



The Real Impact of the Swedish Model on Sex Workers

#5

Right to Work and Other
Work-Related Human Rights

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THE UNIVERSAL DECLARATION OF HUMAN RIGHTS STATES THAT 'EVERYONE HAS THE RIGHT TO WORK, TO FREE CHOICE OF EMPLOYMENT, TO JUST AND FAVOURABLE CONDITIONS OF WORK AND TO PROTECTION AGAINST UNEMPLOYMENT.'

“People take it for granted that you can go to work as a doctor, researcher or academic or a bureaucrat. No one questions your right to do so. No one expects that you can wake up and go to work and your work place has been shut down [...] no explanations, no entitlements, no final pay cheque and no opportunity to seek redress. You might be at work when police come down to shut down your work place – simply because of the occupation you have chosen. Strange to imagine but this is a reality for many sex workers around the world [...] Viewing sex work as work and regulating it within a labour rights framework has multiple benefits and is a crucial element in combating the HIV pandemic [...] Our ability to protect ourselves where we work is tied [to] the reduction of stigma and discrimination and recognition of our rights and ability to choose how and where we work.”

(Sex worker activist, International AIDS Conference, Melbourne, 2014)¹

Introduction

The Universal Declaration of Human Rights states that ‘Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.’² These provisions of the Declaration are expanded and made legally binding in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which requires countries to ‘recognise the right to work, including right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. It further mandates countries to ensure ‘safe and healthy working conditions’ and a fair wage.³

Yet the criminalisation of sex work prevents sex workers from enjoying labour rights and protections against unfair treatment in the workplace. Criminalisation gives national governments and sub-national jurisdictions a reason for not recognising sex work as legitimate work and, consequently, sex workers’ labour rights are not protected. Criminalisation effectively lets states get away with not protecting sex workers as workers, and, in several ways, it also undermines sex workers’ own capacity to protect themselves in the workplace. For example, if sex work is a criminal act, it is unlikely that sex workers are legally able to form collectives, trade unions, or other organisations that could facilitate sex worker-led efforts to ensure safe working conditions for themselves. The criminalisation of clients of sex workers, as happens in Sweden, also undermines the rights of sex workers to work and to choose the work that they do. In turn, this situation also shapes negative public perceptions, whereby sex work is often not viewed as legitimate work, but rather as criminal victimisation. These misuses of criminal law should not be allowed to take away the fundamental labour rights from which sex workers, like all persons, should benefit, and to which UN member states are committed.

This paper explains how existing human rights protections relate to work and addresses the ways in which criminalisation and other factors undermine sex workers’ ability to benefit from these protections. Some recommendations towards better practice are also included.

1 Full speech can be found here: <https://www.youtube.com/watch?v=kgBsEZi4Lig>; accessed on 23 August 2014.

2 Universal Declaration of Human Rights, United Nations, 1948.

3 International Covenant on Economic, Social and Cultural Rights, UN Gen. Assembly res. 2200A(XXI), 16 December 1966, Articles 6, 7.

International standards

The ICESCR is widely ratified, including by the vast majority of states that criminalise sex work. The Covenant includes broad-ranging protections of work-related rights. In addition to the right to work, to freely choose one's work, and the right to safe and healthy conditions of work, ICESCR provisions include the following:

- ▶ Workers must receive fair wages and 'equal remuneration for work of equal value', with particular attention to ensuring equitable remuneration for women compared to men.
- ▶ Women must not suffer from work conditions 'inferior to those enjoyed by men'.
- ▶ Workers have the right to form trade unions and join the trade union of their choice. Trade unions must also be allowed to form national federations and to join international union associations.
- ▶ Workers have the right to go on strike.
- ▶ Police and members of the armed forces must not restrict workers' rights.
- ▶ In the period before and after childbirth, 'working mothers should be accorded paid leave or leave with adequate social security benefits.'
- ▶ Workers have the right to 'rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.'⁴

