lei - composta por ex-líderes de Estado e por peritos em termos jurídicos, de direitos humanos e de HIV - baseou a pesquisa em relatos de mais de 1 000 pessoas, de 140 países. O relatório oficial, divulgado em julho de 2012, concluiu que as leis punitivas e as práticas discriminatórias de muitos países prejudicam o progresso contra o HIV.

“Por exemplo, as leis e os costumes legalmente tolerados, que falham em proteger mulheres e meninas da violência, aprofundam as desigualdades entre gêneros e aumentam a sua vulnerabilidade ao HIV. Algumas leis de políticas de propriedade intelectual não são consistentes com a lei internacional dos direitos humanos e impedem o acesso a tratamento vital e à prevenção. As leis que criminalizam e desumanizam as populações com maior risco de contágio de HIV - incluindo homens que mantêm relações sexuais com outros homens, trabalhadores do sexo, transexuais e usuários de drogas injetáveis - empurram as pessoas para a clandestinidade, afastando-as de serviços de saúde essenciais, aumentando assim o risco de contágio pelo HIV. As leis que criminalizam a transmissão, a exposição e a não revelação do status de portador do HIV, desencorajam as pessoas a fazerem o teste e a serem tratadas. Mais especificamente: [...] mais de 100 países criminalizam algum aspecto do trabalho dos profissionais do sexo. O ambiente legal em muitos países expõe os trabalhadores do sexo à violência, o que leva à sua exclusão econômica e social. Isso também impede que os mesmos acessem serviços de saúde para o HIV.”

A Comissão também recomenda a despenalização de atividades sexuais entre pessoas do mesmo gênero, trabalho sexual e consumo de drogas, permitindo assim que as populações vulneráveis tenham acesso a serviços de saúde e ações de prevenção contra o HIV.

Por fim, Por fim, a lei aqui proposta se intitula “Gabriela Leite” em homenagem a profissional do sexo de mesmo nome, que é militante de Direitos Humanos, mais especificamente dos direitos dos profissionais do sexo, desde o final dos anos 70. Gabriela Leite iniciou sua militância em 1979, quando se indignou com atitudes autoritárias, arbitrarias e violentas por parte do Estado que, através da Polícia de São Paulo, promovia perseguições a travestis e prostitutas. Gabriela Leite participou na criação de vínculo solidário entre os profissionais do sexo, na mobilização política dos mesmos e fundou a ONG “Davida”, que tem como missão o fomento de políticas públicas para o fortalecimento da cidadania das prostitutas; mobilização e a organização da categoria; e a

promoção dos seus direitos. A “Davida” criou, por exemplo, a grife DASPU, um projeto autossustentável gerido por prostitutas e que tem por objetivo driblar a dificuldade de financiamento para iniciativas de trabalho alternativo por parte das profissionais do sexo.