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) reaffirms the right to work 'as an inalienable right of all human beings' and it elaborates on equality of workers' rights between men and women.⁵ It notes that:

- ▶ Women must have the same rights as men with respect to choice of profession, work-related benefits, social security, unemployment benefits, retirement benefits, disability benefits and the right to paid leave.
- ▶ Women have equal rights to 'protection of health and to safety in working conditions, including the safeguarding of the function of reproduction,' and women should not be dismissed from their work on the grounds of pregnancy or maternity leave.
- ▶ The state should ensure that women are provided with 'the necessary supporting social services to enable [them] to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities'.
- ▶ States should ensure 'special protection to women during pregnancy in types of work proved to be harmful to them.'⁶

Sex work as work is not explicitly mentioned in CEDAW. However, the treaty notes that states should 'take all appropriate measures, including legislation, to suppress [...] exploitation of prostitution of women.'⁷ It is important to note that this statement does not imply that all prostitution is exploitative: rather, it is meant to suggest that where exploitation exists, it must be addressed.

⁴ Ibid., Articles 7, 8, 10.

⁵ UN Convention on the Elimination of All Forms of Discrimination Against Women. UN General Assembly res. 34/180, 18 December 1979, Article 11.

⁶ Ibid.

⁷ Ibid., Article 6.



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Regional multilateral bodies have also established protections of workers' rights. The European Social Charter – a legally binding treaty of the member states of the Council of Europe – has perhaps the most wide-ranging labour rights protections of any multilateral treaty. It includes detailed provisions on the right to work, to healthy and safe workplaces, and a wide range of other benefits, including the right of workers to organise and to engage in collective bargaining, to maternity benefits, the right to receive vocational training, and the right to social security.⁸ In its provisions relating to the 'right to dignity at work', the Charter explicitly prohibits sexual harassment in the workplace and mandates states to 'promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work.'⁹

The Charter of the Organization of American States includes the right to fair wages and 'acceptable working conditions for all,' and the American Convention on Human Rights – a legally binding treaty of North, Central, South American and Caribbean states – mandates state parties to move towards progressive implementation of that goal.¹⁰ The African Charter on Human and Peoples' Rights also guarantees that all people 'have the right to work under equitable and satisfactory conditions.'¹¹

The International Labour Organization is a specialised agency of the United Nations that issues labour standards and policies based on the deliberation from a governing body that represents workers, employers and governments. Like human rights conventions, ILO international conventions are legally binding treaties. However, ILO also issues technical guidance that is not legally binding. In 1998, ILO member states highlighted several fundamental principles from existing binding conventions, including 'freedom of association and the effective recognition of the right to collective bargaining' and the 'elimination of discrimination in respect of employment and occupation.'¹² These fundamental human rights standards are however far from the reality of sex workers in most countries.

The 2005 UN World Summit on Social Development mandated ILO to assist countries in promoting the goal of 'fair globalisation [...] full and productive employment and decent work for all'.¹³ ILO has developed a 'Decent Work' agenda that includes maintaining a list of occupations that constitute 'decent work'; ILO defines 'decent work' as being 'based on the understanding that work is a source of personal dignity, family stability, peace in the community, democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development.'¹⁴ Unfortunately the ILO 'decent work' agenda does not include improving work conditions for sex workers. Indeed, for example, the ILO 'decent work' agenda for Africa notes that sex work is an example of 'high-risk and self-destructive behaviour', and suggests that sex work is pursued only when people have limited employment options.¹⁵

8 Council of Europe. European Social Charter, Strasbourg, 1996, Articles 1–29. At: <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ESCRBooklet/English.pdf>

9 Ibid., Article 26.

10 Organization of American States. American Convention on Human Rights (Pact of San Jose), 22 November 1969, Article 26.

11 Organization of African Unity. African (Banjul) Charter on Human and Peoples' Rights, OAU doc. CAB/LEG/67/3, 27 June 1981, Article 15.

12 International Labour Organization. ILO Declaration on Fundamental Principles and Rights at Work. Geneva, 1998. At: <http://www.ilo.org/declaration/lang-en/index.htm>.

13 United Nations General Assembly. 2005 World Summit Outcome. UN doc. A/60/L.1, 15 September 2005, para 47, at: <http://www.who.int/hiv/universalsaccess2010/worldsummit.pdf>.

14 International Labour Organization. 'Decent work agenda' (web text), at: <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-de/index.htm>.

15 International Labour Organization. *The Decent Work Agenda in Africa: 2007–2015*, para 145. Geneva, 2007.



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However, in its non-legally binding guidance on HIV in the workplace, ILO has recognised the vulnerability of sex workers and their need for workplace protections. ILO's 2010 recommendation on this subject urges that employers facilitate access to HIV prevention, treatment, care and support for all workers in all sectors, including formal and informal work: thus, sex work is included.¹⁶ The recommendation urges countries to ensure that all people who work have 'access to all means of prevention [...] in particular male and female condoms and, where appropriate, information about their correct use, and the availability of post-exposure prophylaxis', as well as to harm reduction measures, as advocated by the World Health Organization and UNAIDS.¹⁷ In this statement, the ILO echoes a long-standing position of UN member states on access to condoms and harm reduction services as a matter of human rights.¹⁸ Member states that have endorsed these measures but then say that harm reduction does not apply to sex work or the purchase of sex as a criminal act fundamentally undermine the commitment to human rights that they have previously made.

Some UN human rights bodies have commented upon, or made recommendations relating to, sex workers' working conditions and work-related rights. The UN Special Rapporteur on the right to health noted that safe working conditions are part of the enjoyment of the right to health and are a principal rationale for decriminalising sex work 'along with the institution of appropriate occupational health and safety regulations.'¹⁹

The Global Commission on HIV and the Law – a group of prominent experts including several former heads of state – called for the repeal of laws 'that prohibit consenting adults to buy or sell sex, as well as laws that

otherwise prohibit commercial sex [...] Complementary legal measures must be taken to ensure safe working conditions to sex workers.'²⁰ Some prominent human rights organisations have also commented on sex workers' work-related rights: Human Rights Watch calls for the decriminalisation of sex work, noting that criminalisation of sex work can lead to 'a host of ancillary human rights violations, including exposure to violence from private actors, police abuse, discriminatory law enforcement, and vulnerability to blackmail, control, and abuse by criminals.'²¹

**National legal regimes
and sex workers'
work-related rights**

National legal regimes – laws and court decisions – often do not reflect the human rights protections discussed in this paper. Commercial sexual transactions or activities associated with them – such as soliciting or communicating for sex work, keeping a brothel, and living off the earnings of sex work – are criminal acts under the law in over 100 countries.²² In many cases, criminal prohibitions are applied not only to sex workers themselves but also to clients and third parties, and even families, partners, and friends.²³

Broadly worded laws such as the 'pimping' law in Sweden criminalise landlords and friends of sex workers, even if there is no demonstrable intent to promote sex work. In addition to criminal law sanctions, municipal, civil or public order charges are often brought against sex workers for infractions such as loitering, vagrancy, impeding the flow of traffic, public indecency, or disorderly behaviour.²⁴ These also directly obstruct sex workers' rights to work and to safe and healthy working conditions. Sex workers are too often easy targets for law enforcement agents, and when combined with the stigma and

16 International Labour Organization. Recommendation 200: Recommendation concerning HIV and AIDS and the world of work. Geneva, 2010, p 2.

17 Ibid., para 15.

18 See, e.g., UN General Assembly, Declaration of Commitment on HIV/AIDS, UN doc. A/RES/S.26/2, 2001.

19 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the General Assembly of the UN, A/HRC/14/20, 27 April, 2010. Para 46.

20 Global Commission on HIV and the Law. *Rights, risk and health*. New York, 2012, p 99. At: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

21 Human Rights Watch, 'World Report: 2014', p. 47. At: http://www.nswp.org/sites/nswp.org/files/HRW_world%20report%202014_web_0.pdf.

22 Open Society Foundation Public Health Program. *The Global Commission on HIV and Law: Sex Workers – A brief for civil society*. New York, 2013. At: <http://www.opensocietyfoundations.org/sites/default/files/HIV-and-the-Law-Sex%20Workers-20130930.pdf>.

23 The term 'third parties' includes managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers and anyone else who is seen as facilitating sex work.

24 UNAIDS. UNAIDS Guidance Note on HIV and Sex Work, Annex 1, 'The legal and policy environment and the rights of sex workers.' Geneva, 2011.



**IT IS CONTRARY
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marginalisation they already face in many places, this situation can lead to abusive policing and arbitrary arrest and detention, all of which directly undermine their work-related rights.

In a few countries, improving working conditions for sex workers was an explicit motivation for reform of penal laws, or by court decisions suggesting the need for reform. For example, New Zealand's 2003 legislation decriminalised sex work, and one of the stated goals of the law was to 'promote the welfare and occupational health and safety of sex workers.'²⁵ When the impact of this law was later evaluated, sex workers noted that a number of improvements in their work conditions were linked to the legal change in the status of sex work. These improvements included feeling less pressured to accept undesirable clients, getting greater support from management in the matter of refusing clients, and feeling more empowered to insist on condom use.²⁶

A significant 2013 Supreme Court decision in Canada was brought in the case of *R. v. Bedford*, in which the Court struck down provisions the country's sex work laws, asserting that they endangered the working conditions of sex workers.²⁷ In particular, the prohibition in the Canadian Criminal Code against 'communicating' for the purpose of sex work – such as screening of dangerous clients and hiring security guards – was deemed by the Supreme Court as preventing sex workers from undertaking certain actions that could protect them from violence.²⁸ Furthermore, the law's broad provision against operating a 'bawdy house' blocked sex workers from working indoors: the Court judged this not to be in keeping with maintaining personal safety. The criminal provisions against sex work were also judged to be in conflict with sex workers' right to 'security of the person' under Canada's Charter on Rights and Freedoms,

a wide-ranging human rights law.²⁹ *Bedford* gave the Canadian government one year to produce legislation in response to the points laid out in the decision. Unfortunately, however, the Conservative-led government of Canada proposed a bill that was approved by Parliament in 2014 which criminalises the purchase of sex. Therefore, the bill effectively reinstates some of the Criminal Code provisions that were struck down by the *Bedford* ruling.³⁰

A few court decisions have helped to advance sex workers' claims to labour rights. In the 2010 South African case of *Kylie v. CCMA et al.*, the Labour Appeal Court ruled that a sex worker who had worked in a massage parlour and who had claimed unlawful dismissal had the right to fair labour practices, despite the fact that sex work was deemed illegal under the law.³¹ The successful prosecution in South African courts, and elsewhere, of violent criminals who assaulted or killed sex workers is, of course, also a step toward greater workplace safety for sex workers.³²

In Sweden, where the purchase of sex is a crime and where sex work is seen as inherently victimising and not a legitimate form of work, sex workers are nonetheless required to pay taxes. It is contrary to the spirit of work-related human rights for the state to tax workers without protecting their basic rights of workers by law or recognising their chosen work as legitimate.

Migrant workers whose rights – both as workers and as migrants – are subject to extensive international protections, nonetheless may be blatantly denied workers' rights in many countries when they engage in sex work. As a result, they may often be assumed to be victims of trafficking, they can face xenophobia and discrimination independent of their work, and they are not protected from arbitrary deportation or detention.³³

25 Parliament of New Zealand. Prostitution Reform Act, Public Act no. 28, 27 June 2003, sec. 3, 'Purpose'.

26 G Laverack, A Whipple. 'The sirens' song of empowerment: a case study of health promotion and the New Zealand Prostitutes Collective.' *Global Health Promotion* 17(1): p. 33–38, 2010.

27 Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101.

28 Ibid.

29 Canadian Charter of Rights and Freedoms. Constitution Act, 1982, part I. At: <http://laws-lois.justice.gc.ca/eng/const/page-15.html>.

30 Canadian HIV/AIDS Legal Network. Reckless endangerment: Q&A on Bill C-36: Protection of Communities and Exploited Persons Act. Toronto, 2014. At: <http://www.aidslaw.ca/site/wp-content/uploads/2014/11/BILLC36-June2014-ENG.pdf>.

31 J Whitten, 'Victory for sex worker,' *IOL News*, 29 May 2010. At: <http://www.iol.co.za/news/south-africa/victory-for-sex-worker-1.485488#.VNUEAv50xdl>.

32 Network of Sex Work Projects. Statement by South African civil society organisations, applaud verdict in de Jager case and call for decriminalisation of sex work (press statement), 27 May 2014. At: <http://www.nswp.org/news-story/statement-south-african-civil-society-organisations-applaud-verdict-de-jager-case-and-cal>.

33 See, e.g., TAMPEP. Sex work, migration, health. Amsterdam, 2009. At: http://tampep.eu/documents/Sexworkmigrationhealth_final.pdf.

Conclusions and recommendations

There is a very wide range of labour rights to which sex workers, like all workers, are fully entitled under human rights treaties that are widely ratified. Women in sex work should be supported as parents and should receive all maternity and parental benefits enjoyed by other women in the workforce. Many of the rights of workers that are well established in human rights law are particularly pertinent to sex workers' situations. The human rights protection against police interference with workers' rights, the right to form associations and unions, and the right to a full range of benefits are especially lacking in the lives of millions of sex workers. Instituting policies based on the idea that sex work does not constitute legitimate work, or that sex workers do not have agency to choose their work, contradicts a large body of human rights law and principles that all UN member states have endorsed.

It is clear that governments often fail to ensure that sex workers are able to benefit from the most basic rights of workers. Yet most countries have in fact identified and agreed to implement these rights as part of wider fundamental entitlements for everyone who works. Therefore, in failing to respect, protect, and fulfill the labour rights of sex workers, most countries in the world are in breach of the commitments they have made to workers' rights and women's rights and to fundamental guarantees of safety and non-discrimination.

The single most important measure for improving sex workers' opportunities to enjoy labour rights is the decriminalisation of sex work, as many experts have noted.³⁴ Sex work and all activities associated with it, and by all persons associated with it, should be removed from criminal law. United

Nations agencies concerned with human rights, workers' rights, HIV, and women's rights, should be vocal advocates for decriminalisation of sex work and, within the mandates of their organisations, should provide technical guidance and support for national-level decriminalisation, as well as the inclusion of sex work in existing labour, industrial, and business frameworks in relation to conduct and health and safety standards. Sex workers should participate meaningfully in these reforms.

The International Labour Organization should also take the lead in inclusion of sex work in its efforts to ensure safe and healthy workplaces for all. ILO should also promote the recognition of sex work as legitimate and decent work. It should assist national governments to support sex workers to receive the range of safeguards and benefits enjoyed by all workers. Above all, it should be a leading voice for asserting that sex work is not inherently harmful or exploitative but should be recognised as work that merits the same policy attention to occupational health and safety that is given to other kinds of work.

National governments should allow and encourage the formation of sex worker collectives and unions and enable their registration as legal entities. Sex worker organisations can be a valuable channel for information on occupational health and safety and workers' rights, and sex workers should be included in programme and policy decision-making in these areas.

Finally, national human rights institutions and mainstream labour leaders should help to educate policymakers and the public on the universal right to choose one's work, including sex work, and to practice one's chosen profession.

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³⁴ See, for example, Global Commission on HIV and the Law. *HIV and the law: risks, rights and health*. New York, 2012.



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